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Documentation in Support of Rebuttal to Santa Ana Regional Water Quality Control Board's and the Department of Finance's Responses to Test Claim 09-TC-03 Santa Ana Regional Water Permit – Orange County

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TAB “1”

LEXSEE

Caution
As of: Jun 17, 2010

CITY OF ARCADIA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, - and - NATURAL RESOURCES DEFENSE COUNCIL, et al., Defendants-Intervenors.

No. C 02-5244 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

265 F. Supp. 2d 1142; 2003 U.S. Dist. LEXIS 9044

May 16, 2003, Decided
May 16, 2003, Filed

SUBSEQUENT HISTORY: Affirmed by City of Arcadia v. United States EPA, 411 F.3d 1103, 2005 U.S. App. LEXIS 11240 (9th Cir. Cal., 2005)
Related proceeding at City of Arcadia v. State Water Res. Control Bd., 2006 Cal. App. LEXIS 92 (Cal. App. 4th Dist., Jan. 26, 2006)

DISPOSITION: [**1] Defendants' motion to dismiss granted; plaintiffs' motion for partial summary judgment denied, and objections overruled. Action dismissed in its entirety, without leave to amend in part and with prejudice in part. Intervenors' evidentiary objections overruled as moot.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, California cities, sued defendants, including the United States Environmental Protection Agency (EPA), for declarative and injunctive relief under, inter alia, 5 U.S.C.S. § 706 of the Administrative Procedure Act (APA), 5 U.S.C.S. § 551 et seq. Defendants sought dismissal of the operative complaint. The cities sought partial summary judgment.

OVERVIEW: The first claim for relief alleged APA violations. Generally, it alleged that numerous EPA actions were arbitrary and capricious, and contrary to law, such as the EPA's establishing the EPA Trash Total Daily Maximum Loads (TMDLs) prior to receiving for review the California Trash TMDLs. Violations alleged in the second claim appeared to relate mostly to procedural requirements under the Regulatory Flexibility Act, 5 U.S.C.S. § 601 et seq., and the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C.S. § 801 et seq. The third claim sought a declaration as to which party's interpretation of the law was correct and a judicial determination of the cities' rights and duties. The court concluded that all of the cities' claims were moot, meritless, or unripe. The cities' challenges to the EPA Trash TMDLs were obviously mooted the minute that EPA approved the State Trash TMDLs. The cities' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "de facto TMDL procedure" were patently meritless. Finally, the cities' challenges to the "merits" of the State Trash TMDLs were premature.

OUTCOME: The EPA's motion to dismiss, in which intervenor environmental organizations joined, was granted. The cities' motion for summary adjudication of issues was denied as moot. Various objections to declarations made by the parties were either overruled or overruled as moot.

CORE TERMS: epa, trash, regional, declaration, approve, de facto, moot, water quality, agency actions, partial, summary judgment, consent decree, monitoring, pollutant, pollution, leave to amend, capriciously, reduction, npdes, intervenors, waterbody, deadline, heading, reply, declaratory relief, acted arbitrarily, injunctive, wasteload, hardship, matter jurisdiction

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN1]"Extra-record evidence" may be considered by the court in connection with a motion to dismiss for lack of subject matter jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN2]Fed. R. Civ. P. 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment. In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. The court presumes lack of jurisdiction until the plaintiff proves otherwise.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN3]A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a claim. A motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN4]When the complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. Leave to amend is properly denied where the amendment would be futile.

Environmental Law > Water Quality > General Overview
[HN5]No authority supports the conclusion that the Environmental Protection Agency (EPA) lacks authority to approve state-submitted Total Daily Maximum Loads (TMDLs) after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN6]See 5 U.S.C.S. § 551(13).

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN7]The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. Unripe claims are subject to dismissal for lack of subject matter jurisdiction. In determining whether a case is ripe for review, a court must consider two main issues: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. To address these issues in the context of a challenge to the lawfulness of administrative action, the United States Supreme Court has identified three factors to consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

Civil Procedure > Justiciability > Ripeness > General Overview
Civil Procedure > Justiciability > Standing > General Overview
[HN8]Injury-in-fact is a concept that relates to the issue of standing, not ripeness.

COUNSEL: For Plaintiff: Noam I. Duzman, Richard Montevideo, Robert S. Bower, Rutan & Tucker LLP, Costa Mesa, CA.

For USA, Defendant: Charles M. O'Connor, AUSA & Chief, Environment & Natural Resources, United States Attorney's Office, San Francisco, CA. AND-- S. Randall Humm - Trial Attorney, Pamela Tonglao - Trial Attorney, U.S. Dept. of Justice, Washington, DC.

JUDGES: SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

[*1143] **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DISMISSING ACTION**

[Docket Nos. 18, 28, 31, 43, 47]

Plaintiffs City of Arcadia and other California cities (collectively, "Plaintiffs") bring this action against defendants United States Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Region IX Administrator (collectively, "Defendants") for injunctive and declaratory relief. The Natural Resources Defense Council, Santa Monica BayKeeper, and Heal the Bay (collectively, "Intervenors") have intervened as defendants.

Now before the Court are Defendants' [**2] Motion to Dismiss Second Amended Complaint (the "Motion to Dismiss"), in which Intervenors join, and Plaintiffs' Motion for Summary Adjudication of Issues (the "Motion for Partial Summary Judgment"). Having read and considered the papers submitted and being fully informed, the Court GRANTS the Motion to Dismiss, DENIES AS MOOT the Motion for Partial Summary Judgment, and DISMISSES this action. [1]

1 These matters are suitable for disposition without a hearing. *See* Fed. R. Civ. P. 78; Civ. L.R. 7-1(b).

I. BACKGROUND

[2]

2 Over the years the Court has had the pleasure and privilege of reading some excellent moving papers. Some of these submissions stand out as truly superlative. Defendants' opening and reply briefs for their Motion to Dismiss are shining examples of such superlative submissions. In these briefs Defendants discuss three areas of federal law generally regarded as highly complex--environmental regulation, administrative law, and justiciability--in direct, succinct, well-supported, and powerfully illuminating fashion. Whereas a poor presentation of the statutory and regulatory framework and Defendants' arguments might have required the Court to spend hours to apprehend their arguments, the high quality of Defendants' writing enabled the Court to grasp them in a matter of minutes. Defendants' briefs also thankfully avoid leveling the sorts of thinly veiled (or, at times, not-at-all-veiled) *ad hominem* attacks that unfortunately pervade too much legal writing nowadays. The Court thus commends Defendants' counsel for their outstanding writing and expresses its appreciation for it.

[**3] **A. *Statutory and Regulatory Background***

1. *Water Pollution Control Under the Clean Water Act*

TheClean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, utilizes two fundamental approaches to control water pollution: technology-based regulations and water quality standards. Technology-based [*1144] regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution.

The National Pollutant Discharge Elimination System ("NPDES") permit program is a key means of implementing both technology-based requirements and water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1). An NPDES permit establishes specific limits of pollution for an individual discharger. A discharge of pollutants (other than dredged or fill material) from any "point source," which is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may [**4] be discharged," 33 U.S.C. § 1362(14), into the waters of the United States is prohibited unless that discharge complies with the discharge limits and other requirements of an NPDES permit. *Id.* §§ 1311(a), 1362(12). At

present, 45 states, including California, are authorized to administer the NPDES permit program. State Program Status, *at* http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general. In the remaining states, EPA issues the permits. 33 U.S.C. § 1342(a).

2. *Total Maximum Daily Loads ("TMDLs")*

Section 303(d) of the CWA and EPA's implementing regulations require states to identify and prioritize waterbodies where technology-based effluent limitations and other required controls are insufficiently stringent to attain water quality standards. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b). States must develop a "total maximum daily load," or "TMDL," for each pollutant of concern in each waterbody so identified. A TMDL represents the maximum amount of pollutant "loading" that a waterbody can receive from all combined sources without exceeding applicable [**5] state water quality standards. Although the term "total maximum daily load" is not expressly defined in the CWA, EPA's regulations define a TMDL for a pollutant as the sum of: (1) the "wasteload allocations," which is the amount of pollutant that can be discharged to a waterbody from point sources, (2) the "load allocations," which represent the amount of a pollutant in a waterbody attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).

Under CWA Section 303(d)(2), EPA is required to review and approve or disapprove TMDLs established by states for impaired waters within thirty days of submission. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state TMDL submission, EPA must issue its own TMDL for that waterbody within thirty days. *Id.*

3. *Implementation of TMDLs*

TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of [**6] waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits [*1145] will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution. . . . TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint [**7] source pollution reduction . . . ."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id.* For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355-56 (N.D. Cal. 2000), *aff'd sub nom. Prosolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). [**8]

4. *California Water Quality Control Statutory and Regulatory Framework*

California effectuates the foregoing requirements of the CWA primarily through institutions and procedures set out in certain provisions of the California Water Code (the "Water Code"), including those of the California Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Cal. Water Code § 13000 *et seq.* These Water Code provisions established the State Water Resources Control Board (the "State Board") within the California Environmental Protection Agency to formulate and adopt state policy for water quality control. Cal. Water Code §§ 174-186, 13100, 13140. The State Board is designated as the state water pollution control agency for all purposes stated in the CWA and is the agency authorized to exercise powers delegated to it under the CWA. 33 U.S.C. § 1313; Cal. Water Code § 13160.

The Porter-Cologne Act established nine California Regional Water Quality Control Boards (individually, a "Regional Board"; collectively, the "Regional Boards"), Cal. Water Code §§ 13200, 13201, which operate under the purview of the State Board, *see id.* § 13225. Each Regional [**9] Board is comprised of nine members, *id.* § 13201, and is required to appoint an executive of-

ficer, *id.* § 13220(c), to whom the Regional Board may delegate all but some of its powers and duties, *id.* § 13223. Each Regional Board is required to formulate and adopt water quality control plans for all areas within the region. *Id.* § 13240. The State Board may approve such plan, or it may return it to the Regional Board for further submission and resubmission to the State Board. *Id.* § 13245. It must act on any water quality control plan within 60 days of a Regional Board's submission of such plan to the State Board, or 90 days after resubmission of such plan. *Id.* § 13246. A water quality control plan will not become effective unless and until it is approved by the State Board, followed by approval by the state's Office of Administrative Law ("OAL") in accordance with the appropriate procedures. [*1146] *Id.* § 13245; Cal. Gov't Code §§ 11340.2, 11349.3, 11353(b)(5).

The State Board is required to formulate, adopt, and revise general procedures for the formulation, adoption, and implementation of water quality control plans by the Regional Boards. Cal. Water Code §13164. [**10] The State Board may adopt water quality control plans for purposes of the CWA that include the regional water quality control plans submitted by the Regional Boards. *See id.* § 13170. Such plans, when adopted by the State Board, supersede any regional water quality control plans for the same waters to the extent of any conflict. *Id.*

B. *Factual Summary and Procedural History*

1. *The Consent Decree*

The events underlying the instant action were set in motion by the disposition of *Heal the Bay, Inc., et al. v. Browner, et al.*, No. C 98-4825 SBA ("*Heal the Bay*"), an action previously before this Court. In *Heal the Bay*, an individual and two environmental groups (which groups are now two of the three Intervenors in the instant action) brought a civil action against EPA, the EPA Administrator, and the EPA Region IX Administrator. Their suit primarily concerned EPA's alleged failure to perform its alleged duty under the CWA either to approve or to disapprove TMDLs submitted to EPA by the state of California.

On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree") [3] in which "EPA agreed to ensure that a TMDL [would] [**11] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree PP2a, 2b, 3, 3c.) [4] Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* P3a.) By March 24, 2002, EPA was required either to have approved a state-submitted TMDL for trash in the Los Angeles River or to have established the TMDL itself. (*Id.* PP2d, 3a; *id.* Att. 2, 3.) [5]

3 No original consent decree was entered. Rather, according to Defendants' representations in their opening brief, the Consent Decree incorporated amendments from an original proposal at the urging of proposed intervenors California Association of Sanitation Agencies and California Alliance of POTWs. (*See* Mot. to Dismiss at 6.)

[**12]

4 The Court takes judicial notice of the existence of the Consent Decree and the contents thereof. *See, e.g., Egan v. Teets*, 251 F.2d 571, 577 n.10 (9th Cir. 1957) (holding that district court was entitled to take judicial notice of prior proceedings involving same petitioner before same district court). The Consent Decree is filed as Docket No. 25 in *Heal the Bay*, No. C 98-4825 SBA.

5 Defendants contend that the relevant deadline was March 22, 2002, (Mot. to Dismiss at 6), and Plaintiffs echo this contention in their Second Amended Complaint, (Second Am. Compl. P25). Review of the terms of the Consent Decree, however, reveal that the deadline was a different date. The Consent Decree defines "effective date" as the date on which the Consent Decree is entered. (*Id.* P2d.) Although the Court signed the Consent Decree on March 22, 1999, (*id.* at 29), it was not entered on the docket until March 24, 1999. Under the terms of Attachments 2 and 3 of the Consent Decree, TMDLs for trash for all Water Quality Limited Segments the Los Angeles River were to be submitted by California within two years of the effective date--March 24, 2001. (*Id.* Atts. 2, 3.) Since EPA was required to ensure that a TMDL was in place within one year of California's deadline to submit a proposed TMDL, (*id.* P3a), the deadline for final approval or establishment of a TMDL was March 24, 2002.

Nevertheless, based on the evidence tendered by EPA, it is clear that EPA believed that the deadline was March 22, 2002. (*See* Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss, Ex. B at 2.) As is evident from the discussion below, this discrepancy is immaterial to the Court's analysis of the merits of the Motion to Dismiss.

[**13] [*1147] **2. *EPA's Issuance of TMDLs and Approval of State-submitted TMDLs***

One of the responsibilities of the Regional Board for the Los Angeles region (the "Los Angeles Regional Board") is to develop TMDLs under the CWA for waterbodies in Los Angeles and Ventura Counties. (Decl. of Dennis Dickerson in Supp. of EPA's Mot. to Dismiss (the "Dickerson Declaration") P2.) With few exceptions, TMDLs are developed as draft TMDLs by Los Angeles Regional Board staff and then submitted to the board to be adopted as amendments to the Los Angeles Regional Board's Water Quality Control Plan, which is known as the Basin Plan. (*Id.*) Basin Plan amendments are then submitted to the State Board, and then subsequently to the OAL; after they have been approved by both of these agencies, they are submitted to EPA. (*Id.*)

On September 19, 2001, the Los Angeles Regional Board adopted TMDLs for trash for the Los Angeles River watershed. (*Id.* P3.) "Trash" was defined as man-made litter, as defined in California Government Code § 68055.1(g). (*Id.* Ex. A at 2). These TMDLs (the "State Trash TMDLs") were approved by the State Board on February 19, 2002, by OAL on July 16, 2002, and ultimately [**14] by EPA by letter dated August 1, 2002. (*Id.* P3, Ex. C; Second Am. Compl. for Injunctive & Declaratory Relief ("SAC") PP27, 30.) Prior to its approval of the State Trash TMDLs, however, EPA issued its own TMDLs for trash for the Los Angeles River Basin (the "EPA Trash TMDLs") on March 19, 2002. (SAC P26; Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss (the "Smith Declaration") Ex. B.) The EPA's August 1, 2002, letter approving the State Trash TMDLs announced that they "superceded" the EPA Trash TMDLs. (SAC P31; Smith Decl. P7, Ex. C.)

3. *TMDLs Now in Effect and Implementation Provisions*

Under the provisions of the TMDLs now in effect--the State Trash TMDLs--the numeric target is zero trash in the Los Angeles River. (Dickerson Decl. Ex. A at 16, 29.) Based on this target, California has determined that the wasteload allocations for trash in the Los Angeles River also must be zero. (*Id.*)

To achieve this goal, California has provided, along with the State Trash TMDLs, implementation provisions that specify a phasing-in of progressive reductions in municipal stormwater wasteload allocations over a ten-year period, following completion of a two-year initial [**15] baseline monitoring period. (*Id.* Ex. A at 21.) While the baseline monitoring program is taking place, cities will be deemed to be in compliance with the wasteload allocations provided that all of the trash that is collected during this period is disposed of in compliance with all applicable regulations. (*Id.* Ex. A at 27.) A baseline monitoring report is due to the Los Angeles Regional Board by February 15, 2004. (*Id.* P6.) [6]

6 Plaintiffs have filed Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint ("Plaintiffs' Objections"). Plaintiffs' Objections challenge the admissibility of, *inter alia*, the statements in paragraph 6 of the Dickerson Declaration. The Court considers and resolves the objections to these statements in note 20, *infra*. Although Plaintiffs have objected to all the statements in paragraph 6, careful review of the arguments advanced in these objections reveals that they are not in fact objecting to the statement in paragraph 6 that "the baseline monitoring report is due to the [Los Angeles] Regional Board by February 15, 2004." (Dickerson Decl. P6; *see* Pls.' Objections at 3-4.) To the extent that Plaintiffs are in fact objecting to this statement, however, the Court OVERRULES their objections to this statement for the reasons set forth in note 20, *infra*.

[**16] [*1148] The State Trash TMDLs and incremental wasteload allocations will be implemented through the Los Angeles stormwater permit, which the Los Angeles Regional Board will need to amend to incorporate specific, enforceable permit requirements. (*Id.* P8.) [7] The implementation provisions in the TMDLs allow permittees to "employ a variety of strategies to meet the progressive reductions in their Waste Load Allocations" and maintain that they "are free to implement trash reduction in any manner they choose." (*Id.* Ex. A at 29.) The wasteload reduction strategies are broadly classified as either end-of-pipe full capture structural controls, partial capture control systems, and/or institutional controls. (*Id.*) The provisions state that permittees will be deemed to be in compliance with the final wasteload allocation for their associated drainage areas if they utilize "full capture systems" that are adequately sized and maintained and maintenance records are available for inspection by the Los Angeles Regional Board. (*Id.* Ex. A at 30.)

7 Under heading II.2 of Plaintiffs' Objections, Plaintiffs object to the statements in paragraph 8 of the Dickerson Declaration relating to the Los Angeles Regional Board's understanding of how the State Trash TMDLs will be implemented. (Pls.' Objections at 4.) All of the grounds on which Plaintiffs object are meritless. First, Plaintiffs contend that the statements are objectionable as [HN1]"extra-record evidence." Such evidence, however, may be considered by the Court in

connection with a motion to dismiss for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Since Defendants contend that Plaintiffs' challenges to the merits of EPA's approval of the State Trash TMDLs are unripe, and since the Court considers how these TMDLs will be implemented at least in part for this purpose, this evidence is properly before the Court. Second, Plaintiffs contend that the statements constitute inadmissible hearsay. These statements, however, do not contain or even implicitly rely on any out-of-court statement by one other than Mr. Dickerson for the truth of the matter stated.

Third, Plaintiffs claim that the statements lack foundation, although they do not explain what they mean by this. To the extent Plaintiffs are asserting that the declarant lacks personal knowledge of the Los Angeles Regional Board's intentions, that assertion is refuted by the fact that Mr. Dickerson has been Executive Officer of the board since 1997. (Dickerson Decl. P1.) Fourth, Plaintiffs insist that "the statements are objectionable and inadmissible as the best evidence of the implementation requirements vis-a-vis the TMDLs, is set forth in the TMDLs themselves, as well as in the terms of other enforceable documents, documenting the actions taken by the [Los Angeles] Regional Board, such as the terms of the Municipal Storm Water Permit referenced in the declaration." (Pls.' Objections at 4.) This objection misunderstands the nature of the "best evidence" rule: that rule applies *only* where the witness attempts to testify as to the *contents of a writing, recording, or photograph. See* Fed. R. Evid. 1002. Such is not the case here. Moreover, this objection reflects a fundamental misunderstanding of the nature of TMDLs. TMDLs are *not* self-executing; they require the appropriate state to issue regulations implementing them. It is also not clear what Plaintiffs mean by their assertion that documents "documenting the actions taken by the Regional Board" constitute "enforceable documents." Finally, Plaintiffs assail the statements at issue as "not competent." (*Id.*) Plaintiffs do not explain what they mean by this objection. The Court thus disregards it. Accordingly, the Court OVERRULES the objections under Heading II.2 of Plaintiffs' Objections.

[**17] [*1149] **4. *The Instant Action***

Plaintiffs filed their initial complaint on June 28, 2002, in the United States District Court for the Central District of California. On August 30, 2002, they filed an amended complaint. On October 30, 2002, the case was transferred to this Court, the United States District Court for the Northern District of California. Pursuant to the parties' stipulation and the Court's Order thereon, Plaintiffs filed a Second Amended Complaint for Injunctive and Declaratory Relief (the "SAC" or "Complaint") on December 12, 2002.

The SAC is the operative complaint for purposes of the Motion to Dismiss and the Motion for Partial Summary Judgment. The SAC purports to assert three claims for relief. The First Claim for Relief is ostensibly brought pursuant to a provision of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, (SAC at 34), although certain allegations thereunder also invoke the CWA, the Regulatory Flexibility Act (the "RFA"), and the Small Business Regulatory Enforcement Fairness Act of 1996 (the "SBREFA"), (*id.* PP84-85). [8] The First Claim for Relief alleges several violations of the APA: (1) EPA acted without authority [**18] and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79); (2) EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (*id.* PP80, 83); (3) EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (*id.* PP81-82); (4) the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (*id.* PP84-86); [9] and (5) EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (*id.* P87). [10] The Second Claim for Relief challenges [*1150] the validity of two alleged agency actions, the EPA Trash TMDLs and the "*de facto* TMDL procedure," under the APA, 5 U.S.C. § 551 *et seq.*; the [**19] RFA, 5 U.S.C. § 601 *et seq.*; and the SBREFA, 5 U.S.C. § 801 *et seq.* (SAC at 40; *id.* PP89-99.) The violations alleged under the Second Claim for Relief, however, appear to relate mostly to procedural requirements under the RFA and the SBREFA. (*See id.* PP91-93, 95-98 (invoking 5 U.S.C. §§ 601(5), 601(6), 603, 604(a), 604(b), 605(b), and 611).) [11] The Third Claim for Relief is derivative of the first two claims. It seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, as to which party's interpretation of the law is correct and a judicial determination of Plaintiffs' rights and duties. (*Id.* PP100-105.)

8 With respect to the First Claim for Relief, the SAC comes perilously close to violating Federal

Rule of Civil Procedure 8(a)'s mandate of providing "a *short and plain* statement of the claim showing that the pleader is entitled to relief...." Fed. R. Civ. P. 8(a) (emphasis added). In particular, Plaintiffs' practice of indicating that the First Claim for Relief is based exclusively on the APA, (SAC at 34), yet at the same time claiming in the allegations thereunder that the actions at issue violate other statutes, (*id.* PP84-85), is confusing. Aside from potentially misleading Defendants as to the nature of the claims against them, it has required the Court to spend needless additional time and effort scrutinizing the allegations of the SAC because the Court cannot trust the accuracy of the headings of the SAC. The practice is especially reprehensible because the Court has already been forced to spend undue time and effort identifying and parsing out the five independent, discrete claims for relief that are set out in stream-of-consciousness fashion in the allegations underlying the "First Claim for Relief"--which heading necessarily suggests a *single* claim. *See infra*.

[**20]

9 This alleged *de facto* TMDL procedure is also claimed to violate the CWA, the RFA, and the SBREFA. (*Id.* PP84-85.)

10 Although not clearly stated, this last claim (claim (5)) within the First Claim for Relief appears to challenge the *merits* of EPA's approval of the State Trash TMDLs, as opposed to, for example, challenging EPA's authority to approve *any* state-submitted TMDLs after it issued the EPA Trash TMDLs, (*see id.* PP80, 83). Presumably, this last claim encompasses challenges to, for example, EPA's approval of the State Trash TMDLs where these TMDLs covered "unlisted" waters. (*See id.* PP42, 49, 62.) Defendants appear to have also construed this claim as challenging the merits of EPA's approval of the State Trash TMDLs, and they move to dismiss this claim as unripe. (*See* Mot. to Dismiss at 20-24.) Plaintiffs appear to concur in Defendants' construction of this claim. (*See* Pls.' Opp. Br. at 16-20.) Accordingly, the Court construes this last claim as challenging the merits of EPA's approval of the State Trash TMDLs.

11 This is yet another example of Plaintiffs' objectionable drafting of the SAC. In particular, the paragraph alleging improper agency action supposedly giving rise to the Second Claim for Relief, paragraph 96, identifies four bases on which the CWA, the APA, the RFA, and the SBREFA were violated. (*Id.* P96.) Of these four bases, however, only the first (denoted reason "(a)") appears to have anything to do with the APA; the remaining three ("(b)," "(c)," and "(d)") appear to relate solely to provisions of the RFA and SBREFA, at least based on the allegations of the previous paragraphs under the heading "Second Claim for Relief." (*Id.; compare id.* (*e.g.*, alleging that EPA failed to perform an initial screening of the EPA Trash TMDLs to determine whether they would have a significant economic impact on a substantial number of small entities) *with id.* PP91-93, 95 (*e.g.*, alleging that RFA requires agencies to screen all proposed rules and identify whether such rules would have such an impact, (*id.* P92))).

The Court is thus left with the distinct impression that either Plaintiffs have been careless in drafting the Second Claim for Relief or they have invoked various statutes and inserted a number of allegations in scattershot fashion in the hope that something will slip by Defendants undetected and "stick." Aside from arguably violating Rule 8(a), this practice is unfair not only to Defendants, but also to the Court, because it makes the Court's resolution of Defendants' arguments considerably more difficult. (Nor is the Court interested in any supporting evidence or clarification from Plaintiffs' counsel regarding the nature of their claims that is not in the four corners of the SAC or incorporated therein by reference. The SAC speaks for itself on that score.) Based on its review of the SAC, the Court construes the allegations underlying the Second Claim for Relief as alleging violation of the APA, the RFA, and the SBREFA only with respect to EPA's alleged failure to provide Plaintiffs with notice and an opportunity for comment with regard to the *de facto* TMDL procedure, discussed *infra*, and the establishment of the EPA Trash TMDLs; the Court construes them to allege violation of the RFA and the SBREFA, but not the APA, with regard to the remaining allegations under the heading of "Second Claim for Relief." (*See* SAC P96.)

[**21] On January 13, 2003, Defendants and Intervenors filed answers to the SAC. On that same day, Defendants also filed the instant Motion to Dismiss, which seeks dismissal of the entire action pursuant to Federal Rules of Civil Procedure 12(b)(1)and 12(b)(6). Intervenors filed Intervenors' Notice in Support of Defendants' Motion to Dismiss on February 3, 2003, indicating in brief fashion that they agreed with the arguments in the Motion to Dismiss and therefore supported the motion. On March 10, 2003, Plaintiffs filed their Motion for Partial Summary Judgment.

Most of the plaintiffs in the instant action are currently plaintiffs in a California state court action against the Los Angeles Regional Board and the State Board challenging the legality of the State Trash TMDLs. (*Id.* P33.) Three other lawsuits have similarly been filed challenging either [*1151] California's establishment of the State Trash TMDLs or EPA's approval of the same. (*Id.*)

II. LEGAL STANDARD

A. *Rule 12(b)(1)*

[HN2]Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under [**22] Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). "'A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.'" *Id.* (quoting *Smith v. McCullough*, 270 U.S. 456, 459, 70 L. Ed. 682, 46 S. Ct. 338 (1926)). In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). The court presumes lack of jurisdiction until the plaintiff proves otherwise. *See Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. *Rule 12(b)(6)*

[HN3]A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a claim. [**23] *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *accord Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *see also Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 731. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). [**24]

[HN4]When the complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. DISCUSSION

Defendants have filed a Motion to Dismiss; Plaintiffs have filed a Motion for Partial Summary Judgment. The Motion for Partial Summary Judgment seeks adjudication of issues pertaining to Plaintiffs' challenge to the procedural legitimacy of the State Trash TMDLs. Because the Court grants the Motion to Dismiss (as discussed below), it does not reach the merits of the Motion for Partial Summary Judgment and therefore denies it as moot. Accordingly, the following discussion pertains [*1152] only to the Motion to Dismiss, except where noted.

At the outset, the Court notes that it need not analyze all the arguments presented in Defendants' opening brief because Plaintiffs [**25] concede that certain of their claims are moot. In particular, Defendants contend in their opening brief for the Motion to Dismiss that the EPA Trash TMDLs no longer have any force or effect because EPA has announced that the State Trash TMDLs "supercede" the EPA Trash TMDLs; consequently, Defendants maintain, Plaintiffs' claims that EPA lacked authority to establish the EPA Trash TMDLs, (SAC P78-79), and that the procedures by which EPA established them were unlawful, (*id.* PP81-82, 90, 94, 96-97, 99), are moot. (Mot. to Dismiss at 12-15.) In their opposition brief, Plaintiffs express satisfaction with Defendants' assurances that the EPA Trash TMDLs are no longer (and can never be) in effect and therefore "withdraw their claims directly challenging the validity of EPA's TMDLs . . . ." (Pls.' Opp. Br. at 4 n.6.) Defendants acknowledge this withdrawal in their reply brief. (Defs.' Reply Br. at 1.) As a result, the Court GRANTS the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) with regard to claims (1) and (3) (SAC PP78-79 and SAC PP81-82, respectively) within the First Claim for Relief of the SAC identified in Part I.B.4 of this Order, *supra*. The Court [**26] also GRANTS the Motion to Dismiss pursuant to Rule 12(b)(1) with regard to the Second Claim for Relief of the SAC to the extent it challenges the validity of the EPA Trash

TMDLs. (*See* SAC PP90, 94, 96-97, 99.) The Court now addresses the parties' arguments in relation to the remaining claims.

A. *Challenge to EPA's Authority to Approve the State Trash TMDLs*

Plaintiffs claim that EPA lacked authority to approve the State Trash TMDLs because it had already established the EPA Trash TMDLs. (SAC PP80, 83.) Defendants move to dismiss this claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Mot. to Dismiss at 19-20.) Defendants contend that EPA in fact has a statutory *obligation* under 33 U.S.C. § 1313 to review any proposed TMDLs submitted by a state and either approve them or disapprove them. (*Id.*) Defendants assert that nothing in the CWA or otherwise divests EPA of jurisdiction to approve a state-submitted TMDL once EPA has issued its own TMDLs, and in fact, recognizing such a principle would thwart Congressional intent to vest states with the primary responsibility of implementing the CWA's provisions. [**27] (*Id.* at 20.) Plaintiffs counter (in less than straightforward fashion) that by allowing California to submit the State Trash TMDLs to EPA after EPA established the EPA Trash TMDLs, EPA effectively "remanded" a "TMDL submission" to California, and EPA lacked authority to "remand" this submission and subsequently approve California's "resubmission." (*See* Pls.' Opp. Br. at 15-16.) [12]

> 12 Plaintiffs also argue that EPA lacked authority to approve the State Trash TMDLs because these TMDLs cover "unlisted" waters; according to Plaintiffs, EPA has authority only to approve TMDLs for "listed" waters. (*Id.* at 14-15.) As Defendants correctly point out, this argument goes to the merits of EPA's approval of the State Trash TMDLs, not to the issue of whether EPA had any authority to approve any state-submitted TMDLs after issuing its own TMDLs--the issue raised by this claim. (Defs.' Reply Br. at 10 n.9.) Plaintiffs' argument is relevant only to their own Motion for Partial Summary Judgment, not to the arguments raised in the Motion to Dismiss.

[**28] Plaintiffs' counterargument is meritless. [HN5]No authority supports the conclusion that EPA lacks authority to approve [*1153] state-submitted TMDLs after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission. Moreover, as Defendants astutely note, recognizing such a principle "would lead to absurd results. Under this scenario, once EPA establishes a TMDL, the State could never update it or modify it based on changed circumstances." (Mot. to Dismiss at 20.) Finally, like Defendants, (*see* Defs.' Reply Br. at 10), the Court is at a loss to understand what Plaintiffs mean by their contention that EPA "remanded" the EPA Trash TMDLs to California for revision and resubmission. Nothing in the allegations of the Complaint remotely suggest any sort of sending back of TMDLs to California for revision or additional development. And even if there were such a "remand," it does not follow that EPA lacked authority to approve the State Trash TMDLs.

For these reasons, the Court GRANTS the Motion to Dismiss with respect to claim (2) within the First Claim for Relief, [**29] (SAC PP80, 83), *see supra* Part I.B.4. Additionally, it is evident that Plaintiffs cannot amend the SAC to allege facts sufficient to rehabilitate this claim because it is meritless as a matter of law. Accordingly, this claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

B. *The "*De_Facto *TMDL Procedure"*

Under claim (4) within their First Claim for Relief, *see supra* Part I.B.4, and the Second Claim for Relief, Plaintiffs challenge the "*de facto* TMDL procedure," [13] which they consider to consist of:

> the establishment by the [Los Angeles] Regional Board of the TMDL, followed by the preparation and notice of the TMDL by USEPA, followed by the approval of the TMDL by the State Board, followed by the "establishment" by USEPA of the EPA TMDL, followed by the determination by USEPA to review and/or approve the subsequently submitted State TMDL, and to thereafter find the USEPA established TMDL is "superceded" . . . .

(SAC P85.) Plaintiffs assert that this procedure violates the APA, the RFA, and the SBREFA. (*Id.* PP84-85, 96-98.) Plaintiffs allege not only that they have previously suffered from the effectuation of the *de facto* [**30] TMDL procedure, but also that they will suffer from the effectuation of the procedure in the future. (*See id.* PP84-86.)

> 13 Plaintiffs do not expressly use the phrase "*de facto* TMDL procedure" in the SAC. Instead, they refer to this procedure as the "TMDL Procedure" and contend that EPA has effected a "*de facto* adoption" of the "TMDL Procedure." (SAC P85.) For ease of reference, the Court will refer to

what Plaintiffs call the "TMDL Procedure" as the "*de facto* TMDL procedure."

Defendants move to dismiss these claims by pointing out that the APA and the RFA, which was amended by the SBREFA, permit challenges *only* to "final agency action." (Mot. to Dismiss at 16-19.) [14] They explain that the APA defines [HN6]"agency action" to include "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (*Id.* at 16 (quoting 5 U.S.C. § 551(13).) (They do not indicate whether this definition applies to the RFA and [**31] SBREFA as well.) Defendants assert that what Plaintiffs characterize as a *de* [*1154] *facto* TMDL procedure is not an "agency action," much less a final agency action, but in fact a sequence of events; as such, they maintain, the procedure cannot give rise to a challenge under the APA or under the RFA, as amended by the SBREFA.

14 Defendants also contend that the RFA, as amended by the SBREFA, provides a narrow and exclusive means of judicial review that is not available here due to the nature of Plaintiffs' challenge to the *de facto* TMDL procedure. (*See id.* at 16.)

Plaintiffs respond to Defendants' arguments somewhat curiously. Despite vehemently asserting that Defendants' arguments are incorrect, they do not dispute that a challenge will lie only to final agency action. Instead, they contend that the *de facto* TMDL procedure "led up to and resulted in 'final agency action,'" (Pls.' Opp. Br. at 22), namely the August 1, 2002, approval of the State Trash TMDLs. Plaintiffs also argue at great length that [**32] their challenge to this procedure is not moot because it falls under the "capable of repetition, yet evading review" exception to the mootness doctrine. (*Id.* at 22-25.)

Defendants' arguments are persuasive, and Plaintiffs' responses are both uncompelling and nonresponsive. As Defendants correctly note, (*see* Defs.' Reply Br. at 4-5), Plaintiffs' suggestion that they are challenging EPA's approval of the State Trash TMDLs, as opposed to the so-called "TMDL procedure," is belied by the allegations of the SAC: by their plain language, the allegations of paragraphs 84 through 86 and paragraphs 96 through 98 challenge the "TMDL procedure," (SAC 84-86, 96-98); Plaintiffs' challenge to EPA's approval of the State Trash TMDLs is set out in paragraph 87, (*see id.* P87), the justiciability of which challenge is discussed in Part III.C of this Order, *infra*. Plaintiffs do not demonstrate how the "procedure" is "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" or falls within any other definition, statutory or otherwise, of final agency action. [15] Indeed, as Defendants also correctly note, (*see* [**33] Defs.' Reply Br. at 4-5), Plaintiffs' assertion that the TMDL procedure *consummated in* final agency action, namely EPA's approval of the State Trash TMDLs, is an implicit admission that the "procedure" itself is not final agency action. Nor do Plaintiffs make any effort to distinguish or refute any of the authorities cited by Defendants in support of their arguments. Finally, as Defendants yet again correctly point out, Plaintiffs' mootness argument is nonresponsive because Defendants do not contend that this claim is moot. (*Id.* at 8.) [16]

15 Even though the Court has not been able to locate a statutory definition of "agency action" for purposes of the RFA and SBREFA, Plaintiffs have put forward no argument to suggest that it should be given a meaning substantially different than that provided in the APA. The Court sees no reason to conclude that "agency action" should be given a significantly more expansive definition than that provided for purposes of the APA.

16 Plaintiffs do not respond to Defendants' argument that judicial review is unavailable under the RFA, as amended by the SBREFA, for alleged violations of 5 U.S.C. § 603. (Mot. to Dismiss at 18.) The Court agrees with Defendants that the implication of this lack of response is that any opposition to this argument is waived. (*See* Defs.' Reply Br. at 3-4.) The Court disagrees with Defendants, however, that Plaintiffs have failed to respond to Defendants' arguments that the *de facto* TMDL procedure does not constitute "final agency action" under the RFA, as amended by the SBREFA; but the Court finds their response to this argument meritless for the reasons stated above.

[**34] In sum, it is apparent that the alleged *de facto* TMDL procedure, consisting of the various events identified in paragraph 85 of the SAC, is not subject to challenge under the APA, RFA, or SBREFA because it is not final agency action within the meaning of those statutes. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (rejecting challenge to alleged land withdrawal [*1155] review program on grounds that alleged program was not final agency action within meaning of APA). Accordingly, the Court GRANTS Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to claim (4) within the First Claim for Relief, (SAC PP84-86). The Court also GRANTS Defendants' motion pursuant to Rule 12(b)(6) with regard to the Second Claim for Relief. Given that the Second Claim for Relief challenges the validity of the EPA Trash TMDLs and the alleged *de facto* TMDL procedure alone, and given that Plaintiffs have withdrawn their challenge to the validity

of the EPA Trash TMDLs, the Second Claim for Relief is now dismissed in its entirety.

It is further evident that Plaintiffs cannot amend the SAC to allege [**35] facts sufficient to rehabilitate these claims because they are not actionable as a matter of law. Accordingly, both claim (4) within the First Claim for Relief and the Second Claim for Relief are DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

C. Ripeness of Plaintiffs' Challenge to EPA's Approval of State Trash TMDLs

Plaintiffs' remaining claim (aside from the Third Claim for Relief, which is dependent on the First and Second Claims for Relief) challenges the merits of EPA's approval of the State Trash TMDLs. (*See id.* P87.) Defendants move to dismiss this claim as unripe for judicial review. Specifically, Defendants contend that the issues are not yet sufficiently developed to be fit for judicial review under the APA because Plaintiffs' existing NPDES permit imposes no obligations on Plaintiffs in connection with the State Trash TMDLs and because the Los Angeles Regional Board intends to revisit these TMDLs at the end of the monitoring period. (Mot. to Dismiss at 21-23.) Defendants further contend that Plaintiffs will not suffer any immediate hardship if review is withheld because EPA's approval of the State Trash TMDLs imposes no present, affirmative duties on [**36] Plaintiffs and requires no immediate changes in Plaintiffs' conduct. (*Id.* at 23-24.)

Plaintiffs respond by arguing that they have suffered "injury in fact," both economic and non-economic. (Pls.' Opp. Br. at 16-17.) Citing to the text of the State Trash TMDLs, a copy of which is appended to the Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss (the "Montevideo Declaration") as Exhibit 3, Plaintiffs claim that they are impacted by these TMDLs:

> By the terms of the TMDL itself, most Plaintiffs are directly impacted by its terms and presently have express monitoring obligations to comply with, not to mention pending compliance dates requiring annual reductions in trash. Moreover, the TMDL calls out very specific and expensive implementation measures, including possible implementation through full capture vortex systems totaling $ 109.3 million for all affected entities within the County [of Los Angeles] by the end of Year 1, and a total of $ 2,053,100,000 for the first 12 years of implementation. Even the Trash TMDL itself concludes that "Trash abatement in the Los Angeles [**37] River system may be expensive."

(Pls.' Opp. Br. at 18 (citing Montevideo Decl., Ex. 3 (State Trash TMDLs)) (internal citations and emphasis omitted).) Similarly, Plaintiffs maintain that "to come into compliance by the Compliance Dates, [they] must begin employing strategies now to meet the progressive reductions in Waste Load Allocations required by the State Trash TMDL[s]." (*Id.* at 19.) [*1156] Plaintiffs further allege that the NPDES permit that applies to all of Plaintiffs provides that the State Trash TMDLs are "effective and enforceable." (*Id.* at 18 (citing Montevideo Decl., Ex. 5, at 10 P14).) Citing paragraph 36 of the SAC, they also contend that they have suffered from the TMDLs' being in effect because they are exposed to "unwarranted enforcement action and third party citizen suits." (*Id.*) Finally, Plaintiffs contend that they have suffered "procedural injuries," to wit, their being "forced to submit comments to two different levels of government (the State of California and the EPA) on two sets of TMDL over a series of many months and several hearings." (*Id.* at 20.)

Defendants dispute all of Plaintiffs' arguments in their reply. Defendants note that [**38] "Plaintiffs point to no present effect of the TMDLs on their day-to-day conduct." (Defs.' Reply Br. at 12.) They point out that, contrary to Plaintiffs' contention, Plaintiffs in fact have no monitoring obligations with which to comply because the Los Angeles County Department of Public Works has assumed that responsibility for all of Plaintiffs. (*Id.*) Defendants clarify that the first compliance date under the TMDLs is not until 2006, and the TMDLs identify several potential compliance options without mandating the use of any particular measure. (*Id.*) They further note that Plaintiffs fail to respond to the record evidence that the Los Angeles Regional Board will revisit the TMDLs at the conclusion of the monitoring period, that is, prior to the first compliance deadline, and that such reconsideration has been considered a rational basis for delaying judicial review. (*Id.* at 13 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), and *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992)).) Finally, Defendants assail Plaintiffs' reliance on the aforementioned [**39] statement in Plaintiffs' NPDES permit because this statement does not establish that the State Trash TMDLs are effective or enforceable against *Plaintiffs. (Id.)*

[HN7]The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential

reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993). Unripe claims are subject to dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000). In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). To address these issues in the context of a challenge to the lawfulness of administrative action, the Supreme Court has identified three factors to consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further [**40] administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

In light of these three factors, the Court finds this claim unripe for review. First, delayed review would cause, at most, minimal hardship to the parties. Indeed, Plaintiffs have not demonstrated that they will suffer *any* hardship if review is delayed. Despite their preoccupation with various official pronouncements that the State Trash TMDLs are "effective" and "enforceable," Plaintiffs cannot point to a single future event or condition that is fairly certain to occur and will adversely [*1157] impact *Plaintiffs* themselves. [17] That is because the TMDLs do not presently impose any obligations on Plaintiffs and because they are subject to revision before such obligations will be imposed. Nor do Plaintiffs provide any evidence or explanation whatever of the "unwarranted enforcement action and third party citizen suits" to which they claim to be exposed.

> 17 The Court notes parenthetically that Plaintiffs' invocation of "injury in fact" in their opposition brief, (Pls.' Opp. Br. at 16-17), is inapposite. [HN8]Injury-in-fact is a concept that relates to the issue of standing, not ripeness. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Plaintiffs appear to confuse Defendants' arguments as relating to standing, not ripeness. (Pls.' Opp. Br. at 20 ("Federal courts have long recognized procedural injuries, as well as actual injuries, as an alternative basis for standing.").) Nevertheless, the Court construes Plaintiffs' allegations of "injury in fact" as allegations of hardship.

[**41] Equally unsupported is Plaintiffs' contention that they will bear economic costs in complying with the State Trash TMDLs. The sole evidentiary basis of this allegation, set out in paragraph 35 of the SAC and discussed more thoroughly in Plaintiffs' Opposition, is the estimates provided in the text of the TMDLs themselves. (*See* SAC P35; Pls.' Opp. Br. at 18.) But this matter is inadmissible hearsay because it is offered by an out-of-court declarant, *i.e.*, the Los Angeles Regional Board, for the truth of the matter stated, *i.e.*, that the TMDLs will in fact impose these costs. [18] Yet even if this evidence were admissible, it would be insufficient to support Plaintiffs' contention that they will suffer economic injury: the cited portions of the State Trash TMDLs provide estimates of costs to be borne by "permittees"; there is no indication that these costs will be borne by *Plaintiffs* in particular. (*See* Montevideo Decl., Ex. 3, at 37, 40, *cited in* Pls.' Opp. Br. at 18.) Similarly, Plaintiffs provide no evidentiary support for the bald contention in their opposition brief that *Plaintiffs* must begin employing "strategies" now to meet the progressive reductions [**42] in wasteload allocations required by the State Trash TMDLs. (Pls.' Opp. Br. at 19.)

> 18 The author of the State Trash TMDLs appears to be the Los Angeles Regional Board. (*See* Montevideo Decl., Ex. 3.) Since the Los Angeles Regional Board is an entity created by state law and is subordinate to a state agency, the State Board, the text of the State Trash TMDLs is arguably ascribable to the State Board and the state of California as well.
>
> But these statements cannot be attributed to EPA by virtue of its approval of the State Trash TMDLs. Plaintiffs have laid no legal or evidentiary foundation tending to show that EPA's mere approval of the *TMDLs themselves* implies that EPA further agreed with or endorsed as accurate California's estimates of the costs of compliance provided with those TMDLs.

Even if Plaintiffs will be forced to comply with obligations imposed by the State Trash TMDLs and will suffer costs therefrom, the first Compliance Point is not until Year 3 of the implementation period, which runs [**43] from October 1, 2005, to September 30, 2006. (*See* Montevideo Decl., Ex. 3, at 28.) Thus, as a practical matter, Plaintiffs have three years to reach the specified Compliance Point. They have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n*, 523 U.S. at 734. Accordingly, Plaintiffs cannot be heard to complain that they will suffer hardship if review is withheld at the present time. [19]

> 19 To the extent that Plaintiffs identify past events that are not alleged to recur in the future,

such as Plaintiffs' allegedly having to submit comments to two levels of government, for the purpose of demonstrating hardship, those events are irrelevant because Plaintiffs are solely seeking *prospective* relief (aside from attorney's fees and costs of suit).

[*1158] Second, judicial intervention would likely interfere with further administrative action on the part of the state of California. Plaintiffs have not refuted Defendants' [**44] evidence that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period. [20] It is thus possible that the compliance [*1159] dates or compliance points will be altered or abolished altogether. The State Board may submit new TMDLs to EPA for review and potential approval well before the compliance dates in the State Trash TMDLs. And even if the State Trash TMDLs remain mostly intact, it is certainly possible that the State Board will approve additional regulations that alleviate much of the burden on Plaintiffs. Again, Plaintiffs must bear in mind that it is the state of California, not the federal government, that is charged with implementing the State Trash TMDLs.

20 Plaintiffs' Objections challenge the admissibility of, *inter alia*, the portion of Defendants' evidence tending to show that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period, namely relevant statements in paragraphs 6 and 12 of the Dickerson Declaration. (The statements in paragraph 7 of the Dickerson Declaration and Exhibit C thereto also constitute such evidence, (*see* Mot. to Dismiss at 22), although Plaintiffs do not object to those statements.)

Plaintiffs challenge the statements in paragraph 6 of the Dickerson Declaration on five grounds. First, Plaintiffs contend that these statements are irrelevant "to the issue in question." (Pls.' Objections at 3.) The Court is unclear about what Plaintiffs mean by "the issue in question," but at any rate, the Court overrules this objection because these statements are indeed relevant to an important issue relating to ripeness: whether the Los Angeles Regional Board will revisit the State Trash TMDLs at the end of the monitoring period. Second, Plaintiffs assert that the statements are inadmissible hearsay because they seek "to introduce statements from parties other than the declarant, into evidence." (*Id.*) This argument fails because the statements are not offered for the truth of the matter stated by persons or parties other than Mr. Dickerson. That the Los Angeles Regional Board's *discussed (i.e.*, verbally articulated) the possibility of reopening the TMDLs in the future does not implicate hearsay concerns, *see* United States v. Ballis, 28 F.3d 1399, 1405 (5th Cir. 1994); and the board's orders to its staff are more akin to written or verbal acts.

Third, Plaintiffs assail the statements as "incompetent" because "the opinions and views of individual Regional Board members is [*sic*] not relevant or admissible evidence of the actions or positions of the entire Board." (Pls.' Objections at 3 (emphasis omitted).) But nowhere are the "opinions and views" of the individual Regional Board members set out in the statements in paragraph 6. Fourth, Plaintiffs claim that these statements are "not the best evidence of the position of the entire Regional Board, as the views and positions of an entire Board can only be discerned from the meeting minutes and resolutions which confirm the actions of the public body." (*Id.* (emphasis omitted).) But the "views and positions" of the board are not set out therein. Fifth, Plaintiffs argue that the statements should be excluded as "extra-record evidence." This objection is meritless because the statements are relevant to the ripeness of Plaintiffs' challenge to EPA's approval of the State Trash TMDLs, and the Court may appropriately look beyond the pleadings in evaluating a motion to dismiss pursuant to Rule 12(b)(1).

In sum, Plaintiffs appear to have construed the statements in paragraph 6 of the Dickerson Declaration as stating that the Los Angeles Regional Board intends to *revise* the State Trash TMDLs after completion of the monitoring period, and they have evidently made their objections with this understanding in mind. Careful review of these statements reveals, however, that these statements demonstrate only that board staff have been ordered to report on the TMDLs and make recommendations on whether or not to revise the TMDLs based on the result of the monitoring. Thus, the import of the statements in paragraph 6 is that *the board will be in a position to revisit, and potentially reconsider, the TMDLs at the end of the monitoring period*, not that they have actually decided to revise the TMDLs. Accordingly, and for the reasons stated above, the Court OVERRULES the objections under heading II.1 in Plaintiffs' Objections.

Although Plaintiffs have objected to the admissibility of the statements in paragraph 12 of the Dickerson Declaration, the Court does not rely on those statements in evaluating issues of ripeness. The Court finds that the statements in

paragraphs 6 and 7 of the Dickerson Declaration are sufficient to support a conclusion that the Los Angeles Regional Board will be revisiting--which is not to be confused with an intent to revise--the State Trash TMDLs at the end of the monitoring period. Accordingly, the Court OVERRULES AS MOOT the objections under heading II.5 in Plaintiffs' Objections.

Finally, the Court has reviewed the remaining objections in Plaintiffs' Objections. The Court does not rely on any of the matter to which Plaintiffs have objected other than those under headings II.1 and II.2 in evaluating the Motion to Dismiss. Accordingly, the Court OVERRULES AS MOOT the remaining objections in Plaintiffs' Objections.

[**45] Finally, the Court would benefit from further factual development of the issues presented. For example, Plaintiffs allege that in approving the State Trash TMDLs, EPA failed "to use 'best science' and [failed] to carefully consider suggestions on how to structure the TMDL program to be more effective and flexible to ensure workable solutions, with such failure resulting in an inequitable share of the burden [of pollution reduction] being placed on municipalities, such as Plaintiffs herein, to attain water quality standards." (SAC P47.) Since TMDLs are not self-executing, but require issuance of state regulations for implementation, delaying review will enable the Court to determine more easily and accurately whether the TMDL program could in fact have been structured more flexibly and whether Plaintiffs are bearing an inequitable share of the burden of pollution reduction.

In light of the Court's evaluation of the foregoing three factors, the Court concludes that Plaintiffs' claim is unripe for judicial review. Accordingly, Plaintiffs' claim (5) within the First Claim for Relief, (*id.* P87), is DISMISSED pursuant to Rule 12(b)(1) due to the Court's lack of subject matter jurisdiction. [**46] Since the Court lacks jurisdiction over this claim, it lacks authority to grant Plaintiffs leave to amend the claim; accordingly, the claim is dismissed WITHOUT LEAVE TO AMEND in this action. Finally, because the Court necessarily does not reach the merits of the claim, the dismissal is WITHOUT PREJUDICE.

D. *Third Claim for Relief*

Plaintiffs' Third Claim for Relief is wholly predicated on their first two claims for relief. Because these two claims for relief are dismissed, the Third Claim for Relief is DISMISSED on the same bases, and to the same extent, as the two claims (and sub-claims thereunder) are dismissed.

E. *Motion for Partial Summary Judgment*

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment in Plaintiffs' favor on the issues of (1) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs to the extent that they covered unlisted waters and (2) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs given that they had previously established the EPA Trash TMDLs. For the reasons stated above, the Court grants the Motion to Dismiss. Accordingly, the Motion for Partial Summary Judgment [**47] is DENIED AS MOOT. For the same reason, the Court OVERRULES AS MOOT Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [21] and Plaintiffs' Objections to [*1160] Declaration of Anjali I. Jaiswal and Exhibits.

21 Although the Montevideo Declaration relates both to Plaintiffs' opposition to the Motion to Dismiss and to Plaintiffs' Motion for Partial Summary Judgment, Intervenors' objections to the Montevideo Declaration are made in connection with their opposition to the Motion for Partial Summary Judgment. Accordingly, the Court considers their objections solely for that purpose.

IV. CONCLUSION

Plaintiffs have no reason or right to be before this Court, at least at this time. All of their claims are moot, meritless, or unripe. Plaintiffs' challenges to the EPA Trash TMDLs were quite obviously mooted out the minute that EPA approved the State Trash TMDLs. Indeed, given [**48] that Plaintiffs readily withdrew these challenges based solely on Defendants' representations in their moving papers that the EPA Trash TMDLs are void, (Pls.' Opp. Br. at 4 n.6), the Court wonders why Plaintiffs proceeded to file a lawsuit on this basis. Plaintiffs' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "*de facto* TMDL procedure" are so patently meritless that the Court fails to understand why Plaintiffs decided to assert these claims in the first place. Finally, Plaintiffs' challenges to the "merits" of the State Trash TMDLs may very well be valid, but in the absence of any indication that they will suffer imminent hardship, these claims are premature.

The Court does not suggest by any means that Plaintiffs have acted in bad faith by continuing to prosecute this action after EPA approved the State Trash TMDLs. But after receiving Defendants' opening brief for their Motion to Dismiss, Plaintiffs should have recognized

that their claims could not be maintained at present, if at all. The arguments in their opposition brief appear to reflect more of a "win at all costs" approach than [**49] considered judgment. And while the Court does not doubt that Plaintiffs would appreciate a judicial declaration as to the validity of the State Trash TMDLs, the Court lacks jurisdiction to grant such relief where Plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss Second Amended Complaint [Docket No. 18] is GRANTED, such that:

a. The First Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as follows:

i. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief [**50] can be granted;

iii. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITHOUT LEAVE TO AMEND and [*1161] WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

iv. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

v. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT LEAVE TO AMEND in this action and WITHOUT PREJUDICE as unripe and, thus, for lack of subject matter jurisdiction;

b. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as [**51] follows:

i. To the extent the Second Claim for Relief challenges the validity of the EPA Trash TMDLs, the claim is DISMISSED

WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. To the extent the Second Claim for Relief challenges the validity of the alleged *de facto* TMDL procedure, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

c. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED on the same bases, and to the same extent, as the First and Second Claims for Relief are dismissed, given that the Third Claim for Relief is derivative of the first two claims.

2. Plaintiffs' Motion for Summary Adjudication of Issues [Docket No. 28] is DENIED AS MOOT.

3. Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint [Docket No. 31] are OVERRULED on the merits with respect to the objections under headings II.1 and II.2 therein and OVERRULED AS MOOT with respect [**52] to all remaining objections.

4. Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [Docket No. 43] are OVERRULED AS MOOT.

5. Plaintiffs' Objections to Declaration of Anjali I. Jaiswal and Exhibits [Docket No. 47] are OVERRULED AS MOOT.

IT IS FURTHER ORDERED THAT this action is DISMISSED in its entirety. The Clerk shall enter judgment in favor of defendants accordingly. All deadlines and events presently calendared are VACATED. [*1162] The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

JUDGMENT

In accordance with the Court's Order Granting Defendants' Motion to Dismiss, Denying as Moot Plaintiffs' Motion for Partial Summary Judgment, and Dismissing Action,

IT IS HEREBY ORDERED THAT judgment is entered in favor of defendants and defendants-intervenors, and against plaintiffs, on all of plaintiffs' claims for relief as follows:

1. The First Claim for Relief in the Second Amended Complaint for Injunctive and [**53] Declaratory Relief ("SAC") is DISMISSED, such that:

a. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITH PREJUDICE;

b. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITH PREJUDICE;

c. The claim that EPA acted arbitrarily and capri-

ciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITH PREJUDICE;

d. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITH PREJUDICE;

e. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance [**54] with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT PREJUDICE;

2. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED WITH PREJUDICE in its entirety; and

3. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED to the same extent as the First and Second Claims for Relief are dismissed.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

Received
June 17, 2011
Commission on
State Mandates

TAB “2”

LEXSEE

Caution
As of: Jun 17, 2010

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

No. 98-71080

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

191 F.3d 1159; 1999 U.S. App. LEXIS 22212; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

August 11, 1999, Argued and Submitted, San Francisco, California
September 15, 1999, Filed

SUBSEQUENT HISTORY: [**1] As Amended December 7, 1999.

PRIOR HISTORY: Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

DISPOSITION: PETITION DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners appealed decision of the Environmental Appeals Board denying reconsideration of the Environmental Protection Agency's decision issuing five municipalities National Pollution Discharge System permits, without requiring numeric limitations to ensure compliance with state water-quality standards.

OVERVIEW: The Environmental Protection Agency (EPA) issued permits to municipalities without requiring limitations on storm-sewer discharges. Petitioners alleged that the Water Quality Act (WQA), 33 U.S.C.S. § 1311(b)(1)(C), required municipalities to strictly comply with state water-quality standards. Court concluded that EPA's decision was not arbitrary or capricious. Court determined that WQA unambiguously expressed Congress' intent that municipal storm-sewer discharges did not have to strictly comply with WQA. Congress expressly put in provision for industrial storm-water discharges requiring compliance with WQA, but there was no similar provision in WQA for municipal storm-sewer discharges. The plain language of WQA thus exempted municipal storm-sewer discharges from strict compliance. Court found other provisions in WQA excluded certain discharges from permit altogether. Based on that fact, court concluded exemption of municipal storm-sewer discharges from strict compliance with WQA was not so unusual that the court should not interpret the statute as written.

OUTCOME: Court denied petition for reconsideration, because Environmental Protection Agency did not act arbitrarily or capriciously in issuing permits. In examining Water Quality Act, court determined that it was Congress' specific intent to exempt municipal storm-sewer discharges from strict compliance with the statute.

CORE TERMS: municipal, water quality, storm, water-quality, industrial, pollutant, administrator, storm-sewer, strict compliance, storm-water, environmental, quotation marks omitted, unambiguously, numeric, storm sewers, practicable, dischargers, effluent, entity, exempt, statutory construction, engineering, capricious, stringent, maximum, runoff, Clean Water Act, decision to issue, permit requirements, ensure compliance

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
[HN1] 26 U.S.C.S. § 1342(a)(1) authorizes the Environmental Protection Agency to issue National Pollution Discharge Elimination System permits, thereby allowing entities to discharge some pollutants.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2] 33 U.S.C.S. § 1369(b)(1)(F) authorizes any interested person to seek review in court of an Environmental Protection Agency decision issuing or denying any permit under 26 U.S.C.S. § 1342(a)(1). Any interested person means any person that satisfies the injury-in-fact requirement for U.S. Const. art. III standing.

Environmental Law > Litigation & Administrative Proceedings > Nuisances, Trespasses & Strict Liability
[HN3]A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN4]The Administrative Procedures Act, 5 U.S.C.S. § 701, et seq., provides the standard of review for the Environmental Protection Agency's decision to issue a permit. Under the Administrative Procedures Act, the court generally reviews such a decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity
Administrative Law > Judicial Review > Standards of Review > General Overview
Governments > Legislation > Interpretation
[HN5]The court has established a two-step process for reviewing an agency's construction of a statute it administers. Under the first step, the court employs traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, instead, Congress has left a gap for the administrative agency to fill, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN6]The Clean Water Act, 33 U.S.C.S. § 1251, et seq., generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States. An entity can, however, obtain a National Pollution Discharge Elimination System permit that allows for the discharge of some pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN7]A National Pollution Discharge Elimination System permit imposes effluent limitations on discharges. First, a permit-holder shall achieve effluent limitations which shall require the application of the best practicable control technology currently available. Second, a permit-holder shall achieve any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any state law or regulations.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN8]See 33 U.S.C.S. § 1342(p)(3).

Governments > Legislation > Interpretation
[HN9]Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts. Using traditional tools of statutory construction, when interpreting a statute, the court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, the court looks to the entire statute to determine congressional intent.

Governments > Legislation > Interpretation

[HN10]Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Legislation > Interpretation
[HN11]The court generally refuses to interpret a statute in a way that renders a provision superfluous.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Local Governments > Licenses
[HN12]The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether, and therefore from 33 U.S.C.S. § 1311. For example, the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture. 33 U.S.C.S. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. See 33 U.S.C.S. § 1342(l)(2).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN13]Congress gave the administrator discretion to determine what controls are necessary. Under that discretionary provision, the Environmental Protection Agency (EPA) has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which uses best management practices (BMPs) in first-round storm water permits to provide for the attainment of water quality standards.

COUNSEL: Jennifer Anderson and David Baron, Arizona Center for Law in the Public Interest, Phoenix, Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

JUDGES: Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

OPINION BY: SUSAN P. GRABER

OPINION

[*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations [**2] to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title [HN1] 26 U.S.C. § 1342(a)(1) authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the [**3] permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the

> [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

> The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and [**4] requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

[**5] JURISDICTION

[HN2]Title 33 U.S.C. § 1369(b)(1)(F) authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under section 1342 of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) [HN3]("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II*, 966 F.2d at 1297 ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water [**6] contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under Federal Rule of Civil Procedure 19. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

DISCUSSION

A. *Standard of Review*

[HN4]The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-06, provides our standard of review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**7] *See NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842-44, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir.

1996) ("The [HN5]Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

[**8] [*1163] B. *Background*

[HN6]The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. *See* 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See* 33 U.S.C. § 1342(a)(1).

[HN7]Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See* 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder "*shall . . . achieve . . . any more stringent limitation*, including those *necessary to meet water quality standards*, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311 [**9] (b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992). *See also Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from [**10] the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See NRDC II*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994, [1] most entities discharging storm water did not need to obtain a permit. *See* 33 U.S.C. § 1342(p).

1 As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. *See* Pub. L. No. 102-580.

[**11] Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

[*1164] When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

> (A) Industrial discharges
>
> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.
>
> (B) Municipal discharge

> Permits for discharges from municipal [**12] storm sewers -
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) *shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*

[HN8] 33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. *See* Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or [**13] manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. *See, e.g.*, National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*.") (emphasis in original); Sierra Club v. EPA, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply [**14] strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions [HN9]of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron*. *NRDC II*, 966 F.2d at 1297 (citation omitted). "Using our 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778, when interpreting a statute, we look first to the words that Congress used." *Zimmerman*, 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. *See* 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity *shall meet all applicable* [**15] *provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial [*1165] storm-water discharges "*shall . . . achieve . . . any more stringent limitation*, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311(b)(1)(C) (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further *singled out* industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal [**16] storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "where [HN10]Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (citation and internal quotation marks omitted); *see also United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (stating the same principle), *petition for cert. filed*, No. 98-323 (Aug. 23, 1999). Applying that familiar [**17] and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. § 1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). [**18] In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 634 (9th Cir. 1999) ("This [HN11]court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended*, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, [*1166] the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. [HN12]The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from [**19] § 1311). For example, "the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II*. There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." *NRDC II*, 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the* [**20] *existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

D. *Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality [**21] standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollu-*

tants." (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress [HN13]gave the administrator discretion to determine what controls are necessary. . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide [**22] for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include [*1167] either management practices or numeric limitations in the permits was within its discretion. *See NRDC II*, 966 F.2d at 1308 ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenors.

PETITION DENIED.

Received
June 17, 2011
Commission on
State Mandates

TAB “3”

NATURAL RESOURCES DEFENSE COUNCIL, INC. Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, BATTERY COUNCIL INTERNATIONAL, et al., Respondents-Intervenors.

Nos. 90-70671, 91-70200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

966 F.2d 1292; 1992 U.S. App. LEXIS 12517; 34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703; 92 Daily Journal DAR 7542; 22 ELR 20950

October 9, 1991, Argued and Submitted, San Francisco, California
June 4, 1992, Filed

PRIOR HISTORY: **[**1]** Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner environmental action group challenged regulations implemented by respondent Environmental Protection Agency under § 402(1), (p) of the Clean Water Act (CWA), 33 *U.S.C.S. § 1342(l), (p).* Petitioner argued that those regulations, to be codified at *40 C.F.R. §§ 122.26, 122.26(e),* established deadlines for a storm water discharge rule that exceeded the scope of the CWA's coverage and were otherwise unlawful.

OVERVIEW: Under amendments to the Clean Water Act (CWA), 33 *U.S.C.S. § 1251 et seq.,* respondent Environmental Protection Agency promulgated rules to establish a national pollutant discharge elimination system under § 402 of the CWA, 33 *U.S.C.S. § 1342.* Petitioner environmental action group challenged the implementation of those rules. The court granted declaratory relief because of the importance of the interests and principles at stake, but it denied injunctive relief. The court denied petitioner's request to place all municipalities, no matter what their size, on the same permitting schedule, but it found that respondent's failure to include deadlines for permit approval or denial was arbitrary and capricious. The court upheld certain definitions and disapproved others, including the portion of the regulation regulating light industry. The use of incorporation as a factor was not arbitrary or capricious and was consistent with the CWA. The rule as to oil and gas operations and storm water control was upheld. Respondent's approval of a group application for an industrial discharger was not a rule requiring notice and comment from the public.

OUTCOME: The court granted partial relief to petitioner environmental action group in a challenge to regulations under the Clean Water Act. Declaratory relief was granted, but injunctive relief was denied. All municipalities were not placed one schedule, the lack of deadlines for permit approval was erroneous, the gas operation rules were upheld, and group application approvals did not require notice and comment.

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HM] One major focus of the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.,* is the control of point source

pollution. A point source is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel from which pollutants are or may be discharged. *33 U.S.C.S. § 1362(14).* The CWA also established a national pollutant discharge elimination system (NPDES), requiring permits for any discharge of pollutants from a point source pursuant to § 402 of the CWA, 33 *U.S. C. S. § 1342.* The CWA empowers the Environmental Protection Agency (EPA) or an authorized state to conduct an NPDES permitting program. *33 U.S.C.S. § 1342(a), (b).* Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. *33 U.S. C.S. § 1342(a)(1).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN2] Congress passed the Water Quality Act, codified in scattered sections of 33 U.S.C.S., portions of which set up a new scheme for regulation of storm water runoff. Section 402(p) of the Water Quality Act establishes deadlines by which certain storm water dischargers must apply for permits. The environmental protection agency or states must act on permits and dischargers must implement their permits. The Water Quality Act also set up a moratorium on permitting requirements for most storm water discharges which ends on October 1, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN3] See *33 U.S.C.S. § 1342(p)(2).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN4] Section 402(p) of the Water Quality Act, codified in scattered sections of 33 U.S.C.S., outlines an incremental or phase-in approach to issuance of storm water discharge permits.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
[HN5] Section 509(b)(1) of the Clean Water Act (CWA), 33 *U.S.C.S. § 1369(b)(1),* describes six types of actions by the environmental protection agency administrator that are subject to review in the court of appeals. Section § 509(b)(1)(F) of the CWA, *33 U.S.C.S. § 1369(b)(1)(F),* allows the court to review the issuance or denial of a permit under § 402 of the CWA, *33 U.S. C.S. § 1342.* The court also has the power to review rules that regulate the underlying permit procedures.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Judicial Review > Reviewability > Standing
Environmental Law > Water Quality > General Overview
[HN6] Any interested person may seek review of designated actions of the environmental protection agency administrator under 33 *U.S. C.S. § 1369(b)(1).* The injury-in-fact rule for standing covers the interested person language.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[11N7] *5 U.S.C.S. § 706(2)(A)* authorizes the court to set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Under this standard a court must find a rational connection between the facts found and the choice made. The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority
Governments > Federal Government > U.S. Congress
Governments > Legislation > Interpretation
[IIN8] On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is reasonable. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. Nevertheless, questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Governments > Local Governments > Licenses

[HN9] The Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.,* calls for the Environmental Protection Agency (EPA) to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems (large systems). The CWA requires the EPA to establish regulations for permit application requirements for these two groups by February 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. 33 *U.S. C.S. § 1342(p)(4)(A).* Medium sized municipal separate storm sewer systems, those serving a population of 100,000 or more but less than 250,000, are on a similar schedule, except that the deadlines are two years later. *33 U.S.C.S. § 1342(4)(B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HIN10] The temporary exemption under the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.,* for all storm water sources expires on October 1, 1992. *33 U.S.C.S. § 1342(p)(1).*

Administrative Law > Judicial Review > Reviewability > Ripeness

Civil Procedure > Declaratory Judgment Actions > State Judgments > Appellate Review

[IIN11] A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones.

Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion

[HN12] The granting of declaratory relief rests in the sound discretion of the court exercised in the public interest. The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. A court declaration delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Injunctive Relief

[HN13] The Environmental Protection Agency does not have the authority to ignore unambiguous deadlines set by Congress in the Clean Water Act, *33 U.S.C.S. § 1251 et seq.* The deadlines are not aspirational. Congress set them and expected compliance. The court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements.

Civil Procedure > Remedies > Injunctions > Elements > General Overview

[HN14] Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Local Governments > Licenses

[IIN15] Section 402(p)(4)(A) of the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.,* calls for the Environmental Protection Agency to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that any such permit shall provide for compliance as expeditiously as practicable, but in no event later than three years after the date of the issuance of such permit. *33 U.S.C.S. § 1342(p)(4)(A).* The CWA sets out a similar schedule for medium municipalities, except that the deadlines are two years later. *33 U.S.C.S. § 1342(p)(4)(B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges Governments > Public Improvements > General Overview

[HN16] The temporary exemption under the Clean Water Act (CWA), 33 *U.S. C.S. § 1251 et seq.,* for all storm water sources expires on October 1, 1992. The CWA requires the Environmental Protection Agency to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. 33 *U.S. C.S. § 1342(p)(1), (6).* Section 402(p)(1) of the CWA forbids requiring a permit for entities not listed as exceptions, such as small municipalities, before October 1, 1992. Yet the deadline for part one of the application for medium systems is currently May 18, 1992.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN17] Section 402(p) of the Clean Water Act, 33 *U.S. C.S. § 1251 et seq.,* refers to municipal separate storm sewer systems serving a population of a specified size. *33 U.S.C.S. § 1342.*

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview

Governments > Native Americans > Authority & Jurisdiction

[HN18] The 1987 amendments to the Clean Water Act (CWA), 33 *U.S.C.S. § 1251 et seq.,* do not contain definitions of municipal or separate storm sewer system, but the CWA amendments enacted in 1972 defined municipality. Except as otherwise specifically provided, the term municipality means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to state law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under § *1288* of the CWA, *33 U.S.C.S. § 1288. 33 U.S.C.S. § 1362.*

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN19] An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Administrative Law > Judicial Review > Standards of Review > General Overview
Environmental Law > Water Quality > General Overview

[HN20] The court's role is not to determine whether the environmental protection agency, under the authority of the Clean Water Act, *33 U.S.C.S. § 1254 et seq.,* has chosen the best among all possible methods. The court can only determine if its choices are rational.

Environmental Law > Water Quality > General Overview

[HN21] Under § 402(p)(2)(B) of the Clean Water Act, 33 *U.S.C.S. § 1254 et seq.,* a discharge associated with industrial activity is an exception to the permit moratorium.

Environmental Law > Water Quality > General Overview
Governments > Legislation > Interpretation

[HN22] The de minimis exemption inherent in statutory schemes to make categorical exemptions when the result is de minimis is only available where a regulation would yield a gain of trivial or no value. The de minimis concept is based on the principle that the law does not concern itself with trifling matters. Its applicability is questionable in a situation where the gains from application of the statute are being weighed against administrative burdens to the regulated community.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN23] The 1987 amendments to the Clean Water Act (CWA), *33 U.S. C.S. § 1251 et seq.,* created an exemption from the permit requirement for uncontaminated runoff from mining, oil and gas facilities. *33 U.S.C.S. § 1342(1)(2).* Section 402(1)(2) of the CWA states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products.

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cost Recovery Actions > Potentially Responsible Parties > Owners & Operators
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN24] Under the Clean Water Act (CWA), 33 *U.S. C.S. § 1251 et seq.,* reportable quantities (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which may be harmful to the public health or welfare of the United States. *33 U.S.C.S. § 1321(b)(4).* The environmental protection agency has established RQs for a large number of substances, pursuant to both § 311 of the CWA, *33 U.S.C.S. § 1321,* and § 102 of the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C.S. § 9602.* 40 C.F.R. §§ 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the national response center.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN25] Under the Clean Water Act, 33 *U.S. C.S. § 1251 et seq.,* the environmental protection agency administrator has discretion to determine whether or not storm water runoff at an oil, gas, or mining operation is contaminated with materials. They are overburden, raw material, product, or process wastes and oil, grease or hazardous substances. The report sets out factors for the adminis-

trator to consider in determining contamination for the latter group of pollutants.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN26] Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water under the Clean Water Act (CWA), *33 U.S. C.S. § 1251 et seq.* In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. *33 U.S.C.S. § 1342(p)(3)(A), (B).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN27] See *33 U.S.C.S. § 1342(p)(3)(B).*

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
[HN28] See *5 U.S.C.S. § 551(4).*

Environmental Law > Water Quality > General Overview
[HN29] See 33 *U.S. C.S. § 1342.*

COUNSEL: Robert W. Adler, Natural Resources Defense Council, Washington, D.C., for the petitioner.

Daniel S. Goodman, United States Department of Justice, Washington, D.C., for the respondent.

Dennis J. Whittsley, Collier, Shannon & Scott, Washington, D.C., for intervenors-respondents American Association of Airport Executives, Chemical Specialties Manufacturers Association, Institute of Scrap Recyling Industries, Inc., Leather Industries of America, National Tank Truck Carriers, Inc., Rubber Manufacturers Association, and Specialty Steel Industry of the United States.

William T. O'Neil, Covington & Burling, Washington, D.C., for intervenors-respondents National Food Processors Association and Chemical Manufacturers Association.

Kurt J. Olson, Weinberg, Bergeson & Neuman, Washington, D.C., for intervenor-respondent Battery Council International.

Ellen Siegler, American Petroleum Institute, Washington, D.C., for intervenor-respondent American Petroleum Institute.

Kristy A. Niehaus, Hunton & Williams, Washington, D.C., for intervenor-respondent Electric Utilities.

Russell S. Frye, Chadbourne & Parke, [**2] Washington, D.C., for intervenors-respondents American Paper Institute and National Forest Products Association.

John H. Turner, National Solid Wastes Management Association, Washington, D.C., for intervenor-respondent National Solid Wastes Management Association.

R. Timothy McCrum, Crowell & Moring, Washington, D.C., for intervenors-respondents American Mining Congress, National Coal Association, National Council of Coal Lessors, National Aggregates Association and American Iron and Steel Institute.

Robert J. Saner, II, White, Fine & Verville, Washington, D.C., for intervenor-respondent National Association of Flood and Stormwater Management Agencies.

JUDGES: Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges.Opinion by Judge Ferguson; Partial Concurrence, Partial Dissent by Judge O'Scannlain.

OPINION BY: FERGUSON

OPINION

[*1295] OPINION

FERGUSON, Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule. [1] NRDC argues that the deadlines contained in the rule and the scope of its coverage are unlawful under section 402(1), (p) of the Clean Water Act, [**3] 33 *U.S.C. § 1342(l), (p).* We grant partial relief.

1 National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, *55 Fed. Reg. 47,990 (1990)* (to be codified at *40 C.F.R. § 122.26);* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, *56 Fed. Reg. 12,098 (1991)* (to be codified at *40 C.F.R. § 122.26(e)).*

I. BACKGROUND

In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"), [2] *33 U.S.C. §§ 1251-1387 (1988),* "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 *U.S.*C. *§ 1251(a).* [HN1] One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel from which pollutants are or may be discharged." *33 U.S.C. § 1362(14).* The CWA also established [**4] the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, *33 U.S.C. § 1342.* The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. *33 U.S.C. § 1342(a)-(b).* Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. *33 U.S.C. § 1342(a)(1).*

2 The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 *U.S.C. § 1251.* For more background on the CWA, see *EPA v. State Water Resources Control Bd., 426 U.S. 200, 202-209, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976); Sierra Club v. Union Oil of California, 813 F.2d 1480, 1483 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988);* and *Natural Resources Defense Council v. Train, 166 App. D.C. 312, 510 F.2d 692, 695-97 (D.C. Cir. 1975).*

This case involves runoff [**5] from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, *56 Fed. Reg. 56,548 (1991).* One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. *55 Fed. Reg. at 47,991.* [3]

3 The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. *55 Fed. Reg. at 47,991.* A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id. at 47,992.* Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. *56 Fed. Reg. at 56,548.*

[**6] *A. Efforts to Regulate Storm Water Discharge.*

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle, 186 App. D.C. 147, 568 F.2d 1369, 1372 &* n.5, 1377 (D.C. Cir. 1977). NRDC [*1296] challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. *Id. at 1379.* However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." *Id. at 1382.*

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. *56 Fed. Reg. 56,548.* NRDC challenged various aspects of these rules both at the administrative [**7] level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff' and'EPA's problems in implementing regulations, [5] [HN2] Congress passed the Water Quality Act of 1987 [6] containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. *See* Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

4 *See* 132 Cong. Rec. 32,381 (1986).

5 Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "the Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision

provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987).

[**8]

6 Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

[HN3] (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

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

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

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

CWA § 402(p)(2); *33 U.S.C. § 1342(p)(2).*

[H1\14] Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application [**9] procedures in a staggered fashion.

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline ("the November 1990 rule"). *55 Fed. Reg. at 47,990c.* EPA issued amended rules on March 21, 1991 ("the March 1991 rule"). *56 Fed. Reg. at 12,098.* It is to portions of these rules that NRDC objects.

B. Jurisdiction.

We have jurisdiction pursuant to CWA § 509(b)(1), *33 U.S.C. § 1369(b)(1).* [FINS] Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), *33 U.S.C. § 1369(b)(1)(F)* allows the court to review [*1297] the issuance or denial of a permit under CWA § 402, 33 *U.S.C. § 1342.* The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA, 211 App. D. C. 179, 656 F.2d 768, 775 (D.C. Cir. 1981); cf. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 136, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1976).* [**10] NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 *U.S.C. 1369(b)(1).*

C. Standing.

[HN6] Any "interested person" may seek review of designated actions of the EPA Administrator. *33 U.S.C. § 1369(b)(1).* This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972)* covers the "interested person" language. *Trustees for Alaska v. EPA, 749 F.2d 549, 554 (9th Cir. 1984)* (adopting the analysis in *Montgomery Environmental Coalition v. Costle, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)).* A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or "aesthetic and environmental well-being." *Sierra Club, 405 U.S. at 734.* Intervenors are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations and the potential economic impact of the rules on the intervenors satisfy the [**11] broad standing requirement applicable here.

H. DISCUSSION

A. Standard of Review.

[HN7] 5 U.S.C. § 706(2)(A) (1988) authorizes the court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard a court must find a "rational connection between the facts found and the choice made." *Sierra Pacific Indus., 866 F.2d 1099, 1105 (9th Cir. 1989)* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)).* The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).*

[HN8] On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* [**12] Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id. at 843-44.* If legislative delegation is implicit, courts must defer to an agency's statutory interpretation as long as it is

reasonable. *Id. at 844.* This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. *See id.* Nevertheless, questions of congressional intent that can be answered with "traditional tools of statutory construction" are still firmly within the province of the courts. *INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).*

B. EPA's Extension of Statutory Deadlines.

1. Background.

NRDC challenges EPA's extension of certain statutory deadlines in the November 1990 and March 1991 rules. [HN9] The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems ("large systems"). ' The statute required EPA to establish regulations [* 1298] for permit application requirements for these two groups by February [**13] 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 *U.S.C. § 1342(p)(4)(A).* Medium sized municipal separate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), *33 U.S.C. § 1342(4)(B).* [HN10] The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 *U.S.C. § 1342(p)(1).* EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated after that date.

7 Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) [8]			**EPA Deadlines** [9]
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines
Industrial	2/4/89	2/4/90 - applications due	see below
		2/4/91 - approval due	
Large municipal systems	08/04/89	2/4/90 - applications due	Part 1 - 11/18/91
		2/4/91 - approval	Part 2 - 11/16/92
Medium municipal systems	08/04/91	2/4/92 - applications due	Part 1 - 5/18/92
		2/4/93 - approval due	Part 2 - 5/17/93

EPA Application Deeadlines for "Industrial Activity" Dischargers	
Individual	Group
due 11/18/91	Part 1 9 9/30/91; Part 2 - 10/1/92

8 Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. *See* Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007 (1991). ISTEA deadlines are being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

9 *See 55 Fed. Reg. at 48,071-72* (to be codified at *40 C.F.R. § 122.26(e)); 56 Fed. Reg. at 12,100* (to be codified at *40 C.F.R. § 122.26(e)(2)(iii)).* EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

> The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. *See 55 Fed. Reg. at 48,072.*

[**14] As the chart illustrates, EPA made other elaborations on the statutory scheme in addition to extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. *55 Fed. Reg. at 48,072.* The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id. at 48,066-67.* [*1299] The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. [10] *56 Fed. Reg. at 12,098.* A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. *57 Fed. Reg. at 11,394.* The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

> 10 NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill. Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

[**15] Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;

b) to enjoin EPA from granting future extensions of the deadlines;

c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and

d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

2. Discussion.

a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

[HN I 1] A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin., 947 F.2d 386, 390 n. 1 (9th Cir. 1991)* (citations omitted), *cert. denied,* [**16] *U.S. , 112 S. Ct. 1759, 118 L. Ed. 2d 422, 60 U.S.L.W. 3537 (1992).* Here, the agency regulations are final. *See 55 Fed. Reg. at 47,990, 56 Fed. Reg. at 12,096.* The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

[HN12] The granting of declaratory relief "rests in the sound discretion of the [] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure §* 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342* (9th Cir.) (citing Borchard, *Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied, 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966).* A court declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." [**17] *Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1471 (9th Cir. 1984).* Because of the importance of the interests and the principles at stake, we grant declaratory relief.

[HN13] EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA, 898 F.2d 687, 691* (9th Cir.), *cert. denied, 111 S. Ct. 556, 112 L. Ed. 2d 563 (1990).* In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc., 289 App. D.C. 187, 930 F.2d 72, 74* (D.C. Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied, 116 L. Ed. 2d 241, 112 S. Ct. 297, 112 S. Ct. 298 (1991); Natural Resources Defense Council v. Train, 166 App. D.C. 312, 510 F.2d 692, 712 (D.C. Cir. 1975)* (court may need to give [*1300] agency some leeway due to budgetary commitments or technological problems); *Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 569-70 (D.D. C. 1986)* (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive ["18] agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational - Congress set them and expected compliance. *See* 132 Cong. Rec.

32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as "outside dates.") This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. [HN14] Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure §* 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

Injunctive relief could involve extraordinary supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major [**19] categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. *See Allegheny General Hosp. v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979).* We presume that the EPA will duly perform its statutory duties. *See Upholstered Furniture Action Council v. California Bureau of Home Furnishings, 442 F. Supp. 565, 568 (E.D. Cal. 1977)* (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. [HN15] Section [**20] 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that "any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit." CWA § 402(p)(4)(A), *33 U.S.C. § 1342(p)(4)(A).* The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), *33 U.S.C. § 1342(p)(4)(B).*

The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. *55 Fed. Reg. at 48,072.* By failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue regulations pursuant to the statute.

[**21] We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. [*1301] The regulations should inform the regulated community of the statute's outside dates for compliance. " *See* CWA § 402(p)(4)(A)-(B), 33 *U.S.C.* § *1342(p)(4)(A)-(b).*

> 11 In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, [HN16] the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), *33 U.S.C. § 1342(p)(1), (6).*

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting [**22] schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. *55 Fed. Reg. at 48,072.*

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium [**23] systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. *55 Fed. Reg. at 48,072.* For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

C. Exclusion of Certain Sources from Regulation.

1. Definition of "Municipal Separate Storm Sewer System."

[HN17] Section 402(p) refers to "municipal separate storm sewer systems serving a population" of a specified size. CWA § 402(p)(2)(C), (D), *33 U.S.C. § 1342 §§* 402(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

[HN18] The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm [**24] sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

> except as otherwise specifically provided, when used in this chapter. . . . (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved [*1302] management agency under *section 1288* of this title [33 *U.S.C. § 1288].*
>
> *33 U.S.C. § 1362.*

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances . . . owned or operated by a State, city, town, borough, county, parish, district, association or other public body. . . ." *55 Fed. Reg. at 48,065* (to be codified at *40 C.F.R. § 122.26(b)(8)).* This definition echoes the language of *33 U.S.C. § 1362(4).* However, when defining large and medium municipal separate storm sewer *systems serving a population* of a specified size, EPA brought in other factors. *55 Fed. Reg. at 48,064* (to be codified [**25] at *40 C.F.R. § 122.26(b)(4), (7)).* EPA defines medium and large separate storm sewer systems using two main categories:

> 1) separate storm sewer systems located in an incorporated place with the requisite population, and
>
> 2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. [12] *55 Fed. Reg. at 48,064.*

NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

> 12 The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. *See 40 C.F.R. § 122.26(b)(4)(iii), (iv)* and *(b)(7)(iii), (iv).*

First, NRDC argues that according to the definitional section cited above and principles of [**26]. statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. *See 33 U.S.C. § 1362* ("except as otherwise specifically provided" the definitions apply throughout the act); *Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985).* NRDC argues that the scope of the statutory definition of "municipality" in *33 U.S.C. § 1362(4)* and the scope of the phrase "municipal separate storm sewer system serving a population" are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at *33 U.S.C. § 1362(4),* (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, "municipal separate storm sewer system serving a population of [a specified size]" can be equated with the term "municipality" in the manner that NRDC proposes. The act contains no definition of either "system" or "serving a population." The word "system" is particularly ambiguous in the context of storm [**27] sewers. [13] We therefore agree with EPA that there is no single, plain meaning for the disputed words.

> 13 Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. *See 55 Fed. Reg. at 48,041.*

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. *See*

Abourezk v. Reagan, 251 App. D.C. 355, 785 F.2d 1043, 1053 (D.C. Cir. 1986) ("if the court finds that Congress had a specific intent . . ., the court stops there and enforces that intent regardless of the agency's interpretation") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 & n. 9 (1984)), affd by an equally divided court, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987).* The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first, [14] [**28] this general goal is not helpful in discerning the specific meaning of "municipal separate storm sewer system serving a population." Without clear guidance from Congress, we turn to the agency's justifications [* 1303] for its choices in the face of NRDC's objections.

14 *See, e.g.,* 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA's definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. " [HN19] An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43, 77 L Ed. 2d 443, 103 S. Ct. 2856 (1983).* [**29]

EPA's final definition took into account many issues and concerns of the regulated community *See 55 Fed. Reg. at 48,039.* EPA considered eight different options for defining large and medium municipal separate storm sewer systems. *55 Fed. Reg. at 48,038-43.* EPA considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA's consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC's claim that the definition of regulated "systems" must include [**30] conveyances in all "municipalities."

EPA's use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. *See 55 Fed. Reg. at 48,039, 48,043.* The first major category within the definition of regulated "systems," municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

NRDC questions EPA's second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), *33 U.S.C. § 1342(p)(I).* EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger ["31] systems serving whole counties. EPA's definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of "municipal separate storm sewer systems serving" a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find "a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.*

NRDC objects to EPA's use of 1980 census data and EPA's definition of urban density. While it appears that NRDC has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, [HN20] our role is not to determine whether EPA has chosen the best among all possible [*1304] methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither [**32] this choice nor its use of the Census Bureau's definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. *55 Fed. Reg. at 48,039.* NRDC objects on the basis that Congress considered the issue of work load when it developed the "phase-in" approach and allowed

permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA's work load as one among many factors in its attempt to fashion a workable program.

In summary, NRDC's argument that the phrase "municipal separate storm sewer system serving a population" has the plain meaning NRDC proposes is not persuasive. Although EPA's definition in the face of the statute's ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRDC's request that the definition be declared invalid.

2. *EPA Exemption for Light Industry.*

NRDC challenges the portion of the EPA rule excluding various types of "light industry" from the definition of "discharge associated with industrial activity."

[HN21] Under CWA § 402(p)(2)(B), a "discharge associated with [**33] industrial activity" is an exception to the permit moratorium. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to industrial materials. Although the statute does not define "associated with industrial activity," the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. *55 Fed. Reg. at 48,008.* These types of facilities need apply for permits only if certain work areas or actual materials are exposed to storm water. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturers takes place indoors, and that emissions from stacks, use of unhoused manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. *55 Fed. Reg. at 48,008c.* [**34]

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language "discharges associated with industrial activity" is very broad. The operative word is "associated." It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: "[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. 985 (1987); *see also* 132 Cong. Rec. 31,968 (1986) (same). EPA argues that the words "directly related" indicate Congress's intent to require permits for only those materials that come in contact with industrial materials. [**35] *See 55 Fed. Reg. at 48,007.* However, the examples given - parking lots and administrative buildings - indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA's definition follows the language quoted above: "Storm water discharge associated with industrial activity means the [*1305] discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *40 C.F.R. § 122.26(b)(14).* EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification ("SIC") categories. For most of the industrial SIC categories (identified at *40 C.F.R. § 122.26(b)(i-x)),* the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. *40 C.F.R. § 122.26(b)(14).* However, for the "light industry" categories identified in *40 C.F.R. § 122.26(b)(14)(xi),* stormwater must [**36] be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for "light industry," industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g., 55 Fed. Reg. at 48,008.* Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme. The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient "actual exposure" test. To require actual exposure entirely shifts the burden

in the permitting scheme. Most industrial [**37] facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

3. *Exclusion of Construction Sites of Less than Five Acres.*

NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. *55 Fed. Reg. at 48,033.* Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from [**38] fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining "an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity." *55 Fed. Reg. at 48,036.* EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. *55 Fed. Reg. at 48,035-36.* In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. *55 Fed. Reg. at 48,036.* EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id. at 48,036.* [*1306]

We find that EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its [**39] perception that construction activities on less than five acres are non-industrial in nature.

EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis. Alabama Power Co. v. Costle, 204 App. D.C. 51, 636 F.2d 323, 360 (D.C. Cir. 1979).* However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity. *See Natural Resources Defense Council, Inc. v. Costle, 568 F.2d at 1369, 1377 (D.C. Cir. 1977)* (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. [HN22] The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra, at 361.* Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id. at 360.* [**40] We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community *See id. at 360-361* (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." *55 Fed. Reg. at 48,033.* Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

4. *Exemption for oil and gas activities.*

[HN23] The 1987 amendments created an exemption from the permit requirement for uncontaminated runoff [**41] from mining, oil and gas facilities. *See* Appendix, CWA § 402(1)(2), 33 *U.S.C. §§ 1342(l)(2).* Section 402(1)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and "which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products". NRDC claims that the November 1990 rule sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity [15] since November 1987, or contributes to a violation of a water quality standard. *55 Fed.*

Reg. 48,067 (to be codified at *40 C.F.R. § 122.26(c)(1)(iii)).* A facility which has had a release of oil or a hazardous substance in excess of RQs since [*1307] 1987 must submit a permit application. *Id.; 55 Fed. Reg. at 48,029-30.*

> 15 "[HN24] Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), *33 U.S.C. § 1321(b)(4).* EPA has established RQs for a large number of substances, pursuant to both CWA section 311, *33 U.S.C. § 1321,* and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, *42 U.S.C. § 9602. See* 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. *See, e.g.,* 40 C.F.R. § 110.10.

[**42] NRDC claims that oil and gas operations should be subject to the stricter standards which apply to mining operations. [16] It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRDC's position.

> 16 Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. *40 C.F.R. § 122.26(c)(1)(iv).*

The conference report states:

Permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator,* permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater [**43] is "contaminated by contact with such materials, *as established by the Administrator,* shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act . . ., or in the case of mining operations, above natural background levels.

H.R. Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

Thus, [HN25] the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter group of pollutants.

NRDC first claims that because section 402(1)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas [**44] facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(1)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according [* *45] to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "contributes to a violation of a water quality standard." *40 C.F.R. § 122.26(c)(1)(iii)(C).* This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect [*1308] to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

D. Lack of Controls for Municipal Storm Water Discharge.

NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

[HN26] Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial [**46] and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), *33 U.S.C. § 1342(p)(3)(A)-(B).* [HN27] The Act states that 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-storm water 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.*

Section 402(p)(3)(B), *33 U.S.C. § 1342(p)(3)(B)* (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in Par. (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop [**47] new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards. However, the language in Par. (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. *See 55 Fed. Reg. at 48,049.*

> 17 The requirements for permit applications are set forth at *40 C.F.R. § 122.26(d).* Individual NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. *See 55 Fed. Reg. at 48,070-71.*

[**48] NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute. "

> 18 We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.

NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application. "If EPA approves part 1, only [*1309] a small subset of the member facilities need submit part 2 of the application. *55 Fed. Reg. at 48,072* (to [**49] be codified at *40 C.F.R. 122.26(e)(2)).* NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in *5 U.S. C. § 551(4) (1988)* [20] requiring public notice and opportunity to comment under *5 U.S.C. § 553 (1988),* or is otherwise subject to the notice and comment requirement.

> 19 Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the identity of the subset of the group's members who will submit quantitative data in part 2 of the application. *55 Fed. Reg. at 48,067.*
>
> 20 [HN28] A rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." *5 U.S.C. § 551(4).*

[**50] NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to *5 U.S. C. § 551(4)* and because it will have a "palpable effect" in that it will

relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA, 683 F.2d 752 (3rd Cir. 1982)* and *Council of Southern Mountains, Inc. v. Donovan, 209 App. D.C. 318, 653 F.2d 573 (D.C. Cir. 1981)* in support of its argument. Both cases involved the postponement of regulations. *See NRDC, 683 F.2d at 753-54, 764* (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry); *Council of Southern Mountains, Inc., 653 F.2d at 575, 580 n. 28* (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve [**51] the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to *5 U.S.C. § 551(4)*. Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Corn'n v. Federal Communication Commission, 513 F.2d 1142, 1160 (9th Cir. 1975), cert. denied, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975)*. The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application *See 55 Fed. Reg. at 48,028*. Because the decision involves a discrete, factual issue, the better view [**52] is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

HI. CONCLUSION

In summary, we grant and deny relief as follows:

1. "Deadlines" issue. We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. Exclusion of Sources from Regulation. We uphold the definition of "municipal [*1310] separate storm sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

3. Other issues. We uphold the rule as to oil and [**53] gas operations and storm water control. We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

APPENDIX A

[HN29] *CWA § 402, 33 USCA § 1342*

(1) Limitation on permit requirement

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(p) Municipal and industrial [**54] *stormwater discharges*

(1) General rule

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

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

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

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

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

[**55] *(B) Municipal discharge*

Permits for discharges from municipal storm sewers -

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

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

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or [*1311] the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but [**56] in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary [**57] to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) *Regulations*

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges,other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

CONCUR BY: O'SCANNLAIN (In Part)

DISSENT BY: O'SCANNLAIN (In Part)

DISSENT

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts [**58] I, H.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

[*1312] I

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 6206. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application [* *59] requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously [**60] as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 *U.S.C. § 1342(p)(4) (1988).*

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B) ("Any such permit shall provide for compliance. . . ."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have [* *61] been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 6200 (quoting *Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)),* they fail to apply that axiom.

A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate [* 1313] products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. *See 40 C.F.R. § 122.26(b)(14).* EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes [**62] that the statute does not define "discharge associated with industrial activity." *Ante* at 6213. The operative phrase, as my colleagues note, is "associated with." *See id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the

EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ante* at 6214. Neither the plain meaning of the term "associated" nor the legislative history of the statute support this conclusion. "Associated with" means closely related to or connected with. *See Webster's Ninth New Collegiate Dictionary* 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained [**63] that:

> [a] discharge is associated with industrial activity if it is *directly related to manufacturing, processing or raw materials storage areas* at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt) (emphasis added). [1] The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "directly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

> 1 This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:
>
> > One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.
>
> 132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "such discharges *do not* include" those from parking lots.

[* *64] The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely non-industrial." *Ante* at 6215. My colleagues' reliance on the second sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's [**65] definition and are required to [*1314] apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally conduct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if "areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water." *40 C.F.R. § 122.26(b)(14).* If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit. [2]

> 2 Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 6215, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.
>
> Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

[**66] In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term "associated with industrial activity." Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(1)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with "industrial activities" from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of "industrial activities." For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See 40 C.F.R. § 122.26(b)(14).*

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question [**67] before this court, therefore, is not whether "the agency construction was the only one it permissibly could have adopted" or even whether it is the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A. v. NRDC, 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).* We need only inquire if the agency's construction is a permissible one. *Id. at 843.* EPA's definition falls well within permissible bounds, and should be upheld.

B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that "construction activity is industrial in nature." *Ante* at 6217-18. In the preamble to its final rule, EPA noted that "Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial,* such as natural resource extraction." 3 *55 Fed. Reg. 48,033 (1990)* (emphasis added). EPA explained that it was "attempting to focus [regulation] only on those construction activities [*1315] that *resemble* industrial activity." *55 Fed. Reg. at 48,035* [**68] (emphasis added).

> 3 EPA did admit that "even small construction sites may have a significant negative impact on water quality in localized areas," *55 Fed. Reg. at 48,033.* In the absence of any indication of what EPA meant by "small," however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define "industrial activity" as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., 467 U.S. at 844.*

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. *See 55 Fed. Reg. at 48,035.* Exempting construction that would be completed within a certain designated time frame was deemed inappropriate, because the work [**69] could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." *55 Fed. Reg. at 48,036.*

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. *53 Fed. Reg. 49,431 (1988).* In the final rule, however, EPA adopted a five-acre minimum for all construction projects. *55 Fed. Reg. 48,066 (1990); 40 C.F.R. § 122.26(b)(14)(x).*

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make [**70] it arbitrary and capricious. Line-drawing is often difficult. NRDC was apparently willing to accept EPA's proposed one-acre/five-acre rule. Although NRDC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld.

> 4 Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's rea-

soning. In my view, NRDC's claim is premature, and we should decline to address its merits.

NRDC contends that the 1987 amendments [**71] require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDC relies on CWA § 402(p)(3)(B), 33 *U.S.C.* § *1342(p)(3)(B),* which provides:

> Permits for discharges from municipal storm sewers -
>
> * * *
>
> (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. . . .

This section refers only to ***permits,*** and says nothing about permit applications. Because EPA has yet to issue any permits, NRDC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDC's claim without [*1316] reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for [**72] issuance of and compliance with permits, and I would uphold EPA's definition of "discharge associated with industrial activity." Finally, I would reject NRDC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

TAB “4”

Positive
As of: Jun 02, 2011

GEORGIA BODE, Plaintiff and Respondent, v. LOS ANGELES METROPOLITAN MEDICAL CENTER, Defendant and Appellant.

B207183

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

174 Cal. App. 4th 1224; 94 Cal. Rptr. 3d 890; 2009 Cal. App. LEXIS 925

June 11, 2009, Filed

SUBSEQUENT HISTORY: Rehearing denied by *Bode v. Los Angeles Metropolitan Medical Center, 2009 Cal. App. LEXIS 1212 (Cal. App. 2d Dist., July 6, 2009)* Review denied by *Bode, M.D. (Georgia) v. Los Angeles Metropolitan Medical Center, 2009 Cal. LEXIS 9655 (Cal., Sept. 9, 2009)*

PRIOR HISTORY: [***1]
APPEAL from a judgment of the Superior Court of Los Angeles County, No. BS108838, David P. Yaffe, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of Los Angeles County, California, granted plaintiff anesthesiologist's petition for administrative mandate to set aside defendant hospital's decision to first suspend, and then not renew, the anesthesiologist's temporary privilege to practice at the hospital. The hospital appealed the judgment.

OVERVIEW: The court held that the hospital's appellate review committee committed legal error when it upheld adverse actions against the anesthesiologist's privileges by placing the burden of proof on her. Once the hospital granted staff privileges, as defined by *Bus. & Prof. Code, § 805,* it assumed the burden of proof under *Bus. & Prof. Code, § 809.3,* at any hearing to justify taking action against those privileges for a medical disciplinary cause or reason, despite her original status as an initial applicant. This would not have placed the burden of proof on the hospital if it had proceeded to consider the initial application but, at the time of the anesthesiologist's hearing to rebut charges regarding a missing Demerol ampule, she had withdrawn her application. Under that burden of proof, the court held that the judicial review committee was justified in concluding that there was no way to apportion blame for the disappearance of the Demerol, that the medical executive committee therefore failed to prove that the anesthesiologist was responsible, and therefore that, when the burden of proof was placed on the hospital, there was no good cause for the actions taken.

OUTCOME: The court affirmed the judgment.

LexisNexis(R) Headnotes

Healthcare Law > Business Administration & Organization > Peer Review > Statutes
[HN1] A medical cause or disciplinary reason means that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care. *Bus. & Prof. Code, § 805, subd. (a)(6).*

Healthcare Law > Business Administration & Organization > Peer Review > Statutes

[HN2] See *Bus. & Prof. Code, § 805, subd. (a)(4).*

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Healthcare Law > Business Administration & Organization > Peer Review > Statutes

[HN3] Bus. & Prof. Code, § 809.3, allocates the burden of producing evidence and of proof at hearings that fall under the reporting requirements of *Bus. & Prof. Code, § 805.* The peer review body always has the initial duty to present evidence which supports the charge or recommended action. § *809.3, subd. (b)(1).* Initial applicants have the burden of proof by a preponderance of the evidence of their qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning their current qualifications for staff privileges, membership, or employment. Initial applicants shall not be permitted to introduce information not produced upon request of the peer review body during the application process, unless the initial applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence. § *809.3, subd. (b)(2).* In all other cases than those involving initial applicants, the peer review body has the burden of proving its action or recommendation is reasonable and warranted by a preponderance of the evidence.

Healthcare Law > Business Administration & Organization > Peer Review > Statutes

[HN4] See *Bus. & Prof. Code, §§ 809 - 809.9.*

Administrative Law > Judicial Review > Remedies > Mandamus
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Healthcare Law > Business Administration & Organization > Peer Review > General Overview

[HN5] A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate under *Code Civ. Proc., § 1094.5. Bus. & Prof. Code, § 809.8.* In examining a hospital board's decision, the trial court must determine two issues. The first is a question of law: whether the governing body applied the correct standard in conducting its review of the matter. Second, after determining that the correct standard was used, the trial court must determine whether the governing body's decision was supported by substantial evidence. § *1094.5, subds. (b)-(d).*

Administrative Law > Judicial Review > Standards of Review > De Novo Review
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Healthcare Law > Business Administration & Organization > Peer Review > General Overview

[HN6] The phrase in the nature of an appellate review," in the context of medical peer review, has been judicially construed to mean that an appellate committee does not sit as a trier of fact, but instead determines whether the decision of a judicial review committee -- which was the trier of fact -- was supported by substantial evidence. As a result, the court's review concerns whether an appellate review committee properly conducted its appellate review of the judicial review committee's decision. Determining whether the appellate review committee chose the correct legal standards and properly applied them is a question of law. In determining whether substantial evidence supports the appellate review committee's decision, the court independently reviews the evidence before the judicial review committee to see if it constituted substantial evidence in support of that committee's findings of ultimate fact. The court then compares its independent conclusion on that question of law with the conclusion reached by the appellate review committee to determine whether it correctly applied the substantial evidence rule.

Governments > Legislation > Interpretation

[HN7] In construing a statute, the court's primary task is to determine the Legislature's intent. The court's first step is to scrutinize the words used in the statute and give them a plain and commonsense meaning. If the language is clear and unambiguous, there is no need for construction or for resort to indicia of the Legislature's intent. However, the literal meaning of a statute must be aligned with its purpose. Therefore, the meaning of a statute may not be determined from a single word or sentence. The words must be construed in context, and provisions relating to the same subject matter or that are part of the same statutory scheme must be read together and harmonized to the extent possible.

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Healthcare Law > Business Administration & Organization > Peer Review > Statutes

[HN8] Bus. & Prof. Code, § 809.3, sets forth only two statuses when allocating the burden of proof: initial applicants and all others.

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Healthcare Law > Business Administration & Organization > Peer Review > Statutes
[HN9] *Bus. & Prof. Code, § 809.3, subd. (b)(2),* states that initial applicants have the burden of proving their qualifications by producing information that allows for adequate evaluation of their suitability for staff privileges or membership. They may not produce new information at the discipline hearing without good cause. In the case of a first time applicant, a decision to reject an application due to a medical disciplinary cause or reason obviously must rely on reports of misconduct or other negative incidents that occurred in the past at some other health facility. If a hospital is considering rejecting an applicant based on such information, the hospital cannot reasonably be expected to prove those incidents, and it therefore makes sense to place the burden on the initial applicant to produce sufficient information to disprove them. In other situations, when a licensee is working at a health facility under some arrangement, a decision to terminate that arrangement for a medical disciplinary cause or reason in all likelihood is based on recent conduct occurring while the licensee was at that hospital pursuant to that arrangement. In such cases, the hospital can bear the burden of proof because it will have control over and access to all the relevant witnesses and information.

Healthcare Law > Business Administration & Organization > Peer Review > Statutes
[BN10] Under *Bus. & Prof. Code, § 805, subd. (b)(2),* staff privileges are broadly defined as any arrangement under which a licensee is allowed to practice at a health care facility, including but not limited to temporary staff privileges.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted an anesthesiologist's petition for administrative mandate to set aside a hospital's decision to first suspend, and then not renew, her temporary staff privilege to practice at the hospital. (Superior Court of Los Angeles County, No. BS108838, David P. Yaffe, Judge.)

The Court of Appeal affirmed the judgment, holding that the hospital's appellate review committee committed legal error when it upheld adverse actions against the anesthesiologist's privileges by placing the burden of proof on her. Once the hospital granted the anesthesiologist temporary staff privileges, as defined by *Bus. & Prof. Code, § 805,* it assumed the burden of proof under *Bus. & Prof. Code, § 809.3,* at any hearing to justify taking action against those privileges for a medical disciplinary cause or reason, despite the anesthesiologist's original status as an initial applicant. This would not have placed the burden of proof on the hospital if it had proceeded to consider the initial application but, at the time of the anesthesiologist's hearing to rebut charges regarding a missing Demerol ampule, she had withdrawn her application for staff privileges. Under that burden of proof, the court held that the judicial review committee was justified in concluding that there was no way to apportion blame for the disappearance of the Demerol ampule, that the medical executive committee failed to prove that the anesthesiologist was responsible, and therefore that, when the burden of proof was placed on the hospital, there was no good cause for the actions taken against the anesthesiologist's privileges. (Opinion by Rubin, Acting P. **J.,** with Bigelow, J., and Bauer, **J.;** concurring.) [*1225]

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Healing Arts and Institutions § 22--Medical Practitioners--Disciplinary Proceedings--Definitions.--A medical cause or disciplinary reason means that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care *(Bus. & Prof Code, § 805, subd. (a)(6)).*

(2) Healing Arts and Institutions § 22--Medical Practitioners--Peer Review Hearings--Burdens of Proof.--Bus. & *Prof. Code, § 809.3,* allocates the burden of producing evidence and of proof at hearings that fall under the reporting requirements of *Bus. & Prof. Code, § 805.* The peer review body always has the initial duty to present evidence that supports the charge or recommended action (§ *809.3, subd. (b)(1)).* Initial applicants have the burden of proving by a preponderance of the evidence their qualifications by producing information that allows for adequate evaluation and resolution of reasonable doubts concerning their current qualifications for staff privileges, membership, or employment. Initial applicants are not permitted to introduce information not produced upon request of the peer review body during the application process, unless the initial applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence (§ *809.3, subd. (b)(2)).* In all other cases than those involving initial applicants, the peer review body has the burden of prov-

ing its action or recommendation is reasonable and warranted by a preponderance of the evidence.

(3) Healing Arts and Institutions § 24--Medical Practitioners--Peer Review Hearings--Judicial Review.--A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate under *Code Civ. Proc., § 1094.5 (Bus. & Prof. Code, § 809.8).* In examining a hospital board's decision, the trial court must determine two issues. The first is a question of law: whether the governing body applied the correct standard in conducting its review of the matter. After determining that the correct standard was used, the trial court must determine whether the governing body's decision was supported by substantial evidence (*§ 1094.5, subds. (b)-(d)).*

(4) Statutes § 21--Construction--Legislative Intent--Plain Meaning--Context.--In construing a statute, the court's primary task is to determine the Legislature's intent. The court's first step is to scrutinize the words used in the statute and give them a plain and commonsense [*1226] meaning. If the language is clear and unambiguous, there is no need for construction or for resort to indicia of the Legislature's intent. However, the literal meaning of a statute must be aligned with its purpose. Therefore, the meaning of a statute may not be determined from a single word or sentence. The words must be construed in context, and provisions relating to the same subject matter or that are part of the same statutory scheme must be read together and harmonized to the extent possible.

(5) Healing Arts and Institutions § 22--Medical Practitioners--Peer Review Hearings--Burdens of Proof--Initial Applicant.--Bus. & *Prof. Code, § 809.3,* sets forth only two statuses when allocating the burden of proof: initial applicants and all others. *Bus. & Prof Code, § 809.3, subd. (b)(2),* goes on to state that initial applicants have the burden of proving their qualifications by producing information that allows for adequate evaluation of their suitability for staff privileges or membership. They may not produce new information at the discipline hearing without good cause. In the case of a first time applicant, a decision to reject an application due to a medical disciplinary cause or reason obviously must rely on reports of misconduct or other negative incidents that occurred in the past at some other health facility. If a hospital is considering rejecting an applicant based on such information, the hospital cannot reasonably be expected to prove those incidents, and it therefore makes sense to place the burden on the initial applicant to produce sufficient information to disprove them. In other situations, when a licensee is working at a health facility under some arrangement, a decision to terminate that arrangement for a medical disciplinary cause or reason in all likelihood is based on recent conduct occurring while the licensee was at that hospital pursuant to that arrangement. In such cases, the hospital can bear the burden of proof because it will have control over and access to all the relevant witnesses and information.

(6) Healing Arts and Institutions § 22--Medical Practitioners--Peer Review Hearings--Staff Privileges.--Under *Bus. & Prof. Code, § 805, subd. (b)(2),* staff privileges are broadly defined as any arrangement under which a licensee is allowed to practice at a health care facility, including but not limited to temporary staff privileges. [*1227]

(7) Healing Arts and Institutions § 22--Medical Practitioners--Peer Review Hearings--Burdens of Proof--Temporary Staff Privileges.--Once a hospital granted an anesthesiologist temporary staff privileges, as defined by *Bus. & Prof Code, § 805,* it assumed the burden of proof under *Bus. & Prof. Code, § 809.3,* at any hearing to justify taking action against those privileges for a medical disciplinary cause or reason, despite her original status as an initial applicant. This would not have placed the burden of proof on the hospital if it had proceeded to consider the initial application but, at the time of the anesthesiologist's hearing to rebut charges regarding a missing Demerol ampule, she had withdrawn her application.

[Cal. Forms of Pleading and Practice (2009) ch. 416, Physicians: Membership on Hospital Staffs or in Professional Organizations, § 416.15; 1 Witkin, Cal. Evidence (4th ed. 2000) Introduction, § 61.]

COUNSEL: Fisher, Sparks, Grayson & Wolfe, Jerry R. Sparks; Greines, Martin, Stein & Richland, Robert A. Olson and Marc J. Poster for Defendant and Appellant.

Fenton & Nelson, Henry R. Fenton, Dennis E. Lee and Benjamin J. Fenton for Plaintiff and Respondent.

JUDGES: Opinion by Rubin, Acting P. **J.,** with Bigelow and Bauer, **JJ.,** concurring.

OPINION BY: Rubin

OPINION

[**892] **RUBIN, Acting P.** J.--Los Angeles Metropolitan Medical Center appeals from the judgment entered after the trial court granted Dr. Georgia Bode's petition for administrative mandate to set aside the medical center's decision to first suspend, and then to not renew, her temporary privilege to practice there. We affirm.

FACTS AND PROCEDURAL HISTORY

On January 2, 2003, Dr. Georgia Bode began work as an anesthesiologist at Los Angeles Metropolitan Medical Center (the hospital or L.A. Metro) with temporary, but renewable, 90-day practice privileges pending action on her application for membership on the hospital's medical staff. The [***2] hospital had recently replaced its entire anesthesiology staff after incidents involving the mishandling of controlled narcotic substances caused an accreditation agency to award the hospital only a conditional accreditation. Bode, who had [*1228] an unblemished record since she began practicing in 1987, gave up her staff membership at Centinela Hospital in order to go to L.A. Metro.

In response to the mishandled drug problem, the hospital instituted Sure-Med, a computer-operated drug dispensary system. In order to return unused drugs, a physician must enter information into the Sure-Med system specifying whether drugs were used, wasted (unreturned after disposal by an authorized method), or returned after not being used. Drug returns had to be witnessed and signed off by an authorized hospital staff member. The hospital's pharmacy staff would confirm the return, and would also review patient records to be sure physicians properly documented the use or wastage of unreturned drugs.

Within Bode's first three weeks at the hospital, she had problems properly documenting her use of various medications. Six incidents were reported between January 6 and January 18, 2003. Some were based on Bode's [***3] failure to sign her name to patient records; others involved the failure to document the dosage administered or the disposition of the drugs. On January 22, 2003, Dr. Dapo Popoola, the hospital's surgical chief, sent Bode a letter setting forth the six incidents. The letter ended by warning that any further occurrences "may result in disciplinary action including suspension of privileges." (Boldface omitted.) The hospital's records show that Bode received training and counseling about these issues and seemed to have resolved them satisfactorily.

On March 18, 2003, Bode withdrew several doses of medication to administer to a patient undergoing spinal surgery. The Sure-Med records showed that Bode obtained three ampules of fentanyl, two vials of Versed, and one ampule of Demerol. The patient's chart showed that all of the fentanyl and one of the Versed doses, but not the Demerol, were administered. The Sure-Med records also showed that Bode entered the return of the Demerol and the remaining Versed vial. This was witnessed by a nurse, Vargas, who entered her own user ID and password into the Sure-Med system to confirm Bode's actions. However, when pharmacy staff checked the machines the [***4] next day, they could not find the Demerol ampule. Vargas gave three versions of what she witnessed: (1) Vargas told her supervisor that she told Bode that Bode was returning [**893] fentanyl, not Demerol, and that the machine needed to be corrected; (2) Vargas told the pharmacy chief that she did not see or recall, or had been too busy to see or had no idea, what Bode had returned; and (3) Vargas told the head of the anesthesiology department that she told Bode that Bode was returning fentanyl, not Demerol. [* 1229]

On March 23, 2003, the hospital's surgery department held an emergency peer review meeting, where the hospital's chief of staff summarily suspended Bode's temporary privileges. On March 25, 2003, Bode appeared before a meeting of the surgery department to explain the missing Demerol ampule. Bode submitted a prepared statement. Distilled, Bode said Vargas, an experienced recovery room nurse, witnessed and signed for the return of the Demerol; the Sure-Med system is complicated; the recovery room nurses should be able to recognize Demerol when they see it; and she had never before had any problems with dispensing or returning controlled substances. The peer review committee was unable to "come [***5] to a concrete solution regarding the discrepancy." On March 26, 2003, the surgery department recommended that Bode's privileges remain suspended until their 90-day limit expired four days later. On March 31, 2003, L.A. Metro gave Bode official notice that her temporary privileges would not be renewed "because of issues surrounding the return of controlled substances."

Under state law and the hospital's bylaws, Bode was entitled to, and demanded, a hearing to rebut the charges. As part of that June 2003 demand, Bode told L.A. Metro that she had no further interest in practicing there, effectively withdrawing her application. The hospital refused to provide a hearing and Bode filed a mandate petition *(Code Civ. Proc., § 1085)* to compel L.A. Metro to provide the hearing. *(Bode v. Pacific Health Corp.* (Super. Ct. L.A. County, 2005, No. BS085342) *(Bode 1).)* That petition was granted and the hospital scheduled a hearing on its decision to suspend and not renew Bode's privileges.

1 Because the hospital had agreed to grant Bode a hearing on the nonrenewal of her privileges, the trial court in *Bode I* found that issue was moot. Its writ was therefore directed solely to a hearing on the initial [***6] decision to suspend Bode's privileges. Although Pacific Health Corporation was also named as a party to this action, it was dismissed before judgment was rendered and is not a party to this appeal.

In connection with the hearing, L.A. Metro sent Bode a letter in July 2004 stating that its decision to suspend and not renew her privileges was based on issues that were

"raised regarding the return of controlled substances from January 2, 2003 through March 21, 2003." In August 2004, the hospital sent Bode a notice of charges stating that its decision was based on the six January 2003 drug documentation incidents and the missing Demerol incident. According to the hospital's notice, "[T]he totality of these incidents, occurring in such a short period of time, raised questions about your professional qualifications and/or your ability to exercise the temporary privileges you had been granted." [*1230]

Pursuant to the hospital's bylaws, the medical staffs case against Bode was brought by the hospital's medical executive committee. The finder of fact was a judicial review committee comprised of medical staff members, assisted by a hearing officer. Bode testified that other hospitals using the Sure-Med system [***7] had experienced problems with missing drugs. Bode was sure Vargas saw her return the Demerol and could not explain what happened to it. She did not return any fentanyl because she used all three ampules [**894] during the spinal surgery. Bode also claimed that the head of the hospital's pharmacy department asked her to change the patient's record to reflect that Demerol had been used. Bode declined to do so.' Vargas's statements were also in evidence, but Vargas did not testify.

2 The head pharmacist denied having said this.

In general, under state law and L.A. Metro's bylaws, the burden of proof for an initial applicant at this type of personnel hearing lay with the physician being disciplined. In all other cases, the burden of proof lay with the hospital.

The judicial review committee was unsure whether to place the burden of proof on Bode and, acting on the hearing officer's recommendation, decided the case in the alternative, first by placing the burden on Bode, then by evaluating the evidence as if the hospital bore the burden of proof. Regardless of who bore the burden of proof, the judicial review committee found that the six recording and documentation incidents in January 2003 were [***8] established only in part, and that, as to those, the hospital properly warned Bode that further incidents might result in discipline. However, regardless of who bore the burden of proof, the judicial review committee "is not making any finding that Dr. Bode's care was deficient or inappropriate." Also without regard to the burden of proof, the judicial review committee was unable to determine what happened to the missing Demerol ampule. This was based in part on confusion as to both what nurse Vargas saw and what she told others about the incident, combined with Vargas's failure to testify at the hearing.

3 We discuss the applicable statutes and hospital bylaws in detail *post,* in parts 1 and 2 of our discussion.

Based on these findings, when the burden of proof was placed on the hospital, the judicial review committee found that the hospital's decision to suspend and not renew Bode's temporary privileges was not reasonable or warranted. When the burden of proof was placed on Bode, however, the judicial review committee came to a different conclusion. First, it noted that the hospital, acting on advice of counsel, had rescinded its decision to suspend Bode's temporary privileges. As a [* **9] result, that decision was no longer [*1231] at issue. In regard to the decision not to renew her temporary privileges, the judicial review committee found that Bode had failed to produce sufficient evidence of "her qualifications for medical staff privileges" at L.A. Metro. This evidence included a letter from Bode to the medical executive committee, four letters of reference, Bode's application for staff privileges, her completion of just three of six required proctoring reports, and the testimony of a physician about the charges against Bode. Based on this, the judicial review committee found that Bode "was involved in seven cases which raised concerns during the period of her temporary privileges ... and did not present adequate evidence of her proficiency as an anesthesiologist."

Bode and the medical executive committee separately challenged the portions of the judicial review committee's findings that were unfavorable to them, by way of an appeal to the hospital board's appellate review committee. That group ruled as an issue of law that Bode was nothing more than an initial applicant who bore the burden of proof because her temporary privileges were issued solely in conjunction with her [***10] pending initial application for staff privileges.

Applying the substantial evidence test, the appellate review committee found that there was substantial evidence to up [**895] hold that portion of the judicial review committee's decision which found cause to suspend and not renew Bode's privilege when she bore the burden of proof. The appellate review committee adopted the judicial review committee's findings in this regard, and concluded that Bode's failure to "resolve all doubts" about what happened to the missing Demerol ampule meant she had failed to prove she was not responsible for its loss. The appellate review committee found that the six January 2003 reporting and documentation incidents were, by themselves, sufficient reason to suspend and not renew Bode's temporary privileges. The appellate review committee concluded in the alternative that even if the hospital bore the burden of proof, a decision for Bode was not supported by substantial evidence because the judicial review committee's findings showed that suspension and nonrenewal were proper based solely on the six January 2003 documentation incidents.

Bode then filed an administrative mandate petition *(Code Civ. Proc., § 1094.5), [***11]* contending the

appellate review committee mistakenly placed the burden of proof on her and exceeded its authority by reweighing the evidence introduced before the judicial review committee. The trial court ruled that, as [*1232] a holder of temporary staff privileges, Bode was not an initial applicant and that the appellate review committee therefore erred to the extent its decision was based on Bode bearing the burden of proof. The trial court also found that the appellate review committee erred to the extent it alternatively relied on the six January 2003 documentation incidents to support the hospital's actions. This was so, the trial court found, because the only reason given to Bode at the time of her suspension and nonrenewal was an issue concerning the return of controlled substances, and none of the six documentation incidents involved the actual return of such items. In its judgment, the trial court said it had "independently examined the administrative record, and ... exercised its independent judgment as to the weight of the evidence ... ." The court issued a writ directing the hospital to vacate the appellate review committee's decision and conduct further proceedings as it [***12] deems necessary that are consistent with the court's decision.

L.A. Metro contends the trial court erred because (1) Bode was an initial applicant who bore the burden of proof; (2) the court was bound by the substantial evidence rule and could not exercise its independent judgment; and (3) under the substantial evidence rule, the appellate review committee ruled correctly.

DISCUSSION

1. Hospital Peer Review Legislation

Acute care hospitals must have an organized medical staff that is responsible to the hospital's governing body for the adequacy and quality of medical care. *(Cal. Code Regs., tit. 22, § 70703, subd. (b).)* The medical staff must adopt written bylaws setting the procedures and criteria for evaluating applicants for staff appointments, credentials, privileges, reappointments, and other related matters. The bylaws must also contain an enforcement mechanism *(Ibid.)* In short, the bylaws must establish a peer review process. *(Smith v. Selma Community Hospital (2008) 164 Cal.App.4th 1478, 1482 [80 Cal. Rptr. 3d 745] (Smith).)*

(1) A peer review body must submit a report to the Medical Board of California or other appropriate agency when it takes any of the following actions due to a medical disciplinary cause [* **13] or reason: (1) denies or rejects a medical licensee's application for staff membership; (2) terminates or revokes a licensee's membership, staff [**896] privileges, or employment; or (3) imposes restrictions (or restrictions are voluntarily accepted), on staff privileges, membership, or employment for a cumulative total of 30 days or [*1233] more for any 12-month period. *(Bus. & Prof. Code, § 805, subd. (b).)* [4]

[1-W1] A medical cause or disciplinary reason "means that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." *(Id., subd. (a)(6).)* [11N2] "'Staff privileges' means any arrangement under which a licentiate is allowed to practice in or provide care for patients in a health facility. Those arrangements shall include, but are not limited to, full staff privileges, active staff privileges, limited staff privileges, auxiliary staff privileges, provisional staff privileges, temporary staff privileges, courtesy staff privileges, locum tenens arrangements, and contractual arrangements to provide professional services, including, but not limited to, arrangements to provide outpatient services." *(Id.,* [***14] *subd. (a)(4).)*

4 All further undesignated section references are to the Business and Professions Code.

(2) At issue here is [HN3] *section 809.3,* which allocates the burden of producing evidence and of proof at hearings that fall under the reporting requirements of *section 805.* The peer review body always has the initial duty to present evidence that supports the charge or recommended action. (§ *809.3, subd. (b)(1).)* "Initial applicants" have the burden of proof "by a preponderance of the evidence of their qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning their current qualifications for staff privileges, membership, or employment. Initial applicants shall not be permitted to introduce information not produced upon request of the peer review body during the application process, unless the initial applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence." *(Id., subd. (b)(2).)* In all other cases than those involving initial applicants, the peer review body has the burden of proving its action or recommendation is reasonable and warranted by a preponderance of [***15] the evidence. *(Id., subd. (b)(3).)*

Section 809.3 was part of legislation that took effect in 1990, by which California opted out of federal peer review legislation and set its own standards for this process. (§§ *809-809.9.)* These provisions [HN4] "shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review ... . It is the intent of the Legislature that written provisions implementing *Sections 809 to 809.8,* inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval ... ." (§ *809, subd. (a)(8).)* Therefore, the peer review rules applicable here have two sources: *sections 809 to 809.9* and L.A. Metro's bylaws. *(Smith, supra, 164*

Cal.App.4th at p. 1484.) We examine those bylaws next. [* 1234]

2. *L.A. Metro's Bylaws*

The hospital's bylaws list only six categories of staff members: provisional, active, associate, affiliate, courtesy, and honorafy. The bylaws also identify three other categories of physicians who may practice at the hospital: those with [***16] contractual relationships, those who qualify as allied health professionals, and those granted temporary privileges. With the proper recommendation, temporary privileges may be granted in three circumstances: [**897] for the care of specific patients, for *locum tenens* arrangements, and upon request of those who have applied for appointment to the medical staff. As to the latter, the bylaws provide: "After receipt of a completed application for Staff appointment, including a request for specific temporary privileges, an appropriately licensed applicant may be granted temporary privileges for an initial period up to 90 days, with subsequent renewals not to exceed the period in time until appointment to the Medical Staff. In exercising such privileges, the applicant shall act under the supervision of the Chief of the Department, or his designee, to which the applicant is assigned ... ." Temporary privileges are granted "only when the information available reasonably supports a favorable determination regarding the requesting practitioner's qualifications, ability, judgment and current competence to exercise the privileges requested ... ." They may be terminated " [u]pon the discovery of [***17] any information or the occurrence of any event of a nature which raises questions about the practitioner's professional qualifications or ability to exercise any or all of the temporary privileges granted ... ." A practitioner whose temporary privileges are denied or terminated is entitled to the procedural rights set forth elsewhere in the bylaws.

> *5 Locum tenens* means a physician who acts as a temporary substitute for another. *(Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal.App.4th 32, 39 [100 Cal. Rptr. 2d 627] .)*

Under the bylaws' hearing and appellate review procedures, the judicial review committee, comprised of three medical staff members, takes evidence and makes findings of fact concerning any charges or adverse actions against hospital practitioners. In all cases, the hospital has the burden of producing evidence to support the charges or recommendations. If these concern the practitioner's initial application for Staff membership or privileges or initial application for an advancement in Staff membership category or for clinical privileges not previously granted to the practitioner, the practitioner ('initial applicant') shall have the burden of persuading the Judicial Review Committee [***18] by a preponderance of evidence of his or her current qualifications for the requested Staff membership or privileges by producing information which allows the Judicial Review Committee to adequately evaluate and resolve all reasonable doubts concerning such qualifications of the practitioner. Initial applicants shall not be permitted to introduce information during the hearing which such practitioner did not produce during the application process in [*1235] response to a request from the Medical Staff for such information unless the initial applicant establishes to the satisfaction of the Judicial Review Committee that such information could not have been produced by the practitioner during the application process in the exercise of reasonable diligence. In all cases which do not involve an initial applicant, the Medical Staff representative or body taking or making the adverse recommendation(s) or action(s) shall bear the burden to present evidence which supports the recommendation(s) or action(s)."

A party may challenge a judicial review committee decision through an appeal to the appellate review committee, whose proceedings "shall be in the nature of an appellate review based upon the hearing [***19] record of the Judicial Review Committee, that committee's decision, and all other documentation considered by the Judicial Review Committee." "New or additional matters or evidence not raised or presented during the Judicial Review Committee [**898] hearing, and not otherwise reflected in the record of the hearing, shall be introduced at the appellate review only at the discretion of the [appellate committee] upon a showing of good cause and only following an explanation by the party requesting the consideration or introduction of such matter or evidence as to why it was not presented or raised at the hearing."

3. *Standard of Review*

(3) [HN5] A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate under *Code of Civil Procedure section 1094.5. (Bus. & Prof. Code, § 809.8; Smith, supra, 164 Cal.App.4th at p. 1499.)* In examining a hospital board's decision, the trial court must determine two issues. The first is a question of law: whether the governing body (in this case the hospital's appellate review committee) applied the correct standard in conducting its review of the matter. Second, after determining that the correct standard was used, [***20] the trial court must determine whether the governing body's decision was supported by substantial evidence. *(Code Civ. Proc., § 1094.5, subds. (b)-(d); Weinberg v. Cedars-Sinai Medical Center (2004) 119 Cal.App.4th 1098, 1106-1107 [15 Cal. Rptr. 3d 6] .)*

Under the hospital's bylaws, the appellate review committee's proceedings were described as being "in the nature of an appellate review." [HN6] This phrase has been judicially construed to mean that the appellate

committee does not sit as a trier of fact, but instead determines whether the decision of the judicial review committee--which was the trier of fact--was supported by substantial evidence. *(Huang v. Board of Directors (1990) 220 Cal.App.3d* [*1236] *1286, 1293 [270 Cal. Rptr. 41] (Huang).)* [6] As a result, our review concerns whether the appellate review committee properly conducted *its* appellate review of the judicial review committee's decision. *(Smith, supra, 164 Cal.App.4th at p. 1500.)* Determining whether the appellate review committee chose the correct legal standards and properly applied them is a question of law. *(Ibid.)* In determining whether substantial evidence supports the appellate review committee's decision, we independently review the evidence before the judicial [***21] review committee to see if it constituted substantial evidence in support of that committee's findings of ultimate fact. We then compare our independent conclusion on that question of law with the conclusion reached by the appellate review committee to determine whether it correctly applied the substantial evidence rule. *(Id. at p. 1516.)'*

6 The hospital incorrectly contends that *Huang* is not applicable because the bylaws at issue there specified that the appellate board applied the substantial evidence rule. The pertinent portion of the bylaws quoted by the *Huang* court is virtually identical to the hospital's. *(Huang, supra, 220 Cal.App.3d at p. 1293;* cf. *Weinberg v. Cedars-Sinai Medical Center, supra, 119 Cal.App.4th at pp. 1108-1111 &* fn. 2 [standard of review for hospital appellate boards is found in each hospital's bylaws; because the bylaws at issue did not contain language limiting the hospital's appellate body to the substantial evidence rule, the appellate board could exercise independent judgment when reviewing factfinding committee's decision, but still must accord those findings great weight].) In accord with its own bylaws, the decision issued by L.A. Metro's appellate [***22] review committee expressly stated it was applying the substantial evidence standard.

7 As a result, even if the trial court here erred by independently weighing the evidence, that error is harmless as it does not directly affect our analysis. To the extent the trial court resolved legal issues, such as the interpretation of the relevant statutes or the hospital's bylaws, it properly employed independent review.

[**899] 4. *Because Bode Was Not an Initial Applicant, the Hospital Bore the Burden of Proof*

Both parties agree that the burden of proof issue is to be resolved by an interpretation of *section 809.3.* Because *section 809.3* is called into play only when a duty to report arises under *section 805,* it is also undisputed that the charges against Bode asserted a medical disciplinary cause or reason under that provision. Bode contends the hospital bore the burden of proof at the factfinding hearing because her temporary privileges were eliminated. The hospital contends she had the burden of proof because those privileges were inextricably linked to her pending application for staff membership, making her an initial applicant. We are therefore called upon to construe *section 809.3.*

(4) [1-M7] In doing so, our r "231 primary task is to determine the Legislature's intent. Our first step is to scrutinize the words used in the statute and give them a plain and commonsense meaning. If the language is clear and unambiguous, there is no need for construction or for resort to indicia of the Legislature's [*1237] intent. However, the literal meaning of a statute must be aligned with its purpose. Therefore, the meaning of a statute may not be determined from a single word or sentence. The words must be construed in context, and provisions relating to the same subject matter or that are part of the same statutory scheme must be read together and harmonized to the extent possible. *(TrafficSchoolOnline, Inc. v. Superior Court (2001) 89 Cal.App.4th 222, 230 [107 Cal. Rptr. 2d 412] .) Sections 805* and *809.3* are both included in article 11 on Professional Reporting, which is part of chapter 1, division 2 (Healing Arts) in the Business and Professions Code. Because *section 809.3* specifically references, and is triggered by, *section 805,* we must read these statutes together and harmonize them if possible.

(5) As noted earlier, *section 805* imposes a duty to report as to medical licensees with three distinct statuses: (1) when an application for staff [***24] membership is denied or rejected; (2) when membership or staff privileges are terminated or revoked; and (3) when restrictions on staff privileges are imposed or accepted in the specified amount. (§ *805, subd. (b).)* [HN8] *Section 809.3* sets forth only two statuses when allocating the burden of proof: "initial applicants" and all others. [HN9] *Section 809.3, subdivision (b)(2)* goes on to state that initial applicants have the burden of proving their qualifications by producing information that allows for adequate evaluation of their suitability for staff privileges or membership. They may not produce new information at the discipline hearing without good cause. In the case of a first-time applicant (such as Bode), a decision to reject an application due to a medical disciplinary cause or reason obviously must rely on reports of misconduct or other negative incidents that occurred in the past at some other health facility. If a hospital is considering rejecting an applicant based on such information, the hospital cannot reasonably be expected to prove those incidents, and it therefore makes sense to place the burden on the initial applicant to produce sufficient information to disprove them. In

[***25] other situations, when a licensee is working at a health facility under some arrangement, a decision to terminate that arrangement for a medical disciplinary cause or reason in all likelihood is based on recent conduct occurring while the licensee was at that hospital pursuant to that arrangement. In such cases, the hospital can bear the burden of proof because it will have control over and access to all the relevant witnesses and information.

[**900] Can the distinction we perceive under *section 809.3* be squared up with *section 805?* We believe it can. The three statuses described in *section 805* can also be grouped according to the same logical distinction. Those whose staff privileges have been cut off and those who had conditions imposed on their privileges due to a medical disciplinary cause or reason in all likelihood have been charged with some type of medical misconduct that occurred while working at the health facility that took that action. Those whose applications for staff membership are denied or rejected for a medical disciplinary cause [*1238] or reason are likely to be first time applicants who drew negative reports from their current or former employers.

> 8 We recognize that a medical [***26] licensee who enjoys one type of staff privilege may apply for another type of privilege at the same health facility. Arguably, that person is an initial applicant for the new privilege or category of staff membership. In fact, as discussed below, the hospital's own bylaws provide for this scenario, placing the burden of proof on an initial applicant for a new category of privilege or staff membership. However, if that application is denied for a medical disciplinary cause or reason for purposes of *section 805,* the health care facility would likely be taking action against the licensee's existing privileges as well, thus shifting the burden of proof to the facility. We need not reach that issue here, however, and confine our analysis to licensees such as Bode who are applying from the outside for the first time.

(6) Under *section 805, subdivision (b)(2),* actions taken against staff privileges must be reported, and RIN101 staff privileges are broadly defined as *any arrangement* under which a licensee is allowed to practice at a health care facility, including but not limited to temporary staff privileges. Although Bode was an initial applicant, she was also granted temporary privileges, an arrangement [***27] that allowed her to provide patient care at L.A. Metro. 'Therefore, despite her original status as an initial applicant, the actions taken against Bode's privileges triggered the reporting requirements of *section 805, subdivision (b)(2).* (7) In short, based on the analysis set forth above, once the hospital granted her staff privileges as defined by *section 805,* it assumed the burden of proof at any hearing to justify taking action against those privileges for a medical disciplinary cause or reason. This would not have placed the burden of proof on the hospital if it had proceeded to consider Bodes initial application but, as we have observed, Bode on her own had withdrawn her application.

> 9 According to the bylaws, its grant of these privileges meant L.A. Metro had determined it was reasonably likely Bode was qualified and competent to exercise those privileges.

We find support for this interpretation in the hospital's own bylaws. They state that if an initial applicant for staff membership, privileges, or advancement in staff category has that application denied, the applicant bears the burden of proof at a hearing to contest the decision. In all other cases, the hospital bears the burden. [***28] Bode applied for and was granted temporary privileges and was therefore no longer an initial applicant for those privileges. Pursuant to the bylaws, L.A. Metro's medical executive committee bore the burden of proof for a suspension and nonrenewal of those privileges at the fact-finding hearing before the judicial review committee.

The appellate review committee therefore committed legal error when it upheld the adverse actions against Bode's privileges by placing the burden of proof on her. Accordingly, we affirm the trial court's judgment to the extent it was based on the burden of proof issue. [*1239]

[**901] *5. Substantial Evidence Supported the Judicial Review Committee Rulings Based on a Proper Allocation of the Burden of Proof*

As noted in part 3 of our discussion, *ante,* we review the judicial review committee's decision to determine whether it was supported by substantial evidence, then compare our conclusions with those reached by the appellate review committee. Because of our holding on the burden of proof issue, the only matter left for determination is the judicial review committee's alternative finding that the actions taken against Bode's privileges were not warranted if the hospital bore [***29] the burden of proof.

The hospital does not address this scenario, confining its argument to the notion that the appellate review committee could reweigh the evidence, and that we must review that body's decision for substantial evidence. We therefore deem the issue waived. *(Landry v. Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700 [46 Cal. Rptr. 2d 119].)* We alternatively conclude that substantial evidence supports the judicial review committee's decision under the correct burden of proof.

The judicial review committee found that of the six January 2003 documentation and reporting incidents, one was completely unfounded and the other five were founded only in part. The committee found that the letter warning Bode that further discipline, including suspension of her privileges, could result if such incidents reoccurred, was warranted. As to each incident, however, the judicial review committee expressly declined to find that Bode's care was deficient or inappropriate. The record showed that Bode received training to prevent recurrences of such incidents, and that the training had been "very successful." No other problems were reported until the March 18 incident that led to the suspension and [***30] nonrenewal of Bode's privileges. The judicial review committee was unable to determine what happened to the missing ampule of Demerol. Given nurse Vargas's initial act of signing off for its return to the Sure-Med system, followed by her conflicting versions after the Demerol went missing, the judicial review committee was justified in concluding that there was no way to apportion blame for the disappearance, and that the medical executive committee therefore failed to prove that Bode had been responsible. Because Bode appeared to have corrected the behavior that led to the January warnings, and because the medical executive committee failed to prove Bode was responsible for the missing Demerol, there was substantial evidence to support the judicial review committee's decision that, when the burden of proof was placed on the hospital, there was no good cause for the actions taken against Bode's privileges. As a result, the appellate review committee erred by concluding otherwise. [*1240]

DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondent shall recover her appellate costs.

Bigelow, **J.,** and Bauer, **J., *** concurred.

A petition for a rehearing was denied July 6, 2009, and appellant's petition for review by the Supreme Court was denied September 9, 2009, S174802.

* Judge of the Orange Superior Court, assigned by the [***31] Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

Received
June 17, 2011
Commission on
State Mandates

TAB “5”

DARRYL BROWN, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.

No. B148286.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

102 Cal. App. 4th 155; 125 Cal. Rptr. 2d 474; 2002 Cal. App. LEXIS 4664; 2002 Cal. Daily Op. Service 9703; 2002 Daily Journal DAR 10887

September 19, 2002, Decided
September 19, 2002, Filed

SUBSEQUENT HISTORY: [*1]** Review Denied January 15, 2003, Reported at: *2003 Cal. LEXIS 234.*

PRIOR HISTORY: Superior Court of Los Angeles County, No. BS062713, Dzintra Janays, Judge.

DISPOSITION: The judgment is reversed and the cause is remanded to the trial court with directions to issue a peremptory writ of mandate compelling city to afford Brown an administrative appeal hearing conducted pursuant to a procedure which comports with the requirements of due process; pending that hearing, city is to pay Brown backpay for the period beginning 18 days after the date he requested an administrative appeal and continuing up to the date he is afforded a hearing which comports with the requirements of due process. Appellant is entitled to costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff police officer filed a verified petition for writ of mandate challenging the downgrade by defendants, the City of Los Angeles and the Chief of Police (department), of his advanced paygrade position from Police Officer III to Police Officer II. The Los Angeles County Superior Court, California, denied his petition. The officer appealed.

OVERVIEW: It was uncontested that the department's action with respect to the officer was "punitive" within the meaning of *Cal. Gov't Code § 3304(b),* and the officer was entitled to an administrative appeal. On appeal defendants contended that the officer lacked a property interest in his advanced paygrade. The court disagreed, finding that the specific and substantive criteria imposed under Los Angeles Police Department Manual, vol. 3, §§ 763.55, .60, sufficiently controlled the department's discretion so as to support the officer's claim of a property interest in his advanced paygrade. Defendants further argued that the officer failed to exhaust administrative remedies and that the procedures for administrative appeal set out in Los Angeles Police Department Administrative Order No. 15 satisfied due process requirements. The court disagreed, holding that the procedures, by placing the burden of proof on the officer, by failing to require that the department's decision be based on an application of pertinent substantive criteria, and by failing to provide for a neutral final decision-maker, created a risk of unfairness that failed to comport with due process.

OUTCOME: The court reversed the superior court's judgment and remanded with directions to issue a peremptory writ of mandate compelling defendant City to afford the officer an administrative appeal hearing conducted pursuant to a procedure comporting with the re-

quirements of due process, and to pay the officer back pay pending that hearing. The court awarded the officer costs on appeal.

LexisNexis(R) Headnotes

Governments > Local Governments > Employees & Officials
[HN1] See former City of Los Angeles, Cal., Charter § 202(1).

Administrative Law > Agency Adjudication > Review of Initial Decisions
Governments > Local Governments > Charters
Governments > Local Governments > Employees & Officials
[HN2] Under former City of Los Angeles, Cal., Charter § 202(13)(e), the Board of Rights, upon a finding of guilty, was required to prescribe its penalty by written order of either suspension for a definite period not exceeding six months with total loss of pay, and with or without reprimand; or demotion in rank, with or without suspension or reprimand or both; or reprimand without further penalty; or of removal. Under the City of Los Angeles, Cal., City Charter, the Board of Rights does not have the authority to prescribe a penalty of a reduction in paygrade.

Governments > Local Governments > Employees & Officials
[HN3] See former City of Los Angeles, Cal., Charter § x 202(13)(f).

Governments > Local Governments > Employees & Officials
[HN4] Los Angeles Police Department Manual, vol. 3, § 763.60, provides essentially a progressive discipline procedure when an officer's immediate supervisor becomes aware that the officer is not satisfactorily performing the duties of his or her advanced paygrade position. The supervisor must first counsel the officer regarding the deficiencies and complete various written forms; if the deficiencies continue, the commanding officer is required to complete a performance evaluation report and other interdepartmental correspondence citing the reasons for recommending a reduction in paygrade; the officer must be advised of the right to provide a written response within 30 days of notice of the proposed reassignment to a lower paygrade. All documentation, including the officer's response, must be forwarded to the Commanding Officer, Human Resources Bureau.

Governments > Local Governments > Employees & Officials
[HN5] An exception to the progressive discipline procedure in the Los Angeles Police Department Manual, vol. 3, § 763.60, provides as follows: when an officer's clearly demonstrated failure or inability to satisfactorily perform the duties of his or her advanced paygrade position indicates the need for an immediate reassignment in the best interests of the department, the commanding officer shall temporarily place the officer in a lower paygrade assignment and shall, without delay, forward a Form 15.2, and a Form 1.40 through channels to the Commanding Officer, Human Resources Bureau. The officer shall receive the same paygrade salary pending the concurrence of the Commanding Officer, Human Resources Bureau, in the recommendation that the officer be reassigned to a lower paygrade.

Administrative Law > Agency Adjudication > Review of Initial Decisions
Criminal Law & Procedure > Trials > Judicial Discretion
Governments > Local Governments > Employees & Officials
[HN6] See former City of Los Angeles, Cal., Charter § 202(13)(e).

Administrative Law > Agency Adjudication > Review of Initial Decisions
Governments > Local Governments > Employees & Officials
[HN7] See former City of Los Angeles, Cal., Charter § 202(18).

Administrative Law > Agency Adjudication > Review of Initial Decisions
Governments > Local Governments > Employees & Officials
[HN8] See former *Cal. Gov't Code § 3304(b).*

Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies
Civil Procedure > Justiciability > Exhaustion of Remedies > Failure to Exhaust
Labor & Employment Law > Collective Bargaining & Labor Relations > Exhaustion of Remedies
[HN9] A party is not required to exhaust the available administrative remedies when those administrative procedures are the very source of the asserted injury. This

rule is merely another facet of the inadequate administrative remedy exception to the exhaustion rule.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Civil Procedure > Justiciability > Exhaustion of Remedies > General Overview
[HN10] A remedy is not adequate if it does not square with the requirements of due process.

Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN11] A trial court's decision on a contention regarding procedural matters that presents a pure question of law involving the application of the due process clause is reviewed de novo. Where the issue presented is on undisputed facts and one of law, an appellate court exercises its independent judgment. Further, to the extent an appellate court is called upon to interpret statutes or rules dealing with employment of public employees, such issues involve pure questions of law which an appellate court resolves de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Substantive Due Process > Scope of Protection
[HN12] The *Fourteenth Amendment to the United States Constitution* places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Property interests that are subject to due process protections are not created by the federal Constitution. Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN13] "Property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by existing rules or understandings. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit.

Constitutional Law > Substantive Due Process > Scope of Protection
[11N14] For purposes of due process analysis, a governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. Property cannot be defined by the procedures for its deprivation.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN15] California state law or a city rule or regulation may confer a property interest in a benefit if it imposes particularized standards or criteria that significantly constrain the discretion of the city with respect to that benefit. A statute, rule or regulation may create an entitlement to a governmental benefit either if it sets out conditions under which the benefit must be granted or if it sets out the only conditions- under which the benefit may be denied.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN16] Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, such an interest is created if the procedural requirements are intended to be a significant substantive restriction on decision making. Accordingly, while a governing body may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such interest, once conferred, without appropriate procedural safeguards.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN17] In the context of determining whether an employee has a property interest in a benefit for due process purposes, when permitted by state law the conferring of a benefit need not be formally expressed in a statute or a written contract; it can be implied from words or conduct. Nevertheless, there must be rules or mutually clear understandings securing the commitment.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN18] In a practical sense a permanent employee's property interest in continued employment embraces his current classification as well as his current salary.

Governments > Local Governments > Employees & Officials
[1-1N19] An officer below the rank of lieutenant in an advanced paygrade position may be reassigned to a lower paygrade position within his/her classification when one

of the following conditions exists: an officer requests reassignment; an officer completes a fixed tour of duty in a position; a position is eliminated; or when an officer clearly demonstrates his/her failure or inability to satisfactorily perform the duties of the position.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > Neglect of Office > Elements
Governments > Local Governments > Employees & Officials
[HN20] When an officer is being reassigned for failure or inability to satisfactorily perform duties, the officer cannot be reassigned to a lower paygrade arbitrarily or without cause; rather, to be subject to a reassignment, it must be shown that the officer clearly has failed to satisfactorily perform the duties of the paygrade position. The officer must be counseled regarding the poor performance and be afforded an opportunity to improve. After the officer "continues" to demonstrate a failure to satisfactorily perform duties, the supervisor can institute proceedings to downgrade the officer. Further, the officer must clearly demonstrate failure or inability to perform his or her duties, and the failure or inability must indicate the need for immediate reassignment.

Constitutional Law > Substantive Due Process > Scope of Protection
Governments > Local Governments > Employees & Officials
[HN21] By providing that an officer may be subjected to a reduction in paygrade for specified reasons and under certain conditions, Los Angeles Police Department Manual, vol. 3, §§ 763.55, .60, restrict the authority of the City of Los Angeles Police Department to initiate a reduction in paygrade to those specified reasons. The express language in those sections imposes certain restrictions on the department's decision-making authority, thus creating expectations and entitlements which are sufficient to give rise to a property interest within the meaning of the due process clause.

Governments > Local Governments > Employees & Officials
[HN22] If an employee is subject to discharge only for cause, the employee has a property interest which is entitled to constitutional protection.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[111N23] Generally, due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Constitutional Law > Substantive Due Process > Scope of Protection
[1-11N24] What procedures are constitutionally required under the Fourteenth Amendment if the state seeks to deprive a person of a protected interest is determined by federal law, not state law. To determine what process is constitutionally due, courts generally balance three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN25] Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Constitutional Law > Substantive Due Process > Scope of Protection
Governments > Local Governments > Employees & Officials
[HN26] In the context of determining whether an employee has a property interest warranting due process protection, it is recognized that an employee has a significant private interest in the uninterrupted receipt of his paycheck, indicating that the interest affected by the reduction in paygrade is significant.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN27] Because the Fourteenth Amendment protects the pursuit of one's profession from abridgment by arbitrary state action, it is recognized that when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Governments > Local Governments > Employees & Officials
Labor & Employment Law > Employee Privacy > Disclosure of Employee Information > Public Employees
[HN28] At a minimum, an individual entitled to procedural due process should be accorded: written notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made. Moreover, while due process does not require the employer to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, a public employee is entitled to a full evidentiary hearing after the disciplinary action is imposed.

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN29] In the circumstance where the administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to the punitive action, it is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges. The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose.

Administrative Law > Agency Adjudication > Impartiality > Participation in Prosecution
Administrative Law > Separation of Powers > Constitutional Controls > General Overview
[1-1N30] In administrative disciplinary matters, the combination of adjudicative and investigative functions, without more, does not offend due process, and a decisionmakers mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city police officer petitioned for a writ of mandate challenging the city police department's downgrade of his advanced pay grade position from Police Officer III to Police Officer II. The trial court denied the petition, finding that the officer failed to exhaust his administrative remedies, that he held no property interest in his advanced pay grade, and that the department's procedures for administrative appeal satisfied due process requirements. (Superior Court of Los Angeles County, No. BS062713, Dzintra I. Janays, Judge.)

The Court of Appeal reversed the judgment and remanded the cause to the trial court with directions to issue a peremptory writ of mandate compelling the city to afford the officer an administrative appeal hearing that comported with the requirements of due process, and to pay the officer specified backpay. The court held that the police department manual created expectations and entitlements, with respect to the officer's pay grade, which were sufficient to give rise to a protected property interest in the pay grade within the meaning of the due process clause. The court further held that the administrative appeals procedure established by the department failed to provide adequate due process protection to an officer challenging the department's downgrade of the officer's advanced pay grade position, since the procedure placed the burden of proof on the officer, it failed to require that the department shoulder the burden of establishing the requirements for reduction in pay grade, and it violated the requirement that the decision maker be neutral, since the chief of police initially authorized the punitive action and was also the final decisionmaker on the administrative appeal. The court held that the officer was not entitled to a retroactive set aside of the reduction in pay grade, but the officer was entitled to backpay. (Opinion by Lillie, P. **J.,** with Woods and Perluss, **JJ.,** concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1)Administrative Law § 89--Judicial Review and Relief--Limitations on Availability of Review and Relief--Exhaustion of Administrative Remedies--Exceptions. --A party is not required to exhaust the available administrative remedies when those administrative procedures are the very source of the asserted injury. This rule is another facet of the inadequate administrative remedy exception to the exhaustion rule. A

remedy is not adequate if it does not square with the requirements of due process.

(2)Mandamus and Prohibition 74--Mandamus--Review--Standard of Review--Questions of Law. --On appeal from the trial court's denial of a petition for a writ of mandate, where the appellant's contention regarding procedural matters presents a pure question of law involving the application of the due process clause, the appellate court reviews the trial court's decision de novo. Where the issue presented is on undisputed facts and one of law, the reviewing court exercises its independent judgment. To the extent the court is called upon to interpret statutes or rules dealing with employment of public employees, such issues involve pure questions of law that the court resolves de novo.

(3)Constitutional Law § 102--Due Process--Property Interest--As Created by State Law. --*U.S. Const., 14th Amend.,* places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of property within the meaning of the due process clause. Property interests that are subject to due process protections are not created by the federal Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

(4)Constitutional Law § 102--Due Process--Property Interest--What Constitutes. --Property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by existing rules or understandings. A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support the person's claim of entitlement to the benefit.

(5)Constitutional Law § 102--Due Process--Property Interest--Creation of Interest. --A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. California state law or a city rule or regulation may confer a property interest in a benefit if it imposes particularized standards or criteria that significantly constrain the discretion of the city with respect to that benefit. A statute, rule, or regulation may create an entitlement to a governmental benefit either if it sets out conditions under which the benefit must be granted or if it sets out the only conditions under which the benefit may be denied.

(6)Constitutional Law § 102--Due Process--Property Interest--Creation of Interest--Public Employment. --Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, such an interest is created if the procedural requirements are intended to be a significant substantive restriction on decisionmaking. Accordingly, while a governing body may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such interest, once conferred, without appropriate procedural safeguards. When permitted by state law, the conferring of a benefit need not be formally expressed in a statute or a written contract; it can be implied from words or conduct. Nevertheless, there must be rules or mutually clear understandings securing the commitment. In a practical sense, a permanent employee's property interest in continued employment embraces his or her current classification as well as current salary.

(7)Law Enforcement Officers 9--Police--Compensation--Protected Property Interest--Based on Police Manual--Reassignment to Lower Pay Grade: Constitutional Law § 102--Due Process. --A police department manual created expectations and entitlements, with respect to a police officer's pay grade, which were sufficient to give rise to a protected property interest in the pay grade within the meaning of the due process clause. The manual provided that an officer in an advanced pay grade could be reassigned to a lower pay grade if the officer clearly demonstrated a failure or inability to satisfactorily perform the duties of the pay grade position. Thus, an officer could not be reassigned to a lower pay grade arbitrarily or without cause; rather, it had to be shown that the officer clearly failed to satisfactorily perform the duties of the pay grade position. Thus, by providing that an officer could be subjected to a reduction in pay grade for specified reasons and under certain conditions, the manual restricted the police department's authority to initiate a reduction in pay grade to those specified reasons. The manual imposed sufficiently specific and substantive criteria controlling the department's discretion such as to create a property interest in the pay grade.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 481 et seq.]

(8a)(8b)Law Enforcement Officers § 9--Police--Compensation--Downgrade of Officer's Advanced Pay Grade--Appeals Procedure--Procedural Due Process--Burden of Proof--Requirements for Downgrade--Neutral Decision Maker: Constitutional Law § 109--Due Process. --The administrative appeals procedure established by a city police department failed to provide adequate due process protection to an officer challenging the department's downgrade of the officer's advanced pay grade position, since the procedure placed the burden of proof

on him Also, the department was required to establish the requirements for reduction in pay grade, as set out in the police department manual. However, the administrative appeals procedure failed to require the department to do so. Thus, the appeal process failed to afford even the most minimal safeguards to protect the erroneous deprivation of the officer's property interest. The procedure also violated the requirement that the decision maker be neutral, since the chief of police initially authorized the punitive action and was also the final decision maker on the administrative appeal. Thus, the procedure failed to inspire confidence that it afforded the officer a meaningful administrative appeal.

(9a)(9b)Constitutional Law § 107--Due Process--Procedural Due Process--Required Procedures--As Determined by Federal Law--Factors. --Generally, due process is the opportunity to be heard at a meaningful time and in a meaningful manner. What procedures are constitutionally required under *U.S. Const., 14th Amend.,* if the state seeks to deprive a person of a protected interest, is determined by federal law, not state law. To determine what process is constitutionally due, courts balance three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest. At a minimum, an individual entitled to procedural due process should be accorded written notice of the grounds for the disciplinary measures, disclosure of the evidence supporting the disciplinary grounds, the right to present witnesses and to confront adverse witnesses, the right to be represented by counsel, a fair and impartial decision maker, and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made. Moreover, while due process does not require the employer to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, a public employee is entitled to a full evidentiary hearing after the disciplinary action is imposed.

(10)Constitutional Law § 107--Due Process--Procedural Due Process--Required Safeguards--Factors. --Under the California Constitution, the extent to which procedural due process is available depends on a weighing of the private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds, and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

(11)Constitutional Law § 107--Due Process--Procedural Due Process--Determinations Affecting Employment. --An employee has a significant private interest in the uninterrupted receipt of his or her paycheck, indicating that the interest affected by the reduction in pay grade is significant. Because *U.S. Const., 14th Amend.,* protects the pursuit of one's profession from abridgment by arbitrary state action, it has been recognized that when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

(12)Administrative Law § 55--Administrative Actions--Adjudication--Hearing--Burden of Proof. --In the circumstance where an administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to a punitive action, it is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges. The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose.

(13)Law Enforcement Officers 9--Police--Compensation--Downgrade of Officer's Advanced Pay Grade--Appeals Procedure--Procedural Due Process--Selection of Hearing Officer: Constitutional Law § 109--Due Process. --The administrative appeals procedure established by a city police department did not violate the procedural due process rights of an officer challenging the department's downgrade of his advanced pay grade, insofar as the procedure required that the pool of hearing officers be selected from members of the department of the rank of captain through deputy chief. The hearing officers were department employees, who, like the officer, had the same incentives as him to perform their job duties fairly and well, and who, like the officer, were peace officers protected by the Public Safety Officers Procedural Bill of Rights. Moreover, it was the officer who initially selected the three potential hearing officers from the pool of eligible hearing officers.

(14)Law Enforcement Officers 9--Police--Compensation--Downgrade of Officer's Advanced Pay Grade--Appeal--Retroactive Set Aside of Reduction in Pay Grade--Entitlement to Backpay. --In proceedings in which a city police officer challenged the city police department's downgrade of his advanced pay grade, and asserted that the department was collaterally estopped from basing a reduction in pay grade on charges as to which he was exonerated by the board of rights, the appellate record was insufficient to make a determination in the officer's favor. The record indicated that the department based its reduction in pay grade not only on the incidents for which the officer was subsequently exonerated after hearings before the board of rights, but also on several prior personnel complaints, as well as another incident that was still being investigated. It was for the department, or a hearing officer, to decide in the first instance whether those remaining incidents for which the officer was not exonerated were sufficient to support a reduction in pay grade. Thus, the trial court correctly denied that part of the officer's petition for writ of mandate seeking to retroactively set aside his reduction in pay grade. However, the officer was not barred from seeking backpay on appeal, based on the failure to raise the issue in his proposed statement of decision in the trial court. Given the rationale of the trial court's judgment, that judgment implicitly denied backpay, and it was unnecessary for the trial court to explain the basis for its denial. That issue was litigated below, and it was preserved for review. Since the officer successfully challenged the adequacy of the appeal procedures, he was entitled to backpay from the time he was deprived of an adequate appeal hearing, up to the time of any future hearing held under proper procedural due process principles.

COUNSEL: Silver, Hadden & Silver, Stephen H. Silver, Susan Silver and Elizabeth S. Tourgeman for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Cheryl Ward, Assistant City Attorney, and Matthew C. St. George, Deputy City Attorney, for Defendants and Respondents.

JUDGES: (Opinion by Lillie, P. J., with Woods and Perluss, JJ., concurring.)

OPINION BY: LILLIE

OPINION

LILLIE, P. [*16 1] J.

[**477] Darryl Brown (Brown), a police officer for the City of Los Angeles Police Department (Department), appeals from a judgment denying his petition for writ of mandate challenging the Department's downgrade of his advanced pay grade position from Police Officer **III** to Police Officer **II.** His principal contentions are that the trial court erred in determining (1) he held no property interest in his advanced pay grade, [***2] (2) his petition was premature for failure to exhaust administrative remedies, and (3) procedures for administrative appeal set out in Los Angeles Police Department Administrative Order No. 15 satisfy due process requirements. Brown also challenges the failure of the trial court to grant his request for backpay due to defendants' failure to provide him with a timely administrative appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Administrative Proceedings.*

Brown was appointed to the Department in November 1989; in 1990 he was promoted to Police Officer **II.** In 1992 Brown was assigned to the Van Nuys area. In July 1997, he was granted an advanced pay grade to Police Officer III, also known as a Field Training Officer, responsible for training probationary police officers. The Los Angeles City Administrative Code provides for salary levels within a civil service class for pay-setting purposes only; these salary levels are known as pay grades. In the Department, the civil service class of police officer has pay grades of Police Officer I, Police [* 162] Officer **II,** and Police Officer III. The Department has adopted rules and procedures for advancement and downgrade [***3] of pay grade within a class. The Los Angeles Police Department Manual, volume 3, sections 763.55 and 763.60 (hereinafter Department Manual Section 763.55 or Section 763.60), provides the current rules and procedures involving administrative downgrades.

On July 28, 1998, Brown was off duty at his residence when he received a telephone call from a police service representative who told Brown she was being chased by a reckless driver near his home; Brown told her to drive to a gas station; soon thereafter, Brown met her at the gas station. Brown detained the reckless driver until on-duty police officers could arrive. The reckless driver accused Brown of using force in an altercation.

On June 24, 1999, Brown was served with notice that he was subject to discipline for alleged misconduct arising out of the July 1998 detention of the reckless [**478] driver and alleged false and misleading statements Brown made during an internal affairs interview about the July 1998 incident. Pursuant to Los Angeles City Charter section 202, Brown was ordered to appear at a hearing before the Department's Board of Rights (Board of Rights), which is empowered to conduct a hearing and render recommendations to the chief of police [***4] regarding the appropriate form and degree of discipline; the chief may accept or reduce any recommended discipline, but may not increase it.

1 The city charter was revised and renumbered on July 1, 2000. Former section 202, involved on this appeal, now appears in section 1070. Citations to the city charter herein shall refer to the city charter in effect prior to July 1, 2000.

[HN1] Los Angeles City Charter section 202 (LACC Section 202) provides in pertinent part: "(1) The rights of a tenured officer of the Police Department . . . to hold his or her office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he or she shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No tenured officer of the Department shall be suspended, demoted in rank, suspended and demoted in rank, removed, or otherwise separated from the service of the Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair, and impartial hearing before a Board of Rights . . ."

2 [HN2] Under the provisions of LACC, Section 202(13)(e), the Board of Rights, upon a finding of guilty, was required to prescribe its penalty "by written order of either suspension for a definite period not exceeding six months with total loss of pay, and with or without reprimand; or demotion in rank, with or without suspension or reprimand or both; or reprimand without further penalty; or of removal . . ."

Under the city charter, the Board of Rights did not have the authority to prescribe a penalty of a reduction in pay grade. [HN3] Under LACC, Section 202(13)(f), a "demotion in rank shall mean reduction in civil service classification. The provisions of this section shall not apply to reductions in pay grade or similar personnel actions caused by reassignment, deselection from bonused positions, and the like. Such reductions shall be administered under policies adopted by the Department."

Also on June 24, 1999, the commanding officer of the Van Nuys Community Police Station sent a memorandum to the commanding officer of the [*163] human resources [***6] bureau recommending that Brown's pay grade of Police Officer III be reduced, apparently pursuant to the "Exception" provision of Department Manual Section 763.60.

3 Department Manual Section 763.60 was apparently adopted pursuant to LACC, Section 202(13)(f). [HN4] Section 763.60 provides essentially a progressive discipline procedure "[w]hen an officer's immediate supervisor becomes aware that the officer is not satisfactorily performing the duties of his or her advanced pay grade position." The supervisor must first counsel the officer regarding the deficiencies and complete various written forms; if the deficiencies continue, the commanding officer is required to complete a performance evaluation report and other interdepartmental correspondence citing the reasons for recommending a reduction in pay grade; the officer must be advised of the right to provide a written response within 30 days of notice of the proposed reassignment to a lower pay grade. All documentation, including the officer's response, must be forwarded to the commanding officer, human resources bureau.

[HN5] Section 763.60 provides an exception to the above procedures: "EXCEPTION: When an officer['s] clearly demonstrated failure or inability to satisfactorily perform the duties of his or her advanced pay grade position, indicate the need for an immediate reassignment in the best interests of the Department, the commanding officer shall temporarily place the officer in a lower pay grade assignment and shall, without delay, forward a Form 15.2, and a Form 1.40 through channels to the Commanding Officer, Human Resources Bureau. The officer shall receive the same pay grade salary pending the concurrence of the Commanding Officer, Human Resources Bureau, in the recommendation that the officer be reassigned to a lower pay grade."

[***7] [**479] The memorandum stated that the reduction in pay grade "is taken separate and apart from any discipline that may result from the referenced, pending personnel investigations." As cited in the memorandum, the grounds for such reduction included the July 1998 incident as well as several personnel complaints from 1990 to 1997; the memorandum also detailed two 1998 disciplinary actions resulting in Brown's suspension for 15 and five days respectively; in the first incident, the Board of Rights found Brown guilty of failing to register his vehicle and discourtesy to Department officers who stopped him for a traffic violation ; in a second 1998 incident, the Department suspended Brown for five days for threatening violence to a juvenile while on duty.'

4 Brown alleges that he was the victim of a racially motivated traffic stop; his claim is currently the subject of a federal civil rights lawsuit brought

after he received a right to sue letter from the Equal Employment Opportunity Commission. Brown alleges that the Department was reinvestigating the matter that led to his discipline because the initial investigation was inadequate or incomplete.

[***8]

5 In a May 12, 2000, decision, the Board of Rights found Brown not guilty of any misconduct in connection with this April 20, 1998, incident involving a juvenile.

Following the June 24, 1999, memorandum, Chief of Police Bernard Parks approved the administrative downgrade; effective July 21, 1999, Brown was downgraded to the pay grade of Police Officer II, which loss in pay equals [*164] approximately $ 3,203 per year; he was also transferred to North Hollywood Patrol Division, where he was assigned to work at the desk, an assignment commonly viewed as an additional form of punishment. Brown was not counseled or afforded any notice to correct deficiencies prior to the reduction of his pay grade to Police Officer II. In September 1999, Brown timely filed an administrative appeal with respect to his downgrade. However, because the Department and the Los Angeles Police Protective League (League) were then in the process of negotiations regarding implementation of appeal procedures, Brown's appeal was, according to defendants, "held in abeyance by agreement between the Department and the League. [***9] "

The Board of Rights hearing on the complaint involving the July 1998 incident was held on September 21 and 22, 1999. The Board of Rights found Brown not guilty of all counts of alleged misconduct relating to the July 28, 1998, incident and relating to the subsequent internal affairs interview. LACC, Section 202(13)(e) provides that [HN6] "If the accused is found 'not guilty,' the Board shall order the officer's restoration to duty without loss of pay and without prejudice, and such order shall be self-executing and immediately effective." [HN7] LACC Section 202(18) provides in pertinent part that "In any case of exoneration of the accused after a hearing before a Board of Rights, such exoneration shall be without prejudice to such officer."

Brown claims that his job performance has been excellent. A performance evaluation report by the Van Nuys Division for the period of September 1997 to August 31, 1998, rated his job performance strong in all areas and recommended that he "can best improve his performance by promoting to Sergeant." His performance evaluation report by the North Hollywood Patrol Division for the period June 6, 1999, to August 31, 1999, noted [***10] that Brown "displays a strong work ethic and is attentive to his job," and "is a good addition to the North Hollywood team."

[**480] After his transfer to North Hollywood in July 1999, Brown apparently received some negative performance ratings in a Van Nuys Division transfer report for the period from September 1998 through July 1999. Brown filed a grievance with respect to such evaluation, and in January 2000, an amended transfer report evaluated Brown as "strong" (the highest rating) in only a few areas, and "competent" (the middle level rating, just above "needs improvement") in all others. Although the transfer report noted that Brown received five commendations, it also detailed Brown's complaint history before the July 28, 1998, incident, and concluded that "the latest incident, when viewed in conjunction with Brown's complaint history, constituted a pattern of poor judgment inconsistent with the increased responsibility and trust inherent in the position of Training Officer." The amended transfer report also stated [*165] that the "mention of his downgrade was also left in the rating. The downgrade is based on a pattern of conduct he exhibited from before and during [***11] this rating period. The guilt or innocence of his personnel complaint that also resulted from this conduct is a separate issue and was not mentioned or referred to in the rating." [6]

6 This amended transfer report was prepared after the Board of Rights exonerated Brown of the charges arising out of the July 1998 incident.

B. *Trial Court Proceedings.*

On April 17, 2000, Brown filed a verified petition for writ of mandate challenging his reduction of pay grade on essentially three grounds. In a "first cause of action," Brown alleged that his reduction in pay grade, after being exonerated by the Board of Rights, subjected him to double punishment in violation of LACC Section 202(18) and *Penal Code section 654.* In a "second cause of action," Brown alleged that the Department failed to follow the procedures prescribed in Department Manual Section 763.60 prior to reducing his pay grade, in that he was not counseled or given any notice to correct deficiencies; he further [***12] alleged that the July 28, 1998, incident was not, standing alone, sufficient to invoke the "Exception" in Section 763.60. In a "third cause of action," Brown alleged that the Department violated *Government Code section 3304, subdivision (b)* by failing to provide him with a timely and adequate administrative appeal following his September 1999 request. ' Brown sought appropriate back compensation and benefits, attorneys fees, and a writ commanding defendants to set aside his reduction in pay grade or to afford him a prompt and adequate administrative appeal consonant with due process principles.

7 [HN8] *Government Code section 3304, subdivision (b),* provided: "No punitive action, nor

> denial of promotion on grounds other than merit, shall be undertaken by any public agency . . . without providing the public safety officer with an opportunity for an administrative appeal." This section was recently amended; the amendment is not pertinent to this appeal.

Brown also alleged in [***13] his petition that he had exhausted all available administrative remedies; that the only administrative remedies available to him are futile, and he had done all things necessary, if any, prior to maintenance of this action.

In May 2000, defendants City of Los Angeles and Bernard Parks (hereinafter referred to collectively as the Department) answered the petition for writ of mandate, asserting as an affirmative defense, inter alia, that Brown failed to exhaust all his administrative remedies.

After the parties had filed briefs, the court held a hearing on the petition on September 13, 2000. At that time, the Department [**481] informed the court that [*166] it had not yet implemented an administrative appeal process but it intended to implement its last, best offer to League, which was then embodied in a special order (Administrative Order No. 15), which was ready to go to the chief of police for his approval. Brown's brief had contended that even if the administrative appeal procedure in the last best offer was adopted by the Department, that procedure still was inadequate and did not meet the requirements of due process. Nevertheless, the court did not allow Brown to argue the point [***14] at that time; the court stated that it was concerned about the exhaustion of administrative remedies issue, that it was continuing the matter because it hoped that the Department "might decide this matter [administrative appeal procedures] deserves some attention . . . ." The court stated that it would not decide the petition at that time because "right now I would probably deny your petition . . . for failure to exhaust the administrative remedies."

At a continued hearing on October 31, 2000, the court was informed that the Department expected to implement the new administrative appeal procedure set out in Administrative Order No. 15 sometime in early November. At the hearing on October 31, 2000, Brown again attempted to argue the issue of the inadequacy of the appeal procedures under due process principles and why he should not be required to exhaust administrative remedies under such circumstances. The court again refused to allow Brown to argue the issue, stating that it had read what was in Brown's papers and "unless there's something new and additional that couldn't have been in your papers, that there is no need to argue it further." The court stated that rather than argue the matter, [***15] it felt that "I ought to wait and see at least what happens on November 15 . . . when these new rules are supposed to be taking place."

When Brown's counsel again attempted to argue the issue of the futility of the administrative remedy, the court stated, "You are now arguing the merits of this petition for writ, and I am not going to get into that." Brown's counsel responded that she was "arguing the futility of the administrative appeal [procedures]." The court responded that since the special order implementing the new procedures was not yet signed by the chief of police, "I have no idea until I see [the administrative order] whatever this new thing will be." The court stated that it wanted to see the final, adopted procedures, and then it continued the matter to December 1, 2000; after the anticipated adoption of the appeal procedures in early November, the parties were permitted to file supplemental briefs on the issue of the adequacy of the administrative appeal procedures.

On November 15, 2000, Chief Parks signed Administrative Order No. 15, implementing the administrative appeal procedures therein. After supplemental briefs had been filed, and oral argument on December 1, 2000, the [***16] [*167] matter was submitted. On December 6, 2000, the court issued a minute order denying the petition "on responding party grounds."

A January 4, 2001, statement of decision states that the petition was denied "as premature for failure to exhaust administrative remedies." The court further found that Brown did not have a property interest in his advanced pay grade as "no such property interest can be found under constitutional due process principles as there is no basis in state law, local Charter or statute for such a claim and, further, that there is no understanding between the parties that such property interest exists." The court found that Brown was entitled to an administrative appeal of his downgrade under *Government Code section 3304, subdivision (b);* [**482] that Administrative Order No. 15 "provides due process rights and protections beyond those required by *Government Code section 3304(b), 3306,* and is in compliance with *Government Code sections 3304.5* and *3310";* [8] and that the order provides the following due process protections: notice of reasons [***17] for punitive action; right to appeal; representation at the hearing by a representative, legal counsel, or both; random, impartial selection of a hearing officer not in the chain of command or involved in the case; discovery of all reports and materials used to substantiate the decision; right to subpoena and examine witnesses; right to a transcript; and right to a copy of the written decision of the hearing officer and the decision of the chief of police.

> 8 *Government Code section 3300 et seq.* is known as the Public Safety Officers Procedural Bill of Rights Act.

Government Code section 3306 affords a public safety officer 30 days to file a written response to any adverse comment entered in his personnel file.

Government Code section 3304.5 provides: "An administrative appeal instituted by a public safety officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency."

Government Code section 3310 provides in pertinent part: Any public agency which has adopted . . . any procedure which at a minimum provides to peace officers the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure."

[***18] Judgment was entered dismissing without prejudice the petition for writ of mandate. Brown filed timely notice of appeal from the judgment. Brown contends that the trial court erred in determining he had no property interest in his advanced pay grade position and in determining that Administrative Order No. 15 complied with due process principles. Brown also contends that the trial court erred in failing to grant his request for backpay due to Department's failure to provide him with a timely administrative appeal, and in failing to grant his request to set aside the reduction in pay grade because LACC Section 202(18) requires reinstatement to his advanced pay grade after he was exonerated of all counts relating to the July 1998 incident, which formed the primary basis for the reduction in pay grade.

[*168] DISCUSSION

A. *Respondents' Request for Dismissal of Appeal.*

At the outset, we find without merit respondents' contention that the appeal should be summarily dismissed for appellant's alleged failure to address the issue of the failure to exhaust administrative remedies. Respondents argue that appellant's opening brief allegedly did not challenge the rationale of the [***19] judgment (i.e., that his petition was premature for failure to exhaust administrative remedies), and that appellant is therefore seeking review of issues not properly cognizable on this appeal.

We agree with appellant's argument that he is entitled to challenge that aspect of the judgment upholding the adequacy of the administrative appeal procedures in Administrative Order No. 15. To the extent that he is successful in showing the inadequacy of those procedures, he also would have established the futility of exhausting those administrative remedies. Thus, inherent in his challenge to the adequacy of the administrative remedy is a challenge to the correctness of the trial court's denial of the petition on the ground of failure to exhaust those administrative remedies. (1) [HN9] " 'A party is not required to exhaust the available administrative remedies when those administrative procedures [**483] are the very source of the asserted injury. [Citation.] This rule is merely another facet of the inadequate administrative remedy exception to the exhaustion rule.' " (*Unnamed Physician v. Board of Trustees (2002) 93 Cal. App. 4th 607, 621 [113 Cal. Rptr. 2d 309],* [***20] .) [BN10] A remedy is not adequate if it does not square with the requirements of due process. (*Id., at p. 620;* see also *Bockover v. Perko (1994) 28 Cal. App. 4th 479, 486 [34 Cal. Rptr. 2d 423] .)*

Inasmuch as the trial court addressed the merits of the issue of the adequacy of the administrative appeal procedures, which issue is also addressed by the parties, that issue is properly before us for review.

B. *Standard of Review.*

(2) [HN11] " 'Because [appellant's] contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the trial court's decision de novo.' [Citation.] Since the issue presented is on undisputed facts and one of law, we exercise our independent judgment. [Citation.] Further, to the extent we are called upon to interpret statutes or rules dealing with employment of public employees, such issues involve pure questions of law which we resolve de novo. [Citation.'" (*Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 107-108 [73 Cal. Rptr. 2d 523] , .)*

[*169] The [***21] first principal issue is whether the Department's reduction of Brown's pay grade implicated a property interest under federal due process analysis; if so, the second issue is whether the procedural protections afforded in Administrative Order No. 15 are adequate.

C. *Brown Had a Property Interest in His Advanced Pay Grade.*

(3) [HN12] " 'The *Fourteenth Amendment to the United States Constitution* "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." ' [Citation.] 'Property interests that are subject to due process protections are not created by the federal Constitution. "Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." ' " (*Bostean v. Los Angeles Unified School Dist., supra, 63 Cal. App. 4th 95, 108-109.))*

(4) "As the United States Supreme Court put it, [HN13] ' "property" interests subject to procedural due process protection are not limited by a few rigid, technical

forms. Rather, "property" denotes a broad range of interests that are secured [***22] by "existing rules or understandings." [Citations.] A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . *(Perry v. Sindermann [(1972)] 408 U.S. 593, 601 [92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570, 580] .)" (Mendoza v. Regents of University of California (1978) 78 Cal. App. 3d 168, 174 [144 Cal. Rptr. 117],* italics omitted [property interest grounded on university rule providing permanent employee could be dismissed only for cause].)

(5) [HN14] "A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. *See McGraw v. Huntington Beach, 882 F.2d 384, 389 (9th Cir. 1989)* (property cannot be defined by the procedures for its deprivation)." ([**484] *Sanchez v. City of Santa Ana (9th Cir. 1990) 915 F.2d 424, 428.)* [9]

> 9 "In *Cleveland Bd. of Education v. Loudermill (1985) 470 U.S. 532, 541 [105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494, 503] ,* the high court explained: '[T]he Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than life or liberty.' " (*Campbell v. State Personnel Bd. (1997) 57 Cal. App. 4th 281, 295 [66 Cal. Rptr. 2d 722] .)*

***23]* [HN15] California state law or a city rule or regulation may confer a property interest in a benefit if it imposes particularized standards or criteria that [*170] significantly constrain the discretion of the city with respect to that benefit. (*Allen v. City of Beverly Hills (9th Cir. 1990) 911 F.2d 367, 370.)* A statute, rule or regulation may create an entitlement to a governmental benefit either if it sets out conditions under which the benefit must be granted or if it sets out the only conditions under which the benefit may be denied. *(Ibid.)*

Thus, a city police officer was held to have a property interest in his merit pay when the city charter "treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons. *See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39, [105 S. Ct. 1487, 1491-92, 84 L. Ed. 2d 494] (1985)* (classified civil service employee had property interest in continued employment because a state statute provided that such employees may not be dismissed except for [***24] certain specified reasons) .....(*Sanchez v. City of Santa Ana, supra, 915 F.2d 424, 429 .))*

(6) [HN16] "Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, such an interest is created if the procedural requirements are intended to be a significant substantive restriction on . . . decision making." *(Stiesberg v. State of California (9th Cir. 1996) 80 F.3d 353, 356.)* Accordingly, while a governing body may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such interest, once conferred, without appropriate procedural safeguards. (*Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1114 [278 Cal. Rptr. 346, 805 P.2d 300] .)* [1-M17] When permitted by state law, the conferring of a benefit need not be formally expressed in a statute or a written contract; it can be implied from words or conduct. (*Nunez v. City of Los Angeles (9th Cir. 1998) 147 F.3d 867, 873, fn. 7.)* "Nevertheless, there must be rules or mutually clear understandings securing the commitment." *(Ibid [* **25] .)*

[HN18] "In a practical sense a permanent employee's property interest in continued employment embraces his current classification as well as his current salary." (*Ng v. State Personnel Bd. (1977) 68 Cal. App. 3d 600, 606 [137 Cal. Rptr. 387] .))*

(7) Appellant bases his property interest in his advanced pay grade on Department Manual Sections 763.60 *(ante,* fn. 3) and 763.55. Section 763.55 provides: [HN19] "An officer below the rank of lieutenant in an advanced pay grade position may be reassigned to a lower pay grade position within his/her classification when one of the following conditions exist: [P] An officer requests reassignment, or [P] An officer completes a fixed tour of duty in a [*171] position, or [P] A position is eliminated, or [P] When an officer clearly demonstrates his/her failure [**485] or inability to satisfactorily perform the duties of the position."

In this case, we are concerned only with the last ground cited in Department Manual Section 763.55. [HN20] When an officer is being reassigned for failure or inability to satisfactorily perform duties, the officer cannot be reassigned to a lower pay grade arbitrarily or without cause; rather, to be subject to [***26] a reassignment, it must be shown that the officer clearly has failed to satisfactorily perform the duties of the pay grade position. Under Section 763.60, the officer must be counseled regarding the poor performance and be afforded an opportunity to improve. After the officer "continues" to demonstrate a failure to satisfactorily perform duties, the supervisor can institute proceedings to downgrade the officer. Under the "Exception" set out in Section

763.60, restrictions are also placed on the decision maker: The officer must "clearly demonstrate[] failure or inability to perform" his or her duties, and the failure or inability must "indicate the need for immediate reassignment." Thus, [11N21] by providing that an officer may be subjected to a reduction in pay grade for specified reasons and under certain conditions, Sections 763.55 and 763.60 restrict the Department's authority to initiate a reduction in pay grade to those specified reasons. The express language in those sections imposes certain restrictions on the Department's decisionmaking authority, thus creating expectations and entitlements which are sufficient to give rise to a property interest within the meaning of the due process clause.

[***27] Respondents contend essentially that the foregoing provisions in the Department Manual are too vague to significantly limit the decision makers' discretion, providing only "an outline of relevant considerations." Respondents also argue that even if the language in Section 763.60 could be read to create "good cause" before the Department could reassign and reduce an officer's pay grade, a "good cause" standard does not create a constitutionally protected interest because it is not a significant substantive restriction on the Department's ability to act.

Respondents fail to cite any persuasive authority to support their claims. Respondents' reliance on *Schultz v. Regents of University of California (1984) 160 Cal. App. 3d 768 [206 Cal. Rptr. 910]* is misplaced, as *Schultz* held that the administrative reclassification of the plaintiffs job category, not in the context of a disciplinary action, did not give rise to the right to a full due process hearing. Here, respondents admitted below that the actions taken with respect to appellant fall within the definition of "punitive action" within the meaning of *Government Code section 3304, subdivision* [***28] *(b),* and that appellant is entitled to an administrative appeal. *(Ante,* fn. 7.)

[*172] Also inapposite is *Ass'n of Orange County Deputy Sheriffs v. Gates (9th Cir. 1983) 716 F.2d 733,* (hereinafter *Gates),* as that case involved the claim by retired sheriffs under medical disability that they had a property interest in a certificate to carry a concealed and loaded weapon. In *Gates,* the court held that the statutory requirement of "good cause" prior to the denial of a weapons certificate (former *Pen. Code, § 12027)* did not create a constitutionally protected interest because it was not a significant substantive restriction on the basis for the agency's action. (*Id., at p. 734.)* As *Gates* did not involve the issue of disciplinary matters affecting employment, and dealt with the situation where a plaintiff was seeking to secure a benefit in the first instance, we question its pertinence. Moreover, it has been " ' "widely recognized that [HN22] if the employee is subject to discharge only for cause, he has a property interest [**486] which is entitled to constitutional protection." ' " (*Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 722 [223 Cal. Rptr. 871],* [***29] .)

We submit that the Department Manual imposes sufficiently specific and substantive criteria controlling the Department's discretion as to create a property interest in the pay grade. In light of this conclusion we need not address appellant's contention that the Department is collaterally estopped to assert that he has no property interest in his pay grade in light of our unpublished opinion in *Cooper v. City of Los Angeles* (July 16, 2001, B142714). *Cooper* reached the same conclusion we have reached. In this regard, appellant has filed a request for judicial notice of the *Cooper* decision under *California Rules of Court, rule 977(b)(1).* Inasmuch as we have already resolved the issue in appellant's favor, we need not address the issue of collateral estoppel in this context and deny his request for judicial notice of the unpublished opinion. It is also unnecessary for us to address respondents' arguments regarding LACC Section 202; while respondents may be correct that there is nothing therein which creates the property interest, respondents fail to establish that any provision of the city [***30] charter precludes the Department from adopting rules which create a property interest in an advanced pay grade.

We now proceed to address the issue of whether the provisions of Administrative Order No. 15 meet the requirements of due process. Appellant does not contend in this case that he was entitled to a predeprivation hearing, so we do not address this point.

D. *Adequacy of Procedures in Administrative Order No. 15.* [10]

10 In connection with this issue, appellant requests that we take judicial notice of article 9 of the 2000 to 2003 Memorandum of Understanding (MOU) between the League and City of Los Angeles. The MOU refers to the administrative appeal procedures to challenge, among other things, "a transfer or assignment," which the parties apparently agree applies to a reduction in pay grade. A "Note" IN ARTICLE 9.2 PROVIDES: "The League and its members reserve the right to challenge a dispute concerning a transfer or assignment on constitutional or other legal grounds." Respondent has not filed opposition to appellant's request for judicial notice of the MOU. We grant appellant's request, although we do not rely upon the MOU to resolve any issue on this appeal.

Appellant asserts, correctly, that the League cannot waive or contract away appellant's due process rights. As stated by the court in *Giuffre v. Sparks (1999) 76 Cal. App. 4th 1322, 1330-1331 [91 Cal. Rptr. 2d 171]:* "We reject as without

merit the county's contention that once administrative appeal procedures are established pursuant to an MOU, those procedures control and are not subject to scrutiny or revision by the courts. Procedures established by an MOU are subject to scrutiny to determine whether they satisfy due process requirements and *[Government Code] section 3304."*

According to appellant's reply brief, the League has challenged the adequacy of the appeal procedures in a case now pending in Division Four of the Second District. *(Los Angeles Police Protective League v. City of Los Angeles,* B151027.)

[***31] Administrative Order No. 15 provides for an appeal procedure which includes the following features: (1) The employee must be served with [*173] written notice of the disciplinary action. Once an officer requests a hearing, a hearing officer must be selected within three days. (2) The appellant selects a hearing officer by drawing three names of members eligible to serve as a hearing officer (i.e., a member of the Department of the rank of captain through deputy chief). (3) The Department's representative and the appellant [**487] each strike one name, with the remaining member serving as the hearing officer. (4) No later than five days prior to the date of hearing, appellant is entitled to discovery of all reports and materials used to substantiate the decision to reduce the officer's pay grade. (5) The Department bears no burden of proof at the hearing; evidence is not required, but may be taken from the Department; if the Department elects to present a case, appellant is entitled to such notice at least two days prior to the date of the hearing, but the Department still bears no burden of proof at the hearing. (6) Appellant is entitled to compel attendance of, and/or subpoena, witnesses [***32] for the hearing. (7) The hearing officer must convene the hearing within 15 days of being selected, and shall review all reports and evidence. (8) The testimony shall be recorded and transcribed upon request; the employee shall be entitled to a certified copy without charge when the Department has obtained a copy of such transcript, otherwise the employee can obtain a copy of the transcript upon prepayment of the transcript fee. (9) Within 30 days of the conclusion of the hearing, the hearing officer must prepare a report recommending the grant or denial of the appeal and the reasons for such recommendation, and a penalty recommendation if the charges were sustained; appellant is entitled to a copy of the report. (10) After the hearing officer's report (but not necessarily the transcript of the evidentiary hearing) is forwarded to the chief of police, "the Chief of Police shall make the determination in the matter within twenty days of receiving the hearing officer's report." The order containing the final determination by the chief of police must then be served on appellant.

(8a) [* 174] [***33] Brown contends that Administrative Order No. 15 violates due process principles in four respects in that it (1) places no burden of proof on the Department, leaving the presentation of evidence to the discretion of the Department; (2) does not require the chief of police, the final decision maker, to apply any substantive guidelines or principles in making the decision, and the chief is not required to uphold the decision of the hearing officer; (3) fails to afford a neutral and impartial decision maker, as the chief is embroiled in the controversy as the person who initially ordered the reduction in pay grade; and (4) does not provide an impartial decision maker because the hearing officers are a "captive group of Department managers" who are presumed to have an impermissible financial interest in an outcome favorable to the Department.

(9a) [HN23] Generally, due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (*Burrell v. City of Los Angeles (1989) 209 Cal. App. 3d 568, 576 [257 Cal. Rptr. 427].)* [HN24] "What procedures are constitutionally required under the Fourteenth Amendment if the state seeks to deprive a person of a protected [***34] interest is determined by federal law, not state law." (*Bostean v. Los Angeles Unified School Dist., supra, 63 Cal. App. 4th 95, 112.)* "[T]o determine what process is constitutionally due, 'we have generally balanced three distinct factors: [P] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge [(1976)] 424 U.S. 319, 335 [96 S. Ct. 893, 903, 47 L. Ed. 2d 18] ." (63 Cal. App. 4th at 113.))*

(10) [HN25] " 'Under the California Constitution, the extent to which procedural due [**488] process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires [***35] consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.' "

*(Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 390-391 [84 Cal. Rptr. 2d 466, 975 P.2d 663] .)[*175])*

(11)As acknowledged by the court in *Gilbert v. Homar (1997) 520 U.S. 924, [117 S. Ct. 1807, 1812, 138 L. Ed. 2d 120, 128] ,* [11N26] an employee has a "significant private interest in the uninterrupted receipt of his paycheck," indicating that the interest affected by the reduction in pay grade is significant. [HN27] Because the Fourteenth Amendment protects the pursuit of one's profession from abridgment [***36] by arbitrary state action (see *Oberholzer v. Commission on Judicial Performance, supra, 20 Cal. 4th 371, 391, fn. 16),* it has been recognized that " 'when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.' " *(Ibid.)*

(9b) [HN28] At a minimum, an individual entitled to procedural due process should be accorded: written notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made." (*Burrell v. City of Los Angeles, supra, 209 Cal. App. 3d 568, 577.)* Moreover, while due process does not require the employer to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, "a public employee is entitled [***37] to a full evidentiary hearing after the disciplinary action is imposed." (*Duncan v. Department of Personnel Administration (2000) 77 Cal. App. 4th 1166, 1176 [92 Cal. Rptr. 2d 257].))*

(12) [HN29] In the circumstance where the administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to the punitive action, " Mt is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges." (*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113 [179 Cal. Rptr. 351] .)* The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose. *(Ibid.;* see also *Pipkin v. Board of Supervisors (1978) 82 Cal. App. 3d 652, 658 [147 Cal. Rptr. 502] .))*

(8b) In light of *Parker* and *Pipkin,* we conclude that Administrative Order No. 15 denies Brown due process by placing the burden of proof on him Requiring that the Department shoulder the burden of proving the charges against Brown at the administrative appeal will not impose unreasonable [**489] fiscal or administrative burdens on the Department; [***38] it is likely that the appealing officer will require the attendance and testimony of the witnesses who prepared the underlying documents and reports substantiating the punitive action in any event. Because the relevant witnesses will most [*176] likely already be present at the hearing, it will not create an undue burden on the Department to present its case first and to shoulder the burden of proof.

Consistent with the due process requirement that the Department shoulder the burden of proof is the requirement that the Department shoulder the burden of establishing the requirements for reduction in pay grade as set out in Department Manual Sections 763.55 and 763.60. Nowhere does Administrative Order No. 15 require the Department to establish the requirements for a reassignment to a lower pay grade as set out in the Department Manual. The order merely provides that the purpose of such an appeal is to provide the employee an opportunity to refute the reasons for the Department's action or omission relating to . . . reassignment from an advanced pay grade position." "

> *11* This characterization of the purpose of the administrative appeal hearings is clearly inadequate to vindicate the requirement of Department Manual Section 763.55 that an involuntary reassignment be permitted only under certain circumstances, including "when an officer clearly demonstrates his/her failure or inability to satisfactorily perform the duties of the position." For example, if the Department articulates reasons for a reassignment which, even if true, are insufficient to establish the criteria required by the Department Manual, the procedures set out in the order do not assure that the final decision upholding a punitive action is based on correct legal criteria as set out in the Department Manual. There is no requirement that either the hearing officer or the chief of police ever consider the criteria in the Department Manual.
>
> Moreover, at least theoretically, the hearing officer and chief of police could base a decision upholding reassignment on the determination that Brown failed to adequately refute the Department's reasons, when the Department never provided any evidence to support its reasons in the first instance. This hardly comports with one of the goals of procedural due process, which is to reduce the risk of an erroneous deprivation of a property interest.

[***39] When this provision of the order, which fails to require application of any substantive criteria or standards, is considered in conjunction with the lack of any burden of proof on the Department, it is clear that the order fails to afford Brown any meaningful appeal hearing.

There is no requirement that the Department come forward with evidence to prove the basis for the reassignment; there is also no requirement that the hearing officer or the chief of police ever find or articulate any facts establishing the criteria for a reassignment as set out in Department Manual Sections 763.55 and 763.60. [12] In other words, there is a total "disconnect" between the substantive limitations on discretion as set out in the Department Manual and the requirements [*177] of the administrative appeal process. The appeal process, by failing to acknowledge the requirement that the Department meet the burden of proof as to certain criteria [**490] set out in the manual, and by failing to require the hearing officer or the chief of police to base its decision on such criteria, fails to afford even the most minimal safeguards to protect the erroneous deprivation of Brown's property interest. Accordingly, we agree with appellant's [***40] contention that Administrative Order No. 15 is deficient because it fails to require that the chief of police's decision be based on an application of the pertinent substantive criteria.

12 According to the MOU of which we take judicial notice, there is also no remedy of administrative mandamus with respect to the administrative appeal. Article 9.7 of the MOU provides: "A. Notwithstanding any provision of this agreement, an administrative appeal shall not be deemed a 'hearing' within the provisions of *Code of Civil Procedure section 1094.5*. The function of an administrative appeal is advisory only, and neither its findings nor its recommendations shall be subject to judicial review." As we interpret Administrative Order No. 15 and the MOU, the chief of police would make the final decision on Brown's appeal, and there would be no further judicial review of that decision. If our interpretation of the MOU is correct, then Brown would not even have any opportunity in the court system to vindicate the criteria for reassignment as set out in the Department Manual.

[***41] The circumstances here are thus distinguishable from those in *Burrell v. City of Los Angeles (1989) 209 Cal. App. 3d 568 [257 Cal. Rptr. 427]* , where city employees challenged the constitutionality of Los Angeles City Charter section 112, which afforded the employee an administrative appeal of a disciplinary measure to the board of civil service commissioners (Board), but required that any reduction in penalty recommended by the Board be with the consent of the same official who originally imposed the discipline. The procedure in *Burrell* was upheld because the Board was required to independently review the sufficiency of the evidence supporting the charges against the employee and if it found "an inadequate basis for the charges, and that the employee is fit to fill his position, the Board is *required* by section 112 to reinstate the disciplined employee. The only limitation on the Board's powers occurs after it has already determined that the charges against the employee are substantiated." *(209 Cal. App. 3d at p. 584.)* Unlike the charter provision in *Burrell,* Administrative Order No. 15 places no such requirements on the hearing officer or the chief of [* **42] police to reinstate Brown if they independently determine that the evidence is insufficient to support the criteria for a reduction in pay grade as set out in the Department Manual.

The instant order also violates the requirement that the decision maker be neutral because the chief of police initially authorized the punitive action and is also the final decision maker on the administrative appeal. (See, e.g., *Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 631-632 [273 Cal. Rptr. 730] .)* [13] The cases acknowledge that [BN30] in administrative disciplinary matters, the "combination of adjudicative and investigative functions, without [**491] more, [*178] does not offend due process," (*Binkley v. City of Long Beach, supra,* 16 Cal. App. 4th 1795, 1811 [20 Cal. Rptr. 2d 903]), and both federal courts and our state courts acknowledge that a decision maker's "mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles." (*Burrell v. City of Los Angeles, supra, 209 Cal. App. 3d 568, 582.)*

13 The due process requirement of neutrality is not to be confused with the due process requirement of lack of bias and prejudice. The issue of neutrality appears to be concerned with the fairness of the procedure itself and whether it poses a risk for a "high probability of unfairness." *(Burrell v. City of Los Angeles, supra, 209 Cal. App. 3d 568, 577.)* The issue here is the "constitutionality of allowing a decisionmaker to review and evaluate his own prior decisions." (*Id., at p. 578.)* The issue of neutrality thus appears to focus on the adequacy of the procedural structure itself. On the other hand, the issue of personal or political bias or prejudice focuses on the actual adjudicator, and whether or not that person is capable of judging a particular controversy fairly on the basis of its own circumstances. *(Ibid.)* Such bias or prejudice might be demonstrated if the decision maker is shown to have a personal stake in the outcome of the decision, or shows animosity toward the employee *(ibid.);* however, this type of bias and prejudice is not implied and must be clearly established. (*Binkley v. City of Long Beach (1993) 16 Cal. App. 4th 1795, 1810 [20 Cal. Rptr. 2d 903].)*

> On the other hand, in ***Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1032-1033 [119 Cal. Rptr. 2d 341, 45 P.3d 280],*** the court held that actual bias need not be shown when the alleged bias is due to a financial interest in the outcome of the dispute; the "appearance of bias that has constitutional significance is not a party's ***subjective, unilateral*** perception; it is the ***objective*** appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator." (***Id., at p. 1034.)***

[***43] On the other hand, in " ***Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648 [163 Cal. Rptr. 831]*** the court found a lack of procedural fairness where nearly one-half of the members of the panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which had made the original suspension decision." (***Burrell v. City of Los Angeles, supra, 209 Cal. App. 3d 568, 582-583.)***

When the other constitutionally inadequate provisions of Administrative Order No. 15 are considered in conjunction with the provision that the chief of police be the final decision maker, we conclude that, as a whole, the procedure fails to inspire confidence that it affords Brown a meaningful administrative appeal. In other words, the combination of procedures set out therein presents an intolerably high risk of unfairness. The procedures which together create that risk of unfairness include the lack of any burden of proof on the Department, the lack of any requirement that the hearing officer or chief of police apply the criteria in the Department Manual for a reduction in pay grade, and the lack of a neutral final decision maker.

[***44] Accordingly, a balance of the three ***Mathews v. Eldridge*** factors leads to the conclusion that the above administrative appeal procedures set out in the order would deprive Brown of his property interest without due process of law under the Fourteenth Amendment. The trial court thus erred in concluding that the above procedures in Administrative Order No. 15 satisfy the requirements of procedural due process.

(13) We reject, however, appellant's due process challenge to that part of Administrative Order No. 15 requiring that the pool of hearing officers is to be selected from members of Department of the rank of captain through [*179] deputy chief. ***Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017 [119 Cal. Rptr. 2d 341, 45 P.3d 280] ,*** cited by appellant, is distinguishable from this case. In ***Haas,*** the hearing officers (attorneys licensed to practice law for at least five years) presiding over business license revocations were appointed by the county on a temporary ad hoc basis, whom the county paid according to the duration or amount of work performed. ***Haas*** held that such a procedure gave hearing officers an impermissible financial interest in the outcome of the hearings: [***45] "A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias. " Haas, ***(27 Cal. 4th at p. 1034.)***

Unlike the situation in ***Haas,*** the hearing officers here are Department employees, who, like Brown, would have the same incentives as Brown to perform their job duties fairly and well, and who, like Brown, are peace officers protected by the Public Safety Officers Procedural Bill of Rights. (See ***City of Los Angeles v. Superior Court (1997) 57 Cal. App. 4th 1506, 1512 [67 Cal. Rptr. 2d 775, fn.*** 2].) Moreover, unlike the situation in ***Haas,*** where the hearing officer was selected solely by the county, it is the accused officer who initially selects the three potential hearing officers from the pool of eligible hearing officers. Appellant has failed to establish that [**492] the instant procedure for selection of the hearing officer violates principles of due process.

(14) [*46]** Appellant contends that the Department is collaterally estopped from basing a reduction in pay grade on charges as to which he was exonerated by the Board of Rights, including the incidents in July 1998 and April 1998. Because this issue may arise on a future administrative appeal (conducted pursuant to procedures which comport with due process), we elect to address it here. Appellant's contention has merit, as respondents would be barred from basing punitive action on these matters pursuant to LACC Sections 202(13)(e) and 202(18), as well as principles of collateral estoppel. ***(People v. Sims (1982) 32 Cal. 3d 468, 489 [186 Cal. Rptr. 77, 651 P.2d 321]; Knickerbocker v. City of Stockton (1988) 199 Cal. App. 3d 235, 242, 244 [244 Cal. Rptr. 764] .)***

Appellant contends that LACC Section 202 mandates reinstatement to his advanced pay grade position as of July 1999, because he has been exonerated of all wrongdoing at hearings before the board of rights. However, our record indicates that the Department based its reduction in pay grade not only on the incidents for which Brown was subsequently [***47] exonerated after hearings before the Board of Rights, but also on several personnel complaints from 1990 to 1997, as well as another 1998 incident which is apparently still being investigated and is related to Brown's civil rights lawsuit. (See ***ante,*** [*180] fn. 4.) It is for the Department, or a hearing officer, to decide in the first instance whether those remaining incidents for which Brown was not exonerated by the Board of Rights are sufficient to support a reduction in pay grade. We have an insufficient evidentiary record on which to

make a determination in appellant's favor. On this ground, the trial court correctly denied that part of appellant's petition for writ of mandate seeking to set aside his reduction in pay grade retroactive to July 1999.

As to the issue of backpay, we reject respondents' argument that appellant is barred from raising this issue on appeal because he failed to include this issue in his proposed statement of decision in the trial court. Given the rationale of the trial court's judgment, that judgment implicitly denied backpay, and it was unnecessary for the trial court to explain the basis for its denial. However, because that issue was litigated [***48] below, it has been preserved for our review. Appellant here has not alleged or established the inadequacy of the predeprivation procedures; however because he has successfully challenged the adequacy of the appeal procedures, he is entitled to backpay from the time beginning when he was deprived of an adequate appeal hearing, (i.e., according to those unchallenged provisions of Administrative Order No. 15, 18 days after his request for an appeal filed in September 1999), and continuing up to the time of any future hearing held under proper procedural due process principles. (See, e.g., *Henneberque v. City of Culver City (1985) 172 Cal. App. 3d 837, 843-844 [218 Cal. Rptr. 704].)*

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to issue a peremptory writ of mandate compelling city to afford Brown an administrative appeal hearing conducted pursuant to a procedure which comports with the requirements of due process; pending that hearing, city is to pay Brown backpay for the period beginning 18 days after the date he requested an administrative appeal and continuing up to the date he is afforded a hearing which comports [***49] with the requirements of due [**493] process. Appellant is entitled to costs on appeal.

Woods, J., and Perluss, J., concurred.

Respondents' petition for review by the Supreme Court was denied January 15, 2003.

Received
June 17, 2011
Commission on
State Mandates

TAB “6”

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; SAN DIEGO BAYKEEPER et al., Interveners and Respondents.

D042385

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

124 Cal. App. 4th 866; 22 Cal. Rptr. 3d 128; 2004 Cal. App. LEXIS 2073; 2004 Cal. Daily Op. Service 10694; 2004 Daily Journal DAR 14492; 34 ELR 20149

December 7, 2004, Filed

NOTICE:

As modified Jan. 4, 2005. [***1] CERTIFIED FOR PARTIAL PUBLICATION [1]

1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts III, IV, V, VI and VII.

SUBSEQUENT HISTORY: Modified by, Rehearing denied by Building Industry Assn. v. State Water Resources Control Bd., 2005 Cal. App. LEXIS 7 (Cal. App. 4th Dist., Jan. 4, 2005)
Time for Granting or Denying Review Extended Building Industry Assn. of San Diego v. Calif Regional Water Qlty Bd., 2005 Cal. LEXIS 2502 (Cal., Feb. 24, 2005)
Review denied by, Request denied by Building Industry Association of San Diego County v. California Regional Water Quality Control Board, 2005 Cal. LEXIS 3489 (Cal., Mar. 30, 2005)

PRIOR HISTORY: Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff building industry association filed an administrative appeal with defendant California Water Resources Control Board (State Water Board) regarding the Board's issuance of a comprehensive municipal storm sewer permit. The Board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. The Superior Court of San Diego County, California, found the association failed to prove its claims.

OVERVIEW: The association argued that the permit violated federal law because it allowed the State Water Board and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable" set forth in 33 U.S.C.S. § 1342(p)(3)(B)(iii). The instant court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and/or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards.

OUTCOME: The judgment was affirmed.

CORE TERMS: water quality, water board, storm sewer, Clean Water Act, 'practicable', pollution, maximum, pollutant, municipality, municipal, regional, federal law, environmental, effluent, stringent, challenging, runoff, storm, state laws, regulatory agency, "point sources", iterative, stormwater, entity, Conservation Laws, statutory language, waste discharge, permit requirements, strict compliance, industrial

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations

[HN1]The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. It is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. 33 U.S.C.S. § 1311(a). An NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. 33 U.S.C.S. § 1342(a), (b). Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10. NPDES permits are valid for five years. 33 U.S.C.S. § 1342(b)(1)(B).

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources

[HN2]The Clean Water Act defines a "point source" to be any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Real Property Law > Water Rights > Beneficial Use

[HN3]Under the Clean Water Act, the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. As enacted in 1972, the Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. 33 U.S.C.S. §§ 1311, 1362(11).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Governments > Local Governments > Licenses

[HN4]In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. 33 U.S.C.S. § 1342(p). In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to municipal storm water discharges, Congress clarified that the Environmental Protection Agency had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose controls to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C.S. § 1342(p)(3)(B)(iii).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN5]See 33 U.S.C.S. § 1342(p)(3)(B)(iii).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations

[HN6]See Cal. Water Code § 13377.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Real Property Law > Water Rights > Beneficial Use

[HN7]See Cal. Water Code § 13374.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Public Participation
Governments > Local Governments > Licenses

[HN8]The waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law. Cal. Water Code § 13374.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Environmental Law > Water Quality > General Overview
[HN9]See Cal. Water Code § 13330(b).

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Evidence > Inferences & Presumptions > Presumption of Regularity
[HN10]Where a party has been aggrieved by a final decision of a regional water board for which the California Water Resources Control Board denies review, Cal. Code Civ. Proc. § 1094.5 governs the writ of mandate proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. Cal. Water Code § 13330(d). In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

Administrative Law > Judicial Review > Administrative Record > General Overview
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN11]In reviewing the trial court's factual determinations on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

Environmental Law > Water Quality > General Overview
[HN12]It is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law, 33 U.S.C.S. § 1370, and California law specifically allows the imposition of controls more stringent than federal law, Cal. Water Code § 13377.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN13]The language of 33 U.S.C.S. § 1342(p)(3)(B)(iii) does communicate the basic principle that the Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

Governments > Legislation > Interpretation
[HN14]While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the legislature. If the statutory language is susceptible to more than one reasonable interpretation, a court must also look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
Governments > Public Improvements > General Overview
[HN15]With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the Water Quality Act of 1987, and 33 U.S.C.S. § 1342(p) in particular, supports that Congress intended to provide the Environmental Protection Agency (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where that compliance will be achieved primarily through an iterative process.

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
Governments > Legislation > Interpretation
[HN16]A court is required to give substantial deference to an administrative interpretation of a statute.

Civil Procedure > Appeals > Standards of Review > Reversible Errors
Evidence > Inferences & Presumptions > General Overview
[HN17]All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error.

Civil Procedure > Appeals > Briefs
[HN18]A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) all of the material evidence, not just the evidence favorable to his or her appellate positions.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN19]The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN20]BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A building industry association filed an administrative appeal with the State Water Resources Control Board regarding the board's issuance of a comprehensive municipal storm sewer permit. The board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. Three environmental groups intervened as defendants. The trial court found the association failed to prove its claims. The association argued that the permit violated federal law because it allowed the state water board and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable" under 33 U.S.C. § 1342(p)(3)(B)(iii). (Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.)

The Court of Appeal affirmed. The court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards. (Opinion by Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.) [*867]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Regulatory Permit--Municipal Storm Sewer Control Measures.--A regulatory permit issued by the State Water Resources Control Board allowing it and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable," set forth in 33 U.S.C. § 1342(p)(3)(B)(iii), did not violate federal law.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 69.]

(2) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--The Clean Water Act (33 U.S.C. 1251 et seq.) employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. Pursuant to 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. Pursuant to 33 U.S.C. § 1342(a) and (b) an NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. Pursuant to 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10, before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. Pursuant to 33 U.S.C. § 1342(b)(1)(B), NPDES permits are valid for five years.

(3) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--Under the Clean Water Act (33 U.S.C. § 1251 et seq.), the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected

water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. As enacted in 1972, 33 U.S.C. §§ 1311, 1362(11) of the Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. [*868]

(4) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--In 1987, Congress amended the Clean Water Act (33 U.S.C. 1251 et seq.), to add provisions, specifically, 33 U.S.C. § 1342(p), that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. In these amendments, enacted as part of the Water Quality Act of 1987 (33 U.S.C. § 251 et seq.), Congress distinguished between industrial and municipal storm water discharges. With respect to municipal storm water discharges, Congress clarified in 33 U.S.C. § 1342(p)(3)(B)(iii) that the Environmental Protection Agency had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose controls to reduce the discharge of pollutants to the maximum extent practicable.

(5) Pollution and Conservation Laws § 5--Water Pollution--Waste Discharge Requirements.--Pursuant to Wat. Code, § 13374, the waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law.

(6) Pollution and Conservation Laws § 5--Water Pollution--Writ of Mandate--Exercise of Independent Judgment.--Where a party has been aggrieved by a final decision of a regional water board for which the State Water Resources Control Board denies review, Code Civ. Proc., § 1094.5, governs the writ of mandate proceedings, and the superior court must, pursuant to Wat. Code, § 13330, subd. (d), exercise its independent judgment in examining the evidence and resolving factual disputes. In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

(7) Appellate Review § 144--Scope of Review--Questions of Law and Fact--Factual Determinations--Substantial Evidence Standard--De Novo Review.--In reviewing the trial court's factual determinations on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. [*869]

(8) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--More Stringent State Controls.--It is well settled that the Clean Water Act (33 U.S.C. § 1251 et seq.) authorizes states to impose water quality controls that are more stringent than are required under federal law, 33 U.S.C. § 1370, and California law specifically allows the imposition of controls more stringent than federal law, Wat. Code, § 13377.

(9) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--The language of 33 U.S.C. § 1342(p)(3)(B)(iii) does communicate the basic principle that the Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

(10) Statutes § 21--Construction--Legislative Intent.--While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature. If the statutory language is susceptible to more than one reasonable interpretation, a court must also look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(11) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--NPDES Permits.--With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the Water Quality Act of 1987 (33 U.S.C. § 251 et seq.), and 33 U.S.C. § 1342(p) in particular, supports that Congress intended to provide the Environmental Protection Agency (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES

permit, particularly where that compliance will be achieved primarily through an iterative process.

(12) Statutes § 44--Construction--Administrative--Judicial Deference.--A court is required to give substantial deference to an administrative interpretation of a statute.

(13) Appellate Review § 135--Scope of Review--Presumptions.--All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. [*870]

(14) Appellate Review § 108--Briefs--Requisites--Reference to Record--Party Challenging Sufficiency of Evidence--Summarization of All Material Evidence Required.--A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) all of the material evidence, not just the evidence favorable to his or her appellate positions.

(15) Administrative Law § 116--Judicial Review and Relief--Scope of Review--Abuse of Discretion--Administrative Permit.--The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

(16) Pollution and Conservation Laws § 5--Water Pollution--Industrial Storm Water Dischargers--Best Available Technology Economically Achievable.--BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices.

COUNSEL: Latham & Watkins, David L. Mulliken, Eric M. Katz, Paul N. Singarella, Kelly E. Richardson and Daniel P. Brunton for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Mary Hackenbracht, Assistant Attorney General, Carol A. Squire, David Robinson and Deborah Fletcher, Deputy Attorneys General, for Defendants and Respondents.

David S. Beckman, Heather L. Hoecherl, Anjali I. Jaiswal and Dan L. Gildor for Interveners and Respondents.

Marco Gonzalez for Intervener and Respondent San Diego BayKeeper.

Law Offices of Rory Wicks and Rory R. Wicks for Surfrider Foundation, Waterkeeper Alliance, The Ocean Conservancy, Heal the Bay, Environmental Defense Center, Santa Monica BayKeeper, Orange County CoastKeeper, Ventura CoastKeeper, Environmental Health Coalition, CalBeach Advocates, San Diego Audubon Society, Endangered Habitats League and Sierra Club as Amici Curiae on behalf [***2] of Defendants and Respondents and Interveners and Respondents.

JUDGES: Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.

OPINION BY: HALLER [*871]

OPINION

[**130] **HALLER, J.**--This case concerns the environmental regulation of municipal storm sewers that carry excess water runoff to lakes, lagoons, rivers, bays, and the ocean. The waters flowing through these sewer systems have accumulated numerous harmful pollutants that are then discharged into the water body without receiving any treatment. To protect against the resulting water quality impairment, federal and state laws impose regulatory controls on storm sewer discharges. In particular, municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this case, the California Regional Water Control Board, San Diego Region, (Regional Water Board) conducted numerous public hearings and then issued a comprehensive municipal storm sewer permit governing 19 local public entities. Although these entities did not bring an administrative challenge to the permit, one business organization, the Building Industry [***3] Association of San Diego County (Building Industry), filed an administrative appeal with the State Water Resources Control Board (State Water Board). After making some modifications to the permit, the State Water Board denied the appeal. Building Industry then petitioned for a writ of mandate in the superior court, asserting numerous claims, including that the permit violates state and federal law because the permit provisions are too stringent and impossible to satisfy. Three environmental groups intervened as defendants in the action. After a hearing, the trial court found Building Industry failed to prove its claims and entered judgment in favor of the administrative agencies (the Water Boards) and the intervener environmental groups.

(1) On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).) [2] [**131] In the published

portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include [***4] a permit provision requiring compliance with state water quality standards. In the unpublished portion of the opinion, we find Building Industry's additional contentions to be without merit. We affirm the judgment.

2 Further statutory references are to title 33 of the United States Code, unless otherwise specified.

[*872] RELEVANT BACKGROUND INFORMATION

I. *Summary of Relevant Clean Water Act Provisions*

Before setting forth the factual background of this particular case, it is helpful to summarize the federal and state statutory schemes for regulating municipal storm sewer discharges. [3]

3 The systems that carry untreated urban water runoff to receiving water bodies are known as "[m]unicipal separate storm sewer" systems (40 C.F.R. § 122.26(b)(8)), and are often referred to as "MS4s" (40 C.F.R. § 122.30). For readability, we will identify these systems as municipal storm sewers. To avoid confusion in this case, we will generally use descriptive names, rather than initials or acronyms, when referring to parties and concepts.

[***5] A. *Federal Statutory Scheme*

When the United States Congress first enacted the Federal Water Pollution Control Act in 1948, the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11 [69 L. Ed. 2d 435, 101 S. Ct. 2615]; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal. App. 3d 1421, 1433 [259 Cal. Rptr. 132].) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams ... ." (*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1371 (*Costle*); see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 203 [48 L. Ed. 2d 578, 96 S. Ct. 2022].) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at pp. 204-205.) [***6] The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (§ 1251(a).)

[HN1](2) The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" [4] unless the party discharging the pollutants obtains a permit, known as an NPDES [5] permit. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 205.) It is "unlawful [*873] for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.*; see § 1311(a); *Costle, supra*, 568 [**132] F.2d at p. 1375.) An NPDES permit is issued by the United States Environmental Protection Agency (EPA) or by a state that has a federally approved water quality program. (§ 1342(a), (b); *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 209.) Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. (See 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10; see generally Wardzinski et al., *National Pollutant Discharge Elimination System* [***7] *Permit Application and Issuance Procedures,* in The Clean Water Act Handbook (Evans edit., 1994) pp. 72-74 (Clean Water Act Handbook).) NPDES permits are valid for five years. (§ 1342(b)(1)(B).)

4 [HN2]The Clean Water Act defines a "point source" to be "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (§ 1362(14).)

5 NPDES stands for National Pollution Discharge Elimination System.

[HN3](3) Under the Clean Water Act, the proper scope of the controls in an NPDES permit depends on the applicable state water quality standards for the affected water bodies. (See *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092 [1 Cal. Rptr. 3d 76].) Each state is required to develop water quality standards that establish " 'the desired [***8] condition of a waterway.' " (*Ibid.*) A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. (*Ibid.*) As enacted in 1972, the Clean Water Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the

amount of pollutants that may be discharged at the point source. (§§ 1311, 1362(11).)

Shortly after the 1972 legislation, the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. (*Costle, supra,* 568 F.2d at p. 1372; see *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 (*Defenders of Wildlife*).) When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. (*Costle, supra,* 568 F.2d at pp. 1374-1383.) [***9] The *Costle* court rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. (*Id.* at pp. 1377-1382.) Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. (*Id.* at pp. 1379-1383.)

[*874] During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. (*Defenders of Wildlife, supra,* 191 F.3d at p. 1163; see Gallagher, *Clean Water Act* in Environmental Law Handbook (Sullivan edit., 2003) p. 300 (Environmental Law Handbook); Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff* (1995) 48 Wash. U. J. Urb. & Contemp. L. 1, 40-41 (*Regulation of Urban Stormwater Runoff*).)

(4) Eventually,[HN4] in 1987, Congress amended the [***10] Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (§ 1342(p); see *Defenders of Wildlife, supra,* [**133] 191 F.3d at p. 1163; *Natural Resources Defense Council v. U.S. E.P.A.* (1992) 966 F.2d 1292, 1296.) In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to *industrial* storm water discharges, Congress provided that NPDES permits "shall meet all applicable provisions of this section and section 1311 [requiring the EPA to establish effluent limitations under specific timetables] ... ." (§ 1342(p)(3)(A).) With respect to *municipal* storm water discharges, Congress clarified that the EPA had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable ... ." (§ 1342(p)(3)(B)(iii); see *Defenders of Wildlife, supra,* 191 F.3d at p. 1163.) Because the statutory language pertaining to municipal [***11] storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

"[HN5](B) ... Permits for discharges from municipal storm sewers--

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

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

"(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B).)To ensure this scheme would be administratively workable, Congress placed a moratorium on many new types of required stormwater permits until 1994 (§ 1342(p)(1)), and created a phased approach to necessary municipal [*875] stormwater permitting depending on the size of the municipality (§ 1342(p)(2)(D)). (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 841-842.)

B. *State Statutory Scheme*

Three years before the 1972 Clean Water Act, the California Legislature enacted [***12] its own water quality protection legislation, the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), seeking to "attain the highest water quality which is reasonable ... ." (Wat. Code, § 13000.) The Porter-Cologne Act created the State Water Board to formulate statewide water quality policy and established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as "waste discharge requirements," and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.)

Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards

"[HN6]shall, as required or authorized [***13] by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [**134] [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377.) Water Code section 13374 provides that "[HN7][t]he term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the [Clean Water Act]."

(5) California subsequently obtained the required approval to issue NPDES permits. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1453 [126 Cal. Rptr. 2d 389].) Thus, [HN8]the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)

II. *The NPDES Permit at Issue in this Case*

Under its delegated authority and after numerous public hearings, in February 2001 the Regional Water Board issued a 52-page NPDES permit [*876] and Waste Discharge Requirements (the Permit) governing municipal storm sewers owned [***14] by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, Municipalities). [6] The first 10 pages of the Permit contain the Regional Water Board's detailed factual findings. These findings describe the manner in which San Diego-area water runoff absorbs numerous harmful pollutants and then is conveyed by municipal storm sewers into local waters without any treatment. The findings state that these storm sewer discharges are a leading cause of water quality impairment in the San Diego region, endangering aquatic life and human health. The findings further state that to achieve applicable state water quality objectives, it is necessary not only to require municipalities to comply with existing pollution-control technologies, but also to require compliance with applicable "receiving water limits" (state water quality standards) and to employ an "iterative process" of "development, implementation, monitoring, and assessment" to improve existing technologies.

6 Under the Clean Water Act, entities responsible for NPDES permit conditions pertaining to their own discharges are referred to as "copermittees." (40 C.F.R. § 122.26(b)(1).) For clarity and readability, we shall refer to these entities as Municipalities.

[***15] Based on these factual findings, the Regional Water Board included in the Permit several overall prohibitions applicable to municipal storm sewer discharges. Of critical importance to this appeal, these prohibitions concern two categories of restrictions. First, the Municipalities are prohibited from discharging those pollutants "which have not been reduced to the *maximum extent practicable* ... ." [7] (Italics added). Second, the Municipalities [**135] are prohibited from discharging pollutants "which cause or contribute to exceedances of receiving water quality objectives ... " and/or that "cause or contribute to the violation of water quality standards ... ." This second category of restrictions (referred to in this opinion as the Water Quality Standards provisions) essentially provide that a municipality may not discharge pollutants if those pollutants would cause the receiving water body to exceed the applicable water quality standard. It is these latter restrictions that are challenged by Building Industry in this appeal.

7 The Permit does not precisely define this phrase, and instead, in its definition section, contains a lengthy discussion of the variable nature of the maximum extent practicable concept, referred to as MEP. A portion of this discussion is as follows: "[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their [local storm sewer plan]. Their total collective and individual activities conducted pursuant to the [plan] becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance). In the absence of a proposal acceptable to the [Regional Water Board], the [Regional Water Board] defines MEP." The definition also identifies several factors that are "useful" in determining whether an entity has achieved the maximum extent practicable standard, including "Effectiveness," "Regulatory Compliance," "Public Acceptance," "Cost," and "Technical Feasibility."

[***16] [*877] Part C of the Permit (as amended) qualifies the Water Quality Standards provisions by detailing a procedure for enforcing violations of those standards through a step-by-step process of "timely implementation of control measures ...," known as an "iterative" process. Under this procedure, when a municipality "caus[es] or contribute[s] to an exceedance of an applicable water quality standard," the municipality must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. The municipality and the regional water board must then work together at improving methods and monitoring progress to achieve compliance. But the final provision of Part C states that "Nothing in this section

shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report."

In addition to these broad prohibitions and enforcement provisions, the Permit requires the Municipalities to implement, or to require businesses and residents to implement, various pollution control measures referred to as "best management practices," which reflect techniques for preventing, [***17] slowing, retaining or absorbing pollutants produced by stormwater runoff. These best management practices include structural controls that minimize contact between pollutants and flows, and nonstructural controls such as educational and public outreach programs. The Permit also requires the Municipalities to regulate discharges associated with new development and redevelopment and to ensure a completed project will not result in significantly increased discharges of pollution from storm water runoff.

III. *Administrative and Trial Court Challenges*

After the Regional Water Board issued the Permit, the Building Industry, an organization representing the interests of numerous construction-related businesses, filed an administrative challenge with the State Water Board. Although none of the Municipalities joined in the administrative appeal, Building Industry claimed its own independent standing based on its assertion that the Permit would impose indirect obligations on the regional building community. (See Wat. Code, § 13320 [permitting any "aggrieved person" to challenge regional water board action].) Among its numerous contentions, Building Industry argued that the Water [***18] Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is "practicable" and therefore violate federal law.

In November 2001, the State Water Board issued a written decision rejecting Building Industry's appeal after making certain modifications to the Permit. (Cal. Wat. Resources Control Bd. Order WQ2001-15 (Nov. 15, 2001).) Of particular relevance here, the State Water [*878] Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But the State Water Board did not delete the Permit's [**136] provision stating that the Regional Water Board retains the authority to enforce the Water Quality Standards provisions even if a Municipality is engaged in this iterative process.

Building Industry then brought a superior court action against the Water Boards, challenging the Regional Board's issuance of the Permit and the State Water Board's denial of Building Industry's administrative challenge. [8] Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater [***19] than the "maximum extent practicable" standard; (2) violated state law by failing to consider various statutory factors before issuing the Permit; (3) violated the California Environmental Quality Act (CEQA) by failing to prepare an environmental impact report (EIR); and (4) made findings that were factually unsupported.

8 Several other parties were also named as petitioners: Building Industry Legal Defense Foundation, California Business Properties Association, Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association, and the City of San Marcos. However, because these entities were not parties in the administrative challenge, the superior court properly found they were precluded by the administrative exhaustion doctrine from challenging the administrative agencies' compliance with the federal and state water quality laws. Although these entities were named as appellants in the notice of appeal, they are barred by the exhaustion doctrine from asserting appellate contentions concerning compliance with federal and state water quality laws. However, as to any other claims (such as CEQA), these entities are proper appellants. For ease of reference and where appropriate, we refer to the appellants collectively as Building Industry.

Three environmental organizations, San Diego BayKeeper, Natural Resources Defense Council, and California CoastKeeper (collectively, Environmental Organizations), [***20] requested permission to file a complaint in intervention, seeking to uphold the Permit and asserting a direct and substantial independent interest in the subject of the action. Over Building Industry's objections, the trial court permitted these organizations to file the complaint and enter the action as parties-interveners.

After reviewing the lengthy administrative record and the parties' briefs, and conducting an oral hearing, the superior court ruled in favor of the Water Boards and Environmental Organizations (collectively, respondents). Applying the independent judgment test, the court found Building Industry failed to meet its burden to establish the State Water Board abused its discretion in approving the Permit or that the administrative findings are contrary to the weight of the evidence. In particular, the court found Building Industry failed to establish the Permit requirements were "impracticable under federal law or unreasonable under state law," and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory [*879] controls

before issuing the Permit. Rejecting Building Industry's legal arguments, the court also stated that [***21] under federal law the Water Boards had the discretion "to require strict compliance with water quality standards" or "to require less than strict compliance with water quality standards." The court also sustained several of respondents' evidentiary objections, including to documents relating to the legislative history of the Clean Water Act.

Building Industry appeals, challenging the superior court's determination that the Permit did not violate the federal Clean Water Act. In its appeal, Building Industry does not reassert its claim that the Permit violates state law, except for its contentions pertaining to CEQA.

DISCUSSION

I. *Standard of Review*

[HN9](6) A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely [**137] petition for writ of mandate in the superior court. (Wat. Code, § 13330, subd. (a).) [HN10]Code of Civil Procedure section 1094.5 governs the proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. (Wat. Code, § 13330, subd. [***22] (d).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 [85 Cal. Rptr. 2d 696, 977 P.2d 693].)

[HN11](7) In reviewing the trial court's factual determinations on the administrative record, a Court of Appeal applies a substantial evidence standard. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824.) However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. (See *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129 [133 Cal. Rptr. 2d 249].) Thus, we are not bound by the legal determinations made by the state or regional agencies or by the trial court. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].) But we must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. [9] (*Ibid.*)

> 9 We note that in determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the EPA's statutory construction if the disputed portion of the statute is ambiguous. (See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 842-844 [81 L. Ed. 2d 694, 104 S. Ct. 2778] (*Chevron*).) However, the parties do not argue this same principle applies to a *state agency's* interpretation of the Clean Water Act. Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations in this case. (See *Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 7-8.)

[***23]

[*880] II. *Water Boards' Authority to Enforce Water Quality Standards in NPDES Permit*

Building Industry's main appellate contention is very narrow. Building Industry argues that two provisions in the Permit (the Water Quality Standards provisions) violate federal law because they prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law. [10] Building Industry contends that under federal law the "maximum extent practicable" standard is the "exclusive" measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a "maximum extent practicable" standard.

> 10 These challenged Permit provisions state "Discharges from [storm sewers] which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited" (Permit, § A.2), and "Discharges from [storm sewers] that cause or contribute to the violation of water quality standards ... are prohibited" (Permit, § C.1).

[***24] In the following discussion, we first reject respondents' contentions that Building Industry waived these arguments by failing to raise a substantial evidence challenge to the court's factual findings and/or [**138] to reassert its state law challenges on appeal. We then focus on the portion of the Clean Water Act (§ 1342(p)(3)(B)(iii)) that Building Industry contends is violated by the challenged Permit provisions. On our de novo review of this legal issue, we conclude the Permit's Water Quality Standards provisions are proper under federal law, and Building Industry's legal challenges are unsupported by the applicable statutory language, legislative purpose, and legislative history.

A. *Building Industry Did Not Waive the Legal Argument*

Respondents (the Water Boards and Environmental Organizations) initially argue that Building Industry waived its right to challenge the Permit's consistency with the maximum extent practicable standard because Building Industry did not challenge the trial court's *factual* findings that Building Industry failed to prove any of the Permit requirements were "impracticable" or "unreasonable."

In taking this position, respondents misconstrue the [***25] nature of Building Industry's appellate contention challenging the Water Quality Standards provisions. Building Industry's contention concerns the scope of the authority given to the Regional Water Board under the Permit terms. Specifically, [*881] Building Industry argues that the Regional Water Board does not have the authority to require the Municipalities to adhere to the applicable water quality standards because federal law provides that the "maximum extent practicable" standard is the exclusive standard that may be applied to storm sewer regulation. This argument--concerning the proper scope of a regulatory agency's authority--presents a purely legal issue, and is not dependent on the court's factual findings regarding the practicality of the specific regulatory controls identified in the Permit.

Respondents alternatively contend that Building Industry waived its right to challenge the propriety of the Water Quality Standards provisions under federal law because the trial court found the provisions were valid under state law and Building Industry failed to reassert its state law challenges on appeal. Under the particular circumstances of this case, we conclude Building Industry did [***26] not waive its rights to challenge the Permit under federal law.

(8) Although[HN12] it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law (§ 1370; see *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705 [128 L. Ed. 2d 716, 114 S. Ct. 1900]; *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 989), and California law specifically allows the imposition of controls more stringent than federal law (Wat. Code, § 13377), the Water Boards made a tactical decision in the superior court to assert the Permit's validity based solely on federal law, and repeatedly made clear they were not seeking to justify the Permit requirements based on the Boards' independent authority to act under state law. On appeal, the Water Boards continue to rely primarily on federal law to uphold the Permit requirements, and their assertions that we may decide the matter based solely on state law are in the nature of asides rather than direct arguments. On this record, it would be improper to rely solely on state law to uphold the challenged Permit provisions. [***27]

B. *The Water Quality Standards Requirement Does Not Violate Federal Law*

We now turn to Building Industry's main substantive contention on appeal-- [**139] that the Permit's Water Quality Standards provisions (fn. 10, *ante*) violate federal law. Building Industry's contention rests on its interpretation of the 1987 Water Quality Act amendments containing NPDES requirements for municipal storm sewers. The portion of the relevant statute reads: "(B) ... Permits for discharges from municipal storm sewers ... [¶] ... [¶] (iii) shall require controls to reduce the discharge of pollutants to the *maximum extent practicable, including* management practices, control techniques and [*882] system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B)(iii), italics added.)

1. *Statutory Language*

Focusing on the first 14 words of subdivision (iii), Building Industry contends the statute means that the maximum extent practicable standard sets the upper limit on the type of control that can be used in an NPDES permit, and that each of the phrases following the [***28] word "*including*" identify examples of "maximum extent practicable" controls. (§ 1342(p)(3)(B)(iii), italics added.) Building Industry thus reads the final "and such other provisions" clause as providing the EPA with the authority only to include *other* types of "maximum extent practicable" controls in an NPDES storm sewer permit.

Respondents counter that the term "including" refers only to the three identified types of pollution control procedures--(1) "management practices"; (2) "control techniques"; and (3) "system, design and engineering methods"--and that the last phrase, "*and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants*," provides the EPA (or the approved state regulatory agency) the specific authority to go beyond the maximum extent practicable standard to impose effluent limitations or water-quality based standards in an NPDES permit. In support, respondents argue that because the word "system" in section 1342(p)(3)(B)(iii) is singular, it necessarily follows from parallel-construction grammar principles that the word "system" is part of the phrase "system, design and engineering methods" rather [***29] than the phrase "control techniques and system." Under this view and given the absence of a comma after the word "techniques," respondents argue that the "and such other provisions" clause cannot be fairly read as restricted by the "maximum extent practicable" phrase, and instead the "and such other provisions" clause is a separate and dis-

tinct clause that acts as a second direct object to the verb "require" in the sentence. (§ 1342(p)(3)(B)(iii).)

Building Industry responds that respondents' proposed statutory interpretation is "not logical" because if the "and such other provisions" phrase is the direct object of the verb "require," the sentence would not make sense. Building Industry states that "permits" do not generally "require" provisions; they "include" or "contain" them.

(9) As a matter of grammar and word choice, respondents have the stronger position. The second part of Building Industry's proposed interpretation--"control techniques and system, design and engineering methods"--without a comma after the word "techniques" does not logically serve as a [*883] parallel construct with the "and such other provisions" clause. Moreover, we disagree that the "and such other provisions" [***30] clause cannot be a direct object to the word "require." (§ 1342(p)(3)(B)(iii).) Although it is not the clearest way of articulating the concept, [HN13]the language of section 1342(p)(3)(B)(iii) does communicate the [**140] basic principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of " 'maximum extent practicable.' " (*Defenders of Wildlife, supra,* 191 F.3d at pp. 1165-1167.) We find unpersuasive Building Industry's reliance on several statutory interpretation concepts, *ejusdem generis, noscitur a sociis*, and *expressio unius est exclusion alterius*, to support its narrower statutory construction.

2. *Purpose and History of Section 1342(p)(3)(B)(iii)*

(10) Further, "[HN14][w]hile punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature." (*In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 1 [106 Cal. Rptr. 2d 476]; see *Estate of Coffee* (1941) 19 Cal.2d 248, 251 [120 P.2d 661].) If the statutory language is susceptible [***31] to more than one reasonable interpretation, a court must also "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [14 Cal. Rptr. 3d 857, 92 P.3d 350].)

[HN15](11) The legislative purpose underlying the Water Quality Act of 1987, and section 1342(p) in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.

Before section 1342(p) was enacted, the courts had long recognized that the EPA had the authority to require a party to comply with a state water quality standard even if that standard had not been translated into an effluent limitation. (See *EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 205, fn. 12; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, supra,* 511 U.S. at p. 715; [***32] *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 987; *Natural Resources Defense Council v. U.S.E.P.A.* (9th Cir. 1990) 915 F.2d 1314, 1316.) Specifically, section 1311(b)(1)(C) gave the regulatory agency the authority to impose "any more stringent limitation, including those necessary to meet water quality standards," and section 1342(a)(2) provided that "[t]he [EPA] Administrator shall [*884] prescribe conditions for [NPDES] permits to assure compliance" with requirements identified in section 1342(a)(1), which encompass state water quality standards. The United States Supreme Court explained that when Congress enacted the 1972 Clean Water Act, it retained "[w]ater quality standards ... as a supplementary basis for effluent limitations, ... so that numerous point sources despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. ... " (*EPA v. State Water Resources Control Board, supra,* 426 U.S. at p. 205, fn. 12; see also *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046].)

There [***33] is nothing in section 1342(p)(3)(B)(iii)'s statutory language or legislative history showing that Congress intended to eliminate this discretion when it amended the Clean Water Act in 1987. [**141] To the contrary, Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (See *Regulation of Urban Stormwater Runoff, supra,* 48 Wash. U. J. Urb. & Contemp. L. at pp. 44-46; Environmental Law Handbook, *supra,* at p. 300; Clean Water Act Handbook, *supra,* at pp. 62-63.) In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread

and escalating problems [***34] resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health. (See Remarks of Sen. Durenberger, 133 Cong. Rec. 1279 (Jan. 14, 1987); Remarks of Sen. Chaffee, 133 Cong. Rec. S738 (daily ed. Jan 14, 1987); Remarks of Rep. Hammerschmidt, 133 Cong. Rec. 986 (Jan. 8, 1987); Remarks of Rep. Roe, 133 Cong. Rec. 1006, 1007 (Jan. 8, 1987); Remarks of Sen. Stafford, 132 Cong. Rec. 32381, 32400 (Oct. 16, 1986).) This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

To support a contrary view, Building Industry relies on comments by Minnesota Senator David Durenberger during the lengthy congressional [*885] debates on the 1987 Water Quality Act amendments. [11] (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily [***35] ed. Jan. 14, 1987.) In the cited portions of the Congressional Record, Senator Durenberger states that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge." (*Ibid.*) When viewing these statements in context, it is apparent that the Senator was merely paraphrasing the words of the proposed statute and was not intending to address the issue of whether the maximum extent practicable standard was a regulatory ceiling or whether he believed the proposed amendments limited the EPA's existing discretion. [12]

> 11 We agree with Building Industry that the trial court's refusal to consider this legislative history on the basis that it was not presented to the administrative agencies was improper. However, this error was not prejudicial because we apply a de novo review standard in interpreting the relevant statutes.

[***36]

> 12 In the cited remarks, Senator Durenberger in fact expressed his dissatisfaction with the EPA's prior attempts to regulate municipal storm sewers. He pointed out, for example, that "[r]unoff from municipal separate storm sewers and industrial sites contain significant values of both toxic and conventional pollutants," and that despite the Clean Water Act's "clear directive," the EPA "has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge." (133 Cong. Rec. 1274, 1279-1280 (daily ed. Jan. 14, 1987).)

[**142] Building Industry's reliance on comments made by Georgia Representative James Rowland, who participated in drafting the 1987 Water Quality Act amendments, is similarly unhelpful. During a floor debate on the proposed amendments, Representative Rowland noted that cities have "millions of" stormwater discharge points and emphasized the devastating financial burden on cities if they were required to obtain a permit for each of these points. (133 Cong. Rec. 522 (daily ed. Feb. 3, 1987).) Representative Rowland then explained [***37] that the amendments would address this problem by "allow[ing] communities to obtain far less costly single jurisdictionwide permits." (*Ibid.*) Viewed in context, these comments were directed at the need for statutory provisions permitting the EPA to issue jurisdiction-wide permits thereby preventing unnecessary administrative costs to the cities, and do not reflect a desire to protect cities from the cost of complying with strict water quality standards when deemed necessary by the regulatory agency.

3. *Interpretations by the EPA and Other Courts*

(12) Our conclusion that Congress intended section 1342(p)(3)(B)(iii) to provide the regulatory agency with authority to impose standards stricter than a "maximum extent practicable" standard is consistent with interpretations by [*886] the EPA and the Ninth Circuit. In its final rule promulgated in the Federal Register, the EPA construed section 1342(p)(3)(B)(iii) as providing the administrative agency with the authority to impose water-quality standard controls in an NPDES permit if appropriate under the circumstances. Specifically, the EPA stated this statutory provision requires "controls to reduce the discharge of pollutants to the [***38] maximum extent practicable, *and where necessary water quality-based controls ...* ." (55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added.) [HN16]We are required to give substantial deference to this administrative interpretation, which occurred after an extensive notice and comment period. (See *ibid.*; *Chevron, supra,* 467 U.S. at pp. 842-844.)

The only other court that has interpreted the "such other provisions" language of section 1342(p)(3)(B)(iii) has reached a similar conclusion. (*Defenders of Wildlife, supra,* 191 F.3d at pp. 1166-1167.) In *Defenders of Wildlife*, environmental organizations brought an action against the EPA, challenging provisions in an NPDES permit requiring several Arizona localities to adhere to

various best management practice controls without requiring numeric effluent limitations. (*Id.* at p. 1161.) The environmental organizations argued that section 1342(p) did not allow the EPA to issue NPDES permits without requiring strict compliance with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1161.) Rejecting this argument, the Ninth Circuit found section 1342(p)(3)(B)(iii)'s statutory language "unambiguously [***39] demonstrates that Congress did not require [**143] municipal storm-sewer discharges to comply strictly" with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1164.)

But in a separate part of the opinion, the *Defenders of Wildlife* court additionally rejected the reverse argument made by the affected municipalities (who were the interveners in the action) that "the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Defenders of Wildlife, supra*, 191 F.3d at p. 1166.) The court stated: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], § 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] *Under that discretionary provision, the EPA has the authority to determine that ensuring* [***40] *strict compliance with state water-quality standards is necessary to control pollutants.* The EPA also has the authority to require less than strict compliance with state water-quality standards ... . Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion. [Citations.]" (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1166-1167, second italics added.) Although dicta, this [*887] conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language. [13]

13 Building Industry's reliance on two other Ninth Circuit decisions to support a contrary statutory interpretation is misplaced. (See *Natural Res. Def. Council, Inc. v. U.S.E.P.A., supra*, 966 F.2d at p. 1308; *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832.) Neither of these decisions addressed the issue of the scope of a regulatory agency's authority to exceed the maximum extent practicable standard in issuing NPDES permits for municipal storm sewers.

[***41] To support its interpretation of section 1342(p)(3)(B)(iii), Building Industry additionally relies on the statutory provisions addressing nonpoint source runoff (a diffuse runoff not channeled through a particular source), which were also part of the 1987 amendments to the Clean Water Act. (§ 1329.) In particular, Building Industry cites to section 1329(a)(1)(C), which states, "The Governor of each State shall ... prepare and submit to the [EPA] Administrator for approval, a report which ... [¶] ... [¶] describes the process ... for identifying best management practices and measures to control each [identified] category ... of nonpoint sources and ... to reduce, to the *maximum extent practicable*, the level of pollution resulting from such category ... ." (Italics added.) Building Industry argues that because this "nonpoint source" statutory language expressly identifies only the maximum extent practicable standard, we must necessarily conclude that Congress meant to similarly limit the storm sewer point source pollution regulations to the maximum extent practicable standard.

The logic underlying this analogy is flawed because the critical language in the [***42] two statutory provisions is different. In the nonpoint source statute, Congress chose to include only the maximum extent practicable standard (§ 1329(a)(1)(C)); whereas in the municipal storm sewer provisions, Congress elected to include the "and such other provisions" clause (§ 1342(p)(3)(B)(iii)). This difference leads to the reasonable inference that Congress had a different intent when it enacted the two statutory provisions. Moreover, because of a fundamental difference between point and nonpoint source pollution, Congress has historically treated the two types of pollution differently and has subjected each type to entirely different requirements. (See *Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1126-1127.) Given this different treatment, it would be improper to presume Congress intended to apply the same standard in both statutes. Building Industry's citation to comments during the 1987 congressional debates regarding nonpoint source regulation does [**144] not support Building Industry's contentions.

[*888] 4. *Contention that it is "Impossible" for Municipalities to Meet Water Quality Standards*

We also reject Building Industry's arguments woven throughout [***43] its appellate briefs, and emphasized during oral arguments, that the Water Quality Standards provisions violate federal law because compliance with those standards is "impossible." The argument is not factually or legally supported.

(13) First, there is no showing on the record before us that the applicable water quality standards are unattainable. The trial court specifically concluded that Building Industry failed to make a factual showing to

support this contention, and Building Industry does not present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. [HN17]All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. **(14)** (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [110 P.2d 58].) [HN18]A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) *all* of the material evidence, not just the evidence favorable to his or her appellate positions. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888 [160 Cal. Rptr. 516, 603 P.2d 881]; *People v. Dougherty* (1982) 138 Cal. App. 3d 278, 282 [188 Cal. Rptr. 123].) Building Industry has made [***44] no attempt to comply with this well-established appellate rule in its briefs.

In a supplemental brief, Building Industry attempted to overcome this deficiency by asserting that "[t]he record clearly establishes that [the Water Quality Standards provisions] are unattainable during the period the permit is in effect." This statement, however, is not supported by the proffered citation or by the evidence viewed in the light most favorable to the respondents. Further, the fact that many of the Municipalities' storm sewer discharges currently violate water quality standards does not mean that the Municipalities cannot comply with the standards during the five-year term of the Permit. Additionally, Building Industry's assertions at oral argument that the trial court never reached the impossibility issue and/or that respondents' counsel conceded the issue below are belied by the record, including the trial court's rejection of Building Industry's specific challenge to the proposed statement of decision on this very point. [14]

> 14 Because we are not presented with a proper appellate challenge, we do not address the trial court's factual determinations in this case concerning whether it is possible or practical for a Municipality to achieve any specific Permit requirement.

[***45] **(15)** We reject Building Industry's related argument that it was respondents' burden to affirmatively show it is feasible to satisfy each of the applicable Water Quality Standards provisions. [HN19]The party challenging the scope of an administrative permit, such as an NPDES, has the burden of [*889] showing the agency abused its discretion or its findings were unsupported by the facts. (See *Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 817; *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal. App. 3d 17, 25 [190 Cal. Rptr. 744].) Thus, it was not respondents' burden to affirmatively demonstrate it was possible for the Municipalities to meet the Permit's requirements.

Building Industry alternatively contends it was not required to challenge the facts underlying the trial court's determination that the Permit requirements were feasible [**145] because the court's determination was wrong as a matter of law. Specifically, Building Industry asserts that a Permit requirement that is more stringent than a "maximum extent practicable" standard is, by definition, "not practicable" and therefore "technologically impossible" to achieve under any circumstances. Building [***46] Industry relies on a dictionary definition of "practicable," which provides that the word means " 'something that can be done; feasible,' " citing the 1996 version of "Webster's Encyclopedic Unabridged Dictionary."

(16) This argument is unpersuasive. The federal maximum extent practicable standard is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See *ante*, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, *less* stringent than BAT." (Italics added.) [HN20]BAT is an acronym [***47] for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices. (See *Texas Oil & Gas Ass'n v. U.S. E.P.A.* (5th Cir. 1998) 161 F.3d 923, 928.) If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible. In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. (See *Nat. Wildlife Federation v. Norton* (E.D.Cal. 2004) 306 F. Supp. 2d 920, 928, fn. 12 ["[w]hile the meaning of the term 'practicable' in the [Endangered Species Act] is not entirely clear, the term does not simply equate to 'possible' "]; *Primavera Familienstiftung v. Askin* (S.D.N.Y. 1998) 178 F.R.D. [*890] 405, 409 [noting that "impracticability does not mean impossibility, but rather difficulty [***48] or inconvenience"].)

We additionally question whether many of Building Industry's "impossibility" arguments are premature on the record before us. As we have explained, the record does not support that any required control is, or will be, impossible to implement. Further, the Permit allows the Regional Water Board to enforce water quality standards during the iterative process, but does not impose any obligation that the board do so. Thus, we cannot determine with any degree of certainty whether this obligation would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard.

Finally, we comment on Building Industry's repeated warnings that if we affirm the judgment, all affected Municipalities will be in immediate violation of the Permit because they are not now complying with applicable water quality standards, subjecting them to immediate and substantial civil penalties, and leading to a potential "shut down" of public operations. These doomsday arguments are unsupported. The Permit makes clear that Municipalities [**146] are required to adhere to numerous specific controls (none of which are challenged in this case) and [***49] to comply with water quality standards through "timely implementation of control measures" by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. § 122.47.) There is nothing in this record to show the Municipalities will be subject to immediate penalties for violation of water quality standards.

We likewise find speculative Building Industry's predictions that immediately after we affirm the judgment, citizens groups will race to the courthouse to file lawsuits against the Municipalities and seek penalties for violation of the Water Quality Standards provisions. [15] As noted, the applicable [***50] laws provide time for an affected entity to comply with new standards. Moreover, although we do not reach the enforcement issue in this case, we note the [*891] Permit makes clear that the iterative process is to be used for violations of water quality standards, and gives the Regional Water Board the discretionary authority to enforce water quality standards during that process. Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process. (See § 1365(a)(1)(2).) [***51]

15 The Clean Water Act allows a citizen to sue a discharger to enforce limits contained in NPDES permits, but requires the citizen to notify the alleged violator, the state, and the EPA of its intention to sue at least 60 days before filing suit, and limits the enforcement to nondiscretionary agency acts. (See § 1365(a)(1)(2).)

III.-VII.* [NOT CERTIFIED FOR PUBLICATION]

* See footnote, *ante*, page 866.

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

Benke, Acting P. J., and Aaron, J., concurred.

A petition for a rehearing was denied January 4, 2005, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied March 30, 2005. Baxter, J., and Brown, J., were of the opinion that the petition should be granted. [***52]

TAB “7”

LEXSEE

Positive
As of: Jun 17, 2010

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

S119248

SUPREME COURT OF CALIFORNIA

35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071

April 4, 2005, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)
Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.
City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

DISPOSITION: Judgment affirmed in part and remanded in part..

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff cities sought review of a judgment of the Court of Appeal of California, Second Appellate District, Division Three, holding that Cal. Water Code §§ 13241 and 13263 required a regional water control quality board to take into account economic considerations when it adopted water quality standards in a basin plan but not when the board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

OVERVIEW: The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. The court held that whether the regional board should have complied with Cal. Water Code §§ 13263 and 13241 of California's Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by federal law, from taking into account the economic effects of doing so.

OUTCOME: The court affirmed the judgment of the court of appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants were necessary to satisfy federal Clean Water Act requirements for treated waste-

water. The court remanded for further proceedings to determine whether the pollutant limitations in the permits met or exceeded federal standards.

CORE TERMS: water quality, wastewater, regional boards, pollutant, Clean Water Act, effluent, federal law, basin, plant's, stringent', pollution, discharged, economic factors, narrative, federal standards, clean, Porter-Cologne Act, numeric, beneficial uses, concentration, navigable waters, regional, river, issuing, Conservation Laws, point sources, environmental, authorize, chemical, Control Act

LexisNexis(R) Headnotes

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN1]Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Cal. Water Code § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region. Cal. Water Code § 13240. The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Cal. Water Code § 13050(j). Basin plans must be consistent with state policy for water quality control. Cal. Water Code § 13240.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN2]Under the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act. 33 U.S.C.S. § 1370.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN3]The Clean Water Act, 33 U.S.C.S. § 1251 et seq., provides for two sets of water quality measures. Effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. 33 U.S.C.S. §§ 1311, 1314. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway. 33 U.S.C.S. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Point Sources
[HN4]See 33 U.S.C.S. § 1362(14).

Environmental Law > Water Quality > Clean Water Act > Water Quality Standards
[HN5]The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the state. 33 U.S.C.S. § 1313(c).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN6]Part of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. 33 U.S.C.S. § 1342(a), (b). In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN7]See Cal. Water Code § 13263(a).

Environmental Law > Water Quality > General Overview
Real Property Law > Water Rights > Beneficial Use
[HN8]See Cal. Water Code § 13241.

Governments > Legislation > Interpretation
[HN9]When construing any statute, the reviewing court's task is to determine the legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN10]Cal. Water Code § 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in Cal. Water Code § 13241. Listed among the § 13241 factors is economic considerations. Cal. Water Code § 13241(d).

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN11]Cal. Water Code § 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law, 33 U.S.C.S. § 1311(a), and publicly operated wastewater treatment plants must comply with the act's clean water standards, regardless of cost. 33 U.S.C.S. §§ 1311(a), (b)(1)(B), (C), 1342(a)(1), (3).

Constitutional Law > Supremacy Clause > General Overview
Environmental Law > Water Quality > General Overview
[HN12]Because Cal. Water Code § 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Cal. Water Code § 13377 that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN13]The federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., reserves to the states significant aspects of water quality policy, 33 U.S.C.S. § 1251(b), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard, 33 U.S.C.S. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are more stringent than required by federal law-from taking into account the economic effects of doing so.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I. Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that Wat. Code, §§ 13241 and 13263, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with Wat. Code, §§ 13263 and 13241, of California's Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of

the federal Clean Water Act, 33 U.S.C. § 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by [*614] federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water--"Basin Plans."--Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Wat. Code, § 13140, the regional boards formulate and adopt water quality control plans for all areas within a region, Wat. Code, § 13240. Under Wat. Code, § 13050, subd. (j), the regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with state policy for water quality control under Wat. Code, § 13240.

(2) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--Under 33 U.S.C. § 1370, of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act.

(3) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The Clean Water Act, 33 U.S.C. § 1251 et seq., provides for two sets of water quality measures. Pursuant to 33 U.S.C. §§ 1311 and 1314, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under 33 U.S.C. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

(4) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality [*615] standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, 33 U.S.C. § 1313(c), authorizes the EPA to promulgate water quality standards for the state.

(5) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System.--Part of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. Title 33 U.S.C. § 1342(a), (b), of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, Wat. Code, § 13374, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

(6) Statutes § 21--Construction--Legislative Intent.--When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

(7) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, § 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in Wat. Code, § 13241. Listed among the § 13241 factors is economic considerations, in § 13241, subd. (d).

(8) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, § 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, § 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water

Act. That act prohibits the discharge of pollutants into the navigable waters of [*616] the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants must comply with the act's clean water standards under 33 U.S.C. §§ 1311(a), (b)(1)(B) and (C), 1342(a)(1) and (3), regardless of cost.

(9) Pollution and Conservation Laws § 5--Water--Wastewater Discharge Permits--Economic Considerations.--Because Wat. Code, § 13263, cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of § 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Wat. Code, § 13377, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

(10) Pollution and Conservation Laws § 5--Water--Federal and State Standards.--The federal Clean Water Act, 33 U.S.C. § 1251 et seq., reserves to the states significant aspects of water quality policy under 33 U.S.C. § 1251(b), and it specifically grants the states authority to enforce any effluent limitation that is not less stringent than the federal standard under 33 U.S.C. § 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state--when imposing effluent limitations that are more stringent than required by federal law--from taking into account the economic effects of doing so. Thus, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are less stringent than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69.] [*617]

COUNSEL: Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Richard M. Frank and Tom Greene, Chief Assistant Attorneys General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

David S. Beckman and Dan L. Gildor for Natural Resources Defense Counsel, Butte Environmental Council, California Coastkeeper Alliance, CalTrout, Clean Water Action, Clean Water Fund, Coalition on the Environment and Jewish Life of Southern California, Coast Action Group, Defend the Bay, Ecological Rights Foundation, Environment in the Public Interest, Environmental Defense Center, Heal the Bay, Los Angeles Interfaith Environment Council, Ocean Conservancy, Orange County Coastkeeper, San Diego Baykeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Southern California Watershed Alliance, Ventura Coastkeeper, Waterkeeper Alliance, Waterkeepers Northern California, Westside Aquatics, Inc., and Wishtoyo Foundation as Amici Curiae on behalf of Defendants and Appellants.

Downey, Brand, Seymour & Rohwer, Downey Brand, Melissa A. Thorme, Jeffrey S. Galvin, Nicole E. Granquist and Cassandra M. Ferrannini for Plaintiffs and Appellants.

Dennis A. Barlow, City Attorney, and Carolyn A. Barnes, Assistant City Attorney, for Defendant and Appellant City of Burbank.

Rockard J. Delgadillo, City Attorney, and Christopher M. Westhoff, Assistant City Attorney, for Plaintiff and Appellant City of Los Angeles.

Rutan & Tucker and Richard Montevideo for Cities of Baldwin Park, Bell, Cerritos, Diamond Bar, Downey, Gardena, Montebello, Monterey Park, Paramount, Pico Rivera, Rosemead, San Gabriel, San Marino, Santa Fe Springs, Sierra Madre, Signal Hill, Temple City and West Covina, the California Building Industry Association and the Building Industry Legal Defense Foundation as Amici Curiae on behalf of Plaintiffs and Appellants.

Stoel Rives and Lawrence S. Bazel for Western Coalition of Arid States as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson & Gershon and John J. Harris for the League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

[*618] Squire, Sanders & Dempsey, Joseph A. Meckes; David W. Burchmore; and Alexandra Dapolito

Dunn for Association of Metropolitan Sewerage Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith and B. Richard Marsh for County Sanitation Districts of Los Angeles County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Fulbright & Jaworski, Colin Lennard, Patricia Chen; Archer Norris and Peter W. McGaw for California Association of Sanitation Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants. [***306]

JUDGES: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

OPINION BY: KENNARD [**864]

OPINION

KENNARD, J.--Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic [**865] factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

[*619] **I. Statutory Background**

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats. 1969, ch. 482, § 18, p. 1051.) [1] Its goal is "to attain the highest water [***307] quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board). [2]

1 Further undesignated statutory references are to the Water Code.

2 The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (§ 13200, subd. (d).)

(1) [HN1]Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Basin

plans must be consistent with "state policy for water quality control." (§ 13240.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean [*620] Water Act. The Clean Water Act is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 704, quoting 33 U.S.C. § 1251(a).) The act's national goal was to eliminate by the year 1985 "the discharge of pollutants into the navigable waters" of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

(2) [HN2]Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the California Legislature in 1972 to amend the state's Porter-Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (§ 13372.)

[**866] **(3)** Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], described the distinct roles of the state and federal agencies in enforcing water quality: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Toward [***308] this end, [HN3][the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[3] See §§ 1311, 1314. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

3 A "[HN4]point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362 (14).)

[*621] **(4)** "[HN5]The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c)." (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101.)

(5) [HN6]Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of

the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Bur [***309] bank, serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process hundreds of millions of gallons of sewage [**867] each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary. [4] The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent. [5]

4 This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

5 For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional [*623] board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed $ 50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over $ 9 million annually, a nearly 100 percent increase above its $ 9.7 million annual budget for wastewater treatment.

[***310] The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings [**868] to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases. [6]

6 Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2)

the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

[*624] **III. Discussion**

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) Section 13263 provides in relevant part: "[HN7]*The regional board*, after any necessary hearing, *shall prescribe requirements as to the nature of any proposed discharge* [of wastewater]. *The requirements* shall implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and *the provisions of Section 13241*." (§ 13263, subd. (a), italics added.)

Section 13241 states: "[HN8]Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[***311] "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations.*

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge [**869] permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

(6) [HN9]When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan, supra*, at p. 715.)

(7) As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. [HN10]Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a

regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 [***312] Cal. Rptr. 3d 343, 88 P.3d 71].) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was [*626] not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

(8) [HN11]Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). [HN12]**(9)** Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. [7] Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's [**870] declaration in section 13377 that all discharged wastewater must satisfy federal standards. [8] This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1].) To comport with the principles of federal supremacy, California law cannot authorize this [*627] state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

7 The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways*." (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards*, *regardless of cost* (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)

8 As amended in 1978, section 13377 provides for the issuance of waste discharge permits that comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

[***313] Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain

provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal "*wherever attainable,*" an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' "*use and value* for navigation" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

(10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. [HN13]The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*628] a state--when imposing effluent limitations that are *more stringent* than required by federal law--from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the [**871] United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675] ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule [***314] 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this [*629] matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

CONCUR BY: BROWN

CONCUR

BROWN, J., Concurring.--I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when is-

suing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., *ante*, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law--which purports to be an example of cooperative federalism--would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns. [***315]

[**872] **I. Federal Law**

"In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.? [Citation.] A water quality standard for any [*630] given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric*. [Citation.]" (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.] [¶] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations ... .' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd., supra*, 109 Cal.App.4th at pp. 1093-1094, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co.* (4th Cir. 2001) 268 F.3d 255, 265, fn. 9.) "Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states' handiwork." [***316] (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency* (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349] (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes ... . The states were to revisit and, if [*631] necessary, revise those initial standards at least once every three years." (*American Paper*, at p. 349.) Therefore, "once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, [**873] state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.; Stats. 1969, ch. 482, § 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards--and therefore federal requirements for NPDES permits--through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors--including economic factors--set forth in Water Code section 13241.

In addition, as one court observed: "The Porter-Cologne Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat. Code, § 13377.) Water Code section 13374 provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128].)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)--the body responsible to enforce the statutory framework--failed to comply with its statutory mandate.

[***317] For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years--a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA directs [**874] states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.' " (*American Paper, supra*, 996 F.2d at p. 349.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion--including economic considerations--at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625-627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this mat-

ter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at pp. 628-629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits [***318] designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration. [1] In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner. [2] In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

1 (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

2 Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis [**875] may provide a reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," [3] I write separately to set forth my concerns and concur in the judgment--*dubitante*. [4]

3 Marvin Gaye (1971) "Inner City Blues."

4 I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202] (conc. opn. of Berzon, J.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

Received
June 17, 2011
Commission on
State Mandates

TAB “8”

CITY OF RICHMOND, Plaintiff and Appellant, v. COMMISSION ON STATE MANDATES, Defendant and Respondent; DEPARTMENT OF FINANCE, Real Party in Interest and Respondent.

No. C026835.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

64 Cal. App. 4th 1190*; *75 Cal. Rptr. 2d 754*; *1998 Cal. App. LEXIS 546*; *63 Cal. Comp. Cases 733*; *98 Cal. Daily Op. Service 4644*; *98 Daily Journal DAR 6559

May 28, 1998, Decided

SUBSEQUENT HISTORY: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published June 16, 1998. Review Denied July 19, 1998, Reported at: *1998 Cal. LEXIS 5509*.

PRIOR HISTORY: APPEAL from the judgment of the Superior Court of Sacramento County. Super. Ct. No. 96CS03417. James Timothy Ford, Judge.

DISPOSITION: The judgment is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city filed an administrative mandamus action against the Commission on State Mandates, seeking a determination that an amendment to *Lab. Code, § 4707*, making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, was a state mandate to which the city was entitled to reimbursement under *Cal. Const., art. XIII B, § 6*, which applies when a state law establishes a new program or higher level of service payable by local governments. The amendment eliminated local safety members of PERS from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby survivors of a local safety member of PERS who are killed in the line of duty receive both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. The trial court denied the petition, finding that the amendment created an increased cost but not an increased level of service by local governments. (Superior Court of Sacramento County, No. 96CS03417, James Timothy Ford, Judge.)

The Court of Appeal affirmed. The court held that although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did the amendment impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. Local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. The court also held that assembly bill analyses stating that the amendment was a reimbursable state mandate (*Cal. Const., art. XIII B, § 6*), were irrelevant to the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review, and has provided that the initial determination by Legislative Counsel is not binding on the commission. (Opinion by Morrison, J., with Puglia, P. J., and Nicholson, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

64 Cal. App. 4th 1190, *; 75 Cal. Rptr. 2d 754, **;
1998 Cal. App. LEXIS 546, ***; 63 Cal. Comp. Cases 733

Classified to California Digest of Official Reports

(1) Administrative Law § 138--Judicial Review and Relief--Appellate Court--Standard-- Decision of Commission on State Mandates. --Under *Gov. Code, § 17559*, a proceeding to set aside a decision of the Commission on State Mandates on a claim may be commenced on the ground that the commission's decision was not supported by substantial evidence. Where the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, review on appeal is generally the same. However, the appellate court independently reviews the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. The question of whether a law is a state-mandated program or a higher level of service under *Cal. Const., art. XIII B, § 6*, is a question of law that is reviewed de novo.

(2a) (2b) (2c) State of California § 11--Fiscal Matters--Reimbursement for State Mandates--Workers' Compensation Death Benefits Payable to Local Safety Members. --An amendment to *Lab. Code, § 4707*, to eliminate local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby the survivors of a local safety member of PERS who is killed in the line of duty receive both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter, did not mandate a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under *Cal. Const., art. XIII B, § 6*. Although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did it impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as applicable to local governments as they are to private employers.

(3a) (3b) State of California § 11--Fiscal Matters--Reimbursement for State Mandates--Purpose. --*Cal. Const., art. XIII B, § 6*, which requires a subvention of funds to reimburse local governments when a state law mandates a new program or higher level of service on local governments, was intended to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A.]

(4) Statutes § 43--Construction--Aids--Legislative Analysis--Reimbursement for State Mandates--Legislative Intent. --Assembly bill analyses of an amendment to *Lab. Code, § 4707*, making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, stating that it was a reimbursable state mandate (*Cal. Const., art. XIII B, § 6*), were irrelevant to the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review (*Gov. Code, §§ 17500*, *17559*) and has provided that the initial determination by legislative counsel is not binding on the commission (*Gov. Code, § 17575*).

COUNSEL: Nossaman, Guthner, Knox & Elliott, Robert J. Sullivan, Stephen P. Wilman, John T. Kennedy and Scott N. Yamaguchi for Plaintiff and Appellant.

Dwight L. Herr, County Counsel Santa Cruz, Ronald R. Ball, City Attorney Carlsbad, Michael G. Colantuono, City Attorney Cudahay, William B. Conners, City Attorney Monterey, Jonathan B. Stone, City Attorney Montebello, Daniel J. McHugh, City Attorney Redlands, Jeffrey G. Jorgensen, City Attorney San Luis Obispo, Brian Libow, City Attorney San Pablo, Howard, Rice, Nemerovski, Canady & Falk and Richard C. Jacobs as Amici Curiae on behalf of Plaintiff and Appellant.

Gary D. Hori and Shawn D. Silva for Defendant and Respondent.

Daniel E. Lungren, Attorney General, Linda A. Cabatic, Assistant Attorney General, Marsha Bedwell and Shelleyanne W. L. Chang, Deputy Attorneys General, for Real Party [***2] in Interest and Respondent.

JUDGES: Opinion by Morrison, J., with Puglia, P. J., and Nicholson, J., concurring.

OPINION BY: MORRISON

OPINION

[*1193] [**756] **MORRISON, J.**

Chapter 478 of the Statutes of 1989 (chapter 478) amended *Labor Code section 4707* to eliminate local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and

under PERS. As a result, the survivors of a local safety member of PERS who is killed in the line of duty receives both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. This proceeding presents the question whether chapter 478 mandates a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under *article XIII B section 6 of the California Constitution*. We conclude that chapter 478 is not a state mandate requiring reimbursement and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The workers' compensation system provides for death benefits payable to the deceased employee's survivors. (*Lab. Code, § 4700 et seq.*) There are also [***3] preretirement death benefits under PERS. (*Gov. Code, § 21530 et seq.*) There is a special death benefit under PERS if the death was industrial and the deceased was a patrol, state peace officer/firefighter, state safety officer, state industrial, or local safety member. (*Gov. Code, § 21537.*) *Labor Code section 4707* provides a coordination or offset for workers' compensation death benefits when the special death benefit under PERS is payable. In such cases, no workers' compensation death benefit, other than burial expenses, is payable, except that if the PERS special death benefit is less than the workers' compensation death benefit, the difference is paid as a workers' compensation death benefit. The total death benefit is equal to the greater of the PERS special death benefit or the workers' compensation benefit, not the combination of the two death benefits.

Prior to 1989, *Labor Code section 4707* provided in part: "No benefits, except reasonable expenses of burial . . . shall be awarded under this division on account of the death of an employee who is a member of the Public Employees' Retirement System unless it shall be determined that a special death benefit . . . will not be [***4] paid by the Public Employees' Retirement System to the widow or children under 18 years of age, of the deceased, on account of said death, but if the total death allowance paid to said widow and children shall be less than the benefit otherwise payable under this division such widow and children shall be entitled, under this division, to the difference." (Stats. 1977, ch. 468, § 4, pp. 1528-1529.)

[*1194] Chapter 478 amended *Labor Code section 4707* to make technical changes, to provide the death benefit is payable to the surviving spouse rather than to the widow, and [**757] to add subdivision (b). Subdivision (b) of *Labor Code section 4707* reads: "The limitation prescribed by subdivision (a) shall not apply to local safety members of the Public Employees' Retirement System." (Stats. 1989, ch. 478, § 1, p. 1689.)

In 1992, David Haynes, a police officer for the City of Richmond (Richmond), was killed in the line of duty. Officer Haynes was a local safety member of PERS. His wife and children received the PERS special death benefit; they also received a death benefit under workers' compensation.

Richmond filed a test claim with the Commission on State Mandates (the Commission), [***5] contending chapter 478 created a state-mandated local cost. [1] Richmond sought reimbursement of the cost of the workers' compensation death benefit, estimated to be $ 295,432. As part of its test claim, Richmond included legislative history of chapter 478, purporting to show a legislative intent to create a reimbursable state mandate.

1 " 'Test claim' means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." (*Gov. Code, § 17521.*)

The Commission denied the test claim. It found that chapter 478 dealt with workers' compensation benefits and case law held that workers' compensation laws are laws of general application and not subject to *section 6 of article XIII B of the California Constitution*. It noted the legislative history containing analyses that chapter 478 was a state mandate had been prepared before the issuance of *City of Sacramento v. State of California (1990) 50 Cal. 3d 51 [266 Cal. Rptr. 139, 785 P.2d 522]*. [***6]

Richmond filed a petition for a writ of administrative mandate under *Code of Civil Procedure section 1094.5*, seeking to compel the Commission to approve its claim. Both the Commission and the Department of Finance, as real parties in interest, responded. The court denied the petition, finding chapter 478 created an increased cost but not an increased level of service by local governments.

DISCUSSION

I

(1) Under *Government Code section 17559*, a proceeding to set aside the Commission's decision on a claim may be commenced on the ground that the Commission's decision is not supported by substantial evidence. Where [*1195] the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, our review on appeal is generally the same. (*County of Los Angeles v. Commission on State Mandates (1995) 32 Cal. App. 4th 805, 814 [38 Cal. Rptr. 2d 304]*.) However, we independently review the superior court's legal conclusions as to the meaning

and effect of constitutional and statutory provisions. (*City of San Jose v. State of California (1996) 45 Cal. App. 4th 1802, 1810 [53 Cal. Rptr. 2d 521]*.) The question of whether chapter [***7] 478 is a state-mandated program or higher level of service under *article XIII B, section 6 of the California Constitution* is a question of law we review de novo. (*45 Cal. App. 4th at p. 1810*.)

With certain exceptions not relevant here, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ." (*Cal. Const. art. XIII B, § 6*, (hereafter referred to as section 6).)

In *County of Los Angeles v. State of California (1987) 43 Cal. 3d 46 [233 Cal. Rptr. 38, 729 P.2d 202]*, the Supreme Court considered whether laws increasing the amount employers, including local governments, had to pay in certain workers' compensation benefits were a reimbursable "higher level of service" under section 6. The court looked to the intent of the voters in adopting the constitutional provision by initiative. (*43 Cal. 3d at p. 56*.) Noting that the phrase "higher level of service" is meaningless alone, the court found it must be read in conjunction with the phrase "new program." The court concluded, [***8] "that the drafters and the electorate had in mind the commonly understood meanings of the term--programs that carry out the governmental function of providing services to the public, [**758] or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid*.)

(2a) Richmond contends chapter 478 meets both tests to qualify as a program under section 6. Richmond contends increased death benefits are provided to generate a higher quality of local safety officers and thus provide the public with a higher level of service. Richmond argues that providing increased death benefits to local safety workers is analogous to providing protective clothing and equipment for fire fighters. In *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521 [234 Cal. Rptr. 795]*, executive orders requiring updated protective clothing and equipment for firefighters were found to be reimbursable state mandates under section 6. The executive orders applied only to fire protection, a peculiarly governmental function. The court noted that police and fire [*1196] protection are [***9] two of the most essential and basic functions of local government. (*190 Cal. App. 3d at p. 537*.) Richmond urges that since chapter 478 applies only to local safety members, it is also a state mandate directed to a peculiarly local governmental function.

In *Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal. App. 3d 521*, the executive order required updated equipment for the fighting of fires. The use of this equipment would result in more effective fire protection and thus would provide a higher level of service to the public. Here chapter 478 addresses death benefits, not the equipment used by local safety members. Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public. (*City of Anaheim v. State of California (1987) 189 Cal. App. 3d 1478, 1484 [235 Cal. Rptr. 101]* [temporary increase in PERS benefit to retired employees which resulted in higher contribution rate by local government was not a program or service under section 6].) [***10] In *County of Los Angeles v. State of California, supra, 43 Cal. 3d 46*, the increase in certain workers' compensation benefits resulted in an increase in the cost to local governments of providing services. Nonetheless, the Supreme Court found no "higher level of service" under section 6. Similarly, a new requirement for mandatory unemployment insurance for local government employees, an increase in the cost of providing services, was not a "new program" or "higher level of service" in *City of Sacramento v. State of California, supra, 50 Cal. 3d 51, 66-70*. Chapter 478 fails to meet the first test of a "program" under section 6.

Richmond urges chapter 478 meets the second test of a program under section 6 because it imposed a unique requirement on local governments that was not applicable to all residents and entities within the state. (*County of Los Angeles v. State of California, supra, 43 Cal. 3d 46, 56*.) Richmond argues that only local governments have "local safety members" and chapter 478 required double death benefits, both PERS and workers' compensation, for this specific group of employees. By requiring double death benefits for local safety members, chapter 478 [***11] imposed a unique requirement on local government.

The Commission takes a different view of chapter 478. First, it argues that chapter 478 addresses an aspect of workers' compensation law, which, under *County of Los Angeles v. State of California, supra, 43 Cal. 3d 46*, is a law of general application to which section 6 does not apply. The Commission argues chapter 478 imposes no unique requirement; it merely [*1197] eliminates the previous exemption from providing workers' compensation death benefits to local safety members. As such, chapter 478 simply puts local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit. That chapter 478 affects only local

government does not compel the conclusion that it imposes a unique requirement on local government. The Commission contends Richmond's view of chapter 478 is too narrow; [**759] the law must be considered in its broader context.

While Richmond's argument has surface appeal, we conclude the Commission's view is the correct one. Section 6 was designed to prevent the state from forcing programs on local government. **(3a)** "[T]he intent underlying section [***12] 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to 'force' programs on localities." (*County of Los Angeles v. State of California, supra, 43 Cal. 3d at pp. 56-57*.) "The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. [Citation.] Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage--costs which all employers must bear--neither threatens [***13] excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*Id. at p. 61*.)

Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. In *City of Sacramento v. State of California, supra, 50 Cal. 3d 51*, the Legislature enacted a statute requiring local governments to participate in the state's unemployment insurance system on behalf of their employees. Local entities made a claim for reimbursement. First, the Supreme Court found that like an increase in workers' compensation benefits, a requirement to provide unemployment insurance did not compel new or increased "service to the public" at the local level. (*Id. at pp. 66-67*.) The court next addressed whether the new law imposed a unique requirement on local governments.

"Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are [*1198] imposed on local governments 'unique[ly],' and not merely as an incident of compliance with general laws. State and local governments, [***14] and nonprofit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement 'new' to local agencies, but that requirement was not 'unique.' [P] The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision." (*City of Sacramento v. State of California, supra, 50 Cal. 3d 51, 68-69*, italics in original.)

Richmond argues that *Labor Code section 4707*, prior to chapter 478, was not an exemption from workers' compensation, relying on *Jones v. Kaiser Industries Corp. (1987) 43 Cal. 3d 552 [237 Cal. Rptr. 568, 737 P.2d 771]*. In *Jones*, the plaintiff, a city police officer, was [***15] killed in a traffic accident while on duty. His survivors brought suit against the city, contending it has created and maintained a dangerous condition at the intersection where the accident occurred. Plaintiffs argued their suit was not barred by the exclusivity provisions of workers' compensation because they did not receive a workers' compensation death benefit under *Labor Code section 4707*. The court rejected this argument. [**760] First, plaintiffs did receive a benefit under workers' compensation in the form of burial expenses. Further, *Labor Code section 4707* was designed not to exclude plaintiffs from receiving workers' compensation benefits, but to assure they received the maximum benefit under either PERS or workers' compensation. (*43 Cal. 3d at p. 558*.)

Under *Jones v. Kaiser Industries Corp., supra, 43 Cal. 3d 552*, one receiving a special death benefit under PERS rather than the workers' compensation death benefit is not considered exempt from workers' compensation for purposes of its exclusivity provisions, precluding a suit against the employer for negligence. This conclusion does not affect the analysis that chapter 478, by removing the offset provisions for employers [***16] of local safety members, merely makes local governments "indistinguishable in this respect from private employers." (*County of Los Angeles v. State of California, supra, 43 Cal. 3d at p. 58*.)

(2b) Richmond's error is in viewing chapter 478 from the perspective of what the final result is, rather than from the perspective of what the law mandates. **(3b)** "We recognize that, as is made indisputably clear from [*1199] the language of the constitutional provision, local entities are not entitled to reimbursement for

all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." (*Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal. 3d 830, 835 [244 Cal. Rptr. 677, 750 P.2d 318]*.) **(2c)**While the result of chapter 478 is that local safety members of PERS now are eligible for two death benefits and local governments will have to fund the workers' compensation benefit, chapter 478 does not mandate double death benefits. Instead, it merely eliminates the offset provisions of *Labor Code section 4707*. In this regard, the law makes the workers' compensation death benefit requirements as applicable [***17] to local governments as they are to private employers. It imposes no "unique requirement" on local governments.

Further, the view that the Legislature was proceeding by stages in enacting chapter 478 finds support in the history of the nearly identical predecessor to chapter 478, Assembly Bill No. 1097 (1987-1988 Reg. Sess.). Assembly Bill No. 1097 was passed in 1988, but was vetoed by the Governor. While the final version of Assembly Bill No. 1097 was virtually identical to chapter 478 in adding subdivision (b) to *Labor Code section 4707* (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended Mar. 22, 1988), the bill was very different when it began. The initial version of Assembly Bill No. 1097 repealed *Labor Code section 4707* in its entirety. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) introduced Mar. 2, 1987.) The next version made *Labor Code section 4707* applicable only to state members of PERS. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended June 15, 1987.) The final version left *Labor Code section 4707* applicable to all but local safety members of PERS.

II

(4) As part of its test claim, Richmond included portions of the legislative history of chapter 478 to show [***18] the Legislature intended to create a state mandate. This history includes numerous bill analyses by legislative committees that state the bill creates a state-mandated local program.

Government Code section 17575 requires the Legislative Counsel to determine if a bill mandates a new program or higher level of service under section 6. If the Legislative Counsel determines the bill will mandate a new program or higher level of service under section 6, the bill must contain a section specifying that reimbursement shall be made from the state mandate fund, that there is no mandate, or that the mandate is being disclaimed. (*Gov. Code, § 17579*.) The Legislative Counsel found that chapter 478 imposed [*1200] a state-mandated local program. The enacted statute provided: "Notwithstanding *Section 17610 of the Government Code*, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with *Section* [**761] *17500*) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars [***19] ($ 1,000,000), reimbursement shall be made from the State Mandates Claims Fund." (Stats. 1989, ch. 478, § 2, p. 1689.)

One analysis concluded this language was technically deficient because it does not contain a specific acknowledgment that the bill is a state mandate. Reimbursement could not be made until the Commission held a hearing on a test claim. The analysis concluded it "should not be a serious problem because the information provided in this analysis could also be provided to the Commission on State Mandates if any local agency submits a claim for reimbursement to that Commission."

Another analysis suggested including an appropriation to avoid the necessity of the Commission having to determine that the bill was a mandate.

Richmond argues this legislative history shows the Legislature intended chapter 478 to be a state mandate and that it should be considered in making that determination. Amici curiae submitted a brief urging that case law holding that legislative history is irrelevant to the issue of whether there is a state-mandated new program or higher level of service under section 6 is wrongly decided. [2] Amici curiae argue that the intent of the Legislature [***20] should control. They further note that the legislative history of chapter 478 shows that the initial opposition of the League of California Cities was dropped after the bill was amended to ensure reimbursement, and that the Governor signed the bill after he had vetoed a similar one that was not considered a state mandate. Amici curiae argue that to ignore the widespread understanding that the bill created a state mandate would undermine the legislative process.

2 The California State Association of Counties, and the Cities of Carlsbad, Cudahy, Montebello, Monterey, Redlands, San Luis Obispo and San Pablo filed an amici curiae brief in support of Richmond.

In *County of Los Angeles v. Commission on State Mandates, supra, 32 Cal. App. 4th 805*, plaintiff sought reimbursement for costs incurred under *Penal Code section 987.9* for providing certain services to indigent criminal defendants. Plaintiff argued the Legislature's initial appropriation of funds to cover the costs incurred under *Penal Code section* [***21] *987.9* was a final and [*1201] unchallengeable determination that *sec-*

tion 987.9 constituted a state mandate. The court rejected this argument. "The findings of the Legislature as to whether *section 987.9* constitutes a state mandate are irrelevant." (*32 Cal. App. 4th at p. 818*.)

The court, relying on *Kinlaw v. State of California (1991) 54 Cal. 3d 326 [285 Cal. Rptr. 66, 814 P.2d 1308]*, found the Legislature had created a comprehensive and exclusive procedure for implementing and enforcing section 6. (*County of Los Angeles v. Commission on State Mandates, supra, 32 Cal. App. 4th at pp. 818-819*.) This procedure is set forth in *Government Code section 17500 et seq.* "[T]he statutory scheme contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists, and the Commission properly determined that no state mandate existed." (*32 Cal. App. 4th at p. 819*.)

In *City of San Jose v. State of California, supra, 45 Cal. App. 4th 1802, 1817-1818*, the court relied upon *County of Los Angeles v. Commission* [***22] *on State Mandates, supra, 32 Cal. App. 4th 805*, in rejecting the argument that the determination by Legislative Counsel that a bill imposed a state mandate was entitled to deference.

Amici curiae contend these cases are wrong because they ignore the cardinal rules of statutory construction that courts must construe statutes to conform to the purpose and intent of lawmakers and that the intent of the Legislature should be ascertained to effectuate the purpose of the law.

Amici curiae are correct that " 'the objective of statutory interpretation is to ascertain and effectuate legislative intent.' [Citation.]" (*Trope v. Katz (1995) 11 Cal. 4th 274, 280* [**762] *[45 Cal. Rptr. 2d 241, 902 P.2d 259]*.) Where such intent is not clear from the language of the statute, we may resort to extrinsic aids, including legislative history. (*People v. Coronado (1995) 12 Cal. 4th 145, 151 [48 Cal. Rptr. 2d 77, 906 P.2d 1232]*.) Here, however, the issue is not the interpretation of *Labor Code section 4707*. The parties agree it requires that the survivors of local safety members killed due to an industrial injury receive both the special death benefit under PERS and the workers' compensation [***23] death benefit. Rather, the issue is whether section 6 requires reimbursement for the costs incurred by local governments under chapter 478. The Legislature has entrusted that determination to the Commission, subject to judicial review. (*Gov. Code, § 17500*, *17559*.) It has provided that the initial determination by Legislative Counsel is not binding on the Commission. (*Id*., *§ 17575*.) Indeed, the language of chapter 478 recognizes that the determination of whether the bill is a state mandate lies with [*1202] the Commission. It reads, "*if* the Commission on State Mandates determines that this act contains costs mandated by the state, . . ." (Stats. 1989, ch. 478, § 2, p. 1689, italics added.) While the legislative history of chapter 478 may evince the understanding or belief of the Legislature that chapter 478 created a state mandate, such understanding or belief is irrelevant to the issue of whether a state mandate exists. (*County of Los Angeles v. Commission on State Mandates, supra, 32 Cal. App. 4th 805, 819*.)

DISPOSITION

The judgment is affirmed.

Puglia, P. J., and Nicholson, J., concurred.

Appellant's petition for review by the Supreme Court was denied [***24] August 19, 1998.

Received
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Commission on
State Mandates

TAB “9”

CITY OF SAN JOSE, Plaintiff and Respondent, v. THE STATE OF CALIFORNIA, Defendant and Appellant; KATHLEEN CONNELL, as Controller, etc., et al., Real Parties in Interest and Appellants.

No. H014099.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

45 Cal. App. 4th 1802*; *53 Cal. Rptr. 2d 521*; *1996 Cal. App. LEXIS 520*; *96 Cal. Daily Op. Service 3995*; *96 Daily Journal DAR 6437

June 3, 1996, Decided

PRIOR HISTORY: [***1] Santa Clara County Superior Court. Super. Ct. No. CV734424. Hon. Taketsugu Takei, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted a city's petition for a writ of mandate against the state, ruling that *Gov. Code, § 29550*, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, established a new program or higher level of service under *Cal. Const., art. XIII B, § 6*, which imposes limits on the state's authority to mandate new programs or increased services on local governmental entities. (Superior Court of Santa Clara County, No. CV734424, Taketsugu Takei, Judge.)

The Court of Appeal reversed with directions to the trial court to deny the petition. The court held that *Gov. Code, § 29550*, did not establish a new program or higher level of service under *Cal. Const., art. XIII B, § 6*, since the shift in funding was not from the state to the local entity but from county to city. At the time *Gov. Code, § 29550*, was enacted, and long before, the financial and administrative responsibility associated with the operation of county jails and detention of arrestees was borne entirely by the county (*Gov. Code, § 29602*). In this respect, counties are not considered agents of the state. Moreover, Cal. Const., art. XIII B, treats cities and counties alike as "local government." Thus, for purposes of mandate subvention analysis, counties and cities were intended to be treated alike as part of "local government"; both are considered local agencies or political subdivisions of the state. Nothing in Cal. Const., art. XIII B prohibits the shifting of costs between local governmental entities. The court also held that the statute did not shift costs so as to constitute a state "mandate" within the meaning of *Cal. Const., art. XIII B, § 6*. The pertinent words of the statute state that "a county may impose a fee on a city." Thus, it does not require that counties impose fees on other local entities, but only authorizes them to do so. The court further held that the Legislative Counsel's determination that *Gov. Code, § 29550*, imposed a state mandated local program was not determinative of the ultimate issue whether the enactment constituted a state mandate under *Cal. Const., art. XIII B, § 6*. (Opinion by Bamattre-Manoukian, J., with Cottle, P. J., and Mihara, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Administrative Law § 138--Judicial Review and Relief--Appellate Court--State Mandate Proceedings. --*Gov. Code, § 17559*, requires that the trial court review decisions of the Commission on State Mandates under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, appellate courts are generally confined to inquiring whether substantial evidence supports the trial court's findings and judgment. However, the appellate court independently reviews the trial court's legal conclusions about the meaning and effect of constitutional and statutory provisions. The question whether a statute constitutes a state mandated pro-

gram is a purely legal question, warranting de novo review.

(2) Constitutional Law § 39--Distribution of Governmental Powers--Legislative Power. --Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the People's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers that are not expressly, or by necessary implication denied to it by the Constitution. Secondly, all intendments favor the exercise of the Legislature's plenary authority: if there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations imposed by the Constitution are to be construed strictly and are not to be extended to include matters not covered by the language used.

(3) State of California § 11--Fiscal Matters--State Mandated Programs--What Constitutes--Reimbursement to County for Costs of Booking City Arrestees. --*Gov. Code, § 29550*, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, does not establish a new program or higher level of service under *Cal. Const., art. XIII B, § 6*, which imposes limits on the state's authority to mandate new programs or increased services on local governmental entities, since the shift in funding is not from the State to the local entity but from county to city. At the time *Gov. Code, § 29550*, was enacted, and long before, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county (*Gov. Code, § 29602*). In this respect, counties are not considered agents of the state. Moreover, Cal. Const., art. XIII B, treats cities and counties alike as "local government." Thus, for purposes of subvention analysis, it is clear that counties and cities were intended to be treated alike as part of "local government"; both are considered local agencies or political subdivisions of the state. Nothing in Cal. Const., art. XIII B prohibits the shifting of costs between local governmental entities.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(4) State of California § 11--Fiscal Matters--State Mandated Programs--What Constitutes--Reimbursement of County for Booking City Arrestees. --*Gov. Code, § 29550*, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, does not shift costs so as to constitute a state "mandate" within the meaning of *Cal. Const., art. XIII B, § 6*, which imposes limits on the State's authority to mandate new programs or increased services on local governmental entities. The pertinent words of the statute state that "a county may impose a fee on a city." Thus, it does not require that counties impose fees on other local entities, but only authorizes them to do so. Although as a practical result of the authorization under *Gov. Code, § 29550*, a city is required to bear costs it did not formerly bear, a mandate cannot be read into language that is plainly discretionary. *Cal. Const., art. XIII B, § 6*, was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State.

(5) Constitutional Law § 39--Distribution of Governmental Powers--Legislative Power--Constitutional Restrictions--Strict Construction: State of California § 11--Fiscal Matters--State Mandated Programs. --Rules of constitutional interpretation require that constitutional limitations and restrictions on legislative power are to be construed strictly and are not to be extended to include matters not covered by the language used. Policymaking authority is vested in the Legislature, and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation. Under these principles, there is no basis for applying *Cal. Const., art. XIII B, § 6*, which imposes limits on the state's authority to mandate new programs or increased services on local governmental entities, as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

(6) State of California § 11--Fiscal Matters--State Mandated Programs--What Constitutes--Reimbursement of County For Booking City Arrestees --The Legislative Counsel's determination that *Gov. Code, § 29550*, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, imposed a state mandated local program was not determinative of the ultimate issue whether the enactment constituted a state mandate under *Cal. Const., art. XIII B, § 6*. The legislative scheme contained in *Gov. Code, § 17500 et seq.*, makes clear that this issue is to be decided by the State Commission on Mandates. The statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate

whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists.

COUNSEL: Daniel E. Lungren, Attorney General, Floyd D. Shimomura, Assistant Attorney General, Linda A. Cabatic and Keith Yamanaka, Deputy Attorneys General, Gary D. Hori and Paula A. Higashi for Defendant and Appellant and for Real Parties in Interest and Appellants.

Joan R. Gallo, City Attorney, George Rios, Assistant City Attorney, David J. Stock and Joseph DiCiuccio, Deputy City Attorneys, for Plaintiff and Respondent.

Burke, Williams & Sorensen, J. Robert Flandrick, Deanna L. Ballesteros and Timothy L. Davis as Amici Curiae on behalf of Plaintiff and Respondent.

JUDGES: Opinion by Bamattre-Manoukian, J., with Cottle, P. J., and Mihara, J., concurring.

OPINION BY: BAMATTRE-MANOUKIAN

OPINION

[*1806] [**523] **BAMATTRE-MANOUKIAN, J.**

In 1979 the voters of the State of California (State) adopted an initiative which added article XIII B to the state Constitution. This followed in the wake of Proposition 13, which had added article XIII A the previous year. Section 6 of article XIII B imposed limits on the State's authority to mandate new programs or increased services on local [***2] governmental entities, whose taxing powers had been severely restricted by Proposition 13. [1] Under section 6, whenever the state mandated such a program, the State would be required to reimburse the local entity for the costs of the program.

1 We will refer herein to *section 6 of article XIII B of the California Constitution* simply as section 6.

The present proceeding arose after the Legislature enacted *Government Code section 29550* in 1990 (hereafter, *section 29550*). *Section 29550* authorized counties to charge cities, and other local entities such as school districts, for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities. The City of San Jose (City) claims that at the time of trial it had incurred expenses of over $ 10 million as a result of costs imposed pursuant to *section 29550*.

City contends *section 29550* is a state mandated program under article XIII B, section 6, and that the State must reimburse these costs. The State claims that [***3] *section 29550* simply authorizes allocation of booking costs, which formerly were borne solely by the counties, among all the local entities responsible for the arrests; since there is no mandated shifting of costs from state to local government, *section 29550* does not come within section 6 and no reimbursement is necessary.

We agree with the state and we therefore reverse the judgment of the superior court which had granted City's petition for a writ of mandate. We direct that the court issue an order denying the petition and enter judgment for the State.

BACKGROUND

Articles XIII A and XIII B of the Constitution were intended to be complementary provisions with the general purpose of protecting taxpayers by restricting government's power both to levy and to spend taxes for public purposes. (*County of Fresno v. State of California (1991) 53 Cal. 3d 482, 486-487 [280 Cal. Rptr. 92, 808 P.2d 235]*; *City of Sacramento v. State of California (1990) 50 Cal. 3d 51, 59, fn. 1 [266 Cal. Rptr. 139, 785 P.2d 522]*.) [*1807]

In 1978 article XIII A was added to the California Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling [***4] ad valorem property taxes and the imposition of new "special taxes." (*County of Fresno v. State of California, supra, 53 Cal. 3d at p. 486*.) In recognition of the fact that Proposition 13 would radically reduce county revenues, the State took steps to assume responsibility for programs previously financed by local government. (*County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 61 [233 Cal. Rptr. 38, 729 P.2d 202]*.)

The following year, through another statewide election in 1979, article XIII B was added to the Constitution. Article XIII B placed limitations on the ability of both state and local governments to appropriate funds for expenditures, effectively freezing appropriations at both the state and local level. (*Cal. Const., art. XIII B, § 8, subd. (h)*; *id*., § 2.) Further, section 6 was included in article XIII B in order to protect shrinking tax revenues of local government from state mandates which would require expenditure of such revenues. (*County of Fresno v. State of California, supra, 53 Cal. 3d at p. 487*.) "[It] was intended to preclude the state from shifting financial responsibility for carrying out governmental functions [***5] onto local entities that were ill equipped to handle the task." (*Ibid*.)

Section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level

of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

[**524] In order to implement section 6, the Legislature enacted *Government Code sections 17500-17630*. Those sections set forth a procedure for determining whether a particular statute imposes state-mandated costs on a local entity within the meaning of section 6. Section 17525 created the Commission on State Mandates (Commission), which has the sole purpose of hearing and deciding on claims by local government that the local entity "is entitled to be reimbursed by the state for costs" as required by section 6. (*Gov. Code, § 17551, subd. (a)*.)

A local entity seeking reimbursement must first file a claim with the Commission. The Commission then holds a public hearing, takes evidence and decides whether the particular state enactment mandates a "new program or increased level of service." (*Gov. Code, § 17551*, *17553*, *17556*.) [***6] The first claim made with respect to a particular statute becomes a "test claim" and its adjudication then governs all subsequent claims based on the same statute. (*Gov. Code, § 17521*; *Kinlaw v. State of California (1991) 54 Cal. 3d* [*1808] *326, 332 [285 Cal. Rptr. 66, 814 P.2d 1308]*.) If the claim is rejected, the local entity may bring an action in administrative mandamus in superior court to challenge the Commission's determination. (*Gov. Code, § 17559*.)

Section 29550 was enacted in 1990, effective as of July 1 of that year. It states in relevant part: "Notwithstanding any other provision of law, a county may impose a fee upon a city, [or other local entity], for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city, . . . where the arrested persons are brought to the county jail for booking or detention. The fee imposed by a county pursuant to this section shall not exceed the actual administrative costs, including applicable overhead costs . . . ."

In response to the passage of *section 29550*, the County of Santa Clara enacted Ordinance No. NS-300.470. It provides that "(a) There [***7] is hereby imposed a fee upon every city [or other local entity], equal to the administrative costs, including applicable overhead costs of booking or other processing at any county jail facility of every person arrested by an employee of such city . . . and brought to such county jail facility for booking or detention." The ordinance further provides that "(c) [s]uch fee shall apply to every booking or processing of a person at a county jail facility on and after July 1, 1990."

In October of 1991, City, joined by the Cities of Santa Cruz and Emeryville, filed a test claim with the Commission, claiming that *section 29550* imposed on City "costs mandated by the state" (*Gov. Code, § 17551, subd. (a)*), which were reimbursable under section 6. City alleged it had incurred costs in excess of $ 3 million for the first year following the effective date of Ordinance NS-300.470.

The gist of the argument in City's test claim was that counties function as political subdivisions and agents of the State, charged with enforcement of the state's criminal laws. Detaining and booking arrestees is an integral part of this law enforcement process. By authorizing counties to require cities to bear [***8] these costs, *section 29550* mandated a shift of fiscal responsibility onto local entities, in violation of the purposes underlying section 6.

The Commission heard the matter on May 28, 1992, and issued a proposed statement of decision in which it concluded that *section 29550* does not create a reimbursable state-mandated program within the meaning of section 6. The Commission found that "maintenance of jails and detention of prisoners have always been a local matter charged to local government, and that financial and administrative responsibility for the county jail facility are [*1809] borne by the county." The Commission further found that "the state and counties are not synonymous entities for the maintenance of the jails and detention of prisoners. . . . [P] In sum, cities and counties are both forms of local government." Therefore, "the imposition of costs authorized by *Government Code section 29550* results in a shift or reallocation of funds between local governmental entities that benefit from the county jail facility. . . . [P] . . . [T]he reimbursement required by article XIII B of the California Constitution does not apply in this [**525] situation because that provision [***9] is concerned with the relationship between state and local governments; it does not address legislation that affects financial relationships among local governments."

Furthermore, the Commission found that *section 29550* was not a statemandated program because "the section is clearly discretionary in empowering a county to impose a booking or other processing fee upon a city . . . . *Government Code section 29550* does not require, but merely authorizes, counties to establish booking fees. Each county elects whether to charge cities and other entities for booking and detention services provided at a county jail." The Commission's proposed statement of decision was unanimously adopted by the Commission as its decision on July 23, 1992.

On September 7, 1993, City filed a petition for a writ of mandate in superior court. The petition alleged

that in denying City's claim the Commission misinterpreted the Constitution and *section 29550* as well as various decisions of California courts. City asked 1) that the Commission's decision be vacated, 2) that the court find that *section 29550* mandated a new program for which the State was obligated to reimburse City under section 6, and 3) that [***10] the State be ordered to reimburse City for all booking and processing fees incurred to date.

City named both the state and the Commission as respondents and included the state Controller, the Department of Finance and the Director of Finance as real parties in interest. The matter was fully briefed and, following a hearing on October 28, 1993, the court took it under submission.

On November 23, 1993, the superior court issued a decision in which it found that "shifting of the costs of booking and processing arrestees from counties to cities is a new program which is state mandated as opined by the legislative counsel. To hold otherwise is to deny reality and to ignore the substance of the law and follow only the form. The county is the agent of the state and is responsible for administering the state's criminal justice system." Judgment was entered for the City on May 4, 1994, and a peremptory writ of mandate issued granting City the relief requested.

[*1810] The State and the Commission have appealed. We granted permission to a number of other California cities to file an amicus curiae brief in support of City.

STANDARD OF REVIEW

(1) *Government Code section 17559* governs [***11] the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. (*County of Los Angeles v. Commission on State Mandates (1995) 32 Cal. App. 4th 805, 814 [38 Cal. Rptr. 2d 304]*.) However, we independently review the superior court's legal conclusions about the meaning and effect of constitutional and statutory provisions. (*Greenwood Addition Homeowners Assn. v. City of San Marino (1993) 14 Cal. App. 4th 1360, 1367 [18 Cal. Rptr. 2d 350]*.) Here the question whether *section 29550* is a state-mandated program within the meaning of section 6 is a purely legal question, warranting de novo review.

(2) In interpreting a legislative enactment with respect to a provision of the California Constitution, we bear in mind the following fundamental principles: " 'Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two [***12] important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution. [Citations.] . . . [P] Secondly, all intendments favor the exercise of the Legislature's plenary authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include [**526] matters not covered by the language used." [Citations.]' " (*Pacific Legal Foundation v. Brown (1981) 29 Cal. 3d 168, 180 [172 Cal. Rptr. 487, 624 P.2d 1215]*, quoting *Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal. 3d 685, 691 [97 Cal. Rptr. 1, 488 P.2d 161]*, italics omitted.)

DISCUSSION

We must determine whether *section 29550* constitutes a "new program or higher level of service" which is "mandated" by the State on local government within the meaning [***13] intended by section 6 of the Constitution. [*1811] **(3)** As to the first part of the question, whether *section 29550* establishes a new program or higher level of service, the leading case of *Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal. 3d 830 [244 Cal. Rptr. 677, 750 P.2d 318]* (*Lucia Mar*) provides a useful focus for discussion.

Lucia Mar involved *Education Code section 59300*, passed in 1981, which required local school districts to contribute part of the cost of educating district students at state schools for the severely handicapped. Prior to 1979 the school districts had been required by statute to contribute to the education of students in their districts who attended state schools. (Former *Ed. Code, § 59021*, *59121*, *59221*.) However, those statutes were repealed following the passage of Proposition 13 in 1978, and in 1979 the state assumed full responsibility for funding the schools. When article XIII B was added to the Constitution, effective July 1, 1980, the State had full financial responsibility for operating the state schools, and this was the status when *section 59300* was enacted in 1981.

In 1984 the Lucia Mar Unified School District and other [***14] school districts filed a test claim asserting that *Education Code section 59300* required them to make payments for a " 'new program or increased level of service,' " thus entitling them to reimbursement under section 6. The Commission denied the claim, finding that, although increased costs had been imposed on the district, *section 59300* did not establish any " 'new pro-

gram or increased level of service.' " This decision was affirmed by the superior court, which found that *section 59300* did not mandate a new program or higher level of service but simply called for an " 'adjustment of costs.' " (*Lucia Mar, supra, 44 Cal. 3d at p. 834*.) The Court of Appeal also affirmed, reasoning that a shift in the funding of an existing program is not a "new program."

The Supreme Court reversed the judgment in favor of the State. The court recognized that ". . . local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." (*Lucia Mar, supra, 44 Cal. 3d at p. 835*.) " 'Program,' " as used in article XIII B of the California Constitution, [***15] is "one that carries out the 'governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' " (*Lucia Mar, supra, at p. 835*, quoting *County of Los Angeles v. State of California, supra, 43 Cal. 3d at p. 56*.) Under this definition the high court found that the contributions called for in *Education Code section 59300* were used to fund a "program." This was so even though the school district was required only [*1812] to contribute funds to the state-operated schools rather than to administer the program itself.

The court found further that the program established by *Education Code section 59300* was a "new program" insofar as the school district was concerned since, at the time it was enacted in 1981, school districts were not required to contribute to the education of their students at the state-operated schools. The court concluded that a shift in funding of an existing program from the state to a local entity constitutes a new program within the meaning of section 6. "The intent of the section [section [***16] 6] would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 . . . because the programs are not 'new.' [**527] Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article." (*Lucia Mar, supra, 44 Cal. 3d at p. 836*, fn. omitted.) [2]

> 2 In *Lucia Mar* the case was remanded to the Commission for a determination of the remaining issue, whether *Education Code section 59300* in fact "mandated" the school districts to make the called for contributions. (*Lucia Mar, supra, 44 Cal. 3d at p. 836*.)

[***17] City and the amici curiae cities contend that the principles expressed in *Lucia Mar* compel the same result here. *Section 29550*, they argue, is a classic example of the state attempting to shift to local entities the financial responsibility for providing public services. As in *Lucia Mar*, the program is "new" as to City because City has not formerly been required to contribute financially to services provided via the booking process. And, as the *Lucia Mar* court explained, it does not matter that City itself is not required to provide the services; a shift in funding of an existing program from the State to the local level qualifies as a "new program" under section 6.

The flaw in City's reliance on *Lucia Mar* is that in our case the shift in funding is not from the State to the local entity but from county to city. In *Lucia Mar*, prior to the enactment of the statute in question, the program was funded and operated entirely by the state. Here, however, at the time *section 29550* was enacted, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely [***18] by the county. In the recent case of *County of Los Angeles v. Commission on State Mandates, supra, 32* [*1813] *Cal. App. 4th 805*, this distinction is the focus of the court's section 6 analysis.

In *County of Los Angeles*, the court of appeal addressed the question whether *Penal Code section 987.9* was a state-mandated program for which counties were entitled to be reimbursed. That statute, enacted in 1977, provided that indigent defendants in capital cases could request funds for investigators and experts to assist in the preparation or presentation of the defense. Prior to 1990, costs of this program were reimbursed to the counties by the state by annual appropriations. In the Budget Act of 1990-1991, however, no appropriation was made and counties were obliged to absorb the costs. The County of Los Angeles filed a test claim with the Commission, arguing that the state's withdrawal of funding for *section 987.9* costs constituted an unlawful shifting of financial responsibility for the program from the state to the counties, within the meaning of section 6 and in violation of the Supreme Court's holding in *Lucia Mar*.

The Court of Appeal in *County of Los Angeles* [***19] decided first that the requirements of *Penal Code section 987.9* were not state mandated, but were mandated by the United States Constitution. As a separate basis for its opinion, however, the court found that the State's withdrawal of funds to reimburse *section 987.9* costs was not a "new program" under section 6.

The court distinguished *Lucia Mar* as follows: "In *Lucia Mar*, the handicapped school program in issue had been operated and administered by the State of California for many years. The court found primary responsibility rested with the state and that the transfer of financial responsibility from the state through state tax revenues to school districts through school district tax and assessment revenues in the school district treasuries imposed a new program on school districts. . . . [P] In contrast, the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under *section 987.9*. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility. [***20] There has been no shift of costs from the [**528] state to the counties and *Lucia Mar* is, thus, inapposite." (*County of Los Angeles v. Commission on State Mandates, supra, 32 Cal. App. 4th at p. 817*.)

This analysis applies equally to our case. It has long been the law in California that " ' "the expense of capture, detention and prosecution of persons charged with crime is to be borne by the county . . . ." ' " (*County of San Luis Obispo v. Abalone Alliance (1986) 178 Cal. App. 3d 848, 859 [223* [*1814] *Cal. Rptr. 846]*.) *Government Code section 29602*, which was enacted in 1947, provides that "[t]he expenses necessarily incurred in the support of persons charged with or convicted of a crime and committed to the county jail . . . and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law are county charges." (See also *Washington Township Hosp. Dist. v. County of Alameda (1968) 263 Cal. App. 2d 272, 275 [69 Cal. Rptr. 442]*.) The Penal Code similarly provides that county jails are kept by the sheriffs of the counties in which they are located and that the expenses in providing for prisoners in those jails are [***21] to be paid out of the county treasury. (*Pen. Code, § 4000*, *4015*.)

City acknowledges that counties have traditionally borne these expenses, but argues that they do so only in their role as agents of the State. Counties, it is argued, are political subdivisions of the State, organized for the purpose of carrying out functions of state government and advancing state policies, particularly in the area of administration of justice. (See, e.g., *Wilkinson v. Lund (1929) 102 Cal. App. 767, 772 [283 P. 385]*; *Gov. Code, § 23002*; *Marin County v. Superior Court (1960) 53 Cal. 2d 633, 638-639 [2 Cal. Rptr. 758, 349 P.2d 526]*.) For example, prosecutions take place in county courts but are brought on behalf of the people of the State of California; the state Attorney General has direct supervision over county sheriffs and district attorneys (*Cal. Const., art. V, § 13, subd. (b)*; *Gov. Code, § 12550*, *12560*.); and the state asserts substantial control over the operation of county jails. (*Pen. Code, § 4000 et seq.*; *6030 et seq.*) Enforcement of the state's criminal laws is a governmental function, the expense of which the state imposes on the county as the administrative arm of the [***22] state. (See *Los Angeles Warehouse Co. v. Los Angeles County (1934) 139 Cal. App. 368, 371 [33 P.2d 1058]*.) Thus even though the costs of operating county jails and detaining prisoners are paid from the county treasury, City argues those functions are essentially part of a state program. The imposition of those costs on cities therefore constitutes a shift from the state to local government.

This characterization of the county as an agent of the State is not supported by recent case authority, nor does it square with definitions particular to subvention analysis. In *County of Lassen v. State of California (1992) 4 Cal. App. 4th 1151 [6 Cal. Rptr. 2d 359]*, a county sought indemnity from the state for costs of defending against an action by inmates of the county jail alleging inadequate conditions in the jail facility. The county alleged that the State has the ultimate responsibility for setting forth rules and standards governing the operation of jail facilities, and that county jails are used principally to incarcerate persons convicted of or charged with violations of [*1815] state law. Further, the county reasoned that "it [was] the agent of the State in enforcing [***23] the State's laws against third persons" and that as State's agent in this regard it was entitled to indemnity from its principal for expenditures or losses incurred in discharge of its authorized duties. (*Id. at p. 1155*.)

The Court of Appeal rejected this theory, squarely holding that the costs of operating county jails, including the capture, detention and prosecution of persons charged with crime are to be borne by the counties. (*County of Lassen v. State of California, supra, 4 Cal. App. 4th at p. 1156*, citing *Pen. Code, § 4000*, *4015*; *Gov. Code, § 29602*; see also *County of San Luis Obispo v. Abalone Alliance, supra, 178 Cal. App. 3d at p. 859*.) Further, the court observed that the Legislature was entitled to make policy decisions in order to assist counties in bearing the financial burden of certain aspects of running jails, such as providing funding assistance for construction of new facilities; however, the Legislature had not decided to subsidize the operation of existing [**529] facilities or costs associated with their operation. Unless the Legislature otherwise provides, counties are required to bear costs associated with operating county jails. (*Gov. Code,* [***24] *§ 29602*.)

City points out that *Lassen* is not directly relevant for our purposes because the court in that case specifically declined to comment on the question whether costs would be reimbursable under section 6. Apparently that theory of recovery had not been pursued below. (*County*

of Lassen v. State of California, supra, 4 Cal. App. 4th at p. 1157.) *Lassen* nonetheless supports State's position that fiscal responsibility for the program in question here rests with the county and not with the State.

More importantly, in analyzing a question involving reimbursement under section 6, the definitions contained in California Constitution, article XIII B and in the legislation enacted to implement it must be deemed controlling. Article XIII B treats cities and counties alike as "local government." Under section 8, subdivision (d), this term means "any city, county, city and county, school district, special district, authority or other political subdivision of or within the state." Furthermore, *Government Code section 17514* defines "costs mandated by the state" to mean any increased costs that a "local agency" or school district is required to incur. "Local agency" means [***25] "any city, county, special district, authority, or other political subdivision of the state." (*Gov. Code, § 17518*.) Thus for purposes of subvention analysis, it is clear that counties and cities were intended to be treated alike as part of "local government"; both are considered local agencies or political subdivisions of the State. Nothing in article XIII B prohibits the shifting of costs between local governmental entities.

[*1816] **(4)** Furthermore, we do not believe that the shifting of costs here was a state "mandate," within the meaning of section 6. As the Commission observed, "[t]he pertinent words of the statute state that '. . . a county *may* impose a fee on a city . . . .' " Thus *section 29550* does not require that counties impose fees on other local entities, but only authorizes them to do so. City claims this is too literal an interpretation of the statutory language. If we take a closer look at the circumstances surrounding the enacting of *section 29550*, City argues, it becomes clear that it was designed to accomplish indirectly the exact result section 6 was intended to prevent.

Section 29550 was added by section 1 of Senate Bill No. 2557. Section 2 of Senate [***26] Bill No. 2557 amended *Government Code section 77200* to reduce county revenues by reducing the block grants for trial court funding by approximately 10 percent. (Stats. 1990, ch. 466, pp. 2041-2042.) Moreover, Senate Bill No. No. 2557 was part of the overall state "budget package" of 1990-1991, which contained other shortfalls in county funding. In light of these budget cuts in other areas, City argues, the counties basically had no choice but to pass along booking costs as authorized by *section 29550*. Moreover, as to City the costs incurred are mandated because Ordinance No. NS-300.470, which is authorized by *section 29550*, is mandatory.

In support of its position, City submitted excerpts from the county board of supervisors meeting where Ordinance No. NS-300.470 was adopted. These excerpts reflect the generally held belief on the part of the Board members that *section 29550* was passed to enable counties to make up for state revenue cuts in other programs.

We appreciate that as a practical result of the authorization under *section 29550*, City is required to bear costs it did not formerly bear. We cannot, however, read a mandate into language which is plainly discretionary. Nor [***27] are we persuaded by the argument that budget cuts in other programs trigger the subvention requirement in section 6. Funding decisions are policy choices. (*County of Lassen v. State of California, supra, 4 Cal. App. 4th at p. 1157.*) Section 6 was not intended to entitle local entities to reimbursement for *all* increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State. (*Lucia Mar, supra, 44 Cal. 3d at p. 835.*) Section 6 cannot be interpreted to apply to general legislation [**530] which has an incidental impact on local agency costs. (*County of Los Angeles v. State of California, supra, 43 Cal. 3d at p. 57.*)

(5) A strict construction of section 6 is in keeping with rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power " ' "are to be construed strictly, and are not to [*1817] be extended to include matters not covered by the language used." ' " (*Pacific Legal Foundation v. Brown, supra, 29 Cal. 3d at p. 180*; see also *California Teacher's Association v. Hayes (1992) 5 Cal. App.* [***28] *4th 1513, 1529 [7 Cal. Rptr. 2d 699]* ["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."].) Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

(6) One final point merits brief comment. City contends that the Legislative Counsel's determination that *section 29550* imposed a state-mandated local program is deserving of some deference. *Government Code section 17575* requires the Legislature's Counsel to determine whether a proposed bill mandates a new program or higher level of service pursuant to section 6. Here Legislative Counsel found "[t]his bill would impose a state-mandated local program by authorizing a county to impose a fee upon other local agencies . . . for county costs incurred in processing or booking persons arrested by employees of other local agencies . . . and brought to county facilities for booking or detention." (Legis. Counsel's Dig., Sen. Bill No. [***29] 2557, 5 Stats. 1990 (Reg. Sess.) Summary Dig., pp. 170-171.) Under *Government Code section 17579*, when Legislative

Counsel makes such a determination, the enacted statute must contain explicit language providing that "if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with *section 17500*) of Division 4 of Title 2 of the Government Code. . . ." (Stats. 1990, ch. 466, § 7, p. 2046.)

These findings and required statements are not determinative, however, of the ultimate issue, whether the enactment constitutes a state mandate under section 6. The legislative scheme contained in *Government Code section 17500 et seq.* makes clear that this issue is to be decided by the Commission. " 'It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establish[] procedures which exist for the express purpose [***30] of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. . . . In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6.' [Citation.] [P] Thus [*1818] the statutory scheme contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists . . . ." (*County of Los Angeles v. Commission on State Mandates, supra, 32 Cal. App. 4th at p. 819*, quoting from *Kinlaw v. State of California, supra, 54 Cal. 3d at p. 333*, italics omitted.)

DISPOSITION

We reverse the judgment and direct that the superior court issue an order denying City's petition for a writ of mandate and enter judgment for the State. Costs on appeal are awarded to appellants.

Cottle, P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 1996, and respondent's petition for review by the Supreme Court was denied September 18, [***31] 1996. Mosk, J., was of the opinion that the petition should be granted.

Received
June 17, 2011
Commission on
State Mandates

TAB “10”

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents. CITY OF SONOMA et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

L.A. No. 32106

Supreme Court of California

43 Cal. 3d 46; 729 P.2d 202; 233 Cal. Rptr. 38; 1987 Cal. LEXIS 273

January 2, 1987

SUBSEQUENT HISTORY: Appellants' petition for a rehearing was denied February 26, 1987.

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges. The Court of Appeal, Second Dist., Div. Five, affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings (B001713 and B003561).

DISPOSITION: The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant county and city sought review of a decision of the Court of Appeals, Third Appellate District, Second Division (California), which held that state-mandated increases in workers' compensation benefits, that do not exceed the rise in the cost of living, were not costs which must be borne by respondent state under Cal. Const. art. XIII B, and its legislative implementing statutes.

OVERVIEW: Proceedings were initiated to determine whether legislation, which increased certain workers' compensation benefit payments, was subject to the command of Cal. Const. art. XIII B that local government costs mandated by respondent state must be funded by respondent. Appellant county and city sought review of the appellate court decision which held that state-mandated increases in workers' compensation benefits, that did not exceed the rise in the cost of living, were not costs which must be borne by respondent under Cal. Const. art. XIII B. On appeal, the court agreed that the State Board of Control properly denied appellants' claims but the court's conclusion rested on entirely new grounds. Thus, the judgment was reversed on a finding that appellants' petitions for writs of mandate to compel approval of appellants' claims lacked merit and should have been denied outright. The court concluded that *Cal. Const. art. XIII B, § 6* had no application to, and respondent need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations received.

OUTCOME: The judgment of the court of appeal was reversed in favor of respondent state. The court concluded that appellant county and city's reimbursement claims were both properly denied by the California State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

LexisNexis(R) Headnotes

Governments > Local Governments > Finance
Governments > Public Improvements > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement
[BN1] The legislative intent of the Cal. Const. art. XIII B was subvention for the expense or increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" the commonly understood meaning of the term was meant, as in programs which carry out the governmental function of providing services to the public.

Governments > Legislation > Expirations, Repeals & Suspensions
[HN2] It is ordinarily to be presumed that the legislature by deleting an express provision of a statute intended a substantial change in the law.

Governments > Legislation > Interpretation
[HN3] In construing the meaning of the constitutional provision, the court's inquiry is not focussed on what the legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted Cal. Const. art. XIII B. To determine this intent, the court must look to the language of the provision itself.

Governments > Legislation > Enactment
Governments > Legislation > Types of Statutes
Governments > Local Governments > Elections
[HN4] Although a bill for state subvention for the incidental cost to local governments of general laws may be passed by simple majority vote of each house of the legislature pursuant to *Cal. Const. art. IV, § 8(b),* the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by Cal. Const. art. XIII B. *Cal. Rev. & Tax. Code § 2255(c).* Revenue bills must be passed by two-thirds vote of each house of the legislature. *Cal. Const. art. IV, § 12(d).*

Governments > State & Territorial Governments > Relations With Governments
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > General Overview
[HN5] In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the workers' compensation program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. *Cal. Lab. Code § 3201 et seq.* Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of *Cal. Const. art. XIII B, § 6.*

Governments > Legislation > Interpretation
[HN6] In the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

Governments > Legislation > Effect & Operation > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
[HN7] Cal. Const. art. XIV, § 4 gives the legislature plenary power, unlimited by any provision of the California Constitution, over workers' compensation.

Governments > Legislation > Effect & Operation > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
[I11\18] See *Cal. Const. art. XIV, § 4.*

Governments > Legislation > Expirations, Repeals & Suspensions
[HN9] A pro tanto repeal of conflicting state constitutional provisions removes "insofar as necessary" any restrictions which would prohibit the realization of the objectives of the new article.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service man-

dated by the state for workers' compensation benefits. The trial court found that Cal. Cosnt., art. XIII B, § 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted *art. XIII B, § 6,* their intent was not to require that state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by *art. XIII B, §* 6. Finally, the court held that no pro tanto repeal of *Cal. Const., art. XIV, § 4* (workers' compensation), was intended or made necessary by the adoption of *art. XIII B, § 6.* (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Fanelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed. --When the voters adopted *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

(2) Statutes § 18--Repeal--Effect--"Increased Level of Service." --The statutory definition of the phrase "increased level of service," within the meaning of *Rev. Tax. Code, § 2207, subd. (a)* (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See Am.Jur.2d, Statutes, § 384.]

(3) Constituional Law § 13--Construction of Constitutions--Language of Enactment. --In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

(4) Constitutional Law § 13--Construction of Constitutions--Language of Enactment--"Program" --The word "program," as used in *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(5) State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits. --The provisions of *Cal. Const., art. XIII B. § 6* (reimbursement to local agencies for nw programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of *art. XIII B. § 6.* Accordingly, the State Board of Control properly denied reimbursement to local governmental entitles for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258],* to the extent it reached a dif-

ferent conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees by covered by unemployment insurance.)

[See **Cal.Jur.3d,** State of California, § 78.]

(6) Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts. --Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

(7) Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision. --The goals of *Cal. Const., art XIII B, § 6* (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of *art. XIII B, § 6*, did not effect a pro tanto repeal of *Cal. Const., art. XIV, § 4,* which gives the Legislature plenary power over workers' compensation.

COUNSEL: De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.

James K. Hahn, City Attorney (Los Angeles), Thomas C. Bonaventura and Richard Dawson, Assistant City Attorneys, and Patricia V. Tubert, Deputy City Attorney, as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General, for Defendants and Respondents.

Laurence Gold, Fred H. Altshuler, Marsha S. Berzon, Gay C. Danforth, Altshuler & Berzon, Charles P. Scully II, Donald C. Carroll, Peter Weiner, Heller, Ehrman, White & McAuliffe, Donald C. Green, Terrence S. Terauchi, Manatt, Phelps, Rothenberg & Tunney and Clare Bronowski as Amici Curiae on behalf of Defendants and Respondents.

JUDGES: Opinion by Grodin, **J.,** with Bird, C. **J.,** Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.

OPINION BY: GRODIN

OPINION

[*49] [**203] [***38] We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases [***39] in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. (1) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. [11N1] Rather, the drafters and the electorate had in mind subvention for the expense or [*50] increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict, between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of

[**204] service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning.

> 1 The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[The] initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates . . . .
>
> The one ballot argument which made reference to section 6, referred only to the new program" provision, stating, "Additionally, this measure [para.] (1) will not allow the state government to force programs on local governments without the state paying for them."

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which [*51] employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of *Labor Code sections 4453, 4453.1* and *4460* increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $ 231 per week to $ 262.50 per week. The amendment of *section 4702 of the Labor Code* increased certain death benefits from $ 55,000 to $ 75,000. No appropriation [***40] for increased state-mandated costs was made in this legislation.

> 2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either *Revenue and Taxation Code section 2231,* or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.
>
> Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $ 510 on which to base benefits, an unspecified appropriation was included.

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to *Revenue and Taxation Code section 2207.* [3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to [**205] pay the increased benefits until the state provided reimbursement.

> 3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly [*52] excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost

of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $ 73.50 to $ 168, and the maximum from $ 262.50 to $ 336. For permanent partial disability the weekly wage was raised from a minimum of $ 45 to $ 105, and from a maximum of $ 105 to $ 210, in each case for injuries occurring on or after January 1, 1984. *(Lab. Code, § 4453.)* A $ 10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed *(Lab. Code, § 4553),* and the maximum death benefit was raised from $ 75,000 to $ 85,000 for deaths in 1983, and to $ 95,000 for deaths on or after January 1, 1984. *(Lab. Code, § 4702.)*

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[notwithstanding] section 6 of Article XIIIB of the California Constitution and *section 2231* . . . of the Revenue and Taxation [***41] Code." (Stats. 1982, ch. 922, § 17, p. 3372.) [4]

> 4 The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in *Revenue and Taxation Code section 2207, subdivision (a).*

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or [*53] section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings *(Lab. Code, § 3202.5);* a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine *(Lab. Code, §§ 3601- 3602);* and changes in death and disability benefits and in liability in serious and wilful misconduct cases. *(Lab. Code, § 4551.)*

The court also held: "[The] changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego [**206] appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" sdescribed in subdivision (a) of *Revenue and Taxation Code section 2207.* The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

> 5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in *section 2231, subdivision (e) of the Revenue and Taxation Code* should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of *section 2231* in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the [*54] definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon (1976) 16 Cal.3d 465, 470 [128 Cal. Rptr. 1, 546 P.2d 2891.)* [6] On that basis

the court [***42] concluded that increased costs were no longer tantamount to an increased level of service.

> 6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante).* While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of *Revenue and Taxation Code section 2207, subdivision (a)* enacted in 1975. (Cf. *California Employment Stabilization Co. v. Payne (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702] .)* There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.
>
> The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions.

> 7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See *Code Civ. Proc. § 1094.5, subd. (f).)*

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 [**207] was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para.] (a) Any law . . . which mandates a new program or an increased level of service of an existing program." *(Rev. & Tax. Code § 2207.)* As noted, however, the definition of that term which had been [*55] included in *Revenue and Taxation Code section 2164.3* as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when *Revenue and Taxation Code section 2231,* which had replaced *section 2164.3* in 1973, was repealed and a new *section 2231* enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.) Prior to repeal, *Revenue and Taxation Code section 2164.3 ,* and later *section 2231,* after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that ""Increased level of service' means any requirement mandated by state law or executive regulation . . . which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

> 8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to *Revenue and Taxation Code sections 2218- 2218.54* had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of *Revenue and Taxation Code section 2231, subdivision (a)* that "[the] state shall reimburse each local agency for all 'costs mandated by the state,' as defined in *Section 2207"* and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." *(County of Orange v. Flournoy (1974) 42 Cal. App. 3d 908, 913 [117 Cal. Rptr. 224] .)*

[***43] (2) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting *section 2207,* explained that the provision was "declaratory of existing law." (Stats. 1975,

ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. [11N21 "[It] is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange (1978) 86 Cal. App. 3d 394, 402 [150 Cal. Rptr. 286];* see also *Eu v. Chacon, supra, 16 Cal.3d 465, 470.)* Here, the revision was not minor a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of *section 2207.* If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been [*56] aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

(3) [HN3] In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco (1985) 37 Cal.3d 859, 866 [210 Cal. Rptr. 226, 693 P.2d 811] .)* In section 6, the electorate commands [**208] that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

(4) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments [***44] to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not [*57] for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7 [128 Cal. Rptr. 673, 547 P.2d 449]; Big Sur Properties v. Mott (1976) 63 Cal. App. 3d 99, 105 [132 Cal. Rptr. 835] .)* Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

[HN4] Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a

revenue measure providing the subvention required by article XIII B. *(Rev. & Tax. Code, §§ 2255, subd. (c).)* Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as [**209] applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote. [9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 228 [149 Cal. Rptr. 239, 583 P.2d 1281] .)*

(5) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation [*58] benefits that employees of private individuals or organizations receive. [10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. [HN5] In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See [***45] *Lab. Code, § 3201 et seq.)* Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

10 The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258] ,* with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

IV

(6) [HN6] Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency v. California State Air Resources Bd. (1974) 1 Cal.3d 801, 813-814 [114 Cal. Rptr. 577, 523 P.2d 617]; Serrano v. Priest (1971) 5 Cal.3d 584, 596 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672] .)" (Legislature v. Deukmejian (1983) 34 Cal.3d 658, 676 [194 Cal. Rptr. 781, 669 P.2d 17].)*

[HN7] Our concern over potential conflict arises because article XIV, section 4, " gives the [**210] Legislature "plenary power, unlimited by any provision of [*59] this Constitution" over workers' compensation. Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended [***46] to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

11 [11N8] Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution,* to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any

injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural [*60] limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with [**211] and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 329 [178 Cal. Rptr. 801, 636 P.2d 1139]* . There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto'* of any state constitutional provisions which conflicted with that [*61] amendment. *(Subsequent Etc. Fund. v. Ind. Acc. Com. (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, 695, [151 P. 398].)* [HN9] A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization [***47] of the objectives of the new article. (*Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal.3d 685, 691-692 [97 Cal. Rptr. 1, 488 P.2d 161];* cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 103, 115-117 [148 Cal. Rptr. 626, 583 P.2d 151] .)* Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power -- the disciplining of attorneys -- that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd., supra, 30 Cal.3d 329, 343.)* We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

(7) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency v. Martin (1985) 38 Cal.3d 100, 109-110 [211 Cal. Rptr. 133, 695 P.2d 220] .)* Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage -- costs which all employers must bear -- neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

[**212] Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in [*62] benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal -- whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Ap peal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

CONCUR BY: MOSK

CONCUR

MOSK, J. I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither *article XIII B, section 6, of the Constitution* nor *Revenue and Taxation Code sections 2207* and *2231* require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of *section 2231, subdivision (a),* that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living [*63] adjustment. I agree with the Court of Appeal that this was permissible.

TAB “11”

Positive
As of: Jun 02, 2011

DIVERS' ENVIRONMENTAL CONSERVATION ORGANIZATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; UNITED STATES DEPARTMENT OF THE NAVY et al., Real Parties in Interest and Respondents.

D046112

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

145 Cal. App. 4th 246; 51 Cal. Rptr. 3d 497; 2006 Cal. App. LEXIS 1874; 2006 Cal. Daily Op. Service 10951; 36 ELR 20237

November 29, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by *Divers' Environmental Conservation Organization v. State Water Resource Control Board, 2006 Cal. App. LEXIS 2102 (Cal. App. 4th Dist., Dec. 27, 2006)*

PRIOR HISTORY: **[***1]** Superior Court of San Diego County, No. 01C819689, Ronald S. Prager, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant environmental group sought review of an order of the Superior Court of San Diego County (California), which denied the group's petition for a writ of mandate challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by respondent, a regional water quality control board, pursuant to the federal Clean Water Act, *33 U.S.C. § 1251 et seq.*

OVERVIEW: Instead of imposing numeric limits on chemicals in storm water discharges, the regional board required that the permittee limit its storm water discharges by employing best management practices. The court held that the NPDES permit was not defective for its failure to analyze or impose numeric limits on chemicals in the storm water discharges. *40 C. F.R. § 122.44(d)(1)* did not require that in all cases a permitting authority analyze the particular pollutants in an applicant's storm water discharges when issuing a permit under *33 U.S.C. § 1342(p).* Rather, the permitting authority was required only to use procedures that accounted for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 C.F.R. § 122.44(d)(1)(ii),* that was not the only means of meeting the requirements of the regulation. The best management practices authorized by *§ 122.44(k)(2)* constituted water quality-based effluent limitations that a permitting authority could employ.

OUTCOME: The court affirmed the trial court's judgment.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
[11N1] An appellate court's standard of review must extend appropriate deference to administrative agencies and

their technical expertise. And while interpretation of a statute or regulation is ultimately a question of law, an appellate court must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN2] The federal Water Pollution Control Act, *33 U.S.C. § 1251 et seq.,* commonly known as the Clean Water Act (CWA), is intended to restore and maintain the chemical, physical, and biological integrity of the nation's waters. § *1251(a).* Generally, the CWA prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. The most important of those exceptions is pollution discharge under a valid National Pollutant Discharge Elimination System (NPDES) permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. NPDES permits are valid for five years.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[HN3] In general terms, the federal Clean Water Act, *33 U.S.C. § 1251 et seq.,* and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus, under *40 C.F.R. § 122.44(d)(1)(i),* water quality-based effluent limitations (WQBELs) must be imposed on applicants whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any state water quality standard. Under § *122.44(d)(1)(ii),* in making the determination about whether WQBELs are required, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Effluent Limitations
[BN4] When, after employing the procedures and analysis required by *40 C.F.R. § 122.44(d)(1)(ii),* a permitting agency determines that an applicant's discharges have the reasonable potential to cause an in-stream excursion above a state water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant. *Section 122.44(d)(1)(iii).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[11N5] See *33 U.S.C. § 1342(p).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > General Overview
[HN6] See *40 C.F.R. § 122.44(k).*

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN7] 40 C.F.R. § 122.44(d)(1) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's storm water discharges. The procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in § *122.44(d)(1)(ii).* By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures which account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of § *122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. Storm water consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather. An agency reasonably can conclude that an attempt to provide a numeric analysis of pollutants in storm water discharges is not the most effective means of determining whether water quality-based effluent limitations are needed for storm water discharges.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges
[HN8] Inherent in the flexibility in *40 C.F.R. § 122.44(d)(1)(ii)* is the conclusion that the best management practices authorized by § *122.44(k)(2)* are in fact water quality-based effluent limitations which a permitting authority may employ when it has found that storm water discharges may cause a receiving body to exceed state water quality standards.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HN9] Where, as in the case of storm water discharges, best management practices (BMPs) will be the water quality-based effluent limitations (WQBELs) employed, the study performed under *40 C.F.R. § 122.44(d)(1)(ii)* must at a minimum look to the likely impact of storm water as a whole on the receiving body; however, the BMPs which may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures tailored to decrease the overall risk toxic pollutants from the discharger will reach storm water runoff. Because there is no direct correlation between the type and volume of toxic pollutants in storm water and the BMPs which will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of storm water discharges such a detailed numeric analysis is not a cost effective means of performing a reasonable potential analysis.

Environmental Law > Water Quality > Clean Water Act > Discharge Permits > Storm Water Discharges

[HMO] There is nothing on the face of 33 *U.S.C. § 1342(p)* which suggests that in making express reference to best management practices (BMPs) in particular instances Congress intended to limit use of BMPs in controlling storm water discharges in general. Indeed, there seems to be no rationale which would permit BMPs in the case of municipalities and other nonindustrial storm water discharges but bar them in the case of industrial discharges. Thus, it is reasonable to conclude that in enacting *§ 1342(p),* Congress intended to permit the Environmental Protection Agency and permitting authorities wide discretion in regulating storm water runoff, including the use of BMPs where the agencies believed they were appropriate.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied an environmental group's petition for a writ of mandate challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by a regional water quality control board pursuant to the Clean Water Act, *33 U.S.C. § 1251 et seq.* Instead of imposing numeric limits on chemicals in stormwater discharges, the regional board required that the permittee limit its stormwater discharges by employing best management practices. (Superior Court of San Diego County, No. GIC819689, Ronald S. Prager, Judge.)

The Court of Appeal affirmed the judgment, holding that the NPDES permit was not defective for its failure to analyze or impose numeric limits on chemicals in the stormwater discharges. *40 C.F.R. § 122.44(d)(1)* (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges when issuing a permit under *33 U.S.C. § 1342(p).* Rather, the permitting authority is required only to use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 C.F.R. § 122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. The best management practices authorized by § *122.44(k)(2)* constitute water-quality-based effluent limitations that a permitting authority may employ. (Opinion by Benke, Acting P. **J.,** with Nares and Haller, **JJ.,** concurring.) [*247]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits.--The federal Water Pollution Control Act *(33 U.S.C. § 1251 et seq.),* commonly known as the Clean Water Act (CWA), is intended to restore and maintain the chemical, physical, and biological integrity of the nation's waters (§ *1251(a)).* Generally, the CWA prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. The most important of those exceptions is pollution discharge under a valid National Pollutant Discharge Elimination System (NPDES) permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. NPDES permits are valid for five years.

(2) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations.--In general terms, the Clean Water Act (33 *U.S. C. § 1251 et seq.)* and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus, under *40 C.F.R. § 122.44(d)(1)(i)* (2005), water-quality-based effluent limitations (WQBEL's) must be imposed on applicants whenever the permitting agency determines that pollutants are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any state water quality standard.

Under *40 C.F.R. § 122.44(d)(1)(ii),* in making the determination about whether WQBEL's are required, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(3) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations.--When, after employing the procedures and analysis required by *40 C.F.R. § 122.44(d)(1)(ii)* (2005), a permitting agency determines that an [*248] applicant's discharges have the reasonable potential to cause an in-stream excursion above a state water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant (§ *122.44(d)(1)(iii)).*

(4) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Numeric Analysis.--40 *C.F.R. § 122.44(d)(1)* (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. The procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in § *122.44(d)(1)(ii).* By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures which account for existing controls, the variability of the pollutants in effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. While a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of § *122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. Stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather. An agency reasonably can conclude that an attempt to provide a numeric analysis of pollutants in stormwater discharges is not the most effective means of determining whether water-quality-based effluent limitations are needed for stormwater discharges.

(5) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Best Management Practices.--Inherent in the flexibility in *40 C.F.R. § 122.44(d)(1)(ii)* (2005) is the conclusion that the best management practices (BMP's) authorized by § *122.44(k)(2)* are in fact water-quality-based effluent limitations which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. There is nothing on the face of 33 *U.S.*C. § *1342(p)* which suggests that in making express reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general. Indeed, there seems to be no rationale that would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus, it is reasonable to conclude that in enacting *33 U.S.C. § 1342(p),* Congress intended to permit the Environmental Protection Agency and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate. [*249]

(6) Pollution and Conservation Laws § 5--Water Pollution--Clean Water Act--Discharge Permits--Effluent Limitations--Numeric Analysis.--Where, as in the case of stormwater discharges, best management practices (BMP's) will be the water-quality-based effluent limitations employed, the study performed under *40 C.F.R. § 122.44(d)(1)(ii)* (2005) must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost effective means of performing a reasonable potential analysis. Accordingly, contrary to an environmental group's contention, a regional water quality control board was not required to perform a numeric analysis of each pollutant in stormwater discharges when it issued a discharge permit.

[12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 896.]

COUNSEL: Briggs Law Corporation, Cory **J.** Briggs; Environmental Advocates and Suzanne E. Bevash for Plaintiff and Appellant.

Lawyers for Clean Water, Inc., Daniel Cooper and Layne Friedrich for California Coastkeeper Alliance as Amicus Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary Hackenbracht and Carol A. Squire, Deputy Attorneys General, for Defendants and Respondents.

No appearance for Real Parties in Interest and Respondents.

JUDGES: Benke, Acting P. J., with Nares and Haller, JJ., concurring.

OPINION BY: Benke [*250]

OPINION
[**499]

BENKE, Acting P. J.--This is an appeal from an order denying a petition for a writ of mandate. The petition challenged a discharge permit respondent California Regional Water Quality Control Board, San Diego Region (the Regional Board), issued to real parties in interest United States Department of the Navy et al. (Navy). We affirm. Although the Regional Board could have issued a permit that imposed numeric limits on chemicals in the Navy's stormwater discharges into San Diego Bay, under provisions of the Federal Water Pollution Control [***2] Act *(33 U.S.C. § 1251 et seq.),* commonly known as the Clean Water Act (CWA), and applicable regulations, the Regional Board was authorized to instead require that the Navy limit its stormwater chemical discharges by employing so-called "best management practices" (BMP's). Given these circumstances, we reject appellant Divers' Environmental Conservation Organization's (Divers') contention that the permit was defective for its failure to analyze or impose numeric limits on chemicals in the Navy's stormwater discharges.

SUMMARY

In November 2002 the Regional Board issued a National Pollutant Discharge Elimination System (NPDES) permit to the Navy governing discharges from the Naval Base San Diego Complex (the base complex) to San Diego Bay. The permit includes regulations governing stormwater discharges from the base complex to the bay. In particular, the permit requires that the Navy develop and adopt a "Storm Water Pollution Prevention Plan" (the prevention plan), which employs BMP's [2] designed to reduce or eliminate pollutants received into the bay from industrial activities at the base complex. The permit requires that the prevention plan identify [***3] and evaluate sources of pollution [**500] that might affect stormwater discharges from the base complex and then implement site-specific BMP's to reduce or prevent pollutants in the base complex's stormwater discharges. Under the permit the Navy is required [*251] to consider implementing nonstructural BMP's, such as good housekeeping, preventative maintenance, spill response procedures, material handling and storage procedures, employee training programs, recycling procedures, and erosion controls. Where nonstructural BMP's are not effective, the permit requires that the Navy consider structural BMP's, such as structures which cover chemicals and other pollutants, retention ponds, berms and other devices which channel runoff away from pollutant sources and treatment facilities, such as vegetative swales, which reduce pollutants in stormwater discharges.

1 The base complex includes four installations: Naval Station, San Diego; Mission Gorge Recreational Facility; Broadway Complex; and the Naval Medical Center, San Diego.

2 The permit defines BMP's as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. The BMPs also include treatment measures, operating procedures, and practices to control facility site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The BMPs may include any type of pollution prevention and pollution control measure necessary to achieve compliance with this Order."

[***4] In addition to the prevention plan and based on the Regional Board's study of water quality, the permit contains a numeric limit on the amount of toxicity in the Navy's total effluent. This limitation requires that test organisms be able to survive in the effluent. The permit also prohibits the discharge of the first quarter-inch of runoff from "high-risk" areas.

The Regional Board's study of water quality noted that levels of copper and zinc in stormwater runoff were matters of concern. In addition to the BMP's and limitation on toxicity in the total effluent discharges, the permit set forth "benchmarks" for copper and zinc. The permit requires the Navy to measure the concentration of copper and zinc in its stormwater discharges and if they exceed the benchmark levels, the Navy must commence an iterative process of reviewing and upgrading its BMP's.

The permit requires that the Navy annually review all BMP's to determine "whether the BMP's are properly designed, implemented, and are effective in reducing and preventing pollutants in storm water discharges." In the event the Regional Board finds the prevention plan does meet the requirements of the permit, the permit requires [***5] the plan be revised to implement additional BMP's.

Before the permit was finally adopted by the Regional Board, Divers' challenged it administratively. Divers' argued that applicable federal regulations required that instead of regulating the Navy's industrial stormwater discharges by way of a BMP's-based prevention plan, the Regional Board was required to set numeric "water qual-

ity based effluent limitations" (WQBEL's) on the Navy's stormwater discharges and that before setting those [**501] numeric WQBEL's the Navy was required to conduct an analysis of particular pollutants for which there was a reasonable potential the stormwater [*252] discharges would cause or contribute to a violation of any state water quality standard. The Regional Board rejected Divers's argument and adopted the permit without numeric WQBEL's and without performing any analysis of particular pollutants in the Navy's stormwater discharges. Divers' filed an administrative petition with respondent State Water Resources Control Board (State Board). The administrative petition was dismissed on the grounds it failed to raise substantial issues appropriate for review by the State Board.

Divers' filed a petition [***6] for a writ of administrative mandate *(Code Civ. Proc., § 1094.5)* against the State Board and the Regional Board. The trial court dismissed the State Board as a defendant. As against the Regional Board, Divers' alleged the board abused its discretion in failing to conduct an analysis of the reasonable potential impact of particular stormwater pollutants on state water quality standards and in failing to impose numeric WQBEL's on the Navy's stormwater discharges. The trial court denied Divers's petition. Divers' filed a timely notice of appeal.

DISCUSSION

Standard of Review

[F1N1] " [O]ur standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. [Citations.] And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a statute or regulation involving its area of 'expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision." *(Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1103-1104 [1 Cal. Rptr. 3d 76] [***7] (Communities).)*

II

The Clean Water Act

(1) "In 1972, Congress enacted [HN2] the Federal Water Pollution Control Act *(33 U.S.C. § 1251 et seq.),* commonly known as the Clean Water Act (CWA). [Citation.] The goal of the CWA is to restore and maintain the chemical, [*253] physical, and biological integrity of the Nation's waters.' *(33 U.S.C. § 1251(a);* see *Arkansas v. Oklahoma (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046, 1054] (Arkansas).)* [1] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' [Citation.] The most important of those exceptions is pollution discharge under a valid NPDES permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.]" *(Communities, supra, 109 Cal.App.4th at p. 1092.)*

Initially, the CWA regulated permittees by requiring them to adopt technology-based effluent limitations. *(33 U.S.C. § 1311(b)(1)(A).)* [***8] These are limitations based on the best available or practical technology for the reduction of water pollution.

After July 1, 1977, permittees were required to not only adopt technology-based effluent limitations but more WQBEL's. "In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.]" *(Communities, supra, 109 Cal.App.4th at p. 1093.)*

[HN3] (2) In general terms the CWA and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus under *40 Code of Federal Regulations part 122.44(d)(1)(i)* (2005), WQBEL's must be imposed on applicants "whenever the permitting agency determines that pollutants 'are or may be discharged [***9] at a level which will cause, or *have the reasonable potential to cause, or contribute* to an excursion above any State water quality standard ... " *(Communities, supra, 109 Cal.App.4th at p. 1094.)* Under *40 Code of Federal Regulations part 122.44(d)(1)(ii)* [**502] in making the determination about whether WQBEL's are required "the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water." [*254]

[HN4] (3) When, after employing the procedures and analysis required by *40 Code of Federal Regulations part 122.44(d)(1)(ii),* a permitting agency determines that an applicant's discharge "has the reasonable potential to cause ... an in-stream excursion above ... a State water

quality standard for an individual pollutant" the permit must contain effluent limits for that pollutant. *(40 C.F.R. § 122.44(d)(1)(iii)* (2005).)

[***10] As we explain more fully below, this appeal rests in large measure on Divers's contention that *40 Code of Federal Regulations part 122.44(d)(1)* mandated a numeric analysis of individual pollutants in the Navy's stormwater and numeric WQBEL's for pollutants which would cause the bay to exceed applicable water quality standards. As we explain, we do not adopt this interpretation of the regulations. Briefly, as we read the regulations, the analysis which is mandatory in all cases is the more general analysis required by *part 122.44(d)(1)(ii);* only if that analysis results in a finding that discharges are likely to exceed state numeric criteria for a particular pollutant are limits for that pollutant required. However, as we believe is the case here, an analysis of stormwater discharges may satisfy the requirements of *part 122.44(d)(1)(ii)* without any numeric analysis of individual pollutants and hence without giving rise to any obligation to impose specific pollutant limitations under *part 122.44(d)(1)(iii).*

III

Stormwater Discharges

Before 1987 the CWA did not expressly regulate stormwater discharges. 'In 1987 Congress added [***11] subdivision (p) to section 402 of the CWA [*255] *(33 U.S.C. § 1342(p)),* [4] [**503] which expressly requires NPDES permits [**504] for stormwater discharges either associated with industrial activity or from municipal storm sewer systems. *Section 402(p)(4)(A) of the CWA* gave the administrator of the EPA until 1989 to promulgate regulations governing stormwater discharges from industrial polluters and large municipalities; [*256] applicants for stormwater permits were given until 1990 to make applications and the EPA or state was given until 1991 to issue or deny the permit.

> 3 Shortly after the CWA was enacted in 1972 "the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. [Citations.] When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. [Citation.] The *Costle* court *[(Natural Resources Defense Council, Inc. v. Costle (D. C. Cir. 1977) 568 F.2d 1369)]* rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. [Citation.] Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. [Citation.]
>
> "During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. [Citations.]
>
> "Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.]" *(Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 873-874 [22 Cal. Rptr. 3d 128] .)*

4 *Section 402(p) of the CWA* states:

[HN5] "(p) Municipal and industrial storm water discharges

"(1) General rule

"Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of storm water.

"(2) Exceptions

"Paragraph (1) shall not apply with respect to the following storm water discharges:

"(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

"(B) A discharge associated with industrial activity.

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

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

"(E) A discharge for which the Administrator or the State, as the case may be, determines that

the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

"(3) Permit requirements

"(A) Industrial discharges

"Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

"(B) Municipal discharge

"Permits for discharges from municipal storm sewers--

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

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

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

"(4) Permit application requirements

"(A) Industrial and large municipal discharges

"Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

"(B) Other municipal discharges

"Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

"(5) Studies

"The Administrator, in consultation with the States, shall conduct a study for the purposes of--

"(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

"(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

"(C) establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality.

"Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

"(6) Regulations

"Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate storm water discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."

[***13] In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numerical limitations. "Unlike discharges of process wastewater where numeric effluent limitations (technology-based and/or water-quality-based) are typically used to control the discharge of pollutants from industrial facilit[y's], the primary permit condition used to address discharges of

pollutants in a facilities stormwater is a pollution prevention plan. The development and implementation of a site-specific stormwater pollution prevention plan is considered to be the most important requirement of the EPA and State issued stormwater general permits. Site-specific stormwater pollution prevention plans allow permittees to develop and implement best management practices', whether structural or non-structural, that are best suited for controlling stormwater discharges from their industrial facility." (U.S. EPA NPDES Permit Writers' Manual (Dec. 1996) pp. 149-150; see also *U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761* [***14] *(Aug. 26, 1996);* and *U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996).)* In addition to the rationale it has expressed, the EPA also adopted *40 Code of Federal Regulations part 122.44(k)* (2005) [*257] so that the regulation reads, in part, as follows: [HN6] "[E]ach NPDES permit shall include conditions meeting the following requirements when applicable. [III **[1]**

"(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

"(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

"(2) Authorized under section 402(p) of the CWA for the control of stormwater discharges;

"(3) Numeric effluent limitations are infeasible; or

"(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA."

As we explain more fully below, essentially *40 Code of Federal Regulations part 122.44(k)(2) (2005)* allows permitting agencies to treat BMP's as the type of WQBEL's appropriate for control of stormwater discharges.

IV

[***15] *Reasonable Potential Analysis*

In its first argument on appeal Divers' contends that because the Regional Board did not identify and analyze the numeric level of particular pollutants in the Navy's stormwater discharges, it did not perform the reasonable potential analysis required by *40 Code of Federal Regulations part 122.44(d)(1) (2005).*

(4) Contrary to Divers's argument, [I-11\17] *40 Code of Federal Regulations part 122.44(d)(1) (2005)* does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. As we have seen, [**505] the procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in *40 Code of Federal Regulations part 122.44(d)(1)(ii).* By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of [*258] species to toxicity, and the dilution of effluent in receiving waters. *(40 C.F.R. § 122.44(d)(1)(ii).) [***16]* While, as Divers' points out, a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of *40 Code of Federal Regulations part 122.44(d)(1)(ii),* that is not the only means of meeting the requirements of the regulation. As the trial court noted, the Regional Board performed a water quality analysis and made extensive findings with respect to the toxicity of copper and zinc in the Navy's discharge and established benchmarks for concentrations of those chemicals in the Navy's discharges. The fact the studies the Regional Board performed did not produce numeric analysis of all the potential pollutants in the Navy's stormwater discharges did not prevent the Regional Board from nonetheless concluding, on the basis of the studies it did perform, that the stormwater discharges had a reasonable potential to cause or contribute to pollution in the bay above state water quality standards. As the Regional Board points out and the EPA has repeatedly noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a [***17] basis which is only as predictable as the weather. Given these circumstances the Regional Board could reasonably conclude that any attempt to provide a numeric analysis of pollutants in stormwater discharges was not the most effective means of determining whether WQBEL's were nonetheless needed for the Navy's stormwater discharges.

[HN8] (5) Inherent in the flexibility we find in *40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005)* is our conclusion the BMP'S authorized by *40 Code of Federal Regulations section 122.44(k)(2)* are in fact WQBEL's, which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. In reaching this conclusion we are persuaded by the reasoning the court adopted in *Communities,* where the opponent of a permit argued that numeric WQBEL's were required by *40 Code of Federal Regulations part 122.44(d)(1).* "Case law is limited. A few cases seem to assume that a WQBEL is always a number, but the cases do not squarely address and decide the issue. [Citations.] But *Natural Resources Defense Council, Inc. v. Costle (D. C. Cir. 1977) 186 U.S. App. D.C. 147 [568 F.2d 1369]* [***18] *(Costle),* suggests that Congress did not intend

numeric effluent limitations to be the only limitation on pollution discharges under the CWA, but intended a flexible approach including alternative effluent control strategies. [Citation.]

"We find instructive a prior decision of the State Board, of which we have taken judicial notice: ***In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley*** [*259] ***Audubon Society*** (Order No. WQ 91-03, May 16, 1991) 1991 WL 135460 (Cal.St.Wat.Res.Bd.). In that order, the State Board stated: The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits ... . We have reviewed these authorities, and also opinions we have received [**506] from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and "best management practices" set forth in the permit constitutes effluent limitations as required by law.' [Citation.]

"The State Board noted the EPA's [***19] regulatory definition of 'effluent limitation' was broad, and noted that the ***Costle*** decision supported the conclusion that numeric limitations were not required--especially since CWA ' "gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. ..." ' [Citation.]

"Specifically referring to ***section 122.44(d)(1),*** the State Board noted the regulation did not contain 'the term "numeric" effluent limitation. ... Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric. However, there is no legal requirement that effluent limitations be numeric.' [Citation.] " ***(Communities, supra, 109 Cal.App.4th at pp. 1104-1105.)***

[HN9] (6) Where, as in the case of stormwater discharges, BMP's will be the WQBEL's employed, the study performed under ***40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005)*** must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, as we have seen, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures [***20] tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost-effective means of performing a "reasonable potential" analysis. In sum, contrary to Divers' contention, the Regional Board was not required to perform a numeric analysis of each pollutant in the Navy's stormwater discharges. [*260]

V

Feasibility Study

Divers' does not accept our conclusion the Regional Board was authorized to employ BMP's in lieu of numeric WQBEL's. Instead, Divers' argues that in the case of industrial permits, such as the one the Navy obtained, BMP's are permissible only upon a finding by the permitting authority that numeric WQBEL's are not feasible. We do not read ***40 Code of Federal Regulations part 122.44(k)(2) (2005)*** so narrowly.

As we have noted, ***40 Code of Federal Regulations part 122.44(k)(2) (2005)*** [***21] gives permitting authorities the power to impose BMP's when they are " [a]uthorized under ***section 402(p) of the CWA*** for the control of storm water discharges." Divers' contends that section 402(p) of the CWA ***(33 U.S.C. § 1342(p))*** does not authorize BMP's to control ***industrial*** stormwater discharges and that the only authority for use of BMP's in an industrial setting is provided by ***40 Code of Federal Regulations part 122.44(k)(3),*** which permits BMP's when numeric effluent limitations are not feasible.

Divers' fundamentally misinterprets ***section 402(p) of the CWA.*** Before enactment of ***section 402(p)*** there was considerable controversy over whether and in what manner stormwater discharges were subject to permitting under the CWA. (See ***Building Industry Assn. of San Diego County v. State*** [**507] ***Water Resources Control Bd., supra, 124 Cal.App.4th at pp. 873-874.)*** Enactment of ***section 402(p)*** made it clear that such discharges were subject to the permitting requirements of the CWA and gave the EPA broad discretion in developing and enforcing rules governing stormwater discharges. In this context BMP's are expressly mentioned in [***22] the statute as one of the limitations a permitting authority may impose in municipal stormwater permits. (See 33 ***U.S.C. § I342(p)(3)(B)(iii).)*** However, neither the absence of an express reference to BMP's in industrial settings nor the illustrative reference with respect to municipal stormwater permits, is very persuasive in determining whether, as the Regional Board and the EPA have found, in enacting ***section 402(p)*** Congress intended to authorize a wide array of controls over all stormwater discharges, including use of BMP's. In this regard we note the final paragraph of ***section 402(p)*** contains a further reference to BMP'S and gives the EPA the power to use management practices as a means, among others, of controlling stormwater discharges from sources other than industrial activities and municipalities. This reference to management practices, along with the reference to the use of BMP's in municipal

settings, show that in enacting *section 402(p)* of the CWA, Congress clearly recognized the role of BMP's as a means of controlling pollutants in stormwater discharges. [*261]

In sum, [HN10] there is nothing on the face of the statute that suggests that in making express [***23] reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general. Indeed, we can discern no rationale which would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus the EPA, along with the Regional Board, could reasonably conclude that in enacting *section 402(p) of the CWA.* Congress intended to permit the EPA and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate.

> 5 As we noted in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd., supra, 124 Cal.App.4th at page 874,* under *section 402(p)(3)(B)(iii)* of the CWA municipalities are only required to reduce "pollutants to the maximum extent practicable," whereas stormwater from industrial discharges must be governed by WQBEL's. Nothing in our opinion in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* addressed the specific question raised here: whether a permitting authority may use BMP's as a means of limiting industrial stormwater waste.

[***24] Because the Regional Board and EPA's interpretation of *section 402(p) of the CWA* is not at odds with either the language or overall purposes of the statute, we must accept it. (See *Communities, supra, 109 Cal.App.4th at p. 1104.)* Accordingly, read in light of that interpretation of the statute, *40 Code of Federal Regulations part 122.44(k)(2) (2005)* fully authorized the Regional Board to use BMP's as the principal means of •limiting the Navy's stormwater discharges.

VI

Benchmarks

As we have noted, under the permit the Navy is required to determine whether levels of zinc and copper in its stormwater discharges reach designated benchmarks, and if they do the Navy is then required to review and amend its BMP's. The benchmarks for these chemicals is higher than applicable water quality [**508] standards for San Diego Bay as set forth in the EPA's California toxic rule (CTR). (See *65 Fed. Reg. 31682-31719 (May 18, 2000).)* Contrary to Divers's argument, the discrepancy between the benchmarks and CTR standards does not invalidate the permit.

The CTR was adopted by the EPA because California failed to adopt final water quality standards [***25] as required by the CWA. (See 33 *U.S.C. § 1313(c); 40 C. F.R. §§ 131.6, 131.12 (2005).)* The standards set forth in the CTR are expressed as numeric criteria for specific toxic pollutants and apply to California's inland waters and enclosed bays and estuaries. Following the holding in *Communities,* it is now clear that in implementing numeric [*262] water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by way of corresponding numeric WQBEL's. *(Communities, supra, 109 Cal.App.4th at pp. 1095, 1104-1105.)* In *Communities* the court stated: "[A] water quality *standard* can be numeric; the question before us is whether a *WQBEL,* which implements a ... numeric water quality standard, *must itself* be numeric." *(Id. at p. 1095.)* The court then went on to answer this question in the negative. *(Id. at pp. 1104-1105.)*

We also note that in adopting the CTR, the EPA took note of the use of BMP's as a means of controlling municipal runoff and stated that the EPA "believes that compliance with water quality standards [***26] through the use of Best Management Practices (BMPs) is appropriate." *(65 Fed. Reg. 31703 (May 18, 2000).)* This reference to BMP's, in the context of adopting the CTR, supports the Regional Board's contention that the CTR does not require it to impose the CTR's numeric water quality *standards* as numeric *limits* on toxic substances in the Navy's stormwater discharges.

In sum the Regional Board was empowered to enforce the CTR by way of the BMP's and benchmarks set forth in the permit. Although the CTR governs the entire bay, including the point of any discharge, in employing benchmarks for further action by the Navy, the permit does not in any manner authorize the Navy to violate the CTR. In this context the benchmarks only serve as a means of ensuring that the Navy will monitor toxicity of its stormwater discharges and take appropriate action in the event it discovers toxicity at designated levels. As the Regional Board points out, it is fully capable of taking enforcement action against the Navy in the event a violation of the CTR occurs.

VII

Delegation of Discretion

Finally, we note that Divers' contends that in allowing the Navy to develop a prevention [***27] plan, including BMP's, the permit delegated too much discretion to the Navy. Our review of the record does not support this contention. The requirements of the prevention plan

the Navy must develop are set forth in an 18-page attachment to the permit. The attachment sets forth in some detail what the plan must include in terms of identifying sources of pollution, monitoring, recordkeeping and reporting. In particular, we note the permit provides that " [u]pon notification by the Regional Board and/or local agency that the [prevention plan] does not meet one or more of the minimum requirements of this Section," the Navy must revise the plan and implement [*263] additional BMP's that are effective in reducing and eliminating pollutants in its discharges. Thus the permit both carefully limits the [**509] Navy's discretion in developing a prevention plan and provides for meaningful regulatory review of the prevention plan. (See *Environmental Defense Center, Inc. v. U.S. E.P.A. (9th Cir. 2003) 344 F.3d 832, 856.)*

Judgment affirmed. [6]

6 Amicus curiae California Coastkeeper Alliance asked that we take judicial notice of data it prepared and filed with the State Board in other proceedings and after the Regional Board issued the Navy's permit. We deny the request for judicial notice. Appellant's objection to respondents' lodgment of exhibits is overruled.

Nares, J., [***28] and Haller, J., concurred.

A petition for a rehearing was denied December 27, 2006.

Received
June 17, 2011
Commission on
State Mandates

TAB “12”

Positive
As of: Jun 02, 2011

RAYMOND ELDER, a Minor, etc., Plaintiff and Appellant, v. HARRY R. ANDERSON et al., Defendants and Respondents

Civ. No. 36

Court of Appeal of California, Fifth Appellate District

205 Cal. App. 2d 326; 23 Cal. Rptr. 48; 1962 Cal. App. LEXIS 2137

June 29, 1962

SUBSEQUENT HISTORY: [*1]** A Petition for a Rehearing was Denied July 25, 1962. Conley, J., did not Participate Therein. Respondents' Petition for a Hearing by the Supreme Court was Denied August 22, 1962.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Fresno County. Leonard Irving Meyers, Judge.

Action for damages for an alleged libelous statement made by school district trustees about a student.

DISPOSITION: Reversed. Judgment of dismissal on the pleadings, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, 17-year-old boy and his mother as guardian ad litem, appealed a judgment of the Superior Court of Fresno County (California), which entered a judgment of dismissal on the pleadings on the basis of sovereign immunity. The action alleged libelous statements about the son by defendants, the school district trustees and superintendent.

OVERVIEW: The alleged libel was part of a special announcement mailed to the general public within the boundaries of the school district. The trial court dismissed on the ground that the suit was against public school officials who had immunity for an alleged libel in the performance of their official duties. The court reversed and found that all matters in which discretion was not allowed were ministerial acts, that the prohibition expressed in Cal. Educ. Code § 10751 constituted a mandatory, hard-and-fast rule against dissemination of personal information concerning pupil, and that violation of § 10751 eliminated the doctrine of sovereign immunity as far as the trustees were concerned. The court noted that the special announcement did not imply that the son was being charged with certain indiscretions but stated as a pure matter of fact that the he was involved in serious violations of manners, morals, and discipline. The court found more than a good faith mistaken action. The trustees violated a code section prohibiting dissemination of personal information concerning pupils, and thus stepped outside the protection of their office.

OUTCOME: The court reversed the judgment of dismissal on the pleadings.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Torts > Intentional Torts > Defamation > Procedure
[11N1] On an appeal from a judgment of dismissal entered on the pleadings, the facts alleged in the complaint must be taken to be true, and the reviewing court must assume that the plaintiff can prove all facts as alleged. However,

the appellate function does not include fact finding. Accordingly, questions as to whether the material complained of is in fact defamatory and questions relating to defenses, if any, will not be considered or determined. The task of the reviewing court is to determine whether the trial court erred in finding a proper case for application of the doctrine of civil immunity.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Governments > Local Governments > Employees & Officials
[HN2] Cal. Educ. Code § 10751 specifically provides that no teacher, principal, employee, or governing board member of any public, private, or parochial school shall give out any personal information concerning any particular minor pupil enrolled in the school in any class of the twelfth grade or below or in the thirteenth or fourteenth grades of a public junior college to any person except under judicial process unless the person is one of the following: (a) A parent or guardian of such pupil. (b) A person designated by such parent or guardian in writing. (c) An officer or employee of a public, private, or parochial school where the pupil attends, has attended, or intends to enroll. (d) An officer or employee of the United States, the State of California, or a city, city and county, or county seeking information in the course of his duties. (e) An officer or employee of a public or private guidance or welfare agency of which the pupil is a client.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Students > Student Records > General Overview
[HN3] Cal. Educ. Code § 10751 requires strict interpretation. It indicates by the exceptions that the legislative intent was to permit only the giving of personal information concerning the pupils involved in the participation of athletics and school activities, the winning of honors and awards and other similar information. It also permits the giving of personal information concerning the age and scholastic records of a pupil and lists of names and addresses of seniors in high schools to private business or professional schools and colleges. Thus, under no circumstances is any information to be given out by the school or its officials for any other purposes, whether beneficial or detrimental, except when waived in a public hearing under Cal. Educ. Code § 986.

Governments > Local Governments > Claims By & Against
[HN4] Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion. "Discretion" is defined as follows: "Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion. Where the law prescribes and defines the duties to be performed with such precision and certainly as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion and judgment it is not to be deemed merely ministerial.

Governments > Local Governments > Claims By & Against
Healthcare Law > Actions Against Facilities > Facility Liability > Hospitals
Torts > Public Entity Liability > Liability > General Overview
[HN5] Government officials are liable for the negligent performance of their ministerial duties but are not liable for their discretionary acts within the scope of their authority.

Governments > Local Governments > Claims By & Against
[HN6] Governmental officials are not personally liable for discretionary acts within the scope of their authority, and this rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes.

Education Law > Immunities > General Overview
Estate, Gift & Trust Law > Trusts > Trustees > General Overview
Governments > Local Governments > Claims By & Against
[HN7] School boards have only such authority as is specifically granted by the legislature, to be exercised in the mode and within the limits permitted by the statute. Immunity exists for discretionary acts if the acts complained of are beyond the course and scope of the duties of the school trustees.

Governments > Local Governments > Claims By & Against
Governments > State & Territorial Governments > Claims By & Against
Torts > Public Entity Liability > Immunity > Sovereign Immunity
[11N8] The defense of sovereign immunity from suit presents a jurisdictional question; that the state may not be sued without its consent. This immunity protects public officers and employees acting within the scope of their duties, even against charges of malicious personal torts, such as libel, slander, and false prosecution.

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Students > Disciplinary Proceedings > Decisions
Education Law > Students > Discipline Methods > Expulsions
[HN9] While Cal. Educ. Code § 984(c), (d) provide for regular and special meetings and notices of such meetings of the school trustees, there is no express authorization given to the board to set forth matters in such advance notices which are prohibited by Cal. Educ. Code § 10751. It is provided by Cal. Educ. Code § 985 that no action authorized or required by law shall be taken by the governing board of a school district except in a meeting open to the public. An exception thereto is made by § 986 of which states, in part that notwithstanding the provisions of § 985 of this code the governing body of a school district may hold executive sessions to consider the expulsion, suspension, or disciplinary action in connection with any pupil of the school district, if a public hearing upon such question would lead to the giving out of information concerning school pupils which would be in violation of § 10751.

Administrative Law > Governmental Information > Public Meetings > Sunshine Legislation
Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN10] The school district is permitted by the Open Meetings Law, Cal. Educ. Code § 985 to hold an executive session to consider disciplinary problems, but only when it would not violate Cal. Educ. Code § 10751, which prohibits the school trustees from giving out personal information concerning a pupil. In other words, the school district is prohibited from holding open meetings on such subjects, unless a public meeting is requested by the pupil concerned, or by his parent or guardian. If no such request is made, the school district's governing board may hold a closed door, executive session where the subject matter of the inquiry involves the disclosure of personal information.However, the last sentence of § 986 provides that after the matter has been considered, either in executive session or public meeting, the final action of the board shall be taken at a public meeting and the result of such action shall be a public record of the school district. This allows the result of such action to be a public record without the details as to the cause or reason for the result, and would allow the board to put out for the first time the information that a student had been suspended or expelled, but without explaining the details.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Appeal--Presumptions--Judgment. --On appeal from a judgment of dismissal entered on the pleadings, the facts alleged in the complaint will be taken as true and the appellate court will assume that plaintiff can prove all facts as alleged.

(2) Id.--Questions of Law and Fact--Function of Court. --The appellate function does not include fact finding.

(3) Libel--Appeal--Function of Court. --On appeal from a judgment of dismissal entered on the pleadings in a libel action, the appellate court will not consider or determine questions relating to defense, or whether the material complained of is, in fact, defamatory.

(4) Schools--Construction of School Laws. --Ed. Code, § 10751, relating to disclosure, by school employees, of personal information concerning certain minor pupils, requires a strict interpretation.

(5) Id.--Construction of School Laws. --Ed. Code, § 10751, indicates, by the exceptions, that the legislative intent was to permit only the giving of personal information concerning the pupils involved in the participation of athletics and school activities, the winning of honors and awards and similar information.

(6) Id.--Construction of School Laws. --With respect to pupils referred to in Ed. Code, § 10751, the section indicates that under no circumstances, is any information to be given out by the school or its officials for any purposes other than those therein set forth, except under § 986, after waiver in a public hearing.

(7) Words and Phrases -- "Discretionary Acts." --Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that a person must or

must not take; a clearly defined rule would eliminate discretion.

(8) Schools--Construction of School Laws. --The prohibition in Ed. Code, § 10751, constitutes a mandatory hard and fast rule.

(9a) (9b) Id.--Liability. --School trustees' violation of Ed. Code, § 10751, eliminates the doctrine of sovereign immunity as far as the trustees are concerned.

(10) Public Officers -- Civil Liability. -- Government officials are liable for negligent performance of their ministerial duties.

(11) State of California--Liability. --*Civ. Code, § 22.3,* re-enacts the rule of sovereign immunity and was designed to temporarily nullify the effect of *Muskopf v. Corning Hospital Dist., 55 C.2d 211,* insofar as that decision affected the governmental agency itself, not its agents and employees.

(12) Schools--Boards of Education--Powers. --School boards have only such authority as is specifically granted by the Legislature to be exercised in the mode and within the limits permitted by the statute.

(13) Id.--Liability. --No immunity exists for discretionary acts of a school trustee, if the acts are beyond the course and scope of the trustee's duties.

(14) Public Officers--Civil Liability. --Governmental officials are not personally liable for discretionary acts within the course and scope of their authority, and the rule applies not only to acts essential to accomplishment of the main purpose for which the office was created, but also to acts that, although only incidental and collateral, serve to promote these purposes.

(15) Schools--Construction of School Laws. --Ed. Code, § 984, subds. (c), (d), provide for regular and special meetings and notices of the meetings of the school trustees, but there is no express authorization to set forth in such advance notices matters prohibited by Ed. Code, § 10751.

(16) Id.--Boards of Education--Meetings. --Under Ed. Code, § 985, the school district is prohibited from holding open meetings to consider disciplinary problems in which personal information concerning the minor pupils referred to in Ed. Code, § 10751 is disclosed, unless a public meeting is requested by the pupils or their parents or guardians.

(17) Id.--Boards of Education--Meetings. --Ed. Code, § 986, permits the result of a meeting of school trustees to be a public record without disclosing the details as to the cause or reason for the result, and would allow the board of trustees to divulge, for the first time, that a student had been suspended or expelled, but without explaining the details.

(18) Id.--Liability. --Violation of Ed. Code, § 10751, has no direct penalty even if truthful information is given; however, if the information is false and defamatory, the trustees, individually, are responsible as to libel and slander, as would be other citizens.

(19) Id.--Liability. --The superintendent of a school district does not have immunity from liability insofar as he may have made, or caused to be made, defamatory statements concerning a minor pupil to members of the general public, where the statements do not constitute merely reports of official action, but purport to be statements of fact within his personal knowledge.

COUNSEL: Meux, Gallagher, Baker & Manock, Avery, Meux & Gallagher and John H. Baker for Plaintiff and Appellant.

Barrett & Wagner, Honey, Mayall, Hurley & Knutsen and James F. Wagner for Defendants and Respondents.

Irving G. Breyer as Amicus Curiae on behalf of Defendants and Respondents.

JUDGES: Brown, **J.** Stone, Acting P. **J.,** concurred. Conley, P. J., deeming himself disqualified, did not participate.

OPINION BY: BROWN

OPINION

[*328] [**49] This action was brought by plaintiffs mother, Laura M. Elder, as guardian *ad litem* for her 17-year-old son, for claimed damages from an alleged libelous statement made by five defendants who were all of the duly elected trustees of the Caruthers Union High School District, and defendant Harry [* **2] R. Anderson, who was the superintendent and an employee of said district. Said defendants were not named in their official capacities. The alleged libel is part of an extensive special announcement mailed to many members of the general public within the boundaries of the school district. The portion of the announcement concerned and pleaded in the complaint is as follows:

"At a special public meeting to [be] held Tuesday, November 24, 1959, in the Caruthers High School

Gymnasium at 7:30 p. m. the Caruthers High School Board of Trustees, the administration, teachers and sponsors of the Los Angeles Band trip will bring the public in full focus on the serious violation of manners, morals and discipline that occurred in Los Angeles [*329] as the direct result of interference by the Elder and Fries boys who are now suspended from school."

However, although not complained of, the announcement continued: "These boys were not members of the Band, but were in Los Angeles on their own. This is the issue that brought on this development; therefore, the full details will be open for all the public to hear and any other matter will be heard at this time, if desired."

The pretrial [***3] conference order stated that Harry Anderson was the superintendent and employee of the school district; that the other five defendants were the duly [**50] elected trustees of the school district; that the five trustees prepared the entire special announcement hereinabove referred to and mailed copies thereof to many members of the general public within the boundaries of the high school district; and that the said alleged libelous statement is contained in said special announcement.

Subsequently, the defendants filed a motion to dismiss plaintiffs complaint on the ground that said complaint was beyond the jurisdiction of the superior court, being barred by the doctrine of civil immunity

The court entered a judgment and order for dismissal on the ground that the action is beyond the jurisdiction of the superior court because the suit is against defendants who are public school officials and clothed with civil immunity for an alleged libel in the performance of their official duties.

Plaintiff made a motion for a new trial which was denied, and it is from the judgment that plaintiff now appeals.

(1) [HN1] On an appeal from a judgment of dismissal entered on the pleadings, the facts alleged [***4] in the complaint must be taken to be true (*Saroyan v. Burkett, 57 Cal.2d 706, 708 [21 Cal.Rptr. 557, 371 P.2d* 293], and we must assume that the plaintiff can prove all facts as alleged. (2) However, the appellate function does not include fact finding. (3) Accordingly, questions as to whether the material complained of is in fact defamatory and questions relating to defenses, if any, will not be here considered or determined The task of this court is to determine whether the trial court erred in finding this to be a proper case for application of the doctrine of civil immunity.

Plaintiff claims that the doctrine of civil immunity does not apply to public officials if they are performing ministerial acts as opposed to discretionary acts, or if their acts are not within the course and scope of their authority.

[*330] [HN2] Education Code, section 10751, specifically provides: No teacher, principal, employee, or governing board member of any public, private, or parochial school *shall give out any personal information concerning any particular minor pupil* enrolled in the school in any class of the twelfth grade or below or in the thirteenth or fourteenth grades of a public [***5] junior college to any person except under judicial process unless the person is one of the following:

"(a) A parent or guardian of such pupil.

"(b) A person designated by such parent or guardian in writing.

"(c) An officer or employee of a public, private, or parochial school where the pupil attends, has attended, or intends to enroll.

"(d) An officer or employee of the United States, the State of California, or a city, city and county, or county seeking information in the course of his duties.

"(e) An officer or employee of a public or private guidance or welfare agency of which the pupil is a client.

"Restrictions imposed by this act are not intended to interfere with the giving of information by school personnel concerning participation in athletics and other school activities, the winning of scholastic or other honors and awards, and other like information. Notwithstanding the restrictions imposed by this section, an employer or potential employer of the pupil may be furnished the age and scholastic record of the pupil and employment recommendations prepared by members of the school staff, and rosters or lists containing the names and addresses of seniors in public, private, [***6] or parochial high schools or junior colleges may be furnished to private business or professional schools and colleges." (Italics added.)

(4) [HN3] This section requires strict interpretation. (5) It indicates by the exceptions that the legislative intent was to permit only the giving of personal information concerning [**51] the pupils involved in the participation of athletics and school activities, the winning of honors and awards and other similar information. It also permits the giving of personal information concerning the age and scholastic records of a pupil and lists of names and addresses of seniors in high schools to private business or professional schools and colleges. (6) Thus, under no circumstances is any information to be given out by the school or its officials for any other purposes, whether beneficial or detrimental, except when waived in a public hearing under section 986 of the Education Code.

[*331] Plaintiff admits that the school board has the right and the discretion to determine whether or not to send out notices calling public meetings and also to send

out announcements concerning activities of the school board, but that to insert such personal information in [***7] the announcements is an express violation of section 10751 of the Education Code.

(7) [HN4] Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion. (*Goodman v. Goodman, 68 Nev. 484 [236 P.2d 305] .)*

In the case of *Blalock v. Johnston, 180 S.C. 40 [185 S.E. 51, 54, 105 A.L.R. 1115],* "discretion" is defined as follows: "Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion."

In *State ex rel. Hammond v. Wimberly, 184 Tenn. 132 [196 S.W.2d 561, 563] ,* the court stated: ". . . where the law prescribes and defines the duties to be performed with such precision and certainly as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done [***8] involves the exercise of discretion and judgment it is not to be deemed merely ministerial."

(8) (9a) Therefore, it is the plaintiffs contention that all matters in which discretion is not allowed are ministerial acts; that the prohibition expressed in section 10751 of the Education Code constitutes a mandatory, hard and fast rule; and that violation of that section eliminates the doctrine of sovereign immunity as far as the defendant trustees are concerned. With this we agree.

(10) [HN5] "Government officials are liable for the negligent performance of their ministerial duties [citations] but are not liable for their discretionary acts within the scope of their authority [citations] .....(*Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 220 [11 Cal.Rptr. 89, 359 P.2d 457].)*

In *Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224 [11 Cal.Rptr. 97, 359 P.2d 465],* the school trustees, outside of a meeting, made certain disparaging remarks concerning the superintendent of schools to members of the public. Such remarks were that the superintendent was dictatorial, [*332] operated a rubber-stamp board, was overpaid, suppressed facts from the board, tampered with [***9] minutes of the meetings, received kickbacks from district employees, engaged in shady dealings and cleaned up on business transactions. The court said, at pages 234, 235:

"The statements allegedly made to the press and to members of the public were not confined to reports of charges that were being made; they purported to be statements of fact and were beyond the scope of the trustees' powers. In making these statements the three trustees were not within the immunity rule, and a cause of action is stated against them. The case of *Hardy v. Vial, 48 Cal.2d 577 [311 P.2d* [**52] *494] ,* relied upon by defendants, is distinguishable because the school defendants involved there did not make statements to the public but only to three nonschool persons who filed false charges against the plaintiff with an appropriate administrative body in carrying out an alleged conspiracy with the officials. . . . They cannot claim immunity insofar as they made or caused to be made defamatory statements concerning plaintiff to members of the public which were not merely reports of official action but instead purported to be statements of fact within their personal knowledge."

The *Lipman [***10]* case, at page 230, states that the school district, itself, is immune from "tort liability for the alleged acts of the trustees within the scope of their authority, and familiar principles of agency preclude its liability for acts outside the scope of their authority." It further held, at page 233, that:

"The rule is settled, as pointed out above, that [HN6] governmental officials are not personally liable for discretionary acts within the scope of their authority, and this rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes. (*White v. Towers, 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R.2d 636] .)"*

In the present case, the school trustees have stated that the complaint alleges an intentional and malicious tort, as compared with a negligent act, and that under no circumstances is the state liable for intentional and malicious acts of its public officials or its employees.

(11) Defendants cite *Civil Code section 22.3,* passed by the 1961 session of the Legislature, which reenacts the rule of sovereign immunity and which legislative [***11] action was held constitutional by our Supreme Court in *Corning Hospital* [*333] *Dist. v. Superior Court* (the *Muskopf* case, *supra), 57 Cal.2d 488 [20 Cal.Rptr. 621, 370 P.2d 325] . Section 22.3* was designed to temporarily nullify the effect of the first *Muskopf* case, *supra, 55 Cal.2d 211,* insofar as it affected the governmental agency itself -- not its agents and employees.

Was the Conduct of the Defendants Beyond the Course and Scope of Their Authority

(12) [HN7] School boards have only such authority as is specifically granted by the Legislature, to be exer-

cised in the mode and within the limits permitted by the statute. (*Hughes v. Ewing, 93 Cal. 414, 417 [28 P. 1067] .)*

(13) We think it is clear that no immunity exists for discretionary acts if the acts complained of are beyond the course and scope of the duties of the school trustees. (See *Lipman v. Brisbane Elementary School Dist., supra, 55 Cal.2d 224.)*

The special announcement does not imply that the plaintiff was being charged with certain indiscretions, but states as a pure matter of fact that the plaintiff minor was involved in "serious violations of manners, morals and discipline that [***12] occurred in Los Angeles as the direct result of interference by the Elder [plaintiff] and Fries boys who are now suspended from school."

(14) It is certainly true that governmental officials are not personally liable for discretionary acts within the course and scope of their authority, but, as the *Lipman* case provides (p. 233), ". . . this rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote these purposes." We admit that the case before us may be an important one to all public officials. It is true that official bodies should obtain and retain outstanding citizens to [**53] hold public office, even though the positions may not have a great deal of monetary compensation but only the reward of public service. We borrow some of the language of Judge Learned Hand, stated in *Gregoire v. Biddle, 177 F.2d 579, 581:* To subject citizens serving as public officers to suit and trial in every instance in which their good faith but mistaken actions caused injury to another "would dampen the ardor of all but the most resolute, or the most [***13] irresponsible, in the unflinching discharge of their duties." But here we find more than a good faith mistaken action. **(9b)** In this case defendants' trustees violated a code [*334] section prohibiting dissemination of personal information concerning pupils, and thus stepped outside the protection of their office.

In the case of *Hancock v. Burns, 158 Cal.App.2d 785 [323 P.2d 456] ,* the Senate Fact Finding Committee on Un-American Activities made certain statements regarding the plaintiffs to their employer, causing them to lose their positions. It was held that the action of defendants was protected by their legislative immunity from suit. This is far different from the case before us in which the alleged defamatory statements were made in the general circulation of a special announcement to many members of the general public in the school district. In *Hancock,* the court said at page 792:

"If government, operating through the individuals who form it, is afforded immunity from private suit only when its actions are beyond any question, and loses that immunity upon mere allegation of improper motives or unlawful acts in a complaint seeking damages, then those persons [***14] who form government are subject to the threat of personal liability in any matter in which their discretion is exercised."

Hancock states further at page 792, ". . . that when elected officials so conduct themselves as to indicate a lack of essential obligation to their responsibilities there are remedies available to the electorate. . . ."

Defendants complain that this quotation from the special announcement is taken out of context. Matters to be discussed at the meeting which were mentioned in the special announcement were: That a group of people had held a meeting to which the trustees, teachers or public were not invited on how to improve the school district; that at this meeting the true purpose was to discuss and circulate a petition relative to dividing the school district and eliminating the administrators; that one of the persons at the meeting, Mr. Fries, was dissatisfied because his son had been suspended from school and that he wanted a special set of rules to apply to his son; and that the school trustees had been complimented on their efforts in seeing that the school was operated in an efficient and orderly manner. The portion complained about in this action [***15] next appeared; and, lastly, there were statements that the trustees, administrators and teachers felt that any issue should be brought before the Board of Education at the proper time, with both the public and officials attending; that the board does not believe in secret meetings; that the greatest help to the school district would be the elimination of those [*335] few students who refuse to study and obey the rules and cause a constant turmoil; and that the proposed special meeting was for the general adult public in the school district and students would not be permitted.

We do not think it makes any difference if there are many acts involved, as in the *Lipman* case, *supra, 55 Cal.2d 224,* as compared to the present case where there is only one special announcement which was sent to many members of the general public in the district.

In *Cross v. Tustin, 165 Cal.App.2d 146, 149-150 [331 P.2d 785] ,* the court said: "It is settled law that [HN8] the defense of sovereign immunity from suit presents a jurisdictional question; that the state may not be sued without its consent. [**54] (*People v. Superior Court, 29 Cal.2d 754, 756-757 [178 P.2d 1, 40 A.L.R.2d [***16] 919]; McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46,49 [168 P.2d 65] .)* This immunity protects public officers and employees acting within the scope of their duties, even against charges of malicious personal torts, such as libel, slander, and false prosecution. *(Rauschan v. State Compensation Ins. Fund, 80 Cal.App.*

754 [253 P. 173]; Gould v. Executive Power of the State, 112 Cal.App.2d 890 [247 P.2d 424]; White v. Towers, 37 Cal.2d 727 [235 P.2d 209, 28 A.L.R.2d 636]; Hardy v. Vial, 48 Cal.2d 577 [311 P.2d 494]; Gregoire v. Biddle, 177 F.2d 579.)"

In the *Cross* case, *supra,* the plaintiff alleged that the defendants were acting within the course and scope of their authority. Therefore, it was held that the defendants were immune from civil prosecution. In the present case, however, the defendants were not acting within the course and scope of their authority. The alleged libelous statements contained in the special announcement do not specify that final action by the school board as to disciplinary matters will be taken at the proposed meeting (Ed. Code, § 986).

(15) [HN9] While subsections (c) and (d) of section [***17] 984 of the Education Code provide for regular and special meetings and notices of such meetings of the school trustees, there is no express authorization given to the board to set forth matters in such advance notices which are prohibited by section 10751 of the Education Code. It is provided by section 985 of the Education Code that, "No action authorized or required by law shall be taken by the governing board of a school district except in a meeting open to the public." An exception thereto is made by section 986 of the Education Code which states, in pertinent part:

[*336] "Notwithstanding the provisions of Section 985 of this code . . ., the governing body of a school district may hold executive sessions to consider the expulsion, suspension, or disciplinary action in connection with any pupil of the school district, if a public hearing upon such question would lead to the giving out of information concerning school pupils which would be in violation of Section 10751 of the Education Code."

(16) Thus, in effect, [HN10] the school district is permitted by the Open Meetings Law (§ 985) to hold an executive session to consider disciplinary problems, but only when it would not violate [***18] section 10751, which prohibits the school trustees from giving out personal information concerning a pupil. In other words, the school district is prohibited from holding open meetings on such subjects, unless a public meeting is requested by the pupil concerned, or by his parent or guardian. If no such request is made, the school district's governing board may hold a closed door, executive session where the subject matter of the inquiry involves the disclosure of personal information.

(17) However, the last sentence of section 986 provides that after the matter has been considered, either in executive session or public meeting, the final action of the board shall be taken at a public meeting and the result of such action shall be a public record of the school district. This allows the result of such action to be a public record without the details as to the cause or reason for the result, and would allow the board to put out for the first time the information that a student had been suspended or expelled, but without explaining the details. We do not know from the record that such a meeting had been held, or that the minor plaintiff had been suspended. **(18)** The violation of section 10751 [***19] has no direct penalty even when truthful information is given, but if such information is false and defamatory, then the trustees, individually, are responsible as to libel and slander, as would be other citizens.

We cannot tell from the general allegations in the complaint just exactly what Harry R. Anderson, as the superintendent [**55] of the school district, is alleged to have done, other than that generally alleged against all the other defendants. **(19)** According to the *Lipman* case, *supra, 55 Cal.2d 224,* Anderson cannot claim immunity insofar as he may have made or caused to be made defamatory statements concerning the plaintiff to members of the general public which were not merely reports [*337] of official action but instead, purported to be statements of fact within his personal knowledge.

The judgment is reversed.

Received
June 17, 2011
Commission on
State Mandates

TAB “13”

CHARLES GARDNER, Plaintiff and Appellant, v. COMMISSION ON PROFESSIONAL COMPETENCE, Defendant and Respondent; BOARD OF EDUCATION OF THE TUSTIN UNIFIED SCHOOL DISTRICT, Real Party in Interest and Respondent

No. G000130

Court of Appeal of California, Fourth Appellate District, Division Three

164 Cal. App. 3d 1035; 210 Cal. Rptr. 795; 1985 Cal. App. LEXIS 1670

January 22, 1985

NOTICE: [*1]** Certified for partial publication - See footnote, post, page 1038.

SUBSEQUENT HISTORY: As Modified February 21, 1985.

PRIOR HISTORY: Superior Court or Orange County, No. 359110, Harmon G. Scoville, Judge.

DISPOSITION: The judgment of the superior court denying the petition for a peremptory writ of mandate is affirmed. Each party is to pay its own costs of appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant teacher sought review of the judgment of the Superior Court of Orange County (California), denying his petition for a writ of mandate to compel respondent Commission on Professional Competence to set aside its order of dismissal and to compel respondent and real party in interest board of education to reinstate him as an employee.

OVERVIEW: Real party in interest board of education charged appellant teacher with various acts of immoral conduct and unfitness to teach. After a hearing, respondent Commission on Professional Competence found 10 of the charges to be true by a preponderance of the evidence. The superior court concluded that respondent commission's findings were supported by the weight of the evidence, and denied appellant's petition for a writ of mandate. On review, appellant contended respondent commission and the lower court applied an improper standard of proof. Appellant argued respondent commission was required to apply the higher standard of clear and convincing proof to a reasonable certainty. The court held the standard of proof in an administrative hearing to dismiss a teacher was preponderance of the evidence because the findings of the administrative tribunal did not deprive appellant of the right to practice his profession, but merely terminated his employment with respondent school district. Thus, respondent commission employed the proper standard of proof when it found the preponderance or weight of the evidence supported 10 of the specified charges and the writ was properly denied.

OUTCOME: The court affirmed the judgment of the superior court denying appellant teacher's petition for a peremptory writ of mandate because respondent Commission on Professional Competence employed the proper preponderance of the evidence standard when it found the evidence supported 10 of the specified charges against appellant.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN1] In exercising its independent judgment, a superior court reviews an administrative decision to determine if the findings are supported by the weight of the evidence. *Cal. Civ. Proc. Code § 1094.5(c).*

Governments > State & Territorial Governments > Employees & Officials
[HN2] The standard of proof to be used in state employment cases is a preponderance of the evidence.

Education Law > Faculty & Staff > Qualifications > Certification & Licensure > Revocation & Suspension
Governments > State & Territorial Governments > Employees & Officials
[11N3] The distinction between teacher dismissal and license revocation proceedings is well recognized. There is an undeniable difference between the qualification of a man for the general practice of a profession and his fitness for some particular employment. Transient and local causes may render him undesirable in the latter case although his general fitness might be conceded. There is a vast difference between the right of a board to take away a man's right to practice a profession by revoking his license and subjecting him to dismissal from a single employment after he had become subject to a substantial objection of his employer.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered a judgment denying a teacher's petition for a writ of mandate to compel the Commission on Professional Competence to set aside its order of dismissal and to compel a school district to reinstate him as a permanent certificated employee. The teacher had been dismissed for immoral conduct *(Ed. Code, § 44932, subd. (a))* and for evident unfitness to teach *(Ed. Code, § 44932, subd. (e))*. (Superior Court or Orange County, No. 359110, Harmon G. Scoville, Judge.)

The Court of Appeal affirmed, holding that since the findings of the commission did not deprive the teacher of the right to practice his profession but merely terminated his employment with the school district, the commission properly employed the preponderance or weight of the evidence standard of proof, and that there was sufficient evidence to justify dismissal. (Opinion by Wallin, J., with Trotter, P. J., and Crosby, **J.,** concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Administrative Law § 49 -- Administrative Actions -- Adjudication -- Evidence -- Burden of Proof and Presumptions -- Standard. -- Because the findings of an administrative agency come to the trial court, even in the "independent judgment" context, with a strong presumption of their correctness, an administrative agency is required to apply the proper standard of proof.

(2) Schools § 46 -- Teachers -- Suspension or Dismissal -- Appeals Before Personnel Commission -- Standard of Proof. -- In proceedings to dismiss a teacher from a particular school for immoral conduct (*Ed. Code, § 44932, subd. (a))* and evident unfitness to teach (*Ed. Code, § 44932, subd. (e)),* the Commission on Professional Competence properly employed the preponderance or weight of the evidence standard of proof, rather than the higher clear and convincing proof to a reasonable certainty standard required in teacher license revocation proceedings.

COUNSEL: Anthony C. Duffy for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Parker & Covert, Spencer E. Covert, Jr., and Margaret A. Chidester for Real Party in Interest and Respondent.

JUDGES: Opinion by Wallin, **J.,** with Trotter, P. J., and Crosby, **J.,** concurring.

OPINION BY: WALLIN

OPINION

[* 1036] [* *796] Charles Gardner appeals a judgment denying his petition for a writ of mandate to compel respondent Commission on Professional Competence (Commission) to set aside its order of dismissal and to compel respondent and real party in interest Board of Education of the Tustin Unified School District (District) to reinstate him as a permanent certificated employee. The superior court, using its independent judgment, upheld the findings of the Commission dismissing Gardner for immoral conduct (*Ed. Code, § 44932* [***2] , *subd. (a))* and for evident unfitness to teach (*Ed. Code, § 44932, subd. (e)).* The judgment is affirmed.

Gardner was employed by the District as a teacher intern during the 1969-1970 school year. Thereafter, with the exception of two unpaid leaves of [* 1037] absences in 1972-1973 and 1979-1980, he taught continuously at Tustin High School.

The District did not assign Gardner a regular classroom after he returned from his second leave. In November of 1980, the District's board adopted a written statement of specific charges against him alleging various acts of immoral conduct and unfitness to teach occurring during the 1978-1979 school year. Gardner demanded, and was afforded, a five-day evidentiary hearing before the Commission.

The Commission found 10 of the charges to be true by a preponderance of the evidence. The Commission found that during the fall semester of the 1978-1979 school year several incidents occurred during Gardner's jobs class. During this class, he invited one 15-year-old female student to lunch, and, on another occasion to go out, for an evening date. During another class session, he stroked a female student's open palm [***3] with the middle finger of his hand suggesting to her that he wanted to sleep with her. He invited yet another 15-year-old to attend a barbecue and beach party with him

The Commission made several findings about the decorum Gardner established in his World Cultures class during the same fall semester. Although there were many freshmen students present, Gardner remarked on at least five occasions that one of the attractive female students had a "nice ass" and also on at least five occasions used the word "asshole." Throughout the year he was observed flirting with female students.

Gardner's spring semester of World Cultures was not without incident either. The Commission found that Gardner initiated a private conversation after class with a female student during which he questioned her about sleeping with her boyfriend and her use of contraceptives. The student was extremely embarrassed by the discussion. During one class session, Gardner gave the same student permission to borrow his backgammon board. When she opened the board she saw a plastic baggy with what appeared to be marijuana, zig [**797] zag papers, and a small silver bowl. She returned the board, but Gardner [* **4] became red-faced, flustered, and embarrassed and told the class they had not seen anything and they were not to discuss the incident with anyone.

The Commission also made miscellaneous findings on conduct that occurred at various times throughout the year. He was observed smoking marijuana at an off-campus party by two Tustin High School students. He also invited several female students on separate occasions to activities or parties. Although many times these were organized as group activities, the [*1038] student recipients of Gardner's invitations thought they were being asked to attend the events alone with him. The invitations made them uncomfortable. The Commission specifically found that he invited one female student to a beach party at his home.

The superior court, concluding that the Commission's findings were supported by the weight of the evidence, denied the petition for a writ of mandate. On appeal, Gardner contends: (1) the Commission and the court applied an improper standard of proof; (2) the court's findings were not supported by substantial evidence. (3) he was denied due process in his administrative hearing before the Commission; and (4) the court [***5] committed reversible error by refusing to render a statement of decision. These contentions, discussed in order below, are without merit.

1 Gardner also argues the superior court erred as a matter of law by finding him guilty of immoral conduct and evident unfitness to teach when there was insufficient evidence that his conduct inhibited his effectiveness as a teacher. (*Morrison v. State Board of Education (1969) 1 Cal.3d 214 [82 Cal.Rptr. 175, 461 P.2d 375] .)* We have consolidated this argument with the broader issue of the substantiality of the evidence.

I

The trial court provided a clear record on the central issue of the standard of proof. The court concluded in its intended decision "that the standard of proof . . . is to determine whether or not the findings of the Commission on Professional Competence are supported by the weight or preponderance of the evidence." The Commission also applied the same standard of proof, expressly rejecting Gardner's contention the findings -had [***6] to be supported by clear and convincing proof to a reasonable certainty.

The superior court applied the appropriate standard of proof. [HN1] In exercising its independent judgment, a superior court reviews the administrative decision to determine if the findings are supported by the weight of the evidence. (*Code Civ. Proc., § 1094.5, subd. (c); Chamberlain v. Ventura County Civil Service Commission (1977) 69 Cal.App.3d 362, 367 [138 Cal.Rptr. 155] .)* (1) However, Gardner argues the administrative tribunal was required to apply the higher standard of clear and convincing proof [*1039] to a reasonable certainty. (2) The issue presented is whether the standard of proof in an administrative hearing to dismiss a teacher is preponderance of [**798] the evidence or clear and convincing proof to a reasonable certainty.

2 We agree with Gardner that if the Commission had been required to apply the higher standard of proof, he would be entitled to a new hearing even though the superior court must employ the basic preponderance of the evidence test. Although two courts have held, "the standard of proof in the original administrative proceedings is wholly irrelevant to the standard of proof applicable to a review of such proceedings" (*Chamberlain v. Ventura County Civil Service Commission, supra, 69 Cal.App.3d at p. 370; Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 858 [185 Cal.Rptr. 601]),* there was no evidence in those cases the administrative agencies applied the wrong standard of proof. The findings of the agency come to the trial court, even in the "independent judgment" context "'with a strong presumption of their correctness . . .'" *(Chamberlain v. Ventura County Civil Service Commission, supra, 69 Cal.App.3d at p. 371,* quoting *Drummey v. State Board of Funeral Directors (1939) 13 Cal.2d 75, 85 [87 P.2d 848] .)* Therefore, an administrative agency is required to apply the proper standard of proof. (See *Ettinger v. Board of Medical Quality Assurance, supra, 135 Cal.App.3d at p. 856.)*

*[***7]* Gardner relies on professional license revocation cases requiring the higher standard of proof. *(Furman v. State Bar (1938) 12 Cal.2d 212 [83 P.2d 12]; Realty Projects, Inc. v. Smith (1973) 32 Cal.App.3d 204 [108 Cal.Rptr. 71]; Small v. Smith (1971) 16 Cal.App.3d 450 [94 Cal.Rptr. 136] .)* However, the Commission did not, and could not, revoke Gardner's teaching credential. He remains eligible to teach in any school district in the state.

Having been discharged by one specific employer, Gardner's situation is analogous to state employees dismissed from state employment. (*Skelley v. State Personnel Board (1975) 15 Cal.App.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774]; Pereyda v. State Personnel Board (1971) 15 Cal.App.3d 47 [92 Cal.Rptr. 746] .)* The California Supreme Court has stated that [HN2] the standard of proof to be used in state employment cases is a preponderance of the evidence. (*Skelley v. State Personnel Board, supra,* 15 Ca1.3d at p. 204, fn. 19.)

3 *Johnstone v. Daly City (1958) 156 Cal.App.2d 506 [319 P.2d 756] ,* relied on by Gardner conflicts with the standard of proof enunciated more recently by the Supreme Court in *Skelley. (Chamberlain v. Ventura County Civil Service Commission, supra, 69 Cal.App.3d 362, 370.)*

[***8] [HN3]

The distinction between teacher dismissal and license revocation proceedings is well recognized "'There is an undeniable . . . difference between the qualification of a man for the general practice of a profession and his fitness for some particular employment. Transient and local causes may render him undesirable in the latter case although his general fitness might be conceded. *There is a vast difference between the right of a board to take* [*1040] *away a man's right to practice a profession by revoking his license and subjecting him to dismissal from a single employment after he had become subject to a substantial objection of his employer.'" (Johnston v. Taft School District (1937) 19 Cal.App.2d 405, 407-408 [65 P.2d 912] ,* italics added.)

Moreover in *Board of Trustees v. Stubblefield (1971) 16 Cal.App.3d 820, 826 [94 Cal.Rptr. 318] ,* the Court of Appeal reiterated the distinction. "Another substantial difference is that between the *revocation of a teacher's certificate* and dismissal from employment in a single school district. Thus the court stressed that a teacher 'is entitled to a careful and reasoned inquiry [***9] into his fitness to teach by the Board of Education *before he is deprived of his right to pursue his profession.'* (Italics added.)" *(Ibid.* quoting *Morrison v. State Board of Education, supra, 1 CaL 3d at pp. 238-239.)*

Since the findings of the administrative tribunal did not deprive Gardner of the right to practice his profession but merely terminated his employment with the Tustin Unified School District, the Commission employed the proper standard of proof. It found the preponderance or weight of the evidence supported ten of the specified charges. This is sufficient evidence to justify dismissal.

II [Text omitted.] NOT CERTll-IED FOR PUBLICATION.

The judgment of the superior court denying the petition for a peremptory writ of mandate is affirmed. Each party is to pay its own costs of appeal.

TAB “14”

LEXSEE

Caution
As of: Jun 23, 2010

THOMAS WILLIAM HAYES, as Director, etc., Plaintiff and Respondent, v. COMMISSION ON STATE MANDATES, Defendant, Cross-defendant, and Respondent; DALE S. HOLMES, as Superintendent, etc., Real Party in Interest, Cross-complainant and Appellant; WILLIAM CIRONE, as Superintendent, etc., Real Party in Interest and Respondent; STATE OF CALIFORNIA et al., Cross-defendants and Respondents.

No. C009519

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

11 Cal. App. 4th 1564; 15 Cal. Rptr. 2d 547; 1992 Cal. App. LEXIS 1498; 93 Cal. Daily Op. Service 17; 93 Daily Journal DAR 18

December 30, 1992, Decided

SUBSEQUENT HISTORY: [***1] Review Denied April 1, 1993, Reported at 1993 Cal. LEXIS 1988. Lucas, C.J., Kennard, J., and Arabian, J., are of the opinion the petition should be granted.

PRIOR HISTORY: Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant Riverside Schools sought review from a decision of the Superior Court of Sacramento County (California), which set aside an administrative decision that all local special education costs were state mandated and subject to state reimbursement and, denied appellant's writ of mandate that would have ordered respondent controller to issue a warrant in payment of its claim.

OVERVIEW: Appellant Riverside Schools filed claims seeking state reimbursement for alleged state-mandated costs incurred in connection with special education programs. After lengthy proceedings, the administrative agency decided that all local special education costs were state mandated and subject to reimbursement. On appeal, the lower court issued a writ of administrative mandate directing the agency to reconsider the matter and denying appellant's petition for a writ of mandate that would have directed issuance of a warrant in payment of its claim. The court affirmed the lower court decision and clarified the criteria to be applied by the administrative agency. The court concluded that, all financial assistance or funds under the Rehabilitation Education Act, 29 U.S.C.S. § 794 (1973) or, under the Education of the Handicapped Act, 20 U.S.C.S. § 1400 et seq., were federally mandated and thus, appellant was not entitled to reimbursement from the state for these types of programs.

OUTCOME: The court affirmed the judgment of the lower court, which set aside an administrative decision that all local special education costs were state mandated and subject to state reimbursement because the special education costs were federally mandated and thus, appellant Riverside Schools was not entitled to reimbursement from the state for these types of programs.

CORE TERMS: subvention, educational, reimbursement, mandated, special education, Handicapped Act, federal mandate, handicapped children, local agencies, school district's, handicapped, levels of service, local government's, local school districts, state-mandated, federal government, spending, accommodate, taxing, state mandates, funding, local agency, new programs, appropriation, Rehabilitation Act, state subvention, entity, fiscal year, Handicapped Act, public education

LexisNexis(R) Headnotes

Education Law > Departments of Education > State Departments of Education > Authority
Education Law > Departments of Education > U.S. Department of Education > Authority
[HN1]Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

Education Law > Students > Right to Education
[HN2]States typically do purport to guarantee all of their children the opportunity for a basic education. In fact, in this state basic education is regarded as a fundamental All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate the educational needs of the children in their districts.

Education Law > Departments of Education > U.S. Department of Education > Authority
Education Law > Discrimination > Individuals With Disabilities Education Act > Coverage
Governments > Legislation > Statutory Remedies & Rights
[HN3]Since the 1975 amendment, the Education of the Handicapped Act requires recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education, 20 U.S.C.S. § 1412(1). The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Remedies
Constitutional Law > Supremacy Clause > General Overview
Governments > State & Territorial Governments > Relations With Governments
[HN4]Federal financial assistance is not the only incentive for a state to comply with the Education of the Handicapped Act, 20 U.S.C.S. § 1400 et seq. Congress intends the act to serve as a means by which state and local educational agencies can fulfill their obligations under the equal protection and due process provisions of the Constitution and under § 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act, 42 U.S.C.S. § 1983 and § 504 of the Rehabilitation Act of 1973, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives.

Administrative Law > Judicial Review > General Overview
Constitutional Law > Supremacy Clause > General Overview
Education Law > Discrimination > Individuals With Disabilities Education Act > Enforcement
[HN5]As a result of the exclusive nature of the Education of the Handicapped Act, 20 U.S.C.S. § 1415(e)(2), dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention. This gives local agencies the first opportunity and the primary authority to determine appropriate placement and to resolve disputes. If a party is dissatisfied with the final result of the administrative process then he or she is entitled to seek judicial review in a state or federal court. In such a proceeding the court independently reviews the evidence but its role is restricted to that of review of the local decision and the court is not free to substitute its view of sound educational policy for that of the local authority.

Constitutional Law > State Constitutional Operation
Education Law > Students > Right to Education
[HN6]The constitutional provision requires state subvention when the Legislature or any State agency mandates a new program or higher level of service on local agencies. Cal. Const., art. XIII B, § 6.

Constitutional Law > State Constitutional Operation
Governments > Legislation > Interpretation
[HN7]As a general rule and unless the context clearly requires otherwise, reviewing court must assume that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Two school districts filed claims with the State Board of Control for state reimbursement of alleged state-mandated costs incurred in connection with special education programs. The board determined that the costs were state mandated and subject to reimbursement by the state. In a mandamus proceeding, the trial court entered a judgment by which it issued a writ of administrative

mandate directing the Commission on State Mandates (the successor to the board) to set aside the board's administrative decision and to reconsider the matter in light of an intervening decision by the California Supreme Court, and by which it denied the petition of one of the school districts for a writ of mandate that would have directed the State Controller to issue a warrant in payment of the district's claim. (Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.)

The Court of Appeal affirmed. It held that the 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. The court held that to the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention under Cal. Const., art. XIII B, § 6. Thus, on remand to the commission, the court held, the commission was required to focus on the costs incurred by local school districts and on whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program. (Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs: Words, Phrases, and Maxims -- Subvention. --"Subvention" generally means a grant of financial aid or assistance, or a subsidy. The constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services that the local agency is required by state law to provide to its residents. The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. Reimbursement is required when the state freely chooses to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb.

(2) Schools § 4 -- School Districts -- Relationship to State. --A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. Local school districts are agencies of the state and have been described as quasi-municipal corporations. They are not distinct and independent bodies politic. The Legislature's power over the public school system is exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. The state is the beneficial owner of all school properties, and local districts hold title as trustee for the state. School moneys belong to the state, and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion, and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legislature.

(3) Property Taxes § 7.8 -- Real Property Tax Limitation -- Exemptions and Special Taxes -- Federally Mandated Costs. --Pursuant to Rev. & Tax. Code, § 2271 (local agency may levy rate in addition to maximum property tax rate to pay costs mandated by federal government that are not funded by federal or state government), costs mandated by the federal government are exempt from an agency's taxing and spending limits.

(4) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Costs Incurred Before Effective Date of Constitutional Provision. --Since Cal. Const., art. XIII B, requiring subvention for state mandates enacted after Jan. 1, 1975, had an effective date of July 1, 1980, a local agency may seek subvention for costs imposed by legislation after Jan. 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law.

(5) Schools § 53 -- Parents and Students -- Right or Duty to Attend -- Handicapped Children -- Federal Rehabilitation Act -- Obligations Imposed on Districts. --Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794) does not only obligate local

school districts to prevent handicapped children from being excluded from school. States typically purport to guarantee all of their children the opportunity for a basic education. In California, basic education is regarded as a fundamental right. All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate the educational needs of the children in their districts. Section 504 does not permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. The statute imposes an obligation upon local school districts to take affirmative steps to accommodate the needs of handicapped children.

(6) Schools § 53 -- Parents and Students -- Right or Duty to Attend -- Handicapped Children -- Education of the Handicapped Act. --The federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.), which since its 1975 amendment has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education, is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. Congress intended the act to establish a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children. It is also apparent that Congress intended to achieve nationwide application.

(7) Civil Rights § 6 -- Education -- Handicapped -- Scope of Federal Statute. --Congress intended the Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) to serve as a means by which state and local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). Accordingly, where it is applicable, the act supersedes claims under the Civil Rights Act (42 U.S.C. § 1983) and section 504, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives. As a result of the exclusive nature of the Education of the Handicapped Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention.

(8a) (8b) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Special Education: Schools § 4 -- School Districts; Financing; Funds -- Special Education Costs -- Reimbursement by State. --The 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention under Cal. Const., art. XIII B, § 6. Thus, on remand of a proceeding by school districts to the Commission on State Mandates for consideration of whether special education programs constituted new programs or higher levels of service mandated by the state entitling the districts to reimbursement, the commission was required to focus on the costs incurred by local school districts and whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program.

(9) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- Federally Mandated Costs. --The constitutional subvention provision (Cal. Const., art. XIII B, § 6) and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. When 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. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate, so long as the state had no "true choice" in the manner of implementation of the federal mandate.

(10) Statutes § 28 -- Construction -- Language -- Consistency of Meaning Throughout Statute. --As a general rule and unless the context clearly requires otherwise, it must be assumed that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part.

(11) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- Federally Mandated Costs -- Subvention. --Subvention prin-

ciples are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's taxing and spending limitations. If the costs are imposed by the state, then the state must provide a subvention to reimburse the local agency. Nothing in the scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Thus, the criteria set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits are applicable when subvention is the issue.

(12) State of California § 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Special Education -- Applicable Criteria in Determining Whether Subvention Required. --In a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court did not err in determining that the board failed to consider the issues under the appropriate criteria as set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits. The board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act (20 U.S.C. § 1401 et seq.) without any consideration of whether the act left the state any actual choice in the matter. It also relied on litigation involving another state. However, under the criteria set forth in the Supreme Court's case, the litigation in the other state did not support the board's decision but in fact strongly supported a contrary result.

(13) Courts § 34 -- Decisions and Orders -- Prospective and Retroactive Decisions -- Opinion Elucidating Existing Law. --In a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits, the court elucidated and enforced existing law. Under such circumstances, the rule of retrospective operation controls. Thus, in a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court correctly applied the Supreme Court decision to the litigation pending before it.

COUNSEL: Biddle & Hamilton, W. Craig Biddle, Christian M. Keiner and F. Richard Ruderman for Real Party in Interest, Cross-complainant and Appellant.

Breon, O'Donnell, Miller, Brown & Dannis and Emi R. Uyehara as Amici Curiae on behalf of Real Party in Interest, Cross-complainant and Appellant.

No appearance for Real Party in Interest and Respondent.

Daniel E. Lungren, Attorney General, N. Eugene Hill, Assistant Attorney General, Cathy Christian and Marsha A. Bedwell, Deputy Attorneys General, and Daniel G. Stone for Plaintiff and Respondent.

Gary D. Hori for Defendant, Cross-defendant and Respondent.

Richard J. Chivaro and Patricia A. Cruz for Cross-defendants and Respondents.

JUDGES: Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.

OPINION BY: SPARKS, Acting P. J.

OPINION

[*1570] [**550] This appeal involves a decade-long battle over claims for subvention by two county superintendents of schools [***2] for reimbursement for mandated special education programs. Section 6 of article XIII B of the California Constitution directs, with exceptions not relevant here, that "[w]henever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, ..." The issue on appeal is whether the special education programs in question constituted new programs or higher levels of service mandated by the state entitling the school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them or whether these programs were instead mandated by the federal government for which no reimbursement is due.

The Santa Barbara County Superintendent of Schools and the Riverside County Superintendent of Schools each filed claims with the Board of Control for state reimbursement for alleged state-mandated costs incurred in connection with special education programs. After a lengthy administrative process, the Board of Control rendered a decision [***3] finding that all local special education costs were state mandated and subject to state reimbursement. That decision was then successfully challenged in the Sacramento County Superior Court. The superior court entered a judgment by which it: (1) issued a writ of administrative mandate (Code Civ. Proc., § 1094.5), directing the Commission on State Mandates (the successor to the Board of [*1571] Control) to set aside the administrative decision and to reconsider the matter in light of the California Supreme Court's intervening decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522]; and (2) denied the Riverside County Superintendent of School's petition for a writ of mandate (Code Civ. Proc., § 1085), which would have directed the State Controller to issue a warrant in payment of the claim. The Riverside County Superintendent of Public Schools appeals. We shall clarify the criteria to be applied by the Commission on State Mandates on remand and affirm the judgment.

I. THE PARTIES

This action was commenced in July 1987 by Jesse R. Huff, then the Director of the [***4] California Department of Finance. Huff petitioned for a writ of administrative mandate to set aside the administrative decision which found all the special education costs to be state mandated. On appeal Huff appears as a respondent urging that we affirm the judgment.

The Commission on State Mandates (the Commission) is the administrative agency which now has jurisdiction over local agency claims for reimbursement for state-mandated costs. (Gov. Code, § 17525.) In this respect the Commission is the successor to the Board of Control. The Board of Control rendered the administrative decision which is at issue here. Since an appropriation for payment of these claims was not included in a local government claims bill before January 1, 1985, administrative jurisdiction over the claims has been transferred from the Board of Control to the Commission. (Gov. Code, § 17630.) The Commission is the named defendant in the petition for a writ of administrative mandate. In the trial court and on appeal the Commission has appeared as the agency having administrative jurisdiction over the claims, but has not expressed a position on the merits of the litigation.

[**551] The Santa Barbara County Superintendent [***5] of Schools (hereafter Santa Barbara) is a claimant for state reimbursement of special education costs incurred in the 1979-1980 fiscal year. Santa Barbara is a real party in interest in the proceeding for administrative mandate. Santa Barbara has not appealed from the judgment of the superior court and, although a nominal respondent on appeal, has not filed a brief in this court.

The Riverside County Superintendent of Schools (hereafter Riverside) represents a consortium of school districts which joined together to provide special education programs to handicapped students. Riverside seeks reimbursement for special education costs incurred in the 1980-1981 fiscal year. [*1572] Riverside is a real party in interest in the proceeding for writ of administrative mandate. It filed a cross-petition for a writ of mandate directing the Controller to pay its claim. Riverside is the appellant in this appeal.

The State of California and the State Treasurer are named cross- defendants in Riverside's cross-petition for a writ of mandate. They joined with Huff in this litigation. The State Controller is the officer charged with drawing warrants for the payment of moneys from the State [***6] Treasury upon a lawful appropriation. (Cal. Const., art. XVI, § 7.) The State Controller is a named defendant in Riverside's petition for a writ of mandate. In the trial court and on appeal the State Controller expresses no opinion on the merits of Riverside's reimbursement claim, but asserts that the courts lack authority to compel him to issue a warrant for payment of the claim in the absence of an appropriation for payment of the claim.

In addition to the briefing by the parties on appeal, we have permitted a joint amici curiae brief to be filed in support of Riverside by the Monterey County Office of Education, the Monterey County Office of Education Special Education Local Planning Area, and 21 local school districts.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Legislature has provided an administrative remedy for the resolution of local agency claims for reimbursement for state mandates. In *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750], at pages 71 and 72, we described these procedures as follows (with footnotes deleted): " Section 2250 [Revenue & Taxation Code] and those following [***7] it provide a hearing procedure for the determination of claims by local governments. The State Board of Control is required to hear and determine such claims. (§ 2250.) For purposes of such hearings the board consists of the members of the Board of Control provided for in part 4 (commencing with § 13900) of division 3 of title 2 of the Government Code, together

with two local government officials appointed by the Governor. (§ 2251.) The board was required to adopt procedures for receiving and hearing such claims. (§ 2252.) The first claim filed with respect to a statute or regulation is considered a 'test claim' or a 'claim of first impression.' (§ 2218, subd. (a).) The procedure requires an evidentiary hearing where the claimant, the Department of Finance, and any affected department or agency can present evidence. (§ 2252.) If the board determines that costs are mandated, then it must adopt parameters and guidelines for the reimbursement of such claims. (§ 2253.2.) The claimant or the state is entitled to commence an action in administrative mandate pursuant to Code of Civil Procedure section 1094.5 to set aside a decision of the board on the grounds that the board's decision [***8] is not supported by substantial evidence. (§ 2253.5.)

[*1573] "At least twice each calendar year the board is required to report to the Legislature on the number of mandates it has found and the estimated statewide costs of these mandates. (§ 2255, subd. (a).) In addition to the estimate of the statewide costs for each mandate, the report must also contain the reasons for recommending reimbursement. (§ 2255, subd. (a).) Immediately upon receipt of the report a local government claims bill shall be introduced in the Legislature which, when introduced, must contain an appropriation sufficient to pay for the estimated costs of the mandates. [**552] (§ 2255, subd. (a).) In the event the Legislature deletes funding for a mandate from the local government claims bill, then it may take one of the following courses of action: (1) include a finding that the legislation or regulation does not contain a mandate; (2) include a finding that the mandate is not reimbursable; (3) find that a regulation contains a mandate and direct that the Office of Administrative Law repeal the regulation; (4) include a finding that the legislation or regulation contains a reimbursable mandate and direct that the [***9] legislation or regulation not be enforced against local entities until funds become available; (5) include a finding that the Legislature cannot determine whether there is a mandate and direct that the legislation or regulation shall remain in effect and be enforceable unless a court determines that the legislation or regulation contains a reimbursable mandate in which case the effectiveness of the legislation or regulation shall be suspended and it shall not be enforced against a local entity until funding becomes available; or (6) include a finding that the Legislature cannot determine whether there is a reimbursable mandate and that the legislation or regulation shall be suspended and shall not be enforced against a local entity until a court determines whether there is a reimbursable mandate. (§ 2255, subd. (b).) If the Legislature deletes funding for a mandate from a local government claims bill but does not follow one of the above courses of action or if a local entity believes that the action is not consistent with article XIII B of the Constitution, then the local entity may commence a declaratory relief action in the Superior Court of the County of Sacramento to declare [***10] the mandate void and enjoin its enforcement. (§ 2255, subd. (c).)

"Effective January 1, 1985, the Legislature has established a new commission to consider and determine claims based upon state mandates. This is known as the Commission on State Mandates and it consists of the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member with experience in public finance, appointed by the Governor and approved by the Senate. (Gov. Code, § 17525.) 'Costs mandated by the state' are defined as 'any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which [*1574] 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.' (Gov. Code, § 17514.) The procedures before the Commission are similar to those which were followed before the Board of Control. (Gov. Code, § 17500 et seq.) Any claims which had not been included in a local government claims [***11] bill prior to January 1, 1985, were to be transferred to and considered by the commission. (Gov. Code, § 17630; [Rev. & Tax. Code,] § 2239.)"

On October 31, 1980, Santa Barbara filed a test claim with the Board of Control seeking reimbursement for costs incurred in the 1979-1980 fiscal year in connection with the provision of special education services as required by Statutes 1977, chapter 1247, and Statutes 1980, chapter 797. Santa Barbara asserted that these acts should be considered an ongoing requirement of increased levels of service.

Santa Barbara's initial claim was based upon the "mandate contained in the two bills specified above [which require] school districts and county offices to provide full and formal due process procedures and hearings to pupils and parents regarding the special education assessment, placement and the appropriate education of the child." Santa Barbara asserted that state requirements exceeded those of federal law as reflected in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). [1] Santa [**553] Barbara's initial claim was for $ 10,500 in state-mandated costs for the 1979-1980 fiscal year.

1 Section 794 of title 29 of the United States Code will of necessity play an important part in our discussion of the issues presented in this case.

That provision was enacted as section 504 of the Rehabilitation Act of 1973. (Pub.L. No. 93-112, tit. V, § 504 (Sept. 26, 1973) 87 Stat. 394.) It has been amended several times. (Pub.L. No. 95-602, tit. I, § 119, 122(d)(2) (Nov. 6, 1978) 92 Stat. 2982, 2987 [Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978]; Pub.L. No. 99- 506, tit. I, § 103(d)(2)(B), tit. X, § 1002(e)(4) (Oct. 21, 1986) 100 Stat. 1810, 1844; Pub.L. No. 100-259, § 4 (Mar. 22, 1988) 102 Stat. 29; Pub.L. No. 100-630, tit. II, § 206(d) (Nov. 7, 1988) 102 Stat. 3312.) The decisional authorities universally refer to the statute as "section 504." We will adhere to this nomenclature and subsequent references to section 504 will refer to title 29, United States Code, section 794.

[***12] During the administrative proceedings Santa Barbara amended its claim to reflect the following state-mandated activities alleged to be in excess of federal requirements: (1) the extension of eligibility to children younger and older than required by federal law; (2) the establishment of procedures to search for and identify children with special needs; (3) assessment and evaluation; (4) the preparation of "Individual Education Plans" (IEP's); (5) due process hearings in placement determinations; (6) substitute teachers; and (7) staff development programs. Santa Barbara was claiming reimbursement in excess of $ 520,000 for the cost of these services during the 1979- 1980 fiscal year.

[*1575] Also, during the administrative proceedings the focus of federally mandated requirements shifted from section 504 of the Rehabilitation Act to federal Public Law No. 94-142, which amended the Education of the Handicapped Act. (20 U.S.C. § 1401 et seq.) [2]

2 The Education of the Handicapped Act was enacted in 1970. (Pub.L. No. 91-230, tit. VI (Apr. 13, 1970) 84 Stat. 175.) It has been amended many times. The amendment of primary interest here was enacted as the Education for All Handicapped Children Act of 1975. (Pub.L. No. 94-142 (Nov. 29, 1975) 89 Stat. 774.) The 1975 legislation significantly amended the Education of the Handicapped Act, but did not change its short title. The Education of the Handicapped Act has now been renamed the Individuals with Disabilities Education Act. (Pub.L. No. 101-476, tit. IX, § 901(b)(21) (Oct. 30, 1990) 104 Stat. 1143; Pub.L. No. 101-476, tit. IX, § 901b; Pub.L. No. 102-119, § 25(b) (Oct. 7, 1991) 105 Stat. 607.) Since at all times relevant here the federal act was known as the Education of the Handicapped Act, we will adhere to that nomenclature.

[***13] The Board of Control adopted a decision denying Santa Barbara's claim. The board concluded that the Education of the Handicapped Act resulted in costs mandated by the federal government, that state special education requirements exceed those of federal law, but that "the resulting mandate is not reimbursable because the Legislature already provides funding for all Special Education Services through an appropriation in the annual Budget Act."

Santa Barbara sought judicial review by petition for a writ of administrative mandate. The superior court found the administrative record and the Board of Control's findings to be inadequate. Judgment was rendered requiring the Board of Control to set aside its decision and to rehear the matter to establish a proper record, including findings. That judgment was not appealed.

On October 30, 1981, Riverside filed a test claim for reimbursement of $ 474,477 in special education costs incurred in the 1980-1981 fiscal year. Riverside alleged that the costs were state mandated by chapter 797 of Statutes 1980. The basis of Riverside's claim was Education Code section 56760, a part of the state special education funding formula which, according [***14] to Riverside, "mandates a 10%% cap on ratio of students served by special education and within that 10%% mandates the ratio of students to be served by certain services." Riverside explained that chapter 797 of Statutes 1980 was enacted as urgency legislation effective July 28, 1980, and that at that time it was already "locked into" providing special education services to more than 13 percent of its students in accordance with prior state law and funding formulae. [3]

3 The 1980 legislation required that a local agency adopt an annual budget plan for special education services. (Ed. Code, § 56200.) Education Code section 56760 provided that in the local budget plan the ratio of students to be served should not exceed 10 percent of total enrollment. However, those proportions could be waived for undue hardship by the Superintendent of Public Instruction. (Ed. Code, § 56760, 56761.) In addition, the 1980 legislation included provisions for a gradual transition to the new requirements. (Ed. Code, § 56195 et seq.) The transitional provisions included a guarantee of state funding for 1980-1981 at prior student levels with an inflationary adjustment of 9 percent. (Ed. Code, § 56195.8.) The record indicates that Riverside applied for a waiver of the requirements of Education Code section 56760, but that the waiver request was denied due to a shortage of state funding. It also appears that Riverside did not receive all of the 109 percent funding guarantee under

Education Code section 56195.8. In light of the current posture of this appeal we need not and do not consider whether the failure of the state to appropriate sufficient funds to satisfy its obligations under the 1980 legislation can be addressed in a proceeding for the reimbursement of state-mandated costs or must be addressed in some other manner.

[***15] [**554] The Riverside claim, like Santa Barbara's, evolved over time with increases in the amount of reimbursement sought. Eventually the Board of [*1576] Control denied Riverside's claim for the same reasons the Santa Barbara claim was denied. Riverside sought review by petition for a writ of administrative mandate. In its decision the superior court accepted the board's conclusions that the Education of the Handicapped Act constitutes a federal mandate and that state requirements exceed those of the federal mandate. However, the court disagreed with the board that any appropriation in the state act necessarily satisfies the state's subvention obligation. The court concluded that the Board of Control had failed to consider whether the state had fully reimbursed local districts for the state-mandated costs which were in excess of the federal mandate, and the matter was remanded for consideration of that question. That judgment was not appealed.

On return to the Board of Control, the Santa Barbara claim and the Riverside claim were consolidated. The Board of Control adopted a decision holding that all special education costs under Statutes 1977, chapter 1247, and Statutes 1980, chapter [***16] 797, are state-mandated costs subject to subvention. The board reasoned that the federal Education of the Handicapped Act is a discretionary program and that section 504 of the Rehabilitation Act does not require school districts to implement any programs in response to federal law, and therefore special education programs are optional in the absence of a state mandate.

The claimants were directed to draft, and the Board of Control adopted, parameters and guidelines for reimbursement of special education costs. The board submitted a report to the Legislature estimating that the total statewide cost of reimbursement for the 1980-1981 through 1985-1986 fiscal years would be in excess of $ 2 billion. Riverside's claim for reimbursement for the 1980-1981 fiscal year was now in excess of $ 7 million. Proposed legislation which would have appropriated funds for reimbursement of special education costs during the 1980-1981 through 1985- 1986 fiscal years failed to pass in the Legislature. (Sen. Bill No. 1082 (1985-1986 Reg. Sess.).) A separate bill which would have appropriated funds to reimburse Riverside [*1577] for its 1980-1981 claim also failed to pass. (Sen. Bill No. 238 [***17] (1987-1988 Reg. Sess.).)

At this point Huff, as Director of the Department of Finance, brought an action in administrative mandate seeking to set aside the decision of the Board of Control. Riverside cross-petitioned for a writ of mandate directing the state, the Controller and the Treasurer to issue a warrant in payment of its claim for the 1980-1981 fiscal year.

The superior court concluded that the Board of Control did not apply the appropriate standard in determining whether any portion of local special education costs are incurred pursuant to a federal mandate. The court found that the definition of a federal mandate set forth by the *Supreme Court in* City of Sacramento v. State of California, supra, 50 Cal.3d 51, "marked a departure from the narrower 'no discretion' test" of this court's earlier decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258]. It further found that the standard set forth in the high court's decision in *City of Sacramento* "is to be applied retroactively." Accordingly, the superior court issued a [***18] peremptory writ of mandate directing the Commission on State Mandates to set aside [**555] the decision of the Board of Control, to reconsider the claims in light of the decision in *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, and "to ascertain whether certain costs arising from Chapter 797/80 and Chapter 1247/77 are federally mandated, and if so, the extent, if any, to which the state-mandated costs exceed the federal mandate." Riverside's cross-petition for a writ of mandate was denied. This appeal followed.

III. PRINCIPLES OF SUBVENTION

(1) "Subvention" generally means a grant of financial aid or assistance, or a subsidy. (See Webster's Third New Internat. Dict. (1971) p. 2281.) As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise.

[HN1]Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) [***19] This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by [*1578] state law to provide to its residents. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 70.) The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agen-

cies. (*Id.* at p. 68.) Reimbursement is required when the state "freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." (*Id.* at p. 70, italics in original.)

The requirement of subvention for state-mandated costs had its genesis in the "Property Tax Relief Act of 1972" which is also known as "SB 90" (Senate Bill No. 90). (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188.) That act established limitations upon the power of local governments to levy taxes and concomitantly prevented [***20] the state from imposing the cost of new programs or higher levels of service upon local governments. (Ibid.) The Legislature declared: "It is the intent in establishing the tax rate limits in this chapter to establish limits that will be flexible enough to allow local governments to continue to provide existing programs, that will be firm enough to insure that the property tax relief provided by the Legislature will be long lasting and that will afford the voters in each local government jurisdiction a more active role in the fiscal affairs of such jurisdictions." (Rev. & Tax. Code, former § 2162, Stats. 1972, ch. 1406, § 14.7, p. 2961.) [4] The act provided that the state would pay each county, city and county, city, and special district the sums which were sufficient to cover the total cost of new state-mandated costs. (See Rev. & Tax. Code, former § 2164.3, Stats. 1972, ch. 1406, § 14.7, pp. 2962-2963.) New state-mandated costs would arise from legislative action or executive regulation after January 1, 1973, which mandated a new program or higher level of service under an existing mandated program. (Ibid.)

4 In addition to requiring subventions for new state programs and higher levels of service, Senate Bill No. 90 required the state to reimburse local governments for revenues lost by the repeal or reduction of property taxes on certain classes of property. In this connection the Legislature said: "It is the purpose of this part to provide property tax relief to the citizens of this state, as undue reliance on the property tax to finance various functions of government has resulted in serious detriment to one segment of the taxpaying public. The subventions from the State General Fund required under this part will serve to partially equalize tax burdens among all citizens, and the state as a whole will benefit." (Gov. Code, § 16101, Stats. 1972, ch. 1406, § 5, p. 2953.)

[***21] (2) [**556] (See fn. 5.) Senate Bill No. 90 did not specifically include school districts in the group of agencies entitled to reimbursement for state-mandated costs. [5] (Rev. & Tax. Code, former § 2164.3, Stats. 1972, ch. 1406. § 14.7, pp. 2962-2963.) In fact, at that time methods of financing education in this state were [*1579] undergoing fundamental reformation as the result of the litigation in *Serrano v. Priest* (1971) 5 Cal.3d 584 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]. At the time of the *Serrano* decision local property taxes were the primary source of school revenue. (*Id.* at p. 592.) In *Serrano,* the California Supreme Court held that education is a fundamental interest, that wealth is a suspect classification, and that an educational system which produces disparities of opportunity based upon district wealth would violate principles of equal protection. (*Id.* at pp. 614-615, 619.) A major portion of Senate Bill No. 90 constituted new formulae for state and local contributions to education in a legislative response to the decision in *Serrano.* (Stats. 1972, ch. 1406, § 1.5-2.74, pp. 2931-2953. See *Serrano v. Priest* (1976) 18 Cal.3d 728, 736- 737 [135 Cal.Rptr. 345, 557 P.2d 929].) [***22] [6]

5 A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524 [7 Cal.Rptr.2d 699].) Local school districts are agencies of the state and have been described as quasi-municipal corporations. (*Ibid.*) They are not distinct and independent bodies politic. (*Ibid.*) The Legislature's power over the public school system has been described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. (*Ibid.*) The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. (*Id.* at p. 1525.) The state is the beneficial owner of all school properties and local districts hold title as trustee for the state. (*Ibid.*) School moneys belong to the state and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. (*Ibid.*) While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legislature. (*Id.* at pp. 1523-1524.)

[***23]

6 After the first *Serrano* decision, the United States Supreme Court held that equal protection does not require dollar-for-dollar equality between school districts. (*San Antonio School*

District v. Rodriguez (1973) 411 U.S. 1, 33-34 48-56, 61-62 [36 L.Ed.2d 16, 42-43, 51-56, 59-60, 93 S.Ct. 1278].) In the second *Serrano* decision, the California Supreme Court adhered to the first *Serrano* decision on independent state grounds. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 761-766.) The court concluded that Senate Bill No. 90 and Assembly Bill No. 1267, enacted the following year (Stats. 1973, ch. 208, p. 529 et seq.), did not satisfy equal protection principles. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 776-777.) Additional complications in educational financing arose as the result of the enactment of article XIII A of the California Constitution at the June 1978 Primary Election (Proposition 13), which limited the taxes which can be imposed on real property and forced the state to assume greater responsibility for financing education (see Ed. Code, § 41060), and the enactment of Propositions 98 and 111 in 1988 and 1990, respectively, which provide formulae for minimum state funding for education. (See generally *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

[***24] The provisions of Senate Bill No. 90 were amended and refined in legislation enacted the following year. (Stats. 1973, ch. 358.) Revenue and Taxation Code section 2231, subdivision (a), was enacted to require the state to reimburse local agencies, including school districts, for the full costs of new programs or increased levels of service mandated by the Legislature after January 1, 1973. Local agencies except school districts were also entitled to reimbursement for costs mandated by executive regulation after January 1, 1973. (Rev. & Tax. Code, § 2231, subd. (d), added by Stats. 1973, ch. 358, § 3, p. 783 [*1580] and repealed by Stats. 1986, ch. 879, § 23, p. 3045.) In subsequent years legislation was enacted to entitle school districts to subvention for state-mandated costs imposed by legislative acts after January 1, 1973, or by executive regulation after January 1, 1978. (Rev. & Tax. Code, former § 2207.5, added by Stats. 1977, ch. 1135, § 5, p. 3646 and amended by Stats. 1980, ch. 1256, § 5, pp. 4248-4249.)

[**557] In the 1973 legislation, Revenue and Taxation Code section 2271 was enacted to provide, among other things: "A local agency may levy, or have levied on its behalf, [***25] a rate in addition to the maximum property tax rate established pursuant to this chapter (commencing with Section 2201) to pay costs mandated by the federal government or costs mandated by the courts or costs mandated by initiative enactment, which are not funded by federal or state government." (3) In this respect costs mandated by the federal government are exempt from an agency's taxing and spending limits. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 71, fn. 17.)

At the November 6, 1979, General Election, the voters added article XIII B to the state Constitution by enacting Proposition 4. That article imposes spending limits on the state and all local governments. For purposes of article XIII B the term "local government" includes school districts. (Cal. Const., art. XIII B, § 8, subd. (d).) The measure accomplishes its purpose by limiting a governmental entity's annual appropriations to the prior year's appropriations limit adjusted for changes in the cost of living and population growth, except as otherwise provided in the article. (Cal. Const., art. XIII B, § 1.) [7] The appropriations subject [***26] to limitation do not include, among other things: "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly." (Cal. Const., art. XIII B, § 9, subd. (b).)

7 As it was originally enacted, article XIII B required that all governmental entities return revenues in excess of their appropriations limits to the taxpayers through tax rate or fee schedule revisions. In Proposition 98, adopted at the November 1988 General Election, article XIII B was amended to provide that half of state excess revenues would be transferred to the state school fund for the support of school districts and community college districts. (See Cal. Const., art. XVI, § 8.5; *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

Like its statutory predecessor, the constitutional initiative measure includes a provision [***27] designed "to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of these restrictions on the taxing and spending power of the local entities." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836 [244 Cal.Rptr. 677, 750 P.2d 318].) Section 6 of article XIII B of the state Constitution provides: "Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the [*1581] State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or

regulations initially implementing legislation enacted prior to January 1, 1975."

Although article XIII B of the state Constitution [***28] requires subvention for state mandates enacted after January 1, 1975, the article had an effective date of July 1, 1980. (Cal. Const., art. XIII B, § 10.) **(4)** Accordingly, under the constitutional provision, a local agency may seek subvention for costs imposed by legislation after January 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at pp. 190-193.) Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law. (See 68 Ops.Cal.Atty.Gen. 244 (1985).)

The constitutional subvention provision, like the statutory scheme before it, requires state reimbursement whenever "the Legislature or any State agency" mandates a new program or higher level of service. (Cal. Const., art. XIII B, § 6.) Accordingly, it has been held that state [**558] subvention is not required when the federal government imposes new costs on local governments. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188; see also *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 543 [234 Cal.Rptr. 795].) [***29] In our *City of Sacramento* decision this court held that a federal program in which the state participates is not a federal mandate, regardless of the incentives for participation, unless the program leaves state or local government with no discretion as to alternatives. (156 Cal.App.3d at p. 198.)

In its *City of Sacramento* opinion, [8] the California Supreme Court rejected this court's earlier formulation. In doing so the high court noted that the vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. (50 Cal.3d at p. 73.) However, "certain regulatory standards imposed by the federal government [*1582] under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense." (*Id.* at pp. 73-74.) The test for determining whether there is a federal mandate is whether compliance with federal standards "is a matter of true choice," that is, whether participation in the federal program "is truly voluntary." (*Id.* at p. 76.) The court went on to say: "Given the variety [***30] of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (*Ibid.*)

8 The Supreme Court's decision in *City of Sacramento* was not a result of direct review of this court's decision. The Supreme Court denied a petition for review of this court's *City of Sacramento* decision. After the Board of Control had adopted parameters and guidelines for reimbursement under this court's decision, the Legislature failed to appropriate the funds necessary for such reimbursement. The litigation which resulted in the Supreme Court's *City of Sacramento* decision was commenced as an action to enforce the result on remand from this court's *City of Sacramento* decision. (See 50 Cal.3d at p. 60.)

[***31] IV. SPECIAL EDUCATION

The issues in this case cannot be resolved by consideration of a particular federal act in isolation. Rather, reference must be made to the historical and legal setting of which the particular act is a part. Our consideration begins in the early 1970's.

In considering the 1975 amendments to the Education of the Handicapped Act, Congress referred to a series of "landmark court cases" emanating from 36 jurisdictions which had established the right to an equal educational opportunity for handicapped children. (See *Smith v. Robinson* (1984) 468 U.S. 992, 1010 [82 L.Ed.2d 746, 763, 104 S.Ct. 3457].) Two federal district court cases, *Pennsylvania Ass'n. Ret'd Child. v. Commonwealth of Pa.* (E.D.Pa. 1972) 343 F.Supp. 279 (see also *Pennsylvania Ass'n. Retard. Child. v. Commonwealth of Pa.* (E.D.Pa. 1971) 334 F.Supp. 1257), and *Mills v. Board of Education of District of Columbia* (D.D.C. 1972) 348 F.Supp. 866, were the most prominent of these judicial decisions. (See *Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 180, fn. 2 [73 L.Ed.2d 690, 695, 102 S.Ct. 3034].) [***32]

In the Pennsylvania case, an association and the parents of certain retarded children brought a class action against the commonwealth and local school districts in the commonwealth, challenging the exclusion of retarded children from programs of education and training in the public schools. (*Pennsylvania Ass'n. Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 282.) The matter was assigned to a three- judge panel which heard evidence on the plaintiffs' due process and equal protection claims. (*Id.* at p. 285.) The parties [**559] then agreed to resolve the litigation by means of a consent [*1583] judgment. (*Ibid.*) The consent agreement required the defendants to locate and evaluate all children in need of special education services, to reevaluate placement decisions periodically, and to accord due

process hearings to parents who are dissatisfied with placement decisions. (*Id.* at pp. 303-306.) It required the defendants to provide "a free public program of education and training appropriate to the child's capacity." (*Id.* at p. 285, italics deleted.)

In view of the consent agreement the district court was not required to resolve the plaintiffs' equal [***33] protection and due process contentions. Rather, it was sufficient for the court to find that the suit was not collusive and that the plaintiffs' claims were colorable. The court found: "Far from an indication of collusion, however, the Commonwealth's willingness to settle this dispute reflects an intelligent response to overwhelming evidence against [its] position." (*Pennsylvania Ass'n, Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 291.) The court said that it was convinced the due process and equal protection claims were colorable. (*Id.* at pp. 295-296.)

In the *Mills* case, an action was brought on behalf of a number of school-age children with exceptional needs who were excluded from the Washington, D.C., public school system. (*Mills v. Board of Education of District of Columbia, supra,* 348 F.Supp. at p. 868.) The district court concluded that equal protection entitled the children to a public-supported education appropriate to their needs and that due process required a hearing with respect to classification decisions. (*Id.* at pp. 874-875.) The court said: "If sufficient funds are not available to finance [***34] all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." (*Id.* at p. 876.)

In the usual course of events, the development of principles of equal protection and due process as applied to special education, which had just commenced in the early 1970's with the authorities represented by the *Pennsylvania* and *Mills* cases, would have been fully expounded through appellate processes. However, the necessity of judicial development was truncated by congressional action. In the Rehabilitation Act of 1973, section 504, Congress provided: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) [now 706(8)] of this title, [*1584] shall, solely by reason of his handicap, [***35] be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." (29 U.S.C. § 794, Pub.L. No. 93- 112, tit. V, § 504 (Sept. 26, 1973) 87 Stat. 394.) [9] Since federal assistance to education is pervasive (see, e.g., Ed. Code, § 12000- 12405, 49540 et seq., 92140 et seq.), section 504 was applicable to virtually all public educational programs in this and other states.

9 In section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, the application of section 504 was extended to federal executive agencies and the United States Postal Service. (Pub.L. No. 95-602, tit. I, § 119 (Nov. 6, 1978) 92 Stat. 2982.) The section is now subdivided and includes subdivision (b), which provides that the section applies to all of the operations of a state or local governmental agency, including local educational agencies, if the agency is extended federal funding for any part of its operations. (29 U.S.C. § 794.) This latter amendment was in response to judicial decisions which had limited the application of section 504 to the particular activity for which federal funding is received. (See *Consolidated Rail Corporation v. Darrone* (1984) 465 U.S. 624, 635-636 [79 L.Ed.2d 568, 577-578, 104 S.Ct. 1248].)

[***36] The Department of Health, Education and Welfare (HEW) promulgated regulations to ensure compliance with section 504 [**560] by educational agencies. [10] The regulations required local educational agencies to locate and evaluate handicapped children in order to provide appropriate educational opportunities and to provide administrative hearing procedures in order to resolve disputes. The federal courts concluded that section 504 was essentially a codification of the equal protection rights of citizens with disabilities. (See *Halderman v. Pennhurst State School & Hospital* (E.D.Pa. 1978) 446 F.Supp. 1295, 1323.) Courts also held that section 504 embraced a private cause of action to enforce its requirements. (*Sherry v. New York State Ed. Dept.* (W.D.N.Y. 1979) 479 F.Supp. 1328, 1334; *Doe v. Marshall* (S.D.Tex. 1978) 459 F.Supp. 1190, 1192.) It was further held that section 504 imposed upon school districts and other public educational agencies "the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive [***37] an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free [*1585] public education for the handicapped child." (*Doe v. Marshall, supra,* 459 F.Supp. at p. 1191. See also *David H. v. Spring Branch Independent School Dist.* (S.D.Tex. 1983) 569 F.Supp. 1324, 1334; *Hal-*

derman v. Pennhurst State School & Hospital, supra, 446 F.Supp. at p. 1323.)

> 10 HEW was later dissolved and its responsibilities are now shared by the federal Department of Education and the Department of Health and Human Services. The promulgation of regulations to enforce section 504 had a somewhat checkered history. Initially HEW determined that Congress did not intend to require it to promulgate regulations. The Senate Public Welfare Committee then declared that regulations were intended. By executive order and by judicial decree in *Cherry v. Mathews* (D.D.C. 1976) 419 F.Supp. 922, HEW was required to promulgate regulations. The ensuing regulations were embodied in title 45 Code of Federal Regulations part 84, and are now located in title 34 Code of Federal Regulations part 104. (See *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 404, fn. 4 [60 L.Ed.2d 980, 987, 99 S.Ct. 2361]; *N. M. Ass'n for Retarded Citizens v. State of N. M.* (10th Cir. 1982) 678 F.2d 847, 852.)

[***38] **(5)** Throughout these proceedings Riverside, relying upon the decision in *Southeastern Community College v. Davis, supra,* 442 U.S. 397 [60 L.Ed.2d 980], has contended that section 504 cannot be considered a federal mandate because it does not obligate local school districts to take any action to accommodate the needs of handicapped children so long as they are not excluded from school. That assertion is not correct.

In the *Southeastern Community College* case a prospective student with a serious hearing disability sought to be admitted to a postsecondary educational program to be trained as a registered nurse. As a result of her disability the student could not have completed the academic requirements of the program and could not have attended patients without full-time personal supervision. She sought to require the school to waive the academic requirements, including an essential clinical program, which she could not complete and to otherwise provide full-time personal supervision. That demand, the Supreme Court held, was beyond the scope of section 504, which did not require the school to modify its program affirmatively [***39] and substantially. (442 U.S. at pp. 409-410 [60 L.Ed.2d at pp. 990-991].)

The *Southeastern Community College* decision is inapposite. States typically do not guarantee their citizens that they will be admitted to, and allowed to complete, specialized postsecondary educational programs. State educational institutions often impose stringent admittance and completion requirements for such programs in higher education. In the *Southeastern Community College* case the Supreme Court simply held that an institution of higher education need not lower or effect substantial modifications of its standards in order to accommodate a handicapped person. (442 U.S. at p. 413 [60 L.Ed.2d at pp. 992-993].) The court did not hold that a primary or secondary [**561] educational agency need do nothing to accommodate the needs of handicapped children. (See *Alexander v. Choate* (1985) 469 U.S. 287, 301 [83 L.Ed.2d 661, 672, 105 S.Ct. 712].)

[HN2]States typically do purport to guarantee all of their children the opportunity for a basic [***40] education. In fact, in this state basic education is regarded as a fundamental right. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 765-766.) All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate [*1586] the educational needs of the children in their districts. Section 504 would not appear to permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. (Compare *Lau v. Nichols* (1974) 414 U.S. 563 [39 L.Ed.2d 1, 94 S.Ct. 786], which required the San Francisco Unified School District to take affirmative steps to accommodate the needs of non-English speaking students under section 601 of the Civil Rights Act of 1964.)

Riverside's view of section 504 is inconsistent with congressional intent in enacting it. The congressional record makes it clear that section 504 was perceived to be necessary not to combat affirmative animus but to cure society's benign neglect of the handicapped. [***41] The record is replete with references to discrimination in the form of the denial of special educational assistance to handicapped children. In *Alexander v. Choate, supra,* 469 U.S. at pages 295 to 297 [83 L.Ed.2d at pages 668- 669], the Supreme Court took note of these comments in concluding that a violation of section 504 need not be proven by evidence of purposeful or intentional discrimination. With respect to the *Southeastern Community College v. Davis, supra,* 442 U.S. 397 case, the high court said: "The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. ..." (*Alexander v. Choate, supra,* 469 U.S. at p. 301 [83 L.Ed.2d at p. 672], [***42] fn. omitted.)

Federal appellate courts have rejected the argument that the *Southeastern Community College* case means that pursuant to section 504 local educational agencies need do nothing affirmative to accommodate the needs

of handicapped children. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d at pp. 852-853; *Tatro v. State of Texas* (5th Cir. 1980) 625 F.2d 557, 564 [63 A.L.R. Fed. 844].) [11] We are satisfied that section 504 does impose an obligation upon local school districts to accommodate the needs of handicapped children. However, as was the case with constitutional principles, full judicial development of section 504 as it relates to special education in elementary and secondary school districts was truncated by congressional action.

11 Following a remand and another decision by the Court of Appeals, the *Tatro* litigation, *supra,* eventually wound up in the Supreme Court. (*Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883 [82 L.Ed.2d 664, 104 S.Ct. 3371].) However, by that time the Education of the Handicapped Act had replaced section 504 as the means for vindicating the education rights of handicapped children and the litigation was resolved, favorably for the child, under that act.

[***43] [*1587] In 1974 Congress became dissatisfied with the progress under earlier efforts to stimulate the states to accommodate the educational needs of handicapped children. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 180 [73 L.Ed.2d at p. 695].) These earlier efforts had included a 1966 amendment to the Elementary and Secondary Education Act of 1965, and the 1970 version of the Education of the Handicapped Act. (*Ibid.*) The prior acts had been grant programs that did not contain specific guidelines for a state's use of grant funds. (*Ibid.*) In 1974 Congress greatly increased federal funding for education of the handicapped and simultaneously required recipient [**562] states to adopt a goal of providing full educational opportunities to all handicapped children. ([73 L.Ed.2d at pp. 695-696].) The following year Congress amended the Education of the Handicapped Act by enacting the Education for All Handicapped Children Act of 1975. ([73 L.Ed.2d at p. 696].)

[HN3]Since the 1975 amendment, the Education [***44] of the Handicapped Act has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education. (20 U.S.C. § 1412(1).) (6) The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. (*Smith v. Robinson, supra,* 468 U.S. at p. 1010 [82 L.Ed.2d at p. 764].) To accomplish this purpose the act incorporates the major substantive and procedural requirements of the "right to education" cases which were so prominent in the congressional consideration of the measure. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 194 [73 L.Ed.2d at p. 704].) The substantive requirements of the act have been interpreted in a manner which is "strikingly similar" to the requirements of section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1016-1017 [82 L.Ed.2d at p. 768].) The Supreme [***45] Court has noted that Congress intended the act to establish "'a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children.'" (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 200 [73 L.Ed.2d at p. 708] citing the House of Representatives Report.) [12]

12 Consistent with its "basic floor of opportunity" purpose, the act does not require local agencies to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Rather, the act requires that handicapped children be accorded meaningful access to a free public education, which means access that is sufficient to confer some educational benefit. (Ibid.)

It is demonstrably manifest that in the view of Congress the substantive requirements of the 1975 amendment to the Education of the Handicapped Act were commensurate with the [***46] constitutional obligations of state and local [*1588] educational agencies. Congress found that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" and "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." (20 U.S.C. former § 1400(b)(8) & (9).) [13]

13 That Congress intended to enforce the Fourteenth Amendment to the United States Constitution in enacting the Education of the Handicapped Act has since been made clear. In *Dellmuth v. Muth* (1989) 491 U.S. 223 at pages 231232 [105 L.Ed.2d 181, 189-191, 109 S.Ct. 2397], and the court noted that Congress has the power under section 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit in federal court, but concluded that the Education of the Handicapped Act did not clearly evince such a congressional intent. In 1990 Congress responded by expressly abrogating state sovereign immunity under the act. (20 U.S.C. § 1403.)

[***47] It is also apparent that Congress intended the act to achieve nationwide application: "It is the pur-

pose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." (20 U.S.C. former § 1400(c).)

[**563] In order to gain state and local acceptance of its substantive provisions, the Education of the Handicapped Act employs a "cooperative federalism" scheme, which has also been referred to as the "carrot and stick" approach. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at pp. 73-74; *City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 195.) [***48] As an incentive Congress made substantial federal financial assistance available to states and local educational agencies that would agree to adhere to the substantive and procedural terms of the act. (20 U.S.C. § 1411, 1412.) For example, the administrative record indicates that for fiscal year 1979- 1980, the base year for Santa Barbara's claim, California received $ 71.2 million in federal assistance, and during fiscal year 1980-1981, the base year for Riverside's claim, California received $ 79.7 million. We cannot say that such assistance on an ongoing basis is trivial or insubstantial.

Contrary to Riverside's argument, [HN4]federal financial assistance was not the only incentive for a state to comply with the Education of the Handicapped Act. (7) Congress intended the act to serve as a means by which state and [*1589] local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act (42 U.S.C. § 1983) [***49] and section 504 of the Rehabilitation Act of 1973, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1009, 1013, 1019 [82 L.Ed.2d at pp. 763, 766, 769].) [14]

14 In *Smith v. Robinson, supra,* the court concluded that since the Education of the Handicapped Act did not include a provision for attorney fees, a successful complainant was not entitled to an award of such fees even though such fees would have been available in litigation under section 504 of the Rehabilitation Act of 1973 or section 1983 of the Civil Rights Act. Congress reacted by adding a provision for attorney fees to the Education of the Handicapped Act. (20 U.S.C. § 1415(e)(4)(B).)

[HN5]As a result of the exclusive nature of the Education of the Handicapped [***50] Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention. (*Smith v. Robinson, supra,* 468 U.S. at p. 1011 [82 L.Ed.2d at p. 764].) This gives local agencies the first opportunity and the primary authority to determine appropriate placement and to resolve disputes. (*Ibid.*) If a party is dissatisfied with the final result of the administrative process then he or she is entitled to seek judicial review in a state or federal court. (20 U.S.C. § 1415(e)(2).) In such a proceeding the court independently reviews the evidence but its role is restricted to that of review of the local decision and the court is not free to substitute its view of sound educational policy for that of the local authority. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at pp. 206-207 [73 L.Ed.2d at p. 712].) And since the act provides the exclusive remedy for addressing a handicapped child's right to an appropriate education, where the act applies a party [***51] cannot pursue a cause of action for constitutional violations, either directly or under the Civil Rights Act (42 U.S.C. § 1983), nor can a party proceed under section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1013, 1020 [82 L.Ed.2d at pp. 766, 770].)

Congress's intention to give the Education of the Handicapped Act nationwide application was successful. By the time of the decision in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* all states except New Mexico had become recipients under the act. (458 U.S. at pp. 183-184 [73 L.Ed.2d at p. 698].) It is important at this point in our discussion to consider the experience of New Mexico, both because the Board of Control relied upon that state's failure to adopt the Education [**564] of the Handicapped Act as proof that the act is not federally mandated, and because it illustrates the consequences of a failure to adopt the act. [*1590]

In *N. M. Ass'n for Retarded Citizens v. State of N. M.* (D.N.M. 1980) 495 F.Supp. 391, [***52] a class action was brought against New Mexico and its local school districts based upon the alleged failure to provide a free appropriate public education to handicapped children. The plaintiffs' causes of action asserting constitutional violations were severed and stayed pending resolution of the federal statutory causes of action. (*Id.* at p. 393.) The district court concluded that the plaintiffs could not proceed with claims under the Education of the Handicapped Act because the state had not adopted that act and, without more, that was a governmental decision within the state's power. (*Id.* at p. 394.) [15] The court then

considered the cause of action under section 504 and found that both the state and its local school districts were in violation of that section by failing to provide a free appropriate education to handicapped children within their territories. (495 F.Supp. at pp. 398-399.)

15 The plaintiffs alleged that the failure of the state to apply for federal funds under the Education of the Handicapped Act was itself an act of discrimination. The district court did not express a view on that question, leaving it for resolution in connection with the constitutional causes of action. (Ibid.)

[***53] After the district court entered an injunctive order designed to compel compliance with section 504, the matter was appealed. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d 847.) The court of appeals rejected the defendants' arguments that the plaintiffs were required to exhaust state administrative remedies before bringing their action and that the district court should have applied the doctrine of primary jurisdiction to defer ruling until the Office of Civil Rights could complete its investigation into the charges. (*Id.* at pp. 850-851.) The court also rejected the defendants' arguments that section 504 does not require them to take action to accommodate the needs of handicapped children and that proof of disparate treatment is essential to a violation of section 504. (678 F.2d at p. 854.) The court found sufficient evidence in the record to establish discrimination against handicapped children within the meaning of section 504. (678 F.2d at p. 854.) However, the reviewing court concluded that the district court had applied an erroneous standard in reaching its decision, [***54] and the matter was remanded for further proceedings. (*Id.* at p. 855.)

On July 19, 1984, during the proceedings before the Board of Control, a representative of the Department of Education testified that New Mexico has since implemented a program of special education under the Education of the Handicapped Act. We have no doubt that after the litigation we have just recounted New Mexico saw the handwriting on the wall and realized that it could either establish a program of special education with federal financial assistance under the Education of the Handicapped Act, or be compelled through litigation to accommodate the educational needs of handicapped [*1591] children without federal assistance and at the risk of losing other forms of federal financial aid. In any event, with the capitulation of New Mexico the Education of the Handicapped Act achieved the nationwide application intended by Congress. (20 U.S.C. § 1400(c).)

California's experience with special education in the time period leading up to the adoption of the Education of the Handicapped Act is examined as a case study in Kirp et al., *Legal Reform of Special Education: Empirical* [***55] *Studies and Procedural Proposals* (1974) 62 Cal.L.Rev. 40, at pages 96 through 115. As this study reflects, during this period the state and local school districts were struggling to create a program to accommodate adequately the educational needs of the handicapped. (*Id.* at pp. 97-110.) Individuals and organized groups, such as the California Association for the Retarded and the California Association for Neurologically Handicapped Children, were exerting pressure through political and other means at every level of the educational system. (Ibid.) Litigation was becoming so prevalent [**565] that the authors noted: "Fear of litigation over classification practices, prompted by the increasing number of lawsuits, is pervasive in California." (*Id.* at p. 106, fn. 295.) [16]

16 Lawsuits primarily fell into three types: (1) Challenges to the adequacy or even lack of available programs and services to accommodate handicapped children. (*Id.* at p. 97, fns. 255, 257.) (2) Challenges to classification practices in general, such as an overtendency to classify minority or disadvantaged children as "retarded." (*Id.* at p. 98, fns. 259, 260.) (3) Challenges to individual classification decisions. (*Id.* at p. 106.) In the absence of administrative procedures for resolving classification disputes, dissatisfied parents were relegated to self-help remedies, such as pestering school authorities, or litigation. (*Ibid.*)

[***56] In the early 1970's the state Department of Education began working with local school officials and university experts to design a "California Master Plan for Special Education." (Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals, supra,* 62 Cal.L.Rev. at p. 111.) In 1974 the Legislature enacted legislation to give the Superintendent of Public Instruction the authority to implement and administer a pilot program pursuant to a master plan adopted by State Board of Education in order to determine whether services under such a plan would better meet the needs of children with exceptional needs. (Stats. 1974, ch. 1532, § 1, p. 3441, enacting Ed. Code, § 7001.) In 1977 the Legislature acted to further implement the master plan. (Stats. 1977, ch. 1247, especially § 10, pp. 4236-4237, enacting Ed. Code, § 56301.) In 1980 the Legislature enacted urgency legislation revising our special education laws with the express intent of complying with the 1975 amendments to the Education of the Handicapped Act. (Stats. 1980, ch. 797, especially § 9, pp. 2411-2412, enacting Ed. Code, § 56000.)

As this history demonstrates, in determining whether to [***57] adopt the requirements of the Education of the Handicapped Act as amended in 1975, our [*1592]

Legislature was faced with the following circumstances: (1) In the *Serrano* litigation, our Supreme Court had declared basic education to be a fundamental right and, without even considering special education in the equation, had found our educational system to be violative of equal protection principles. (2) Judicial decisions from other jurisdictions had established that handicapped children have an equal protection right to a free public education appropriate to their needs and due process rights with regard to placement decisions. (3) Congress had enacted section 504 of the Rehabilitation Act of 1973 to codify the equal protection rights of handicapped children in any school system that receives federal financial assistance and to threaten the state and local districts with the loss of all federal funds for failure to accommodate the needs of such children. (4) Parents and organized groups representing handicapped children were becoming increasingly litigious in their efforts to secure an appropriate education for handicapped children. (5) In enacting the 1975 amendments to [***58] the Education of the Handicapped Act, Congress did not intend to require state and local educational agencies to do anything more than the Constitution already required of them. The act was intended to provide a means by which educational agencies could fulfill their constitutional responsibilities and to provide substantial federal financial assistance for states that would agree to do so.

(8a) Under these circumstances we have no doubt that enactment of the 1975 amendments to the Education of the Handicapped Act constituted a federal mandate under the criteria set forth in *City of Sacramento v. State of California, supra,* 50 Cal.3d at page 76. The remaining question is whether the state's participation in the federal program was a matter of "true choice" or was "truly voluntary." The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event. We conclude [***59] that so far [**566] as the state is concerned the Education of the Handicapped Act constitutes a federal mandate.

V. SUBVENTION FOR SPECIAL EDUCATION

Our conclusion that the Education of the Handicapped Act is a federal mandate with respect to the state marks the starting point rather than the end of the consideration which will be required to resolve the Santa Barbara and Riverside test claims. In *City of Sacramento v. State of California, supra,* 50 Cal.3d at pages 66 through 70, the California Supreme Court concluded that the costs at issue in that case (unemployment insurance premiums) were not subject to state subvention because they were incidental to a law of general [*1593] application rather than a new governmental program or increased level of service under an existing program. The court addressed the federal mandate issue solely with respect to the question whether the costs were exempt from the local government's taxing and spending limitations. (*Id.* at pp. 70-71.) It observed that prior authorities had assumed that if a cost was federally mandated it could not be a state mandated cost subject to subvention, and [***60] said: "We here express no view on the question whether 'federal' and 'state' mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. ..." (*Id.* at p. 71, fn. 16.) The test claims of Santa Barbara and Riverside present that question which we address here for the guidance of the Commission on remand.

(9) The constitutional subvention provision and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions [HN6]themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. (Cal. Const., art. XIII B, § 6.) Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. (See Rev. & Tax. Code, former § 2164.3 [Stats. 1972, ch. 1406, § 14.7, pp. 2962- 2963], 2231 [Stats. 1973, ch. 358, § 3, pp. 783-784], 2207 [Stat. 1975, ch. 486, § 1.8, pp. 997-998], 2207.5 [***61] [Stats. 1977, ch. 1135, § 5, pp. 3646-3647].) When 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. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 76.)

This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 68.) Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies [***62] without subvention merely because those costs were imposed upon the state by the federal government. In our

view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which [*1594] is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed [**567] upon the state by the federal government.

The Education of the Handicapped Act is a comprehensive measure designed to provide all handicapped children with basic educational opportunities. While the act includes certain substantive and procedural requirements which must be included in a state's plan for implementation of the act, it leaves primary responsibility for implementation to the state. (20 U.S.C. § 1412, 1413.) **(8b)** In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of [***63] the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.

We can illustrate this point with a hypothetical situation. Subvention principles are intended to prevent the state from shifting the cost of state governmental services to local agencies and thus subvention is required where the state imposes the cost of such services upon local agencies even if the state continues to perform the services. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835-836.) The Education of the Handicapped Act requires the state to provide an impartial, state-level review of the administrative decisions of local or intermediate educational agencies. (20 U.S.C. § 1415(c), (d).) Obviously, the state could not shift the actual performance of these new administrative reviews to local districts, but it could attempt to shift the costs to local districts [***64] by requiring local districts to pay the expenses of reviews in which they are involved. An attempt to do so would trigger subvention requirements. In such a hypothetical case, the state could not avoid its subvention responsibility by pleading "federal mandate" because the federal statute does not require the state to impose the costs of such hearings upon local agencies. Thus, as far as the local agency is concerned, the burden is imposed by a state rather than a federal mandate.

In the administrative proceedings the Board of Control did not address the "federal mandate" question under the appropriate standard and with proper focus on local school districts. In its initial determination the board concluded that the Education of the Handicapped Act constituted a federal mandate and that the state-imposed costs on local school districts in excess of the federally imposed costs. However, the board did not consider the [*1595] extent of the state-mandated costs because it concluded that any appropriation by the state satisfied its obligation. On Riverside's petition for a writ of administrative mandate the superior court remanded to the Board of Control to consider whether [***65] the state appropriation was sufficient to reimburse local school districts fully for the state-mandated costs. On remand the board clearly applied the now-discredited criteria set forth in this court's decision in *City of Sacramento v. State of California, supra,* 156 Cal.App.3d 182, and concluded that the Education of the Handicapped Act is not a federal mandate at any level of government. Under these circumstances we agree with the trial court that the matter must be remanded to the Commission for consideration in light of the criteria set forth in the Supreme Court's *City of Sacramento* decision. We add that on remand the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed *on local districts* by federal mandate or by the state's voluntary choice in its implementation of the federal program.

VI. RIVERSIDE'S OBJECTIONS

In light of this discussion we may now consider Riverside's objections to the trial court's decision to remand the matter to the Commission for reconsideration.

Riverside asserts that the California Supreme Court opinion in *City of Sacramento* is not [***66] on point because the court did not address the federal mandate question with respect to state subvention principles. Riverside implies that the definition of a federal mandate may be different [**568] with respect to state subvention than with respect to taxing and spending limitations. [HN7] **(10)** As a general rule and unless the context clearly requires otherwise, we must assume that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part. (*Lungren v. Davis* (1991) 234 Cal.App.3d 806, 823 [285 Cal.Rptr. 777].) **(11)** Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's [***67] taxing and spending limitations. If the costs are imposed by the state then the state must provide a sub-

vention to reimburse the local agency. Nothing in this scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Accordingly, we reject the claim that the criteria set forth in [*1596] the Supreme Court's *City of Sacramento* decision do not apply when subvention is the issue.

(12) Riverside asserts that the trial court erred in concluding that the Board of Control did not consider the issues under the appropriate criteria and that the board did in fact consider the factors set forth in the Supreme Court's *City of Sacramento* decision. From our discussion above it is clear that we must reject these assertions. In its decision the board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act without any consideration whether the act left the state any actual choice in the matter. In support of its conclusion the board relied upon the New Mexico litigation which we have also discussed. However, as we have pointed out, under [***68] the criteria set forth in the Supreme Court's *City of Sacramento* decision, the New Mexico litigation does not support the board's decision but in fact strongly supports a contrary result. We are satisfied that the trial court correctly concluded that the board did not apply the appropriate criteria in reaching its decision.

Riverside asserts that the Supreme Court's *City of Sacramento* decision elucidated and enforced prior law and thus no question of retroactivity arises. (See *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 37 [196 Cal.Rptr. 704, 672 P.2d 110].) **(13)** We agree that in *City of Sacramento* the Supreme Court elucidated and enforced existing law. Under such circumstances the rule of retrospective operation controls. (See also *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953-954 [148 Cal.Rptr. 379, 582 P.2d 970]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680-681 [312 P.2d 680].) Pursuant to that rule the trial court correctly applied the *City of Sacramento* decision to the [***69] litigation pending before it. As we have seen, that decision supports the trial court's determination to remand the matter to the Commission for reconsideration.

Riverside asserts that if further consideration under the criteria of the Supreme Court's *City of Sacramento* decision is necessary then the trial court should have, and this court must, engage in such consideration to reach a final conclusion on the question. To a limited extent we agree. In our previous discussion we have concluded that under the criteria set forth in *City of Sacramento,* the Education of the Handicapped Act constitutes a federal mandate as far as the state is concerned. We are satisfied that is the only conclusion which may be drawn and we so hold as a matter of law. However, that conclusion does not resolve the question whether new special education costs were imposed upon local school districts by federal mandate or by state choice in the implementation of the federal program. The issues were not addressed by the parties or the Board of Control in this light. The [*1597] Commission on State Mandates is the entity with the responsibility for considering the issues in [**569] the first instance [***70] and which has the expertise to do so. We agree with the trial court that it is appropriate to remand the matter to the Commission for reconsideration in light of the appropriate criteria which we have set forth in this appeal.

In view of the result we have reached we need not and do not consider whether it would be appropriate otherwise to fashion some judicial remedy to avoid the rule, based upon the separation of powers doctrine, that a court cannot compel the State Controller to make a disbursement in the absence of an appropriation. (See *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at pp. 538-541.)

DISPOSITION

The judgment is affirmed.

Davis, J., and Scotland, J., concurred. The petition of plaintiff and respondent for review by the Supreme Court was denied April 1, 1993. Lucas, C.J., Kennard, J., and Arabian, J., were of the opinion that the petition should be granted.

Received
June 17, 2011
Commission on
State Mandates

TAB “15”

Positive
As of: Jun 02, 2011

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.

No. H022665.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

98 Cal. App. 4th 1351; 121 Cal. Rptr. 2d 228; 2002 Cal. App. LEXIS 4198; 2002 Cal. Daily Op. Service 4853; 2002 Daily Journal DAR 6161

June 3, 2002, Decided

SUBSEQUENT HISTORY: [*1]** Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: *2002 Cal. LEXIS 5938.*

PRIOR HISTORY: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

DISPOSITION: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff taxpayers filed a complaint under *Cal. Code Civ. Proc. § 863* to determine the validity of a storm drainage fee imposed by defendant city. The Monterey County Superior Court (California) ruled that the fee did not violate Cal. Const. art. XIIID, § 6. The taxpayers appealed.

OVERVIEW: The city adopted ordinances and a resolution imposing a storm water management utility fee that was imposed on the owners of every developed parcel of land within the city. The storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it was discharged into natural bodies of water. The appellate court found that: (1) Cal. Const. art. XIIID, § 6, required the city to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area because the fee was not exempt as a water service; and (2) the trial court therefore erred in ruling that Salinas, Cal., Ordinance 2350, 2351, and Salinas, Cal., Resolution 17019 were valid exercises of authority by the city council.

OUTCOME: The judgment of the superior court was reversed.

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > Elections
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[I-IN1] The Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. Cal. Const. art. XIIID, § 6 (a)(2).

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[I-IN2] See Cal. Const. XIIID, § 6(c).

Communications Law > Ownership > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN3] Cal. Const. art. XIIID, § 2(e), defines a "fee" under the article as a levy imposed upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

Communications Law > Ownership > General Overview
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN4] A "property-related service" is a public service having a direct relationship to property ownership. Cal. Const. art. XIIID, § 2(h).

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN5] Salinas, Cal., Resolution 17019 plainly establishes a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the city. The resolution expressly states that each owner and occupier of a developed lot or parcel of real property within the city, is served by the city's storm drainage facilities and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property should therefore pay for the improvement, operation and maintenance of such facilities. Accordingly, the resolution makes the fee applicable to each and every developed parcel of land within the city.

Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN6] Cal. Proposition 218, § 5, specifically states that the provisions of the Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Legislation > Interpretation
[HN7] The appellate court is obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Tax Law > State & Local Taxes > Personal Property Tax > Exempt Property > General Overview
[HN8] The exception in Cal. Const. art. XIIID, § 6(c), applies to fees for sewer, water, and refuse collection services.

Governments > Legislation > Interpretation
[HN9] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

Governments > Legislation > Interpretation
Tax Law > State & Local Taxes > Real Property Tax > General Overview
[HN10] Exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.

Governments > Legislation > Interpretation
[HN11] Cal. Gov't Code § 53750 is enacted to explain some of the terms used in Cal. Const. art. XIIIC, XIIID, and defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 *(Cal. Const., art. XIII D, § 6, subd. (c))*. The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as

property-related. (Opinion by Elia, **J.,** with Premo, Acting P. **J.,** and Mihara, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1a) (1b) Drains and Sewers § 3--Fees and Assessments--Storm Drain Fee--Application of Voter Approval Requirement for Property-related Fees: Property Taxes § 7.8--Special Taxes. --A storm water management fee resolution established a property-related fee for a property-related service, the management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 *(Cal. Const., art. XIII D, § 6, subd. (c)).* The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C.]

(2) Constitutional Law § 12--Construction--Ordinary Language--Amendments. --Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

COUNSEL: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

JUDGES: Opinion by Elia, **J.,** with Premo, Acting P. **J.,** and Mihara, J., concurring.

OPINION BY: Elia

OPINION

[*1352] [**229] **ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to *California Constitution, article XIII D, section 6, subdivision (c),* which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee [*1353] and (2) it met the exemption [***2] for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 *U.S. C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)),* the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each [***3] and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" [1] on that parcel.

1 "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural condi-

tions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[***4] [**230] Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under *Code of Civil Procedure section 863* to determine the validity of the fee. 'Plaintiffs alleged that this was a property-related fee that violated *article XIII D, section 6, subdivision (c), of the California Constitution* because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[***5] DISCUSSION*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D [3] [HN1] requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), [HN2] which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

3 All further unspecified section references are to article XIII D of the California Constitution.

[HN3] Section 2 [***6] defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) [11N4] A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) (la) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 [11N5] plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [*1355] City. The resolution [**231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [***7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to *"each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930]* [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905]* [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [***8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, root) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged $ 18.66 based on that assumption.

4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

Proposition 218 [HN6] specifically stated that " [t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [***9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) (2) [HN7] We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; Arden Carmichael, Inc. v. County of Sacramento (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 863 [167 [*1356] Cal. Rptr. 820, 616 P.2d 802] .)* (1b) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners,"* and is therefore subject [***10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra, 24 Cal. 4th at p. 842.)*

[**232] *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." [11N8] The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of *California Constitution, article XIII D, section 6(c)* extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. sThe City also points to *Public Utilities Code section 230.5* and the Salinas City Code, which describe storm drains as a type of sewer.

5 Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[***11]

6 *Public Utilities Code section 230.5* defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the [*1357] Attorney General, who observed that several California [***12] statutes differentiate between management of storm drainage and sewerage systems. *(81 Ops.Cal.Atty.Gen. 104, 106 (1998).)* Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198] .)* Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically [**233] for *"sewers,* water, flood control, [and] *drainage systems"* (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

7 For example, *Government Code section 63010* specifies "storm sewers" in delimiting the scope of " '[d]rainage,' " while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.' " (*Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section 53750,* part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." *Health and Safety Code section 5471* sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

[***13] The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858] .)* On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. [HN9] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' [***14] intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted [*1358] by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra,* p. 38.) Accordingly, we are compelled to resort to the principle that [HN10] exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. [8] (Cf. *Estate of Banerjee (1978)21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; City of Lafayette v. East Bay Mun. Utility Dist. (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658] .)*

8 Sanitary sewerage carries "putrescible waste" from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

The City itself treats storm drainage differently [***15] from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water. [9] The Salinas City Code contains requirements [**234] addressed specifically to the management of storm water runoff. m (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

9 Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised *[sic]* of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (1) [defining "storm drainage system"].)

[***16]

10 Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750,* [HN11] enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (*Gov. Code, § 53750, subd. (m).)* The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of [*13591 the affected area. The trial court therefore [***171 erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

Received
June 17, 2011
Commission on
State Mandates

TAB “16”

CHARLES SCOTT HUGHES, Plaintiff and Appellant, v. BOARD OF ARCHITECTURAL EXAMINERS, Defendant and Appellant.

No. S056373.

SUPREME COURT OF CALIFORNIA

17 Cal. 4th 763; 952 P.2d 641; 72 Cal. Rptr. 2d 624; 1998 Cal. LEXIS 1453; 98 Cal. Daily Op. Service 2190; 98 Daily Journal DAR 3025

March 26, 1998, Decided

SUBSEQUENT HISTORY: Rehearing Denied May 20, 1998, Reported at: *1998 Cal. LEXIS 3198.*

PRIOR HISTORY: Superior Court of Sacramento County. Super. Ct. No. CV375591. John R. Lewis, Judge.

* Judge of the Sacramento Municipal Court, assigned by the Chief Justice prusuant to *article VI, section 6 of the California Constitution.*

DISPOSITION: We reverse the judgment of the Court of Appeal and remand the matter to that court to permit it to decide the remaining issue that it previously did not consider--whether the Board imposed an excessive sanction in revoking Hughes's license. (*DaFonte v. UpRight, Inc. (1992) 2 Cal. 4th 593, 604-605 [7 Cal. Rptr. 2d 238, 828 P.2d 140];* Cal. Rules of Court, rule 29.4(b).)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant board sought review of a judgment of the Court of Appeal (California) that reversed a trial court judgment affirming defendant's decision to revoke plaintiff architect's license for violation of *Cal. Bus. & Prof. Code §§ 5583* and *5584.*

OVERVIEW: Plaintiff architect, though unlicensed, established an architecture firm in Washington D.C. Plaintiff concealed the fact that he was unlicensed and even held himself out to be licensed. The D.C. licensing board eventually disciplined plaintiff. Shortly thereafter, plaintiff applied to defendant board for a license to practice in California. On the application form, plaintiff neglected to reveal his past discipline. A license was eventually issued; however, when defendant learned of plaintiffs past, it revoked his license for violation of *Cal. Bus. & Prof. Code §§ 5583* and *5584.* The trial court affirmed this decision, but on appeal the revocation was reversed on the ground §§ *5583* and *5584* did not apply to prelicensure conduct. Defendant sought review, and the court reversed and remanded. *Sections 5583* and *5584* were ambiguous. Therefore, the court had to consider evidence of the legislature's intent beyond the words of the statutes, including the statutory scheme, the history and background of the statutes, and any considerations of constitutionality. The court concluded that the legislature did not intend these provisions to be limited only to postlicensure conduct.

OUTCOME: Judgment reversing a trial court judgment affirming defendant board's decision to revoke plaintiff architect's license was reversed and remanded. The disciplinary statutes under which plaintiff was charged applied to both prelicensure and postlicensure conduct.

LexisNexis(R) Headnotes

17 Cal. 4th 763, *; 952 P.2d 641, **;
72 Cal. Rptr. 2d 624, ***; 1998 Cal. LEXIS 1453

Governments > State & Territorial Governments > Licenses
[HN1] See *Cal. Bus. & Prof. Code §§ 5583* and *5584.*

Governments > Legislation > Interpretation
[HN2] The objective of statutory interpretation is to ascertain and effectuate legislative intent. The first step in determining legislative intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. In analyzing statutory language, the court seeks to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose. Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction.

Governments > Legislation > Interpretation
[HN3] In construing statutes, the use of verb tense by the legislature is considered significant.

Governments > Legislation > Interpretation
[HN4] A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable.

Governments > Legislation > Interpretation
Pensions & Benefits Law > Governmental Employees > County Pensions
[HN5] When a statute is ambiguous, the court typically considers evidence of the legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure.

Governments > State & Territorial Governments > Licenses
Insurance Law > Malpractice Insurance > Settlements
[11N6] It does not appear that the legislature intended the provisions of Cal. Bus. & Prof. Code art. 5 to be limited only to discipline following licensure. Nor does it appear that the legislature intended the provisions of article 5 specifically relating to disciplinary action to apply only to conduct following acquisition of a license.

Governments > Legislation > Interpretation
[HN7] When statutes are ambiguous, it is appropriate to examine their legislative history, including the historical development of the act.

Governments > State & Territorial Governments > Licenses
[HN8] When the legislature's intent is to protect the health, safety, and welfare of the public rather than to serve punitive interests, that body additionally intends, in order to protect the public, that the law be interpreted broadly so that particular licensees not be able easily to evade the statute's protective purposes.

Criminal Law & Procedure > Bail > Denial of Bail
Governments > State & Territorial Governments > Licenses
[HN9] In general terms, decisional law long has recognized the authority of a governmental licensing entity to examine and determine, from the past conduct of a party, his or her fitness to undertake or continue a business or profession.

Governments > Legislation > Interpretation
[HN10] A presumption exists that in enacting a statute, the legislature did not intend it to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers. Therefore, a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality.

Constitutional Law > Substantive Due Process > Scope of Protection
Healthcare Law > Business Administration & Organization > Licenses > Requirements
[EN 11] An individual, having obtained the license required to engage in a particular profession or vocation, has a "fundamental vested right" to continue in that activity.

Constitutional Law > Substantive Due Process > Scope of Protection
Governments > State & Territorial Governments > Licenses
[HN12] The circumstance that an individual has acquired a license, and thus that the right to practice the particular profession or vocation has vested, does not affect the due process analysis.

Constitutional Law > Substantive Due Process > Scope of Protection
Governments > State & Territorial Governments > Licenses
[111\113] The circumstance that a licensee is entitled to a higher standard of review or other procedural protections accorded by due process of law, because of his or her status as possessor of a fundamental vested right, does not compel the conclusion that the particular licensing board must limit disciplinary actions only to conduct occurring after licensure. The general right to engage in a trade, profession or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order and safety; such regulations do not deprive owners of property without due process of law. No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers.

Governments > Legislation > Effect & Operation > Prospective Operation
Governments > Legislation > Effect & Operation > Retrospective Operation
[HN14] A statute is retroactive if it substantially changes the legal effect of past events. A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.

Governments > Legislation > Effect & Operation > Prospective Operation
Governments > Legislation > Effect & Operation > Retrospective Operation
[11N15] A retroactive statute is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
[HN16] The equitable estoppel doctrine ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
[HN17] The doctrine of equitable estoppel may be invoked only when the party to be estopped is apprised of the facts and intends that his or her conduct will be acted upon, and the other party is ignorant of the true facts and relies upon the conduct to his or her detriment.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel
Administrative Law > Agency Adjudication > Review of Initial Decisions
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN18] The doctrine of collateral estoppel prevents an administrative agency from reconsidering, in the absence of new facts, its prior final decision made in a judicial or quasi-judicial capacity in the context of an adversary hearing.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The California Board of Architectural Examiners revoked an architect's license for violations of *Bus. & Prof Code, §§ 5583* and *5584,* relating to fraud, deceit, negligence, and willful misconduct. The wrongful acts occurred in other states before the architect was licensed in California. The trial court denied the architect's petition for a writ of administrative mandamus seeking to overturn the board's decision. (Superior Court of Sacramento County, No. CV375591, John R. Lewis, Judge. *) The Court of Appeal, Third Dist., No. C019165, reversed.

> * Judge of the Sacramento Municipal Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court to permit it to decide whether the board imposed an excessive sanction in revoking the architect's license. The court held that the board had authority to revoke the architect's license. The language of *Bus. & Prof. Code, §§ 5583* and *5584,* is ambiguous regarding application of those statutes to prelicensure misconduct. However, it does not appear that the Legislature intended the provisions of the Architect's Practice Act *(Bus. & Prof. Code, § 5500 et seq.),* of which *Bus. & Prof. Code, §§ 5583* and *5584,* are a part, to be limited only to discipline following licensure. Furthermore, no constitutional violation arises from an interpretation of *Bus. & Prof. Code, §§ 5583* and *5584,* that permits consideration of prelicensure conduct. The court further held that the doctrine of equitable estoppel did not prevent the board from revoking the architect's license, since application of the doctrine would have defeated the

strong public policy of regulating the architectural profession. Moreover, at the time it issued the license, the board did not have full knowledge of the architect's wrongful conduct. (Opinion by George, C. J., with Kennard, Baxter, Werdegar, Brown, JJ., and Croskey, J., + concurring. Dissenting opinion by Mosk, J.)

+ Associate Justice of the Court of Appeal, Second District, Division Three, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(la) (lb) (lc) (1d) (le) (10 (lg) Architects, Engineers, and Surveyors § 3--Licensing, Registration, and Regulation--Revocation of Architect's License--For Prelicensure Acts. --In a proceeding brought by an architect whose license had been revoked, the trial court properly concluded that the California Board of Architectural Examiners had authority to revoke plaintiffs license, based on plaintiffs wrongful conduct *(Bus. & Prof. Code, §§ 5583* (fraud or deceit) and 5584 (negligence or willful misconduct)), that occurred in other states before plaintiff was licensed in California. The language of *Bus. & Prof. Code, §§ 5583* and *5584,* is ambiguous regarding application of those statutes to prelicensure misconduct. However, article 5 of the Architect's Practice Act *(Bus. & Prof Code, § 5500 et seq.),* of which *Bus. & Prof. Code, §§ 5583* and *5584,* are a part, is not directed solely at postlicensure wrongful conduct, but rather simply at wrongful conduct, whether occurring prior to or following licensure. Hence, it does not appear that the Legislature intended the provisions of article 5 to be limited only to discipline following licensure. An examination of the act's legislative history further supports this application of article 5. Furthermore, no constitutional violation arises from an interpretation of *Bus. & Prof Code, §§ 5583* and *5584,* that permits consideration of prelicensure conduct. Even though the wrongful acts occurred out of state, discipline meted out by one jurisdiction can properly be based upon conduct that occurred in another jurisdiction prior to licensure.

[See 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 1053.]

(2) Statutes 29--Construction--Language--Legislative Intent. --The objective of statutory interpretation is to ascertain and effectuate legislative intent. A court's first step in determining legislative intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning, and seeking to give meaning to every word and phrase to accomplish a result consistent with the legislative purpose. Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction.

(3) Statutes § 28--Construction--Language--Verb Tense. --In construing statutes, the use of verb tense by the Legislature is to be considered significant.

(4) Statutes 28--Construction--Language--Ambiguity. --A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. When a statute is ambiguous, the court typically considers evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any consideration of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure.

(5) Business and Occupational Licenses § 10--Suspension, Revocation, and Merger of Licenses--Regulatory Statutes--As Penal in Nature. --Although courts early in this century characterized regulatory statutes authorizing administrative actions to revoke or suspend a professional or vocational license in a given field as being penal in nature, a characterization that resulted in strict construction of those statutes, courts have since recognized that such administrative proceedings are not intended to punish the licensee, but rather to protect the public. If the purpose of a licensing statute is not to punish but to serve another legitimate governmental purpose, such as protecting the consumers and the public who deal with members of a particular profession or trade, the statute is considered nonpenal. When the Legislature's intent is to protect the health, safety, and welfare of the public rather than to serve punitive interests, that body additionally intends, in order to protect the public, that the law be interpreted broadly so that particular licensees not be able easily to evade the statute's protective purposes.

(6) Constitutional Law § 25--Constitutionality of Legislation--Rules of Interpretation--Presumption of Constitutionality. --A presumption exists that in enacting a statute, the Legislature did not intend it to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers. Therefore, a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality.

(7a) (7b) Constitutional Law § 111--Substantive Due Process--Fundamental Vested Right--To Practice Profession--Subject to Regulation. --The right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the due process and equal protection clauses of *U.S. Const., 14th Amend.* Therefore, a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession. An individual, having obtained the license required to engage in a particular profession or vocation, has a "fundamental vested right" to continue in that activity. Nevertheless, the general right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety; such regulations do not deprive owners of property without due process of law. No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation that is subject to legislative control under the police powers.

(8) Business and Occupational Licenses § 10--Suspension, Revocation, and Merger of Licenses--Due Process--Standard of Review for Administrative Decision: Administrative Law § 115--Judicial Review and Relief--Presumptions. --A licensee, having obtained a fundamental vested right to continue to practice the profession or vocation for which he or she was licensed, is entitled to certain procedural protections greater than those accorded an applicant. For example, the "independent judgment" standard of review must be applied to an administrative decision that substantially affects such a fundamental vested right. Nonetheless, the circumstance that an individual has acquired a license, and thus that the right to practice the particular profession or vocation has vested, does not affect the due process analysis. There is little similarity between the analysis applied in determining (1) whether a right is a fundamental right for equal protection and due process purposes on the one hand, and (2) whether a right is a fundamental right for purposes of deciding which level of scrutiny is applicable for administrative review purposes, on the other. The principle of fundamentality differs depending on the context or analysis within which the concept arises. Courts distinguish generally between applicants and recipients in determining whether a right is vested for the limited purpose of determining the applicable scope of review.

(9) Statutes § 5--Operation and Effect--Retroactivity. --A statute is retroactive if it substantially changes the legal effect of past events. A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. A retroactive statute is one that affects rights, obligations, acts, transactions, and conditions that are performed or exist prior to the adoption of the statute. The theory against retroactive application of a statute is that the parties affected have no notice of the new law affecting past conduct.

(10a) (10b) (10c) Estoppel and Waiver § 6--Equitable Estoppel--Revocation of Architect's License for Prelicensure Acts--Public Policy of Regulation. --The doctrine of equitable estoppel did not prevent the California Board of Architectural Examiners from revoking an architect's license, based on the architect's wrongful conduct *(Bus. & Prof Code, §§ 5583* (fraud or deceit) and 5584 (negligence or willful misconduct)), that occurred in other states before plaintiff was licensed in California. This doctrine ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. The architect did not demonstrate that grave injustice would result from the delay that occurred in imposing discipline. Furthermore, application of the equitable estoppel doctrine would have defeated the strong public policy of regulating the architectural profession. Moreover, at the time it issued the license, the board did not have full knowledge of the architect's out-of-state wrongful conduct.

(11) Estoppel and Waiver § 8--Equitable Estoppel--Course of Conduct or Silence. --The doctrine of equitable estoppel may be invoked only when the party to be estopped is apprised of the facts and intends that his or her conduct will be acted upon, and the other party is ignorant of the true facts and relies upon the conduct to his or her detriment.

(12) Estoppel and Waiver § 6--Collateral Estoppel--Administrative Agency--Reconsideration of Prior Decision. --The doctrine of collateral estoppel prevents an administrative agency from reconsidering, in the absence of new facts, its prior final decision made in a judicial or quasi-judicial capacity in the context of an adversary hearing. In issuing the license, the board did not make a final determination within the context of an adversary hearing of the architect's fitness to practice architecture based upon a review of his prelicensure conduct.

COUNSEL: Smiland & Khachigian, Willliam M. Smiland and Kenneth L. Khachigian for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Joel S. Primes and Steven M. Kahn, Deputy Attorneys General, for Defendant and Appellant.

JUDGES: Opinion by George, C. J., with Kennard, Baxter, Werdegar, Brown, JJ., and Croskey, J., * concurring. Dissenting opinion by Mosk, J.

* Associate Justice of the Court of Appeal, Second District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: GEORGE

OPINION

[*767] [**643] [***626] GEORGE, C. **J.**

Pursuant to *Business and Professions Code sections 5583* and *5584,* an architect may be disciplined for wrongful conduct occurring [*768] after his or her license has been [**644] [***627] issued. In this case we decide whether, pursuant to those sections, an architect may be disciplined for wrongful conduct that occurred prior to the time the architect's license was issued, when the license itself was not obtained by fraud or misrepresentation. We conclude that the cited statutes also may be applied to wrongful conduct that precedes issuance of the license.

1 Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

I

Charles Scott Hughes studied architecture at the University of Virginia and the Boston Architectural Center between 1970 and 1975 but did not receive a degree. Hughes successfully completed the architectural examination given by the Board of Architectural Examiners of Washington, D.C., but, having failed to submit his college transcript, he did not obtain an architectural license from that entity.

Following an apprenticeship in several architectural firms, in 1982 Hughes established his own architectural firm. Initially, Hughes employed licensed architects to perform that part of the work that required licensure as an architect. Eventually, however, he personally performed work that required a license.

In addition, Hughes took measures to conceal his lack of a license, and to hold himself out as a licensed architect. In 1981, the American Institute of Architects (hereafter, the MA), sent Hughes a letter requesting that he cease representing himself to be a member of that organization. In 1986, Hughes applied for membership in the MA, falsely stating on his application that he was licensed in Washington, D.C., and enclosing the certificate of registration of another architect upon which he had substituted his own name. Also in 1986, Hughes falsely stated on his resume that he was a registered architect in Washington, D.C., Virginia, and Maryland. During the period in which he operated his own firm, Hughes applied architecture stamps belonging to other licensed architects to work he himself had performed.

In January 1989, while Hughes was engaged in the design of an addition to the residence of Dan Quayle, then Vice-President of the United States, it was discovered that Hughes did not have a valid license. The Board of Architectural Examiners of Washington, D.C., initiated disciplinary proceedings. In addition, following his indictment by a grand jury, the Commonwealth of Virginia charged Hughes with one count of misrepresentation to a government agency in connection with representations he made in the course [*769] of performing architectural services for Arlington County. Hughes executed a plea agreement, pleading guilty to making a fraudulent misrepresentation to the county. In November 1989, the court ordered Hughes to perform 200 hours of community service, undergo counseling, and pay costs. Pursuant to Virginia law, the court suspended imposition of sentence until October 25, 1991, in order to permit Hughes an opportunity to meet the conditions of the court's order.

Hughes promptly completed the conditions imposed and on February 1, 1990, contacted his probation officer, requesting advancement of the court appearance set to resolve the disposition of the case, to enable Hughes to represent that he had not suffered any prior convictions. On February 12, 1990, the probation officer wrote to the court requesting the advancement. On April 27, 1990, the Arlington County prosecutor entered a nolle prosequi requesting that the charge be dismissed. The charge was not formally dismissed until May 1, 1990.

Meanwhile, on February 22, 1990, Hughes applied to the California Board of Architectural Examiners (hereafter, the Board) for a license to practice in California. Hughes enclosed the application with a transmittal letter explaining that he successfully had completed an architectural examination in Washington, D.C., in 1980 and the results of that examination were to be forwarded to the Board, but that he "did not complete" his licensing at that time and therefore was [**645] [***628] seeking initial registration in California. On the application form itself, Hughes provided information concerning his prior employment for other architectural firms as well as his self-employment at his own firm. Hughes left blank that part of the form designated "LICENSED AS:" and also indicated that he never had been licensed in any other

state or foreign country. In the area of the form inquiring whether the applicant had been convicted of any offense and advising the applicant to report all convictions, including those dismissed pursuant to *Penal Code section 1203.4* (dismissal of charges following fulfillment of probation terms), Hughes answered in the negative.

On March 8, 1990, Hughes wrote a supplemental letter to the Board, disclosing that he had "never completed the licensing process," and that "technically" his registration "was never perfected" in Washington, D.C., because of his "initial oversight" in failing to produce his college transcript. The letter indicated that during the period in the 1980's when he operated his own firm, the majority of the services that he or his firm performed did not require the services of a licensed architect. The letter also disclosed that in 1989, Hughes's architectural firm became involved in civil litigation that had "called into question" his professional licensing status, that his conduct [*770] had been the subject of "a great deal of publicity," that he had "made a full disclosure" of the facts concerning his nonlicensure to the Washington, D.C., authorities (by whom "investigations were instituted"), that he had "closed his office," that the Commonwealth of Virginia had charged him with one count of misrepresentation to a government agency, that he had entered a plea to the charge, that imposition of his sentence had been suspended, that he had been placed on probation, paid restitution, and performed community service, that "on February 22, 1990, . . . all charges against [him] were dropped," and that, as a result, no charges were pending against him and he had no record.

The Board apparently did not respond to this communication. Hughes thereafter successfully completed the oral examination. On September 10, 1990, the Board issued Hughes a license.

In May 1991, the National Council of Architectural Registration Boards (hereafter, NCARB) sent a letter to the Board informing it that Hughes had sought NCARB certification based upon his California registration, the certification form for which indicated that the Board "has no derogatory information on file" concerning Hughes. NCARB indicated its understanding that Hughes previously had been denied registration in Virginia and Washington, D.C., "on the basis of character." NCARB suggested that the Board contact the boards of architectural examiners in those localities to obtain additional information. The Board then commenced an investigation.

On February 5, 1992, the Board filed an accusation against Hughes, asserting that he was subject to discipline and seeking suspension or revocation of his license. Based upon Hughes's statements in his application and subsequent explanatory letter, made prior to actual dismissal of the charge, that he never had been convicted of criminal charges and that the charge previously instituted against him had been dismissed, the accusation alleged that Hughes knowingly had made a false statement of fact in his application to the Board (§ 490) and had obtained his license by fraud or misrepresentation (§ 5579).

On June 29, 1992, the Board issued a supplemental accusation alleging three additional statutory violations. The Board asserted: (1) based upon his guilty plea entered in Arlington County in October 1989, Hughes had been convicted of a crime substantially related to the qualifications, functions, and duties of an architect (§ 5577); (2) based upon his seeking admittance to the AIA by substituting the certificate of registration of another architect and falsely stating on the application that he was registered as an architect in the District of Columbia since 1977, in falsely stating on his resume that he was [[4]*771] a graduate of the University of Virginia and a registered architect in Maryland, Virginia, and the District of Columbia, and in using the stamps or certificates issued to other architects on architectural plans that he personally had prepared in or [***629] about 1986, [**646] Hughes was guilty of fraud and deceit in the practice of architecture (§ *5583);* (3) based upon his violation of Virginia law resulting in his guilty plea in October 1989, his misrepresentation or use of false documents in commercial dealings with Arlington County in January 1989, his submission of false information to the MA, the false representations on his resume relating to his graduation from college and his professional licensure, and his improper use of the stamps or certificates of other architects in conjunction with his preparation of his own plans in or about 1986 as described above, Hughes was guilty of willful misconduct in the practice of architecture (§ *5584).*

On August 13, 1992, a hearing was conducted before an administrative law judge. Considerable evidence was presented concerning Hughes's alleged misrepresentations to the Board as well as his earlier wrongful conduct. On November 19, 1992, a proposed decision issued. Therein, the administrative law judge found that Hughes had not violated section 490 or 5579 and that section 5577 did not apply, because he ultimately had not been convicted in the Commonwealth of Virginia and had not knowingly misstated (at the time he communicated with the Board) that the charges previously had been dismissed. The administrative law judge also found, however, that Hughes had violated *sections 5583* and *5584* because he personally had undertaken work requiring licensure, falsely had stated on his application to the AIA that he had been registered to practice architecture in the District of Columbia since 1977 and had submitted therewith a falsified certificate of registration of another architect, falsely had stated on his resume that he was a graduate of the University of Virginia and a registered architect in

Maryland, Virginia, and the District of Columbia, and had used or caused to be used the stamps of other architects on his own work during the period he operated his own firm. The administrative law judge ordered that Hughes's license be revoked.

Initially, the Board issued an order of nonadoption of the findings and proposed decision of the administrative law judge. After considering the record of the administrative hearing and further written argument, on June 16, 1993, the Board issued a decision adopting the proposed decision of the administrative law judge that Hughes's license be revoked for his performance of architectural work requiring a license without having obtained licensure, his false statement that he had a license and his substitution of another individual's certificate in order to gain admission to the AIA, his false statements on his resume that he had graduated from college and was a [*772] registered architect in several jurisdictions, and his use on his own work of architectural stamps belonging to others. Hughes's license was revoked effective July 24, 1993.

On August 19, 1993, Hughes filed in superior court a petition for a peremptory writ of mandate pursuant to *Code of Civil Procedure section 1094.5.* That court denied the petition, determining that *sections 5583* and *5584* authorized disciplinary action based upon prelicensure wrongful conduct, that the Board was not estopped to revoke the license, and that the Board's choice of sanction--revocation--was not excessive.

Hughes filed an appeal, and the Board filed a cross-appeal. The Court of Appeal reversed the judgment of the superior court solely on the basis that the relevant disciplinary statutes did not apply to prelicensure wrongful conduct.[2] On petition [**647] by [***630] the Board, we granted review, limiting the issue to be argued, pursuant to California Rules of Court, rule 29.2(b), to "whether an architect may be disciplined for misconduct occurring before a license is issued if the license was not obtained by fraud or misrepresentation."

2 In his appeal, Hughes also contended that the Board did not have the power to reverse its earlier decision to license him, and that, in revoking his license, it had sanctioned him excessively. The Court of Appeal did not consider these claims, in light of its conclusion that *sections 5583* and *5584* did not authorize disciplinary action based upon prelicensure wrongful conduct.

In its appeal, the Board contended that the trial court had erred in refusing to consider newly discovered evidence pertaining to Hughes's prelicensure wrongful conduct. The Court of Appeal concluded that the issue was moot in light of that court's holding that *sections 5583* and *5584* could not be applied on the basis of prelicensure wrongful conduct.

The Board also contended that the trial court had jurisdiction to reconsider its determination that the criminal proceeding in the Commonwealth of Virginia did not constitute a criminal conviction within the meaning of section 5577. The Court of Appeal rejected this contention on the bases that the Board previously had conceded the Virginia criminal proceeding did not constitute a criminal conviction pursuant to section 5577, and that that section, as part of article 5 pertaining to the discipline of licensees, could not be applied to discipline a licensee for a conviction suffered prior to licensure.

II

Division 3 of the Business and Professions Code relates to various professions and vocations, each chapter of that division focusing upon a particular profession or vocation. Chapter 3 of the Architects Practice Act (§ *5500 et seq.)* (hereafter, the Act) was enacted to regulate the practice of architecture in this state. The Act is divided into seven articles: article 1, general provisions (§ 5500-5502); article 2, administration (§ 5510-5528); article 3, application of the chapter (§ 5535-5538); article 4, issuance of licenses (§ 5550-5557); article 5, disciplinary proceedings (§ 5560-5590); article 6, revenue (§ 5600-5604); and article 7, architectural corporations (§ 5610-5610.7).

[*773] The Act includes a legislative statement of purpose providing as follows: "The Legislature finds and declares that it is the mandate of the board to regulate the practice of architecture in the interest and for the protection of the public health, safety, and welfare. For this purpose, the board shall delineate the minimum professional qualifications and performance standards for admission to and practice of the profession of architecture. The board shall establish a fair and uniform enforcement policy to deter and prosecute violations of this chapter or any rules and regulations promulgated pursuant to this chapter to provide for the protection of the consumer." (§ *5510.1.)*

Article 4 of the Act provides that a candidate for licensure must file an application with the Board. (§ 5550.) The applicant "shall" furnish evidence of the completion of eight years of training and educational experience in architectural work (§ *5552, subd. (b))* and "shall" not have committed acts or crimes constituting grounds for denial of licensure pursuant to *section 480. (§ 5552, subd. (a)). Section 480,* a part of division 1.5 pertaining to denial, suspension, and revocation of business and professional licenses generally, in subdivision (a) provides that a board

may deny a license on the grounds that the applicant has (1) been convicted of a crime, (2) " [d]one any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another," or (3) done any act that, if done by a licentiate of the business or profession would be a ground for suspension or revocation of a license. *Subdivision (a) of section 480* further provides that such a crime or act may provide a basis for denial only if "substantially related to the qualifications, functions or duties of the business or profession for which application is made." *Section 5553* provides that if the Board receives evidence that the applicant has committed or done any act that would be a ground for suspension or revocation if committed or done by a holder of a license, the Board may deny issuance of the license.

Article 4 of the Act also provides that any person who meets the qualifications set forth in that article and has filed an application and paid the application fee "shall be entitled to an examination for a license to practice architecture." (§ 5550.) In the event the applicant's examination is satisfactory, the applicant pays the license fee, and no charges of deception in obtaining the license or any other violation "of the provisions of this chapter" have been filed with the Board, that body "shall issue a license to the applicant showing that the person named therein is entitled to practice architecture . . . ." (§ 5551.)

Article 5 of the Act provides that the Board may on its own motion, and shall upon the verified written complaint of any person, investigate the [*774] actions of any architect, and may temporarily suspend or permanently revoke the license of any architect "who is guilty of, or commits any one or more of, the acts or omissions constituting grounds for disciplinary action under this chapter." [**648] [***631] (*§ 5560.)* Article 5 specifies as a period of limitations that all accusations against licensees charging the holder of a license "with the commission of any act constituting a cause for disciplinary action shall be filed with the board within five years after the board discovers, or through the use of reasonable diligence should have discovered, the act or omission alleged as the ground for disciplinary action, whichever occurs first, but not more than 10 years after the act or omission alleged as the ground for disciplinary action." (§ 5561.) If the accusation alleges fraud or misrepresentation in obtaining the license, the accusation may be filed within three years after the Board's discovery of the alleged facts constituting fraud or misrepresentation. (§ 5561.)

Article 5 of the Act also sets forth particular acts or omissions constituting grounds for disciplinary action. The holder of a license may be subject to discipline if he or she is convicted of a crime (including one for which an order granting probation is made suspending the imposition of sentence) (§ 5577), is practicing in violation of the provisions of the chapter (§ 5578), has obtained the license by fraud or misrepresentation (§ 5579), is impersonating an architect of the same or similar name or is practicing under an assumed, a fictitious, or (if not providing services through a corporation) a corporate name (§ 5580), has aided or abetted the practice of architecture by a person not authorized to practice architecture (§ 5582), has affixed his or her signature to architectural work not personally performed or immediately supervised or has permitted the use of his or her name to assist a nonarchitect in evading the provisions of the chapter (§ 5582.1), has been guilty of incompetence or recklessness in the construction or structural design of a building (§ 5585), or has been disciplined by a public agency for an act related to architectural practice in another jurisdiction (§ 5586).

Included in the enumerated grounds for disciplinary action within article 5 are the two sections that are the subject of the present appeal. [11N1] *Section 5583* provides: "The fact that, in the practice of architecture, the holder of a license has been guilty of fraud or deceit constitutes a ground for disciplinary action." *SECTION 5584* PROVIDES: "The fact that, in the practice of architecture, the holder of a license has been guilty of negligence or willful misconduct constitutes a ground for disciplinary action."

(1a) The Board contends that *sections 5583* and *5584* authorize the discipline imposed, because the sections provide that the current holder of a license may be disciplined if he or she has been guilty in the past of fraud, [*775] deceit, negligence, or willful misconduct. On the other hand, Hughes takes the position, with which the Court of Appeal agreed, that these statutes may not be applied to Hughes's conduct, because the three factual prerequisites set forth therein--(1) wrongful acts of the types specified, (2) done in the practice of architecture, (3) by the holder of a license--must occur contemporaneously with one another. Under this view, Hughes was not the "holder of a license" during the period in which he committed the above described acts of wrongful conduct.

> 3 Hughes also urges that the statutes *unambiguously* permit discipline of a holder of a license *only* for postlicensure wrongful conduct, because the wrongful acts must be committed "in the practice of architecture," defined as "offering or performing, or being in responsible control of, professional services which require the *skills of an architect"* in the planning of sites and the design of buildings or structures (*§ 5500.1, subd. (a),* italics added). Therefore, according to Hughes, one may not be engaged in the practice of architecture without being an *architect,* that is, "a person who

is licensed to practice architecture in this state under the authority of this chapter." (§ *5500.)*

The difficulty with Hughes's argument is that offering or performing professional services requiring the skills of an architect in the planning of sites and the design of buildings, and being an architect, are not the same thing. One who offers or performs such professional services without a license is engaged in the practice of architecture although he or she does not satisfy the definition of "architect" provided by *section 5500.* In the present case, Hughes committed the wrongful acts during the time he offered to perform, and did perform, professional services that required the skills of an architect in the planning of sites and the design of buildings. Thus, Hughes was engaged in the practice of architecture when he committed the wrongful conduct.

[**649] [***632] (2) Our analysis commences with the premise that [HN2] the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*Viking Pools, Inc. v. Maloney (1989) 48 Cal. 3d 602, 606 [257 Cal. Rptr. 320, 770 P.2d 732] .)* " 'Our first step [in determining legislative intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.' " (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 633 [59 Cal. Rptr. 2d 671, 927 P.2d 1175]; Lungren v. Deukmejian (1988) 45 Cal. 3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299] .)* " 'In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . . " (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist., supra, 14 Cal. 4th 627, 634.)* "Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction." (*California School Employees Assn. v. Governing Board (1994) 8 Cal. 4th 333, 340 [33 Cal. Rptr. 2d 109, 878 P.2d 1321]; Ladd v County of San Mateo (1996) 12 Cal. 4th 913, 921 [50 Cal. Rptr. 2d 309, 911 P.2d 496]; California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 349 [45 Cal. Rptr. 2d 279, 902 P.2d 297] .)*

*[*776]* (lb) Neither of the two statutes in question explicitly authorizes the Board to discipline a licensee based upon wrongful conduct arising prior to licensure, but neither does the statutory language expressly limit the Board to imposing disciplinary measures on a holder of a license only if the wrongful conduct occurred following licensure. Moreover, in contrast with several of the other sections of article 5 defining the acts or omissions that may constitute grounds for discipline, each of the two sections specifies that the holder of a license "has been guilty," employing the past tense rather than the present tense in referring to the conduct involved. (3) [HN3] In construing statutes, the use of verb tense by the Legislature is considered significant. (*People v. Loeun (1997) 17 Cal. 4th 1, 10-11 [69 Cal. Rptr. 2d 776, 947 P.2d 1313];* see *United States v. Wilson (1992) 503 U.S. 329, 333 [112 S. Ct. 1351, 1353-1354, 117 L. Ed. 2d 593] .)* That circumstance renders it likely that the Legislature intended these statutes to apply to conduct occurring prior to licensure, but it does not, standing alone, appear to negate the plausibility of the opposite interpretation.

(4) [HN4] A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. (*Fiol v. Doellstedt (1996) 50 Cal. App. 4th 1318, 1328 [58 Cal. Rptr. 2d 308]; San Bernardino Valley Audubon Society v. City of Moreno Valley (1996) 44 Cal. App. 4th 593, 601 [51 Cal. Rptr. 2d 897] .)* In view of the statutory language itself and the contrasting but reasonable interpretations the parties have derived from that language, it appears that the statutes must be considered to be ambiguous.

[HN5] When, as in this case, a statute is ambiguous, we typically consider evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure." (*Watts v. Crawford (1995) 10 Cal. 4th 743, 751 [42 Cal. Rptr. 2d 81, 896 P.2d 807]; Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal. 4th 821, 828 [25 Cal. Rptr. 2d 148, 863 P.2d 218]; People v. Woodhead (1987) 43 Cal. 3d 1002, 1008 [239 Cal. Rptr. 656, 741 P.2d 154]; Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 816-817 [226 Cal. Rptr. 81, 718 P.2d 68] .)*

(1c) In order to determine whether the interpretation advanced by Hughes and the Court of Appeal--or instead that of the Board--is the more reasonable estimation of legislative intent, we examine more specifically the statutory scheme, of which these sections are a part, pertaining to architectural applicants and licensees. We also examine the related sections of the [*777] broader statutory scheme pertaining to business and professional licenses generally.

In concluding that *sections 5583* and *5584* may not be invoked to discipline a licensee based upon wrongful conduct that [***633] occurred [**650] prior to licensure, the Court of Appeal emphasized the separation of the procedural subject matter of the Act into several articles within the Act. The Court of Appeal determined that article 4 governed denial of a license, thus controlling prelicensure wrongful conduct, and that article 5 governed

discipline of a licensee by suspension or revocation of a license, thus controlling only postlicensure wrongful conduct. Accordingly, the Court of Appeal concluded that the placement of *sections 5583* and *5584* within article 5 evidenced a legislative intent to limit temporally the grounds afforded by those sections, for suspension or revocation of a license, only to wrongful conduct that arises following issuance of a license.

A review of the pertinent sections included within articles 4 and 5 does not support the appellate court's interpretation. As described above, article 4 provides specific criteria for application for a license, including grounds for denial of such application, in the course of delineating the procedures for issuance of a license. On the other hand, article 5 not only provides specific grounds pursuant to which the Board may take "disciplinary action" consisting of suspension, revocation, or in certain cases imposition of a fine against a licensee, but also provides specific grounds pursuant to which the Board may take measures other than "disciplinary action," whether against licensees or nonlicensees. (In the case of the latter, appropriate measures may include denial of a license.) Thus, those articles do not appear to contemplate that the application of each article is exclusive with regard, respectively, to prelicensure and postlicensure conduct.

The following sections within article 5 implicitly or explicitly confirm that conclusion. *Section 5560,* authorizing the Board temporarily to suspend or permanently to revoke the license of any architect who *is guilty of or commits* any of the acts or omissions constituting grounds for disciplinary action under "this chapter," suggests by that language that the acts or omissions constituting such grounds may have occurred prior to as well as following licensure. That section does not specify that the status of "architect," that is, a person licensed to practice architecture pursuant to the authority of the chapter (§ *5500),* must exist contemporaneously with his or her guilt of (or commission of) the acts or omissions subject to discipline. Similarly, section 5561, providing a lengthy period of limitations in which the Board must act upon an accusation, does not specify that the grounds for the accusation are confined to matters arising only after the architect has been licensed.

[*778] Section 5577 provides that the conviction of a crime substantially related to the qualifications, functions, and duties of an architect may be a ground for disciplinary action against "the holder of a license." The section authorizes the Board to suspend, revoke, or *decline to issue* a license to one convicted of such an offense at the appropriate procedural stage (expiration of time for appeal, affirmance on appeal, or grant of probation and suspension of imposition of sentence), thus presumably encompassing those individuals who have not yet become licensees. The placement of such authorization pertaining to applicants within article 5 is inconsistent with the conclusion that that article was intended to apply only to those individuals who have attained the status of licensees.

Section 5578 provides: "The fact that the holder of a license is practicing in violation of the provisions of this *chapter* constitutes a ground for disciplinary action." (Italics added.) That language is consistent with the conclusion that article 5 confers upon the Board authority to take disciplinary action against the holder of the license based upon conduct described in other articles, including article 4, that are also within the chapter.

In addition, article 5 includes sections pursuant to which the Board may issue a citation and take other measures, against either an unlicensed individual or a licensee, that do not rise to the level of "disciplinary action." The Board, having investigated the actions of any architect, may suspend or revoke the license of one who has committed an act or omission constituting a ground for discipline (§ *5560, 5565), or,* when it has probable cause to conclude that the individual has violated any of the provisions of the *chapter,* may issue a citation to a licensee (or an unlicensed individual acting in the capacity of [***634] an architect) [**651] (§ *5566).* Such a citation may contain an assessment of a civil penalty (§ *5566),* and, following exhaustion of the procedures for review, the Board may apply in superior court for a judgment in the amount of the civil penalty (§ 5566.2, subd. (d)).

Once a citation has issued, the statutes provide for an informal conference, a decision by the "executive officer" affirming or modifying the citation and (if present) the proposed assessment of a civil penalty, and (if that decision is contested) a hearing and decision by the Board. (§ 5566.2, subds. (a)-(c).) It is only the individual's failure to comply with the provisions of the decision or failure to pay any assessed penalty that is deemed to constitute a ground for *discipline* of that individual under these circumstances. (§ 5566.2, subds. (c), (e).) Therefore, the citation, and any civil penalty assessed pursuant to *section 5566,* clearly are not themselves a form of discipline, but rather are designed as more moderate measures, taken to correct acts or omissions by a licensee or unlicensed individual, and initiated *in lieu of* discipline.

[*779] In view of the Board's broad authority under article 5 either to take "disciplinary action" against licensees, or to take the above described alternative measures against both licensed and unlicensed persons, it appears that that article is not directed solely at postlicensure wrongful conduct but, rather, simply at wrongful conduct, whether occurring prior to or following licensure. In light of these sections, [HN6] it does not appear that the Legislature intended the provisions of article 5 to be limited

only to discipline following licensure. Nor does it appear that the Legislature intended the provisions of article 5 specifically relating to disciplinary action to apply only to conduct following acquisition of a license. [4]

> 4 Although, as the Court of Appeal indicated, certain sections within article 5 do appear to apply exclusively to liability arising after licensure (§ 5588 [requirement that professional liability insurer send report to the Board within 30 days of settlement or arbitration award in excess of $ 5,000 on claim against license holder for fraud, deceit, negligence, incompetency, or recklessness in practice]; 5590 [requirement that a court of this state report to the Board, within 10 days of judgment, that license holder has committed a crime or is liable for death, personal injury, or property loss caused by his or her fraud, deceit, negligence, incompetency, or recklessness in practice]), that circumstance does not compel the conclusion that all provisions within article 5 apply only to postlicensure wrongful conduct.

In concluding that *sections 5583* and *5584* may not be invoked to discipline a licensee based upon wrongful conduct arising prior to licensure, the Court of Appeal also noted a lack of reciprocity between article 4 and article 5. The court emphasized that within article 4, both *section 5552, subdivision (a)* (considered together with *section 480, subdivision (a)(3),* to which it refers), and *section 5553* expressly provide that conduct which, if committed by a licensee, would be a ground for suspension or revocation of a license, also may be the basis for denial of a license to *an applicant.* The court observed that within article 5, no similar section provides that conduct which, if committed by an applicant, would be a ground for denial of a license, also may be the basis for suspension or revocation of a license of a *licensee.*

The statutory scheme does not support the view that, because of the absence of such reciprocal provisions in articles 4 and 5, discipline of a licensee must be limited to postlicensure wrongful conduct. Within article 4, *section 5552* provides that an applicant for a license *shall* (a) not have committed acts constituting grounds for denial of a license under *section 480, subdivision (a).* That statute specifies, in subpart (2), that the applicant shall not have "[d]one any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself . . . ." As noted above, within article 5, section 5578 provides that a holder of a license may be subject to discipline if he or she "is practicing in violation of the provisions of this chapter." Therefore, the holder of a license who has committed acts involving dishonesty, fraud, or deceit with the intent to obtain substantial personal [*780] benefit, such as prior to licensure representing that he or she is a licensed architect, or applying to his or her own work the architectural stamps belonging to other individuals, must be considered to be practicing [***635] in violation of *section 5552,* subdivision [**652] (a), which precludes even an *application* for a license when prior commission of those acts has occurred. The circumstance that the two articles do not contain corresponding sections employing substantially similar language does not compel the conclusion that the Legislature intended that the wrongful conduct of an individual who applies for a license may not provide a basis for the Board to discipline that individual as a licensee. [5]

> 5 Within certain statutory schemes governing other professions or occupations, the Legislature in more recent times has included language expressly authorizing the licensing entity to suspend or revoke a license on the basis of conduct that would have warranted denial of the application for a license. (See, e.g., § 10177 ["The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done . . . any of the following: [P] . . . [P] (f) Acted or conducted himself or herself in a manner which would have warranted the denial of his or her application for a real estate license . . . ."]; 1670 & 1680, subd. (x) [dentists]; 3401, subd. (m) [hearing aid dispensers]; 7510.1, subds. (e) & (i) [repossessors]; 7561.1, subds. (d) & (/) [private investigators].) In the context of the real estate licensing scheme, it has been recognized that, because one of the general purposes of the regulatory power is to "ensure the holders of state licenses will be honest and truthful in their dealings and will maintain a good reputation" (*Stickel v. Harris (1987) 196 Cal. App. 3d 575, 588 [242 Cal. Rptr. 88]),* the regulatory power operates within broad chronological and substantive boundaries in order to promote that purpose. "It has thus been held that conduct within the statutes may form the basis for discipline even 'though occurring before the issuance of the license which is the subject of a particular suspension or revocation.' " (*Id. at pp. 588-589,* citing *Grand v. Griesinger (1958) 160 Cal. App. 2d 397, 410-411 [325 P.2d 475] .)* Even taking into consideration the absence of a specific analogous provision in the Act, in view of the similarity in these statutory schemes it is not apparent why architects should be treated differently from other licensees such as real estate professionals. (See *People v. Woodhead, supra, 43 Cal. 3d 1002, 1008-1009.)*

[HN7]

Because the statutes are ambiguous, it also is appropriate to examine their legislative history, including the historical development of the Act. (*Brown v. Poway Unified School Dist. (1993) 4 Cal. 4th 820, 830 [15 Cal. Rptr. 2d 679, 843 P.2d 624];* see *Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 250 [279 Cal. Rptr. 325, 806 P.2d 1360] .)* The results of that examination further undermine the position that articles 4 and 5 were intended separately and exclusively to address prelicensure and postlicensure wrongful conduct, respectively.

The Legislature, having enacted the Business and Professions Code in 1937 (Stats. 1937, ch. 399, p. 1229), in 1939 added chapter 3 on architecture to division 3 of that code (Stats. 1939, ch. 33, § 1, p. 340). At the time it was added, chapter 3 was divided into separate articles, which, as they presently do, included article 4 concerning issuance of certificates of registration (now licenses) (Stats. 1939, ch. 33, § 1, p. 344, adding former § 5550-5556) and [*781] article 5 concerning disciplinary proceedings (Stats. 1939, ch. 33, § 1, pp. 344-346, adding former § 5570-5578). [6]

> 6 In 1985, the Legislature amended provisions of the chapter to replace references to "certificate" with "license." (Stats. 1985, ch. 1223, p. 4163 et seq.)

At the time of its enactment, the Act contemplated that, following an individual's successful examination, a "district board" initially would issue him or her a "provisional certificate" (Stats. 1939, ch. 33, § 1, p. 344, adding former § 5550, 5551), that the holder of such a provisional certificate could practice architecture until the time of the next annual meeting of the "State board" (the Board) *(id.,* adding former § *5552),* and that, in the event no charges of dishonest practice, deception in obtaining a certificate, gross incompetence in practice, or "any other violation of the provisions of this chapter" had been substantiated, the holder of a provisional certificate was entitled to a "final certificate" issued by the Board *(id.,* adding former § *5553).* At that time, the Act also directed that "any form of certificate, whether provisional or final, could be suspended or revoked (*id., p. 344,* adding former § 5570) for, among other reasons, dishonest practice, deception in obtaining a certificate, gross incompetence in practice, or "any violation of the provisions of this chapter" (*id., p. 345,* adding former § 5578). Thus, it appears that at the time the Act first was enacted, revocation or suspension could be invoked not only to discipline the holder of a final certificate, but also to prevent the [**653] [***636] holder of a provisional certificate from seeking or obtaining a final certificate.

In 1941, the Act was amended. (Stats. 1941, ch. 831, p. 2379.) At that time, within article 4, former sections 5550, 5551, and 5552 continued to authorize the issuance of a provisional certificate by a district board and the temporary practice of architecture by the holder of such a certificate, and former *section 5553* continued to provide that the holder of a provisional certificate who had not engaged in dishonest practice, resorted to deception in obtaining any form of certificate, or violated any of the provisions of the chapter could be issued a final certificate by the Board.

Within article 5, the Legislature added or amended *sections 5560 through 5577.* Newly added *section 5560* authorized the Board to investigate "any" architect and suspend or revoke the certificate, whether provisional or final, of "any" architect. Newly added section 5561 provided that a complaint against the holder of "any" certificate, alleging an act constituting cause for disciplinary action, must be filed with the Board within two years of commission of the act. Newly added *section 5565* authorized the Board to issue a disciplinary decision that immediately, eventually, or conditionally suspended or revoked the holder's certificate. The 1941 changes also repealed former section 5578 and replaced it with sections 5578 through 5587. [*782] (Stats. 1941, ch. 831, § 2, p. 2380 et seq.) In its new version, section 5578 provided that violation of the provisions of the chapter constituted a ground to discipline the holder of a certificate. The additional sections, including the two sections at issue in the present case, separately stated the other grounds for discipline in substance as we have described their current versions. Thus, these grounds for disciplinary action could be asserted against the holder of either a provisional or a final certificate.

In 1945, the Act further was amended to abolish the process of provisional certification. (Stats. 1945, ch. 1231, § 4, 5, p. 2341.) Within article 4, sections 5550 and 5551 were amended to require that an individual seeking to practice architecture file an application and take an examination, and that the Board issue a "certificate to practice architecture," provided that the applicant met the qualifications of education and experience, the applicant's examination was satisfactory, and no charges had been filed with the Board alleging that the applicant had resorted to deception in obtaining the certificate or committed any other violation of the provisions of the chapter. Former *sections 5552* and *5553* were repealed. (Stats. 1945, ch. 1231, § 14, p. 2343.)

Within article 5, *section 5560* was amended to delete references to the provisional certificate and section 5561 was amended to modify references to accusations against the holder of "any certificate" to accusations against the holder of "a certificate." (Stats. 1945, ch. 889, § 1, 2, p. 1655; *id.,* ch. 1231, § 8, 9, p. 2342.) Section 5578 provided, as before, that the holder of a certificate could be disciplined for violation of the provisions of the chapter,

and sections 5579 through 5587, separately stating other particular grounds for discipline, generally remained unchanged.

In 1957, the Act was amended further. (Stats. 1957, ch. 299, p. 943.) Within article 4, a new *section 5552* was enacted, this time to set forth the requirements that an applicant be "of good character" (a requirement subsequently replaced by one excluding potential applicants who had committed acts or crimes constituting grounds for denial of a certificate pursuant to *section 480* (Stats. 1978, ch. 1161, § 295, p. 3682) and furnish evidence of the requisite educational training and experience. (Stats. 1957, ch. 299, § 3, p. 944.) A new *section 5553* was enacted, this time to provide for denial of the certificate if the applicant had committed any acts that would be grounds for suspension or revocation if done by the holder of a certificate. (Stats. 1957, ch. 299, § 4, p. 944.)

Within article 5, *section 5560* remained unchanged and section 5561 was amended to extend the period of limitations--if the ground for discipline [*783] consisted of fraud in obtaining the certificate--to three years following the Board's discovery of the fraud. Section 5577 was added, providing that the conviction of a felony by the holder of a certificate in connection with the practice of architecture constituted a ground for disciplinary [**654] [***637] action and that a "conviction" encompassed a plea of guilty or of nolo contendere. (Stats. 1957, ch. 299, § 6, p. 945.) The then existing grounds for discipline (§ 5578-5587), other than the modification of certain language in section 5587, remained unchanged.

It is clear from the historical development of articles 4 and 5 that they were not designed to address, respectively, only prelicensure and postlicensure wrongful conduct. Rather, it appears that originally, article 4 contemplated an initial phase of temporary licensing, and article 5 provided for disciplinary action not only following the acquisition of the final license but during this provisional stage as well, based upon conduct that might predate even the acquisition of the provisional license. Although the provisional and final stages of licensure subsequently were deleted and only one stage of licensure thereafter was recognized, none of the statutory modifications or additions appear directed at circumscribing the temporal reach of the disciplinary provisions of article 5. These circumstances support a construction of the particular sections within article 5 at issue in the present case in a manner that does not limit their application to only postlicensure wrongful conduct.'

> 7 Without examining the general historical development of these articles, the Court of Appeal determined that the legislative history attending the recent enactment of section 5586 (Stats. 1994, ch. 258, § 2) supported its interpretation of *sections 5583* and *5584* as applicable only to postlicensure wrongful conduct, because otherwise the Legislature would have had no need to enact that new section. Section 5586 specifies that the circumstance that a "holder of a license has had disciplinary action taken by any public agency for any act substantially related to the qualifications, functions, or duties as an architect constitutes a ground for disciplinary action." The Court of Appeal observed that, prior to its passage, the legislation was described as follows: "The sponsor [the Board] contends that currently if an architect, licensed to work in California and another state, works in another state, and that work is found to be in violation of that state's requirements, because the work did not occur in California, there is no action that can be taken by the Board of Architectural Examiners. This bill would allow for such an action." (Assem. Com. on Consumer Protection, Analysis of Assem. Bill No. 2702 (1993-1994 Reg. Sess.) as introduced Feb. 7, 1994.) As the Board has pointed out, other legislative materials refer to the circumstance that the measure was enacted to permit the Board to discipline an architect licensed in this state solely based upon the circumstance that discipline was imposed in another state, without the necessity of establishing separately, by independent factual findings, a violation of the Act. (E.g., Sen. Corn. on Business & Professions, Analysis of Assem. Bill No. 2702 (1993-1994 Reg. Sess.) as introduced Feb. 7, 1994.) It appears the enactment of section 5586 was motivated by a need for efficient use, when appropriate, of the disciplinary determination of another agency similarly authorized in another jurisdiction, rather than by a purported need to grant authority to the Board that it did not then possess, to discipline a licensee based upon particular conduct occurring in another jurisdiction. Analogous statutes applicable to other professions have been similarly interpreted. (*Marek v. Board of Podiatric Medicine (1993) 16 Cal. App. 4th 1089, 1096-1098 [20 Cal. Rptr. 2d 474]* [interpreting § 2305]; *Clare v. State Bd. of Accountancy (1992) 10 Cal. App. 4th 294, 304-306 [12 Cal. Rptr. 2d 481]* [interpreting § 5100, subd. (g)].)

[*784] (5) We next examine the statutory purpose of the provisions in question. Early in this century, decisions interpreting analogous regulatory statutes authorizing administrative actions to revoke or suspend a professional or vocational license in a given field often characterized such statutes and related proceedings as being penal in nature. (See, e.g., *Schomig v. Keiser (1922) 189 Cal. 596, 598 [209 P. 550]* [Real Estate Brokers' Act authorizing forfeiture of license of broker or salesman

was "highly penal in its nature"]; *Abrams v. Daugherty* (1922) 60 Cal. App.. 297, 304 *[212 P. 942]* [proceeding to revoke stockbroker's license]; *Fuller v. Board of Medical Examiners (1936) 14 Cal. App. 2d 734, 742 [59 P.2d 171]* [provision of Medical Practice Act invoked in proceeding against physician].) That characterization yielded the conclusion that such statutes should be strictly construed. *(Schomig v. Keiser, supra, 189 Cal. 596, 598* [act "should not be construed to include anything which is not embraced within its terms"]; *Fuller v. Board of Medical Examiners, supra, 14 Cal. App. 2d 734, 742* [discipline provision was subject to construction with degree of strictness commensurate with severity of penalty].)

> 8 In contrast, this court long has recognized the noncriminal nature of a disciplinary proceeding under the State Bar Act. Although an accusation has been characterized as being in the nature of a criminal charge, and a proceeding on such a charge has been characterized as a quasi-criminal action, proceedings for disbarment uniformly have been treated " 'as peculiar to themselves, and governed exclusively by the code sections specifically covering them.' [Citation.] The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual but for the protection of the courts and the legal profession." (*In re Vaughan (1922) 189 Cal. 491, 496 [209 P. 353, 24 A.L.R. 858].)* Accordingly, our cases have recognized that the rules applicable to criminal cases do not apply, and we have rejected penal-based claims such as that an accused attorney cannot be compelled to testify against himself or herself. (*Id. at pp. 495-496;* see *Fish v. The State Bar (1931) 214 Cal. 215, 222 [4 P.2d 937];* see also *Johnson v. State Bar (1935) 4 Cal. 2d 744, 752 [52 P.2d 928] .)*

[**655] [***638] In 1941, however, within several years of the enactment of the modern Business and Professions Code, this court in *Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534 [110 P.2d 992] (Webster)* reviewed the accuracy of that general characterization. In *Webster,* we addressed the claim that, because a disciplinary proceeding is quasi-criminal in nature, the rules regarding the burden and quantum of proof should be analogous to those applicable to a criminal proceeding. Although we observed that an analogy between a proceeding to revoke a license and a criminal trial was recognized in a number of the earlier cases, we noted that in those instances the [*785] Legislature had "provided for forfeiture of the professional license as an extra penalty to be added by the criminal court after a conviction for violation of the statute." (*Id. at p. 537,* citing *Cavassa v. Off (1929) 206 Cal. 307, 312 [274 P. 523]).* We further observed that "language describing the revocation of a license as penal in nature is entirely inapplicable to an administrative proceeding . . . ." *(Webster, supra, 17 Cal. 2d 534, 537.)* We also recognized that, when "the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law." *(Webster, supra, 17 Cal. 2d at pp. 537-538,* citing *Suckow v. Alderson (1920) 182 Cal. 247 [187 P. 965]; Lanterman v. Anderson* (1918) 36 Cal. App.. 472 *[172 P. 625]* , and numerous out-of-state decisions.)

Following *Webster,* several decisions recognized that such administrative proceedings are not intended to punish the licensee, but rather to protect the public. In *West Coast etc. Co. v. Contractors' etc. Bd. (1945) 72 Cal. App. 2d 287 [164 P.2d 811] ,* for example, the court, relying upon *Webster,* and deriving its holding by analogy to early State Bar Act cases, rejected the contention that a licensed contractor is not required to testify in disciplinary proceedings. The court noted that "the purpose of a disciplinary proceeding . . . is to determine the fitness of a licensed contractor to continue in that capacity. It is not intended for the punishment of the individual contractor, but for the protection of the contracting business as well as the public by removing, in proper cases, either permanently or temporarily, from the conduct of a contractor's business a licensee whose method of doing business indicates a lack of integrity upon his part or a tendency to impose upon those who deal with him." *(72 Cal. App. 2d at pp. 301-302.)*

Subsequent decisions by the Courts of Appeal have held to the same effect with respect to a variety of professions, vocations, and businesses. (See, e.g., *Murrill v. State Board of Accountancy (1950) 97 Cal. App. 2d 709, 712 [218 P.2d 569]* [revocation of an accountant's license "is not penal in any respect, and its only purpose is to protect the public from incompetence and lack of integrity in those practicing trades and professionsl ; *Kendall v. Bd. of Osteopathic Examiners (1951) 105 Cal. App. 2d 239, 248-249 [233 P.2d 107]* [proceeding to revoke license of a non-drug-dispensing practitioner is not criminal in nature]; *Cornell v. Reilly (1954) 127 Cal. App. 2d 178, 184 [273 P.2d 572]* [proceeding to revoke liquor license is not for the primary purpose of punishment but "to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and [*786] to keep the regulated business clean and wholesome"]; [**656] [***639] *Furnish v. Board of Medical Examiners (1957) 149 Cal. App. 2d 326, 331 [308 P.2d*

924] [revocation or suspension of a license to practice medicine is not penal, but is intended "to protect the life, health and welfare of the people at large"]; *Ready v. Grady (1966)243 Cal. App. 2d 113, 116 [52 Cal. Rptr. 303]* [proceeding to revoke insurance agent's licenses was not criminal but had as its purpose the protection of the public].)

In the wake of these decisions recognizing the foregoing purpose of licensing statutes and related proceedings in other occupations and professions, the Legislature prefaced certain amendments to the Act with an uncodified section expressly stating its intent to protect the public health, safety, and welfare (Stats. 1963, ch. 2133, § 1, p. 4432), and subsequently added to the Act a separate code section declaring its intent that the mandate of the Board be to regulate the practice of architecture in the interest and for the protection of the public health, safety, and welfare (§ *5510.1,* as added by Stats. 1985, ch. 1223, § 2, p. 4163). The Legislature's stated purpose is analogous to that repeatedly and consistently recognized in the licensing laws applicable to numerous other professions and occupations. (See, e.g., *Viking Pools, Inc. v. Maloney, supra, 48 Cal. 3d 602, 606* [intent of contractors licensing statutes is to protect the public from the perils of contracting with dishonest or incompetent contractors]; *Bryce v. Board of Medical Quality Assurance (1986) 184 Cal. App. 3d 1471, 1476 [229 Cal. Rptr. 483]* [purpose of physician discipline is to " 'protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from ignorance or incompetency or a lack of honesty and integrity' "]; *Murrill v. State Board of Accountancy, supra, 97 Cal. App. 2d 709, 712* [purpose of license revocation is to protect the public from incompetence and lack of integrity in those practicing trades and professions] .)

As we recently reiterated in *Viking Pools, Inc. v. Maloney, supra, 48 Cal. 3d 602, 607,* footnote 4, if the purpose of a licensing statute is not to punish but to serve another legitimate governmental purpose, such as protecting the consumers and the public who deal with members of a particular profession or trade, the statute is considered nonpenal. Accordingly, we conclude that the Act before us is nonpenal in nature. As we also observed in *Viking Pools,* [HN8] when the Legislature's intent is to protect the health, safety, and welfare of the public rather than to serve punitive interests, that body additionally intends, in order to protect the public, that the law be interpreted broadly so that particular licensees not be able easily to evade the statute's protective purposes. (*Id. at pp. 606-607.)* **(1d)** Considering the statutory [*787] scheme at issue in the present case, which evidences such a legislative intent to protect the public health, safety, and welfare, we construe the statutes broadly to preclude architects (and those holding themselves out as such) from evading the protective purposes of the Act.

[HN9] In general terms, decisional law long has recognized the authority of a governmental licensing entity to examine and determine, from the past conduct of a party, his or her fitness to undertake or continue a business or profession. (*McDonough v. Goodcell (1939) 13 Cal. 2d 741, 749-751 [91 P.2d 1035, 123 A.L.R. 1205]* [affirming denial, based upon past conduct, of bail bondsmen's licenses to individuals who long had conducted bail bond business prior to enactment of Bail Bond Regulatory Act]; *Foster v. Police Commissioners (1894) 102 Cal. 483, 490-493 [37 P. 763]* [affirming validity of ordinance authorizing denial of license to sell liquor based upon conduct (employment of females to wait on customers) not then prohibited by law, occurring prior to issuance of license]; *Murrill v. State Board of Accountancy, supra, 97 Cal. App. 2d 709, 711* [upholding revocation of accountant's license based upon conviction of offense committed prior to enactment of Accountancy Act].) As we have observed, past conduct of this nature furnishes evidence of the unfitness of such persons as a class and is no less conclusive for having occurred prior to the inception of the authority under which it is examined. (See *McDonough v. Goodcell, supra, 13 Cal. 2d 741, 749-752;* [***640] [**657] *Foster v. Police Commissioners, supra, 102 Cal. 483, 490-492.)*

In common with numerous other statutory licensing schemes, the Act provides that conviction of a felony substantially related to the performance of his or her professional obligations is a ground for discipline of a licensed individual. (§ 5577). Presumably, that is because such a conviction is *evidence* of the unfitness to practice of the person convicted. (See *Foster v. Police Commissioners, supra, 102 Cal. 483, 492-493;* cf. *Ready v. Grady, supra, 243 Cal. App. 2d 113, 115-117* [expungement of conviction does not justify automatic reinstatement of license to sell insurance; affirmative showing of rehabilitation is required]; *Epstein v. California Horse Racing Board (1963) 222 Cal. App. 2d 831, 835, 836-841 [35 Cal. Rptr. 642]* [expungement of prior conviction does not prevent State Horse Racing Board from excluding petitioner from racing premises; basis for expulsion is the circumstances of the conduct resulting in conviction, rather than the conviction itself].)

In the same manner as provisions such as section 5577 (specifying that a conviction may be the basis for disciplinary action), *sections 5583* and *5584,* construed to apply to conduct occurring prior to licensure, consider wrongful conduct predating licensure as evidence of a licensee's unfitness to practice [*788] architecture. There is no reason why these sections may not be so applied in order to protect the public welfare when it is learned,

following licensure, that an architect previously committed acts of wrongful conduct that constitute evidence of unfitness to practice that profession.

(6) Finally, we examine several points made regarding the need to construe these statutory provisions in a manner consistent with constitutional principles. [HN10] A presumption exists that in enacting a statute, the Legislature did not intend it to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers. (*People v. Superior Court (Romero) (1996) 13 Cal. 4th 497, 509 [53 Cal. Rptr. 2d 789, 917 P.2d 628] ; Ector v. City of Torrance (1973) 10 Cal. 3d 129, 133 [109 Cal. Rptr. 849, 514 P.2d 433] ; Miller v. Municipal Court (1943) 22 Cal. 2d 818, 828 [142 P.2d 297].) Therefore, we frequently have observed that a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality. (Building Industry Assn. v. City of Camarillo, supra, 41 Cal. 3d 810, 816-817; Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 [135 Cal. Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]; In re Kay (1970) 1 Cal. 3d 930, 942 [83 Cal. Rptr. 686, 464 P.2d 142] .)*

(1e) Hughes contends that, as the United States Supreme Court and this court often have recognized, the right to pursue one's chosen profession is a fundamental liberty protected by the due process clauses of the Fifth and Fourteenth Amendments, and that therefore his license, once obtained, may not be revoked based upon prelicensure wrongful conduct. (7a) It is axiomatic that the right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the due process and equal protection clauses of the Fourteenth Amendment. (See *Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238-239 [77 S. Ct. 752, 755-756, 1 L. Ed. 2d 796, 64 A.L.R.2d 288]; Meyer v. Nebraska (1923) 262 U.S. 390, 399 [43 S. Ct. 625, 626-627, 67 L. Ed. 1042, 29 A.L.R. 1446]; Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 17 [95 Cal. Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; Bixby v. Pierno (1971) 4 Cal. 3d 130, 145, fn. 12 [93 Cal. Rptr. 234, 481 P.2d 242] .)* Therefore, for example, a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession. (*Arneson v. Fox (1980) 28 Cal. 3d 440, 448 [170 Cal. Rptr. 778, 621 P.2d 817] , Newland v. Board of Governors (1977) 19 Cal. 3d 705, 711 [139 Cal. Rptr. 620, 566 P.2d 254]; Cartwright v. Board of Chiropractic Examiners (1976) 16 Cal. 3d 762, 767 [129 Cal. Rptr. 462, 548 P.2d 1134] .)*

Consistent with that basic proposition, in the context of a variety of professions and vocations, we often have recognized that [HN11] an individual, [*789] having obtained the license required to engage in a particular profession [***641] or [**658] vocation, has a "fundamental vested right" to continue in that activity. *(Unterthiner v. Desert Hospital Dist. (1983) 33 Cal. 3d 285, 296-297 [188 Cal. Rptr. 590, 656 P.2d 554]* [physician licensed to practice medicine has a vested right to practice his profession]; see, e.g., *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 823 [140 Cal. Rptr. 442, 567 P.2d 1162]* [physician has a fundamental vested right to continue to practice in a hospital]; *Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal. 2d 831, 835 [123 P.2d 457]* [right to practice optometry is a vested property right]; *Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 84 [87 P.2d 848]* [funeral director's and embalmer's licenses characterized as "existing valuable privilege[s]"].)

(8) A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. For example, this court repeatedly has held, with exceptions not pertinent here, that the "independent judgment" standard of review must be applied to an administrative decision that substantially affects such a fundamental vested right. (See, e.g., *Anton v. San Antonio Community Hosp., supra, 19 Cal. 3d 802, 820-825; Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 34 [112 Cal. Rptr. 805, 520 P.2d 29]; Bixby v. Pierno, supra, 4 Cal. 3d 130, 144.)* [9]

> 9 Similarly, it has been held that procedural due process of law requires a regulatory board or agency to prove the allegations of an accusation filed against a licensee by clear and convincing evidence rather than merely by a preponderance of the evidence. (See, e.g., *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 184, fn. 1 [242 Cal. Rptr. 196, 745 P.2d 917]; Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 856 [185 Cal. Rptr. 601];* see also *Coffman v. Board of Architectural Examiners* (1933) 130 Cal. App.. 343, 347-348 *[19 P.2d 1002].)*

Nonetheless, as this court also has recognized, [BN12] the circumstance that an individual has acquired a license, and thus that the right to practice the particular profession or vocation has vested, does not affect the due process analysis. "There is little similarity between the analysis applied in determining (1) whether a right is a 'fundamental right' for equal protection/due process purposes on the one hand, and (2) [whether a right is a 'fundamental right' for purposes of deciding] which [level of] scrutiny is applicable for administrative review purposes, on the other. The principle of 'fundamentality" differs depending on the context or analysis within which the concept arises." (*Berlinghieri v. Department of Motor*

Vehicles (1983) 33 Cal. 3d 392, 397 [188 Cal. Rptr. 891, 657 P.2d 383].)

"The term 'vested' has been used in a nontechnical sense to denote generally a right 'already possessed' *(Bixby v. Pierno, supra, [4 Cal. 3d 130,]* [*790] 146) or 'legitimately acquired.' (*Strumsky v. San Diego County Employees Retirement Assn., supra, [11 Cal. 3d 28,]* 34.) On this basis, this court has distinguished generally between applicants and recipients in determining whether a right is 'vested' *for the limited purpose of determining the applicable scope of review." (Harlow v. Carleson (1976) 16 Cal. 3d 731, 735 [129 Cal. Rptr. 298, 548 P.2d 698] ,* italics added.)

(7b) Therefore, [HN13] the circumstance that a licensee is entitled to a higher standard of review or other procedural protections accorded by due process of law, because of his or her status as possessor of a fundamental vested right, does not compel the conclusion that the particular licensing board must limit disciplinary actions only to conduct occurring after licensure. "The general right to engage in a trade, profession or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order and safety; such regulations do not deprive owners of property without due process of law. [Citation.] No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers. [Citations.]" (*Gregory v. Hecke* (1925) 73 Cal. App.. 268, 283 *[238 P. 787];* see *Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 550-551* [***642] *[54 Cal. Rptr. 2d 128];* [**659] *Kenneally v. Medical Board (1994) 27 Cal. App. 4th 489, 497 [32 Cal. Rptr. 2d 504]; Murrill v. State Board of Accountancy, supra, 97 Cal. App. 2d 709, 711-712.)*

(1f) Thus, although Hughes is correct that his status as a licensee entitles him to certain procedural protections consistent with a vested interest, he does not possess a substantive vested right to continue to pursue his occupation. Nor does his status as a licensee ensure that his license may not be revoked based upon his prelicensure wrongful conduct.

The Court of Appeal asserted that the Board's construction of *sections 5583* and *5584* to permit disciplinary action based upon wrongful conduct arising prior to licensure would "cast a constitutional shadow over the Act" and "pose grave substantive due process questions." The appellate court observed that whenever (in the words of the court) a "citation for revocation of a license is filed," the citation may contain an assessment of a civil penalty *(§ 5566),* and, following exhaustion of the procedures for review, the Board may apply in superior court for a judgment in the amount of the civil penalty (§ 5566.2, subd. (d)) ranging from $ 50 to $ 2,000 for each violation *(Cal. Code Regs., tit. 16, § 152).* The Court of Appeal determined that construing *sections 5583* and *5584* to permit the Board to seek revocation of a license based upon prelicensure wrongful conduct also would permit the [*791] imposition of such a fine based upon conduct that occurred prior to licensure in another jurisdiction.

We do not perceive the "constitutional shadow" cast, nor the "grave substantive due process questions" posed, by a construction of these sections that permits the discipline of a licensee based upon prelicensure wrongful conduct. The Act does not contemplate that a "citation for revocation of a license" will be filed upon revocation of a license, nor that a fine that may be assessed, as a result of the citation, will be based upon revocation of the license. [10]

10 The Court of Appeal did not suggest that the fine that may be imposed as a form of discipline pursuant to *section 5565* against the holder of a license for a cause specified in section 5577 (conviction related to the practice of architecture) is unconstitutional. As discussed above, the conduct underlying such a conviction itself may predate licensure.

The Board may on its own motion, or must upon the filing of a complaint by any person, investigate the actions of any architect. (§ *5560.)* Having investigated, it may suspend or revoke the license of one who has committed an act or omission constituting a ground for discipline (§ *5560, 5565), or* on probable cause it may issue a citation to a licensee (or to an unlicensed individual acting in the capacity of an architect) (§ *5566).* The citation itself may not be issued until a Board designee has reviewed the matter, attempted to discuss and resolve the alleged violation with the licensed or unlicensed individual, made findings of fact and a recommendation, and concluded that probable cause exists. (§ *5566.)*

As we have explained above in the part of our opinion considering whether articles 4 and 5 separately address prelicensure and postlicensure misconduct, it is only after a citation has issued, and the various other procedural steps have been taken, that a failure to comply with provisions of the decision or to pay any assessed penalty may constitute a ground for discipline. (§ 5566.2, subds. (c), (e).) As we have seen, the citation and any civil penalty provided are not themselves a form of discipline, but rather are corrective steps initiated *in lieu of* discipline. No constitutional violation arises from an interpretation of *sections 5583* and *5584* (which themselves are part of the separate *disciplinary* portion of article 5) that permits consideration of prelicensure conduct.

Hughes contends that a construction of *sections 5583* and *5584* permitting discipline based upon prelicensure wrongful conduct that occurred in another state would be inconsistent with precedent suggesting that the Legislature generally may not enact statutes applicable to incidents or transactions arising outside this state. (See *North Alaska Salmon Co. v. Pillsbury (1916)* [*792] *174 Cal. 1, 4 [162 P. 93] .)* Hughes emphasizes that his practice without a license in Virginia and Washington, D.C., did not harm any resident of (or property in) California.

[**660] [***643] As was recognized by the Court of Appeal, conduct occurring anywhere, that falls within the statutory grounds for *denial* of a license, may provide the basis for such denial without offending jurisdictional principles. It is obvious that the statutory provisions affording a basis for denial of a license because of prior convictions, dishonest conduct, or certain other conduct for which a licensee would be subject to discipline, apply whether the conduct occurred in this state or in another jurisdiction. The mere circumstance that the act occurring within the boundaries of another state or locality is being scrutinized at a different stage of the Board's administrative authority over the subject--that is, following licensure--does not undermine the agency's authority to act based upon the out-of-state conduct.

In this state and others, postlicensure disciplinary proceedings have been based upon acts that occurred prior to licensure and outside the state in which the individual was licensed. (See, e.g., *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 464 [163 Cal. Rptr. 566]* [proceedings to revoke license of California physician following conviction based upon prelicensure filing of fraudulent tax returns in Mississippi]; *Office of Disciplinary Counsel v. Clark (1988) 40 Ohio St.3d 81, 81 [531 N.E.2d 671]* [disciplinary proceedings against attorney in Ohio following conviction based upon prelicensure trafficking in controlled substances in Virginia].) Although in these decisions, the disciplinary action was based upon the convictions that occurred following licensure, that circumstance did not affect the conclusion that the discipline meted out by one jurisdiction properly could be based upon conduct that occurred in another jurisdiction prior to licensure in the jurisdiction imposing that discipline. As we have discussed above, the decisional law has distinguished between the facts that in themselves justify discipline, giving rise to a conviction, and the conviction itself, which as a matter of law may be expunged from the licensee's or applicant's record.

In addition, the administrative licensing scheme applicable in the present case, as well as the licensing schemes applicable to a number of other professions, all provide that a California licensee who has suffered disciplinary action by an agency regulating the same profession in a different jurisdiction is subject to discipline in this state based solely upon the disciplinary determination of the other jurisdiction. (§ 5586; see, e.g., § 2305 [physicians], 2761, subd. (a)(4) [nurses], 5100, subd. (g); [accountants], 6049.1 [attorneys]; see also Annot., Disbarment or Suspension of [*793] Attorney in One State as Affecting Right to Continue Practice in Another State *(1977) 81 A.L.R.3d 1281.)* If jurisdictional principles precluded the imposition of discipline upon a licensee in this state for conduct occurring outside the state, statutes of that nature also would offend those jurisdictional principles. Nonetheless, in reviewing such statutes, our courts have concluded otherwise. (*Marek v. Board of Podiatric Medicine, supra, 16 Cal. App. 4th 1089, 1097-1098; Clare v. State Bd. of Accountancy, supra, 10 Cal. App. 4th 294, 303-306.)*

Hughes contends that to construe the statutes to permit discipline of a current holder of a license for conduct occurring prior to issuance of the license would constitute impermissible retroactive application of the statutes. (9) " [HN14] 'A statute is retroactive if it substantially changes the legal effect of past events. [Citations.] A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. [Citations.]' [Citation.] The rule is also stated: [11N15] 'A retroactive statute is one which " 'affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.' " [Citation.]' [Citations.] The theory against retroactive application of a statute is that the parties affected have no notice of the new law affecting past conduct. [Citation.] " *(Borden v. Division of Medical Quality (1994) 30 Cal. App. 4th 874, 879-880 [35 Cal. Rptr. 2d 905]; Fox v. Alexis (1985) 38 Cal. 3d 621, 627 [214 Cal. Rptr. 132, 699 P.2d 309] .)* (1g) This theory obviously is inapplicable in the present case, in which the relevant statutes were enacted in essentially the same form in 1941, and the conduct that gave rise [**661] [***644] to Hughes's discipline by the Board occurred during the 1980's.

III

(10a) Nor does the doctrine of equitable estoppel prevent the Board from disciplining Hughes based upon wrongful conduct arising prior to licensure. We previously have recognized that [IAN161 this doctrine ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. *(Bib7e v. Committee of Bar Examiners (1980) 26 Cal. 3d 548, 553 [162 Cal. Rptr. 426, 606 P.2d 733]; Hock Investment Co. v. City and County of San Francisco (1989) 215 Cal. App. 3d 438, 449 [263 Cal. Rptr. 665] .)* In the present case, Hughes has not demonstrated that grave injustice would result from the delay that occurred in imposing discipline. Application of the equitable estoppel

doctrine would work to defeat the strong public policy of regulating the architectural profession so as to exclude from practice those individuals who, by their wrongful conduct, have demonstrated their unfitness to practice within this state. (See *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 219 [252 Cal. Rptr. 293]* [*794] [equitable estoppel not applied when strong public policy underlies regulation of the types of persons permitted to wager on legitimate horse racing and when the asserted unfairness resulting from the agency's delay in disciplining a licensee, based upon prelicensure misconduct, is slight].)

(11) Moreover, [BN17] the doctrine of equitable estoppel may be invoked only when the party to be estopped is apprised of the facts and intends that his or her conduct will be acted upon, and the other party is ignorant of the true facts and relies upon the conduct to his or her detriment. (See *Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 725 [125 Cal. Rptr. 896, 543 P.2d 264]; City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489 [91 Cal. Rptr. 23, 476 P.2d 423] .)* **(10b)** It is evident that, at the time it issued the license, the Board did not have full knowledge of the circumstances giving rise to the allegations of out of state wrongful conduct, nor had it represented that it would not act to discipline the licensee based upon conduct arising prior to licensure. Under these circumstances, the doctrine may not be applied.

Similarly, the doctrine of collateral estoppel does not preclude the Board from disciplining Hughes based upon wrongful conduct arising prior to licensure. (12) As we have observed in other cases, [HN18] that doctrine prevents an administrative agency from reconsidering, in the absence of new facts, its prior final decision made in a judicial or quasi-judicial capacity in the context of an adversary hearing. (*Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control (1961) 55 Cal. 2d 728, 731-733 [13 Cal. Rptr. 104, 361 P.2d 712]; Aylward v. State Board etc. Examiners (1948) 31 Cal. 2d 833, 839 [192 P.2d 929];* see *People v. Sims (1982) 32 Cal. 3d 468, 481, 484-486 [186 Cal. Rptr. 77, 651 P.2d 321] .) (10c)* In issuing Hughes a license, the Board did not make a final determination, within the context of an adversary hearing, of his fitness to practice architecture based upon a review of his prelicensure misconduct. Nor did the Board, in issuing that license, have before it the complete record as subsequently developed during the disciplinary hearing. The doctrine of collateral estoppel is inapplicable in this context.

We caution that the Board may not, in reliance upon our decision here, simply defer to the postlicensure phase its examination of questions raised concerning an applicant's background, and that, in an egregious case, the doctrines of estoppel or laches might have application were the Board to delay inordinately its investigation of an application despite substantial questions raised at the licensing stage concerning the applicant's character or fitness. We believe, however, that these doctrines, considered together with the period of limitations imposed by statute upon the Board's authority to [*795] file an accusation, sufficiently protect the licensee, and that the statutes here at issue properly may be construed to permit discipline for the prelicensure wrongful conduct committed in this case.

[**662] [***645] IV

We reverse the judgment of the Court of Appeal and remand the matter to that court to permit it to decide the remaining issue that it previously did not consider--whether the Board imposed an excessive sanction in revoking Hughes's license. (*DaFonte v. UpRight, Inc. (1992) 2 Cal. 4th 593, 604-605 [7 Cal. Rptr. 2d 238, 828 P.2d 140];* Cal. Rules of Court, rule 29.4(b).)

Kennard, J., Baxter, **J.,** Werdegar, **J.,** Brown, **J.,** and Croskey, J.; concurred. *

* Associate Justice of the Court of Appeal, Second District, Division Three, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

DISSENT BY: MOSK

DISSENT

MOSK, J.,

Dissenting.--Though the majority's goal of protecting the public is laudable, their solution may inadvertently achieve the opposite effect. It will allow the Board of Architectural Examiners to escape the consequences of disregarding its statutory mandate, punishing Hughes instead. The board concedes, moreover, that " [n]egligence is not an issue in this case." Rather, the issue is the tangled web Hughes wove for himself when first he practiced to deceive.

Hughes contends that the board improperly "appears to [assert] that it needs two bites at the apple--one at license time, another at discipline time--in order to be able to effectively deal with prelicense out-of-state misconduct . . ." I agree. The Court of Appeal correctly held that the statutes Hughes purportedly violated do not apply to him.

Business and Professions Code section 5510.1 provides: "The Legislature finds and declares that it is the mandate of the board to regulate the practice of architecture in the interest and for the protection of the public health, safety, and welfare. For this purpose, the board shall delineate the minimum professional qualifications and performance standards for admission to and practice

of the profession of architecture. *The board shall establish a fair and uniform enforcement policy to deter and prosecute violations of this chapter* or any rules and regulations promulgated pursuant to this chapter to provide for the protection of the consumer." (Italics added.)

By ordering the board to "establish a fair and uniform enforcement policy," the Legislature also meant for the board to enforce such a policy. (*Bus. & Prof. Code, § 5526.)* The board failed to comply.

[*796] Hughes obtained his California license to practice architecture September 10, 1990. On his application, dated February 22 of that year, he checked a box on question No. 8 declaring that he had never "been convicted by a court of any offense."

The board found that in a follow-up letter to the board's examiners, sent March 8, 1990, Hughes "related some of his problems with his licensed status and [that] the criminal charges against him had been dismissed." "As a result," Hughes explained in the March 8 letter, "there are no charges pending against me nor will any other criminal charges be brought against me in Virginia. For practical as well as legal purposes, I have no record."

The board received the March 8 letter but did not investigate the problems of which Hughes had given notice. In failing to do so, it disregarded *Business and Professions Code sections 480, subdivision (a)(2),* and *5552, subdivision (a),* which required it to reject Hughes's application. Apparently the March 8 letter was filed and forgotten. The board admitted at trial that it had made a "mistake" in processing his application. Only in May 1991, on receipt of a letter from the National Council of Architectural Registration Boards advising that Hughes may have been denied registration as an architect in other jurisdictions "on the basis of character," did the board begin its inquiry.

The board found that Hughes "did not respond falsely to question 8 on his application. [He] did falsely state in his letter of March 8, 1990, that the charges against him had been dropped. The charges were in fact dismissed in May. However, the evidence indicates that [Hughes] made his statement in error, not as a knowing misstatement."

[**663] [***646] Nevertheless, the board revoked his license, solely under the authority of *Business and Professions Code sections 5583* and *5584,* evidently on the basis of misconduct prior to obtaining it. The trial court denied a petition for writ of administrative mandate *(Code Civ. Proc., § 1094.5),* but the Court of Appeal reversed, explaining that his license was revoked under statutes that did not apply to him.

The relevant statutes provide: "The fact that, in the practice of architecture, the holder of a license has been guilty of fraud or deceit constitutes a ground for disciplinary action." (*Bus. & Prof. Code, § 5583.)* "The fact that, in the practice of architecture, the holder of a license has been guilty of negligence or willful misconduct constitutes a ground for disciplinary action." *(Id., § 5584.)* Hence, to be disciplined under these statutes, the licensee must (1) be the holder of a license and (2) have committed the wrongful act "in the practice of architecture."

[*797] The "practice of architecture .. . is defined as offering or performing, or being in responsible control of, professional services which require the skills of an architect . . . ." (*Bus. & Prof. Code, § 5500.1, subd. (a).)* The prior version of this statute was not materially different. (Stats. 1986, ch. 541, § 2, p. 1938.) Hence, nobody can be engaged in the "practice of architecture" without being an "architect."

But "[a's used in this chapter *[Business and Professions Code sections 5500- 5610.7],* architect means a person who is licensed to practice architecture in this state under the authority of this chapter." (*Bus. &Prof Code, § 5500.)* When Hughes committed his wrongful acts, he was not "licensed to practice architecture in this state . . . ." *(Ibid.)* Hence he cannot be disciplined under the statutes in question.

Apparently uncomfortable with the substance of Hughes's point, the board, in the main, argues that he did not raise it below and may not do so now. It then adds, "In any event[,] as the unchallenged factual findings . . . clearly established, Hughes'[s] misconduct was committed in the practice of architecture." I remain unconvinced. With regard to the procedural point, Hughes raised the question whether he may be disciplined under *Business and Professions Code section 5583* or *5584,* and he has sufficiently preserved his claim. With regard to the board's substantive comment, the factual findings have nothing to do with any statutory limitations.

The majority refer to the need to protect the public. That is indeed the board's duty. (*Bus. & Prof. Code, § 5510.1.)* The possible consequences of architectural error require no less. But when, as appears from the record, the board fails in its duty, it is the board's procedures that should be adjusted. We should not instead interpret the statutes to rescue the board from its own inattention to Hughes's application.

The statutory construction that the majority prefer is implausible. The Court of Appeal explained that such a "construction would unlink the connection between the holder of a license and the holder's misconduct. Under [that] view, these statutes could be violated by an unlicensed person who commits architectural misconduct anywhere in the world if perchance that person should later become licensed in California. Such a strained con-

struction is contrary to the ordinary meaning of the statutory language."

The Court of Appeal also noted that "whenever a citation for revocation of a license is filed, the citation may 'contain an 'assessment of a civil penalty.' *([Bus. & Prof Code,] § 5566.)* After exhaustion of the review procedures, the Board may apply to the appropriate superior court for a judgment in the [*798] amount of the civil penalty. *([Id.,] §* 5566.2, subd. (d).) Under the regulations adopted by the Board, the assessments may range from $ 50 to $ 2,000 for each violation depending upon the gravity of the violation and its consequences. (*Cal. Code Regs., tit. 16, § 152.)* Thus, under the construction advanced by the Board, plaintiff could have been fined under the Act for conduct committed in another jurisdiction when he was a nonresident and years before he was licensed by the Board in California. . . . We would be hard pressed to find a rational basis for the imposition of such a retroactive, extraterritorial fine."

[**664] [***647] The Court of Appeal also identified another part of the statutory scheme that calls into doubt the majority's interpretation of it. "After an investigation, if the executive officer of the Board has probable cause to believe that a licensee has violated the Act, the officer may issue a citation to the licensee. But before a citation may issue, the executive officer shall submit the alleged violation to a least one designee of the Board who is a certificate holder or a staff architect. 'The review shall include attempts to contact the licensee or unlicensed individual *to discuss and resolve the alleged violation.' ([Bus. & Prof. Code,] § 5566,* italics added.) Obviously, this review procedure could not be applied to a[n] unlicensed nonresident who acted years before in another state. It presupposes that the unlicensed person committed his acts in California or that the violation occurred after the accused was licensed to practice architecture in California."

The majority and I read the statutory scheme differently. Evidently they emphasize *skills,* whereas I emphasize *architect,* in construing *Business and Professions Code section 5500.1's* definition of the practice of architecture "as offering or performing, or being in responsible control of, professional services which require the *skills* of an *architect . . . ." (Id.,* subd. (a), italics added.) The meaning of the statutes in question is not entirely clear. But the majority do not satisfactorily address the incongruities their interpretation creates in the statutory scheme, as identified by the Court of Appeal.

Moreover, the Legislature has distinguished between misconduct by a licensee, i.e., an architect, acting "in the practice of architecture" (*Bus. & Prof. Code, § 5583, 5584)* and misconduct by "an unlicensed individual acting in the capacity of an architect . . ." *(id., § 5566).*

If Hughes had committed fraud in applying for a California license, he could be sanctioned. (*Bus. & Prof. Code, § 480, subd. (c), 5552, subd. (a), 5560.)* If he had committed malpractice or misconduct after obtaining his California license, he could be sanctioned. *(Id., § 5583, 5584.)* But neither *section 5583* nor *5584 of the Business and Professions Code* provides a [*799] sanction for the prelicensure misconduct the board found Hughes to have committed--misconduct that his own warning had given the board notice to investigate.

I would affirm the Court of Appeal's judgment.

The petition of appellant Charles Scott Hughes for a rehearing was denied May 20, 1998. Chin, J., did not participate therein. Mosk, J., was of the opinion that the petition should be granted.

TAB “17”

LEXSEE

Caution
As of: Jun 25, 2010

LONG BEACH UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Appellants; MARK H. BLOODGOOD, as Auditor-Controller, etc., et al., Defendants and Respondents

No. B033742

Court of Appeal of California, Second Appellate District, Division Five

225 Cal. App. 3d 155; 275 Cal. Rptr. 449; 1990 Cal. App. LEXIS 1198

November 15, 1990

SUBSEQUENT HISTORY: [***1] Appellants' petitions for review by the Supreme Court were denied February 28, 1991. Lucas, C. J., did not participate therein.

PRIOR HISTORY: Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.

DISPOSITION: We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. Former Revenue and Tax Code section 2234 does not provide reimbursement of the subject claim. Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against certain funds appropriated through subsequent budget acts. We affirm the decision of the trial court that the Fines [***2] and Forfeitures Funds are not "reasonably available" to satisfy the Claim. Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order. The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant state challenged an order from the Superior Court of Los Angeles County (California) stating that it was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools, and cross-appellant challenged that part of the order stating that certain funds were not available for this reimbursement.

OVERVIEW: The California Department of Education issued an executive order mandating expenditures to integrate the schools, and when the legislature deleted the requested funding from its budget, cross-appellant school district filed a petition to compel reimbursement after the Board of Control approved the claim. The trial court stated that appellant state was required to make these reimbursements and designated specific funds as reasonably available for the payments, but also ruled that certain funds were not available for these payments. On appeal, the court affirmed the decision as modified, holding that the doctrines of collateral estoppel and waiver were inapplicable and that the trial court should have allowed appellant to challenge the initial decisions of Board of Control in this matter. However, the court concluded that as a matter of law the executive order was a reimbursable state mandate pursuant to Cal. Const. art. XIII B, § 6, not pursuant to former Cal. Rev. & Tax.

Code § 2234. The court modified the decision by striking certain funds as sources of reimbursement and affirmed that portion of the order stating that certain funds were not available for the payments.

OUTCOME: The court affirmed the order stating that appellant state was required to reimburse cross-appellant school district for mandated expenditures to integrate the schools because the executive order was a reimbursable state mandate under the California constitution and modified the designated funds for payment. The case was remanded to determine if unexpended, unencumbered funds existed in the approved budget line item account numbers.

CORE TERMS: reimbursement, executive order, school district, expenditure, mandated, reimburse, state-mandated, appropriation, state mandate, local governments, reasonably available, reimbursable, budget, levels of service, line item, segregation, funding, appropriated, alleviate, local agencies, ethnic, collateral estoppel, fiscal years, estoppel, guidelines, entity, desegregation, special fund, controller, budgets acts

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN1]Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. The traditional elements of collateral estoppel include the requirement that the prior judgment be "final."

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2]Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with respect to action by the administrative agency (Cal. Civ. Proc. Code § 1094.5(a)); and (2) the decision must have conclusive effect. A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. Next, the decision must have conclusive effect. In other words, the decision must be free from direct attack. A direct attack on an administrative decision may be made by appeal to the superior court for review by petition for administrative mandamus. Cal. Civ. Proc. Code § 1094.5. A decision will not be given collateral estoppel effect if such appeal has been taken or if the time for such appeal has not lapsed.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation
Civil Procedure > Appeals > Standards of Review
[HN3]A waiver occurs when there is an existing right, actual or constructive knowledge of its existence, and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived.) Ordinarily, the issue of waiver is a question of fact which is binding on the appellate court if the determination is supported by substantial evidence. However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference.

Governments > State & Territorial Governments > Relations With Governments
[HN4]See Cal. Const. art. XIII B, § 6.

Constitutional Law > State Constitutional Operation
[HN5]In construing the meaning of the Cal. Const. art. VIIIB, § 6, the court must determine the intent of the voters by first looking to the language itself that should be construed in accordance with the natural and ordinary meaning of its words.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN6]Lack of subject matter jurisdiction may be raised at any time.

Governments > Legislation > Interpretation
[HN7]A statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the legislature. The legislative history of a statute may be considered in ascertaining legislative design.

Constitutional Law > Separation of Powers
Governments > Courts > Authority to Adjudicate

[HN8]A trial court cannot compel the legislature either to appropriate funds or to pay funds not yet appropriated. Cal. Const. art. III, § 3; art. XVI, § 7. However, no violation of the separation of powers doctrine occurs when a trial court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are "reasonably available" for reimbursement when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriations specifically refer to the particular expenditure or must past administrative practice sanction coverage from a particular fund.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district filed a claim with the state Board of Control asserting that its expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through an executive order (in the form of regulations issued by the state Department of Education) and were reimbursable pursuant to former Rev. & Tax. Code, § 2234, and Cal. Const., art. XIII B, § 6. The board approved the claim, but the Legislature deleted the requested funding from an appropriations bill and enacted a "finding" that the executive order did not impose a statemandated local program. The district then filed a petition to compel reimbursement pursuant to Code Civ. Proc., § 1085, and a complaint for declaratory relief. The trial court ruled that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the board's decisions. The court's judgment in favor of the district identified certain funds previously appropriated by the Legislature as "reasonably available" for reimbursement of the claimed expenditures. (Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.)

The Court of Appeal modified the trial court's decision by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts," and by including charging orders against certain funds appropriated through subsequent budget acts. The court affirmed the judgment as so modified and remanded to the trial court to determine whether at the time of its order, there were, in the funds from which reimbursement could properly be paid, unexpended, unencumbered funds sufficient to satisfy the judgment. The court held that since the doctrines of collateral estoppel and waiver were inapplicable to the facts of the case, the trial court should have allowed the state to challenge the board's decisions. However, the court also held that the executive order required local school boards to provide a higher level of service than is required constitutionally or by case law and that the order was a reimbursable state mandate pursuant to Cal. Const., art. XIII B, § 6. The court further held that former Rev. & Tax. Code, § 2234, did not provide reimbursement of the subject claim. (Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a) (1b) (1c) (1d) Judgments § 88--Collateral Estoppel--Finality of Judgment--Administrative Order--Where Appeal Still Possible. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of administrative collateral estoppel was inapplicable and did not prevent the state from litigating whether the state Board of Control properly considered the subject claim and whether the claim was reimbursable. The board had approved the claim but the Legislature had deleted the requested funding from an appropriations bill. The board's decisions were administratively final, for collateral estoppel purposes, since no party requested reconsideration within the applicable 10-day period, and no statute or regulation provided for further consideration of the matter by the board. However, a decision will not be given collateral estoppel effect if an appeal has been taken or if the time for such appeal has not lapsed. The applicable statute of limitations for review of the board's decisions was three years, and the school district's action was filed before this period lapsed.

(2) Judgments § 88--Collateral Estoppel--Finality of Judgment. --Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. The traditional elements of collateral estoppel include the requirement that the prior judgment be "final."

(3a) (3b) Administrative Law § 81--Judicial Review and Relief--Finality of Administrative Action--For Collateral Estoppel Purposes. --Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: the decision must be final with respect to action by the administrative agency, and the decision must have conclusive effect. A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. To have

conclusive effect, the decision must be free from direct attack.

(4) Limitation of Actions § 30--Commencement of Period. --A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon.

(5a) (5b) (5c) Estoppel and Waiver § 23--Waiver--State's Right to Contest Board of Control's Findings as to State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of waiver did not preclude the state from contesting the state Board of Control's previous findings that the subject claim was reimbursable (the Legislature subsequently deleted the requested funding from an appropriations bill). The statute of limitations applicable to an appeal by the state from the board's decisions had not run at the time the state raised its affirmative defenses in the district's action, and this assertion of defenses was inconsistent with an intent on the state's part to waive its right to contest the board's decisions.

(6) Estoppel and Waiver § 19--Waiver--Requisites. --A waiver occurs when there is an existing right, actual or constructive knowledge of its existence, and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. Ordinarily the issue of waiver is a question of fact that is binding on the appellate court if the determination is supported by substantial evidence. However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference.

(7) Estoppel and Waiver § 6--Equitable Estoppel--Challenge to State Board of Control's Findings as to State-mandated Costs--Absence of Confidential Relationship. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the state was not equitably estopped from challenging the state Board of Control's decisions finding that the subject claim was reimbursable as a state-mandated cost (the Legislature subsequently deleted the requested funding from an appropriations bill). In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. There was no confidential relationship, and since the statute of limitations did not bar the state from litigating the mandate and reimbursability issues, the doctrine was inapplicable.

(8) Appellate Review § 145--Function of Appellate Court--Questions of Law. --On appeal by the state in an action by a school district to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the appellate court's conclusion that the trial court erred in failing to consider the merits of the state's challenge to the state Board of Control's decisions that the subject claims were reimbursable as state-mandated costs did not require that the matter be remanded to the trial court for a full hearing, since the question of whether a cost is state-mandated is one of law.

(9a) (9b) (9c) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures. --A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since an executive order (in the form of regulations issued by the state Department of Education) required a higher level of service and constituted a state mandate. The requirements of the order went beyond constitutional and case law requirements in that they required specific actions to alleviate segregation. Although under Cal. Const., art. XIII B, § 6, subd. (c), the state has discretion whether to reimburse pre-1975 mandates that are either statutes or executive orders implementing statutes, it cannot be inferred from this exception that reimbursability is otherwise dependent on the form of the mandate. Further, the district's claim was not defeated by Gov. Code, §§ 17561 and 17514, limiting reimbursement to certain costs incurred after July 1, 1980, the effective date of Cal. Const., art. XIII B, since the limitations contained in those sections are confined to the exception contained in Cal. Const., art. XIII B, § 6, subd. (c).

(10) State of California § 11--Fiscal Matters--Reimbursement to Local Governments for State-mandated Costs. --The subvention requirement of Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), is directed to state-mandated increases in the services provided by local agencies in existing "programs." The drafters and electorate had in mind the commonly understood meaning of the term--programs that carry out the governmental function of providing services to the public, or laws that, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(11) Constitutional Law § 13--Construction of Constitutions--Language of Enactments. --In construing a constitutional provision enacted by the voters, a court must determine the intent of the voters by first looking to the language itself, which should be construed in accordance with the natural and ordinary meaning of its words.

(12) State of California § 11--Fiscal Matters--Reimbursement to Local Governments for State-mandate Costs--Executive Order as Mandate. --In Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), "mandates" means "orders" or "commands," concepts broad enough to include executive orders as well as statutes. The concern that prompted the inclusion of § 6 in art. XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services that the state believed should be extended to the public. It is clear that the primary concern of the voters was the increased financial burdens being shifted to local government, not the form in which those burdens appeared.

(13) Administrative Law § 88--Judicial Review and Relief--Exhaustion of Administrative Remedies--Claim by School District for Reimbursement of State-mandated Costs. --A school district did not fail to exhaust its administrative remedies in seeking reimbursement for expenditures related to its efforts to alleviate racial and ethnic segregation, based on its claim that the expenditures were mandated by a state executive order, where the state Board of Control approved the district's reimbursement claim, even though the state Commission on State Mandates subsequently succeeded to the functions of the board and the district never made a claim to the commission. The board's decisions in favor of the district became administratively final before the commission was in place, and there was no evidence that the commission did not consider these decisions by the board to be final. Although the commission was given jurisdiction over all claims that had not been included in a local government claims bill enacted before January 1, 1985, the subject claim was included in such a bill (which was signed into law only after the recommended appropriation was deleted). Under the statutory scheme, the district pursued the only relief that a disappointed claimant at such a juncture could pursue--an action in declaratory relief to declare an executive order void or unenforceable and to enjoin its enforcement. There was no requirement to seek further administrative review.

(14) Courts § 20--Subject Matter Jurisdiction--When Issue May Be Raised. --Lack of subject matter jurisdiction may be raised at any time.

(15a) (15b) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Applicability of Statute Requiring Reimbursement of Subsequently Mandated Costs. --A school district was not entitled to reimbursement on the basis of former Rev. & Tax. Code, § 2234 (reimbursement of school district for costs it is incurring that are subsequently mandated by a state), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since the executive order (in the form of regulations issued by the state Department of Education) that required the district to take specific actions to alleviate segregation fell outside the purview of § 2234. The "subsequently mandated" provision of § 2234 originally was contained in sections that set forth specific date limitations, and the Legislature likewise intended to limit claims made pursuant to § 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs. Since the executive order fell outside the January 1, 1978, limits set by Rev. & Tax. Code, § 2207.5, Rev. & Tax. Code, § 2234, did not provide reimbursement to the district.

(16) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts. --A statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. The legislative history of the statute may be considered in ascertaining legislative design.

(17a) (17b) (17c) Constitutional Law § 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds--Reimbursement of State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court's award of reimbursement to the district, on the ground that the district's expenditures were mandated by an executive order, from appropriated funds and specified budgets and accounts did not constitute an invasion of the province of the Legislature or a judicial usurpation of the republican form of government guaranteed by U.S. Const., art. IV, § 4, except insofar as it designated the Special Fund for Economic Uncertainties as a source for reimbursement. The specified line item accounts for the Department of Education, the Commission on State Mandates, and the Reserve for Contingencies and Emergencies provided funds for a broad range of activities similar to those specified in the executive order and thus were reasonably

available for reimbursement. However, remand to the trial court was necessary to determine whether these sources contained sufficient unexhausted funds to cover the award.

(18) Constitutional Law § 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds. --A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are "reasonably available" for reimbursement of local government expenditures when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure, nor must past administrative practice sanction coverage from a particular fund.

(19) Appellate Review § 162--Modification--To Add Charge Order. --An appellate court is empowered to add a directive that a trial court order be modified to include charging orders against funds appropriated by subsequent budgets acts.

(20) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Effect of Legislative Finding That Costs Not State-mandated. --A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, notwithstanding that after the state Board of Control approved the district's reimbursement claim, the Legislature enacted a "finding" that the executive order requiring the district to undertake desegregation activities did not impose a state-mandated local program. Unsupported legislative disclaimers are insufficient to defeat reimbursement. The district had a constitutional right to reimbursement, and the Legislature could not limit that right.

(21) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Department of Education Budget as Source. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in ordering reimbursement to take place in part from the state Department of Education budget. Logic dictated that department funding be the initial and primary source for reimbursement: given the fact that the executive order was issued by the department, the evidence overwhelmingly supported the trial court's finding of a general relationship between the department budget items and the reimbursable expenditures.

(22) Interest § 8--Rate--Reimbursement of School District's State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in awarding the district interest at the legal rate (Cal. Const., art. XV, § 1, par. (2)), rather than at the rate of 6 percent per annum pursuant to Gov. Code, § 926.10. Gov. Code, § 926.10, is part of the California Tort Claims Act (Gov. Code, § 900 et seq.), which provides a statutory scheme for the filing of claims against public entities for alleged injuries. It makes no provision for claims for reimbursement for state-mandated expenditures.

(23) Schools § 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--County Fines and Forfeitures Funds as Source. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in determining that moneys in the Fines and Forfeiture Funds in the custody and possession of the county auditor-controller for transfer to the state treasury were not reasonably available for reimbursement purposes. There was no evidence in the record showing the use of those funds once they were transmitted to the state, nor was there any evidence indicating that those funds were then reasonably available to satisfy the district's claim. It could not be concluded as a matter of law that a general relationship existed between the funds and the nature of the costs incurred pursuant to the executive order. Further, there was no ground on which the funds could be made available to the district while in the possession of the auditor-controller.

COUNSEL: John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General,

Joseph R. Symkowick and Joanne Lowe for Defendants and Appellants.

De Witt W. Clinton, County Counsel, and Lawrence B. Launer, Assistant County Counsel, for Defendants and Respondents.

Ball, Hunt, Hart, Brown & Baerwitz, Anthony Murray, Allan E. Tebbetts, Agnes H. Mulhearn, Ross & Scott, William D. Ross, Corin L. Kahn and Diana P. Scott for Plaintiff and Appellant.

JUDGES: Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.

OPINION BY: LUCAS

OPINION

[*163] [**454] Introduction

Long Beach Unified School District (LBUSD) filed a claim with the Board of Control of the State of California [***3] (Board), asserting that certain expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through regulations (Executive Order) issued by the Department of Education (DOE) and were [*164] reimbursable pursuant to former Revenue and Taxation Code section 2234 and article XIII B, section 6 of the California Constitution. The Board eventually approved the claim and reported to the Legislature its recommendation that funds be appropriated to cover the statewide estimated costs of compliance with the Executive Order. When the Legislature deleted the requested funding from an appropriations bill, LBUSD filed a petition to compel reimbursement (Code Civ. Proc., § 1085) and complaint for declaratory relief. The trial court held that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the decisions of the Board, and it gave judgment to LBUSD. It also ruled that certain funds previously appropriated by the Legislature were "reasonably available" for reimbursement of the claimed expenditures, subject to audit by the state Controller.

We conclude that the doctrines of collateral [***4] estoppel and waiver are inapplicable to the facts of this case. However, we determine as a question of law that the Executive Order requires local school boards to provide a higher level of service than is required either constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. We also decide that former Revenue and Taxation Code section 2234 does not provide for reimbursement of the claim.

Based on uncontradicted evidence, we modify the decision of the trial court regarding which budget line item account numbers provide "reasonably available" funds to reimburse LBUSD for appropriate expenditures under the claim. We further modify the decision to include charging orders against funds appropriated by subsequent budget acts. Finally, we remand the matter to the trial court to determine whether at the time of its order unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court must resolve this same issue with respect to the charging order.

[**455] Background and Procedural History

The California Property [***5] Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 1, p. 2931) limited the power of local governmental entities to levy property taxes. It also mandated that when the state requires such entities to provide a new program or higher level of service, the state must reimburse those costs. Over time, amendments to the California Constitution and numerous legislative changes impacted both the right and procedure for obtaining reimbursement.

[*165] Sometime prior to September 8, 1977, LBUSD, at its option, voluntarily began to incur substantial costs to alleviate the racial and ethnic segregation of students within its jurisdiction.

On or about the above date, DOE adopted certain regulations which added sections 90 through 101 to title 5 of the California Administrative Code, effective September 16, 1977. We refer to these regulations as the Executive Order.

The Executive Order and related guidelines for implementation required in part that school districts which identified one or more schools as either having or being in danger of having segregation of its minority students "shall, no later than January 1, 1979, and each four years thereafter, develop and adopt a reasonably feasible [***6] plan for the alleviation and prevention of racial and ethnic segregation of minority students in the district."

On or about June 4, 1982, LBUSD submitted a "test claim" (Claim) [1] to the Board for reimbursement of $ 9,050,714 -- the total costs which LBUSD claimed it had incurred during fiscal years 1977-1978 through 1981-1982 for activities required by the Executive Order and guidelines. LBUSD cited former Revenue and Taxation Code section 2234 as authority for the requested reimbursement, asserting that the costs had been "subsequently mandated" by the state. [2]

1 Former Revenue and Taxation Code section 2218 defines "test claim" as "the first claim filed

with the State Board of Control alleging that a particular statute or executive order imposes a mandated cost on such local agency or school district." (Stats. 1980, ch. 1256, § 7, p. 4249.)

2 All statutory references are to the Revenue and Taxation Code unless otherwise stated.

Former section 2234 provided: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for such costs incurred after the operative date of such mandate." (Stats. 1980, ch. 1256, § 11, pp. 4251-4252.)

[***7] The Board denied the Claim on the grounds that it had no jurisdiction to accept a claim filed under section 2234. LBUSD petitioned superior court for review of the Board decision. (Code Civ. Proc., § 1094.5.) That court concluded the Board had jurisdiction to accept a section 2234 claim and ordered it to hear the matter on its merits. The Board did not appeal this decision.

On February 16, 1984, the Board conducted a hearing to consider the Claim. LBUSD presented written and oral argument that the Claim was reimbursable pursuant to section 2234 and, in addition, under article XIII B, section 6 of the California Constitution. DOE and the State Department [*166] of Finance (Finance) participated in the hearing. [3] The Board concluded that the Executive Order constituted a state mandate. On April 26, 1984, the Board adopted parameters and guidelines proposed by LBUSD for reimbursement of the expenditures. No state entity either sought reconsideration of the Board decisions, [**456] available pursuant to former section 633.6 of the California Administrative Code, [4] or petitioned for judicial review. [5]

3 The DOE recommended that the Claim be denied on the grounds that the requirements of the Executive Order were constitutionally mandated and court ordered and because the Executive Order was effective prior to January 1, 1978 (issues discussed *post*). However, counsel for the DOE expressed dismay that school districts which had voluntarily instituted desegregation programs had been having problems receiving funding from the Legislature, while schools which had been forced to do so had been receiving "substantial amounts of money."

A spokesman from Finance recalled there had been some doubt whether the Board had jurisdiction to hear a 2234 claim. He stated that, assuming the Board did have jurisdiction, the Executive Order contained at least one state mandate, which possibly consisted of administrative kinds of tasks related to the identification of "problem areas and the like."

[***8]

4 Former section 633.6 of the California Administrative Code (now renamed California Code of Regulations) provided in relevant part: "(b) Request for Reconsideration. [para.] (1) A request for reconsideration of a Board determination on a specific test claim . . . shall be filed, in writing, with the Board of Control, no later than ten (10) days after any determination regarding the claim by the Board . . . ." (Title 2, Cal. Admin. Code)

5 Former section 2253.5 provided: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the Board of Control on the grounds that the board's decision is not supported by substantial evidence. The court may order the board to hold another hearing regarding such claim and may direct the board on what basis the claim is to receive a rehearing." (Stats. 1978, ch. 794, § 8, p. 2551.)

In December 1984, pursuant to former section 2255, the Board reported to the Legislature the number of mandates it had found and the estimated statewide costs of each mandate. [***9] With respect to the Executive Order mandate, the Board adopted an estimate by Finance that reimbursement of school districts, including LBUSD, for costs expended in compliance with the Executive Order would total $ 95 million for fiscal years 1977-1978 through 1984-1985. The Board recommended that the Legislature appropriate that amount.

Effective January 1, 1985, the Commission on State Mandates (Commission) succeeded to the functions of the Board. (Gov. Code, §§ 17525, 17630.)

On March 4, 1985, Assembly Bill No. 1301 was introduced. It included an appropriation of $ 95 million to the state controller "for payment of claims of school districts seeking reimbursable state-mandated costs incurred pursuant to [the Executive Order] . . . ." On June 27, the Assembly amended the bill by deleting this $ 95 million appropriation and adding a [*167] "finding" that the Executive Order did not impose a state-mandated local program. [6] On September 28, 1985, the Governor approved the bill as amended.

6 Former Section 2255 provided in part: "(b) If the Legislature deletes from a local government claims bill funding for a mandate imposed either by legislation or by a regulation . . . , it may take one of the following courses of action: (1) In-

clude a finding that the legislation or regulation does not contain a mandate . . . ." (Stats. 1982, ch. 1638, § 7, p. 6662.)

[***10] On June 26, 1986, LBUSD petitioned for writ of mandate (Code Civ. Proc., § 1085) and filed a complaint for declaratory relief against defendants State of California; Commission; Finance; DOE; holders of the offices of State Controller and State Treasurer and holder of the office of Auditor-Controller of the County of Los Angeles, and their successors in interest. LBUSD requested issuance of a writ of mandate commanding the respondents to comply with section 2234 (fn. 2, *ante*) [7] and, in an amended petition, its successor, Government Code section 17565, and with California Constitution, article XIII B, section 6. [8] It further requested respondents to reimburse LBUSD $ 24,164,593 for fiscal years 1977-1978 through 1982-1983, $ 3,850,276 for fiscal years 1983-1984 and 1984-1985, and accrued interest, for activities mandated by the Executive Order.

7 The language of Government Code section 17565 is nearly identical to that of section 2234 (fn. 2, *ante*), and provides: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." (Stats. 1986, ch. 879, § 10, p. 3043.)

[***11]

8 Article XIII B, section 6 provides in pertinent part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

The trial court let stand the conclusion of the Board that the Executive Order constituted a reimbursable state mandate and ruled in favor of LBUSD. No party requested a statement of decision.

The judgment stated that the Executive Order constituted a reimbursable state mandate which state entities could not challenge because of the doctrines of administrative collateral estoppel and waiver. It provided that certain previously appropriated [**457] funds were "'reasonably available'" to reimburse LBUSD for its claimed expenditures, applicable interest, and court costs. The judgment also stated that funds denominated the "Fines and Forfeitures Funds," under the custody of the Auditor-Controller of the County of Los Angeles, were not reasonably available. The judgment further decreed [***12] that the State Controller retained the right to audit the claims and records of LBUSD to verify the amount of the reimbursement award sum.

[*168] State respondents (State) and DOE separately filed timely notices of appeal, and LBUSD cross-appealed. [9]

9 Although an "Amended Notice to Prepare Clerk's Transcript" filed by DOE on April 11, 1988, requests the clerk of the superior court to incorporate in the record its notice of appeal filed April 1, 1988, this latter document does not appear in the record before us, and the original apparently is lost within the court system. Respondent LBUSD received a copy of the notice on April 4, 1988.

Discussion

State asserts that neither the doctrine of collateral estoppel nor the doctrine of waiver is applicable to this case, the costs incurred by LBUSD are not reimbursable, and the remedy authorized by the trial court is inconsistent with California law and invades the province of the Legislature, a violation of article IV, section 4 of the United States Constitution.

The [***13] thrust of the DOE appeal is that its budget is not an appropriate source of funding for the reimbursement.

LBUSD has argued in its cross-appeal that an additional source of funding, the "Fines and Forfeiture Funds," should be made available for reimbursement of its costs and, in supplementary briefing, requests this court to order a modification of the judgment to include as "reasonably available funding" specific line item accounts from the 1988-1989 and 1989-1990 state budgets.

I. State Not Barred From Challenging Decisions of the Board

A. Administrative Collateral Estoppel

(1a) State first contends that the doctrine of administrative collateral estoppel is not applicable to the facts of this case and does not prevent State from litigating whether the Board properly considered the subject claim and whether the claim is reimbursable.

(2) [HN1]Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439].) The traditional elements of collateral estoppel include the requirement [***14] that the prior judgment be "final." (*Ibid.*)

(3a) [HN2]Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with [*169] respect to action by the administrative agency (see Code Civ. Proc., § 1094.5, subd. (a)); and (2) the decision must have conclusive effect (*Sandoval* v. *Superior Court* (1983) 140 Cal.App.3d 932, 936-937 [190 Cal.Rptr. 29]).

A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim. [Fn. omitted.]" (*Chas. L. Harney, Inc.* v. *State of California* (1963) 217 Cal.App.2d 77, 98 [31 Cal.Rptr. 524].)

(1b) In the case at bar, former section 633.6 of the Administrative Code provided a 10-day period during which any party could request reconsideration of any Board determination (fn. 4, *ante*). The Board decided on February 16, 1984, that the Executive Order constituted a state mandate, and on April 26, 1984, it adopted parameters and guidelines for the reimbursement of the claimed expenditures. No party requested [***15] reconsideration, no statute or regulation provided for further consideration of the matter by the Board (see, e.g., *Olive Proration etc. Com.* v. *Agri. etc. Com.* (1941) 17 Cal.2d 204, 209 [109 P.2d 918]), and the decisions became administratively final on February [**458] 27, 1984, and May 7, 1984, respectively [10] (*Ziganto* v. *Taylor* (1961) 198 Cal.App.2d 603, 607 [18 Cal.Rptr. 229]).

10 We take judicial notice pursuant to Evidence Code section 452, subdivision (h), that February 26, 1984, and May 6, 1984, fall on Sundays.

(3b) Next, the decision must have conclusive effect. (*Sandoval* v. *Superior Court, supra*, 140 Cal.App.3d 932, 936-937.) In other words, the decision must be free from direct attack. (*People* v. *Sims* (1982) 32 Cal.3d 468, 486 [186 Cal.Rptr. 77, 651 P.2d 321].) A direct attack on an administrative decision may be made by appeal to the superior court for review [***16] by petition for administrative mandamus. (Code Civ. Proc., § 1094.5.)

(1c) A decision will not be given collateral estoppel effect if such appeal has been taken or if the time for such appeal has not lapsed. (*Sandoval* v. *Superior Court, supra*, 140 Cal.App.3d at pp. 936-937; *Producers Dairy Delivery Co.* v. *Sentry Ins. Co.* (1986) 41 Cal.3d 903, 911 [226 Cal.Rptr. 558, 718 P.2d 920].) The applicable statute of limitations for such review in the case at bar is three years. (*Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 534 [234 Cal.Rptr. 795]; *Green* v. *Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256].)

(4) A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon. (*Dillon* v. *Board of Pension Comm'rs.* (1941) 18 Cal.2d 427, 430 [116 P.2d 37, 136 A.L.R. 800].)

(1d) In the instant case, State's causes of action accrued when the Board made the two decisions [***17] adverse to State on February 16 and April 26, 1984, [*170] as discussed. State did not request reconsideration, and the decisions became administratively final on February 27 and May 7, 1984. [11] For purposes of discussion, we will assume the applicable three-year statute of limitations period for the two Board decisions commenced on February 28 and May 8, 1984, and ended on February 28 and May 8, 1987. [12] LBUSD filed its petition for ordinary mandamus (Code Civ. Proc., § 1085) and complaint for declaratory relief on June 26, 1986. At that point, the limitations periods had not run against State and the Board decisions lacked the necessary finality to satisfy that requirement of the doctrine of administrative collateral estoppel. [13]

11 We do not address the contention of LBUSD that State failed to exhaust its administrative remedies (*Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715]; *Morton* v. *Superior Court* (1970) 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533]) and therefore State cannot assert its affirmative defenses in response to the petition and complaint of the school district. Traditionally, the doctrine has been raised as a bar only with respect to the party seeking judicial relief, not against the responding party (*ibid.*); we have found no case holding otherwise.

[***18]

12 If State had sought reconsideration and its request been denied, or if its request had been granted but the matter again decided in favor of LBUSD, the Board decision would have been final 10 days after the Board action, and at that point the statute would have commenced to run against State.

13 State argues that its statute of limitations did not commence until the legislation was enacted without the appropriation (Sept. 28, 1985), citing *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at page 548. However, *Carmel Valley* held that the *claimant* does not exhaust its administrative remedies and cannot come under the court's jurisdiction until

the legislative process is complete, which occurred in that case when the legislation was enacted without the subject appropriations. At that point, *Carmel Valley* reasoned, the state had breached its duty to reimburse, and the claimant's right of action in traditional mandamus accrued. (*Ibid.*) However, *Carmel Valley* decided, as do we in the case at bar, that the state's statute of limitations commenced on the date the Board made decisions adverse to its interests. (*Id.* at p. 534.)

In addition, we see no reason to permit State to rely on the fortuitous actions of the Legislature, an independent branch of government, to bail it out of obligations established in the distant past by state agents -- especially given the lengthy three-year statute of limitations. (Compare, e.g., Gov. Code, § 11523 [mandatory time limit within which to petition for administrative mandamus can be 30 days after last day on which administrative reconsideration can be ordered]; Lab. Code, § 1160.8, and *Jackson & Perkins Co. v. Agricultural Labor Relations Board* (1978) 77 Cal.App.3d 830, 834 [144 Cal.Rptr. 166] [30 days from issuance of board order even if party has filed a motion to reconsider].)

[***19] [**459] *B. Waiver*

(5a) State also asserts that the doctrine of waiver is not applicable.

(6) [HN3]A waiver occurs when there is "an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce [*171] a reasonable belief that it has been waived. [Citations.]" (*Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 534.) Ordinarily, the issue of waiver is a question of fact which is binding on the appellate court if the determination is supported by substantial evidence. (*Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263, 268 [159 Cal.Rptr. 522].) However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 151-152 [135 Cal.Rptr. 802].)

(5b) In the instant case, the right to contest the findings of the Board is at issue, and there is no dispute that [***20] the state was aware of the existence of this right. As discussed, the statute of limitations had not run when State raised its affirmative defenses, and during this time State could have filed a separate petition for administrative mandamus.

(7) (See fn. 14.)

(5c) State's assertion of its affirmative defenses during this period is inconsistent with an intent to waive its right to contest the Board decisions, and therefore the doctrine of waiver is not applicable. [14]

14 LBUSD contends that State should be equitably estopped from challenging the Board decisions. In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. (*Gilbert v. City of Martinez* (1957) 152 Cal.App.2d 374, 378 [313 P.2d 139]; *People v. Stuyvesant Ins. Co.* (1968) 261 Cal.App.2d 773, 784 [68 Cal.Rptr. 389].) There is no confidential relationship herein, and since we conclude as a matter of law and contrary to the trial court that the statute of limitations does not bar State from litigating the mandate and reimbursability issues, the doctrine is inapplicable.

[***21] *II. Issue of State Mandate*

(8) Ordinarily, our conclusion that the trial court erred in failing to consider the merits of the State's challenge to the decisions of the Board would require that the matter be remanded to the trial court for a full hearing. However, because the question of whether a cost is state mandated is one of law in the instant case (cf. *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at p. 536), we now decide that the expenditures are reimbursable pursuant to article XIII B, section 6 of the California Constitution and that no relief is available under section 2234. [15]

15 We invited State, DOE, and LBUSD to submit additional briefing on the following issues: "1. Can it be determined as a question of law whether sections 90 through 101 of Title 5 of the California Administrative Code [Executive Order] constitute a state mandate within the meaning of article XIII B, section 6 of the California Constitution? 2. Do the above sections constitute such mandate?" State and LBUSD submitted additional argument; DOE declined the invitation.

[***22] [*172] *A. Recovery Under Article XIII B, Section 6*

(9a) On November 6, 1979, California voters passed initiative measure Proposition 4, which added article XIII B to the state Constitution. This measure, a corollary to the previously passed Proposition 13 (art. XIII A, which restricts governmental taxing authority), placed limits on the growth of state and local government appropriations. It also provided reimbursement to local governments for the costs of complying with certain requirements mandated by the state. LBUSD argues that section 6 of this provision is an additional ground for reimbursement.

1. The Executive Order Requires a Higher Level of Service

In relevant part article XIII B, section 6 (Section 6) provides: [HN4]"Whenever the Legislature or any state agency mandates a new program or higher level of service on any [**460] local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

(10) The subvention requirement of Section 6 "is directed to state mandated increases in the services provided by local agencies in existing 'programs.'" (*County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) [***23] "[T]he drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*)

(9b) In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. (Cf. *Carmel Valley Fire Protection Dist.* v. *State of California, supra,* 190 Cal.App.3d at p. 537.) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a "program" within the meaning of Section 6.

State argues that the Executive Order does not mandate a higher level of service -- or a new program -- because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. In support of its argument, State cites *Brown* v. *Board of Education* (1952) 347 U.S. 483, 495 [98 L.Ed. 873, 881, 74 S.Ct. 686, 38 A.L.R.2d 1180]; [***24] *Jackson* v. *Pasadena City School District* (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]; *Crawford* v. *Board of Education* (1976) 17 Cal.3d 280 [130 Cal.Rptr. 724, 551 P.2d 28] and cases cited therein; and *National Assn. for Advancement of Colored People* v. *San Bernardino* [*173] *City Unified Sch. Dist.* (1976) 17 Cal.3d 311 [130 Cal.Rptr. 744, 551 P.2d 48]. These cases show that school districts do indeed have a constitutional obligation to alleviate racial segregation, and on this ground the Executive Order does not constitute a "new program." However, although school districts are required to "'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause[]'" (*Crawford, supra,* at p. 305, italics omitted, citing *Jackson*), the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention (*Crawford,* at pp. 305-306; *Jackson, supra,* at pp. 881-882; *Swann* v. *Board of Education* (1971) 402 U.S. 1, 18-21 [28 L.Ed.2d 554, 567-570, 91 S.Ct. 1267]). [***25] On the other hand, courts have required specific factors be considered in determining whether a school is segregated (*Keyes* v. *School District No. 1, Denver, Colo.* (1973) 413 U.S. 189, 202-203 [37 L.Ed.2d 548, 559-560, 93 S.Ct. 2686]; *Jackson, supra,* at p. 882).

The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. (*County of Los Angeles* v. *State of California, supra,* 43 Cal.3d 46, 50.) A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. (*Id.,* at pp. 54-56.) However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial [***26] racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may [**461] wish to consider but are required acts. These requirements constitute a higher level of service. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "[O]nly those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."

2. The Executive Order Constitutes a State Mandate

For the sake of clarity we quote Section 6 in full: "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 [*174] reimburse such local government for the [***27] costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.*" (Italics added.) This amendment became effective July 1, 1980. (Art. XIII B, § 10.) Again, the Executive Order became effective September 16, 1977.

State argues there is no constitutional ground for reimbursement because (a) with reference to the language of exception (c) of Section 6, the Executive Order is neither a statute nor an executive order or regulation implementing a statute; (b) recent legislation limits reimbursement to certain costs incurred after July 1, 1980, the effective date of the constitutional amendment; and (c) LBUSD failed to exhaust administrative procedures for reimbursement of Section 6 claims (Gov. Code, § 17500 et seq.). We conclude that recovery is available [***28] under Section 6.

(a) *Form of Mandate*

State argues the Executive Order is not a state mandate because, with reference to exception (c) of Section 6, it is neither a statute nor an executive order implementing a statute.

(11) [HN5]In construing the meaning of Section 6, we must determine the intent of the voters by first looking to the language itself (*County of Los Angeles* v. *State of California, supra*, 43 Cal.3d 46, 56), which "'should be construed in accordance with the natural and ordinary meaning of its words.' [Citation.]" (*ITT World Communications, Inc.* v. *City and County of San Francisco* (1985) 37 Cal.3d 859, 865 [210 Cal.Rptr. 226, 693 P.2d 811].) The main provision of Section 6 states that whenever the Legislature or any state agency "mandates" a new program or higher level of service, the state must provide reimbursement.

(12) We understand the use of "mandates" in the ordinary sense of "orders" or "commands," concepts broad enough to include executive orders as well as statutes. As has been noted, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived [***29] attempt by the state to enact legislation *or adopt administrative orders* creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 56.) It is clear that the primary concern of the voters was the increased financial [*175] burdens being shifted to local government, not the form in which those burdens appeared.

We derive support for our interpretation by reference to the ballot summary presented to the electorate. (Cf. *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) The legislative analyst determined that the amendment would limit the rate of growth of governmental appropriations, require the return of taxes which exceeded amounts appropriated, and "[r]equire the state to reimburse local governments for the costs of complying with 'state mandates.'" [**462] The term "state mandates" was [***30] defined as "requirements imposed on local governments by legislation *or executive orders*." (Italics added; Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979) p. 16.)

(9c) Although exception (c) of Section 6 gives the state discretion whether to reimburse pre-1975 mandates which are either statutes or executive orders implementing statutes, we do not infer from this exception that reimbursability is otherwise dependent on the form of the mandate. We conclude that since the voters provided for mandatory reimbursement except for the three narrowly drawn exceptions found in (a), (b), and (c), there was no intent to exclude recovery for state mandates in the form of executive orders. Further, as State sets forth in its brief, the adoption of the Executive Order was "arguably prompted" by the decision in *Crawford* v. *Board of Education, supra*, 17 Cal.3d 280, a case decided after the 1975 cutoff date of exception (c). Since case law and statutory law are of equal force, there appears to be no basis on which to exclude executive orders which implement case law or constitutional law [***31] while permitting reimbursement for executive orders implementing statutes. We see no relationship between the proposed distinction and the described purposes of the amendment (*County Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 56; *County of Los Angeles* v. *Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545 [263 Cal.Rptr. 351]).

(b) *Recent Legislative Limits*

State contends that LBUSD cannot claim reimbursement under Section 6 because Government Code sections 17561 (Stats. 1986, ch. 879, § 6, p. 3041) and

17514 (Stats. 1984, ch. 1459, § 1, p. 5114) limit such recovery to mandates created by statutes or executive orders implementing statutes, and only for costs incurred after July 1, 1980.

As discussed above, the voters did not intend to limit reimbursement of costs only to those incurred pursuant to statutes or executive orders implementing [*176] statutes except as set forth in exception (c) of Section 6. We presume that when the Legislature passed Government Code sections 17561 and 17514 it was aware of Section 6 as a related law and intended to maintain a consistent [***32] body of rules. (*Fuentes* v. *Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449].) As discussed above, the limitations suggested by State are confined to exception (c).

Further, the state must reimburse costs incurred pursuant to mandates enacted after January 1, 1975, although actual payments for reimbursement were not required to be made prior to July 1, 1980, the effective date of Section 6. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at pp. 547-548; *City of Sacramento* v. *State of California* (1984) 156 Cal.App.3d 182, 191-194 [203 Cal.Rptr. 258], disapproved on other grounds in *County of Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 58, fn. 10.)

(c) *Administrative Procedures*

The Legislature passed Government Code section 17500 et seq. (Stats. 1984, ch. 1459, § 1, p. 5113), effective January 1, 1985 (Stats. 1984, ch. 1459, § 1, p. 5123), to aid the implementation of Section 6 and to consolidate the procedures for reimbursement [***33] under statutes found in the Revenue and Taxation Code. This legislation created the Commission, which replaced the Board, and instituted a number of procedural changes. (Gov. Code, §§ 17525, 17527, subd. (g), 17550 et seq.) The Legislature intended the new system to provide "the sole and exclusive procedure by which a local agency or school district" could claim reimbursement. (Gov. Code, § 17552.)

(13) State argues that since LBUSD never made its claim before the Commission, it failed to exhaust its administrative [**463] remedies and cannot now receive reimbursement under section 6.

As discussed, the Board decisions favorable to LBUSD became administratively final in 1984. The Commission was not in place until January 1, 1985. There is no evidence in the record that the Commission did not consider these decisions to be final.

State argues the Commission was given jurisdiction over all claims which had not been included in a local government claims bill enacted before January 1, 1985. (Gov. Code, § 17630.) State is correct. However, the subject claim was included in such a bill, but the bill was signed into law after the recommended appropriation had been deleted. Under the statutory [***34] scheme, the only relief offered a disappointed claimant at such juncture is an action in declaratory relief to declare a subject executive order void [*177] (former Rev. & Tax Code, § 2255, subd. (c); Stats. 1982, ch. 1638, § 7, pp. 6662-6663) or unenforceable (Gov. Code, § 17612, subd. (b); Stats. 1984, ch. 1459, § 1, p. 5121) and to enjoin its enforcement. LBUSD pursued this remedy and in addition petitioned for writ of mandate (Code Civ. Proc., § 1085) to compel reimbursement. There is no requirement to seek further administrative review. Indeed, to do so after the Legislature has spoken would appear to be an exercise in futility.

We conclude that Section 6 provides reimbursement to LBUSD because the Executive Order required a higher level of service and because the Executive Order constitutes a state mandate.

B. Section 2234

As set forth in the procedural history of this case, the Board originally declined to consider the Claim as a claim made under section 2234 on the ground that it lacked jurisdiction to do so. LBUSD petitioned for judicial relief, and the trial court held that the Board had jurisdiction and must consider the claim on its merits. The Board did not [***35] appeal that decision. State raised the jurisdiction issue as an affirmative defense to the second petition for writ of mandate filed by LBUSD and presents it again for our consideration.

(14) Of course, [HN6]lack of subject matter jurisdiction may be raised at any time. (*Stuck* v. *Board of Medical Examiners* (1949) 94 Cal.App.2d 751, 755 [211 P.2d 389].)

Former section 2250 provided: "The State Board of Control, pursuant to the provisions of this article, shall hear and decide upon a claim by a local agency or school district that such local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*. [para.] Notwithstanding any other provision of law, this article shall provide the sole and exclusive procedure by which the Board of Control shall hear and decide upon a claim that a local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*." (Italics added; Stats. 1978, ch. 794, § 5, p. 2549.) Given the clear, unambiguous language of the statute, there is no need for construction. (*West Covina Hospital* v. *Superior Court* (1986) 41 Cal.3d 846, 850 [226 Cal.Rptr. 132, 718 P.2d 119, 60 A.L.R.4th 1257].)

[***36] **(15a)** We conclude that the Board had jurisdiction to consider a claim filed under former section 2234. However, as discussed below, the 1977 Executive Order falls outside the purview of section 2234.

Former section 2231 provided: "(a) . . . The state shall reimburse each school district only for those 'costs mandated by the state', as defined in [*178] Section 2207.5." (Stats. 1982, ch. 1586, § 3, p. 6264.) In part, former section 2207.5 defines "costs mandated by the state" as increased costs which a school district is required to incur as a result of certain new programs or certain increased program levels or services mandated by an executive order issued *after* January 1, 1978. (Stats. 1980, ch. 1256, § 5, pp. 4248-4249.) As previously stated, the Executive Order in the case at bar was issued September 8, 1977.

Former section 2234, pursuant to which LBUSD initially filed its claim, does not itself contain language indicating a time limitation: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the [**464] local agency or school district for such costs incurred after the operative [***37] date of such mandate." (Stats. 1980, ch. 1256, § 11, p. 4251.)

State asserts that the January 1, 1978, limitation of sections 2231 and 2207.5 applies to section 2234, preventing reimbursement for costs expended pursuant to the September 8, 1977, Executive Order; LBUSD argues section 2234 is self-contained and without time limitation.

(16) It is a fundamental rule of statutory construction that [HN7]a statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. (*Moore* v. *Panish* (1982) 32 Cal.3d 535, 541 [186 Cal.Rptr. 475, 652 P.2d 32]; *Pitman* v. *City of Oakland* (1988) 197 Cal.App.3d 1037, 1042 [243 Cal.Rptr. 306].) The legislative history of a statute may be considered in ascertaining legislative design. (*Walters* v. *Weed* (1988) 45 Cal.3d 1, 10 [246 Cal.Rptr. 5, 752 P.2d 443].)

The earliest version of section 2234 is found in former section 2164.3, subdivision (f), which provided reimbursement to a city, county, or special district for "a service or program [provided] at its [***38] option which is subsequently mandated by the state . . . ." Reimbursement was limited to costs mandated by statutes or executive orders enacted or issued after January 1, 1973. (Stats. 1972, ch. 1406, § 3, pp. 2962-2963.)

In 1973, section 2164.3 was amended to provide reimbursement to school districts for costs mandated by statutes enacted after January 1, 1973 (subd. (a)), *but it expressly excluded school districts from reimbursement for costs mandated by executive orders* (subd. (d)). (Stats. 1973, ch. 208, § 51, p. 565.) Later that same year, the Legislature repealed section 2164.3 (Stats. 1973, ch. 358, § 2, p. 779) and added section 2231, which took over the pertinent [*179] reimbursement provisions of section 2164.3 virtually unchanged. (Stats. 1973, ch. 358, § 3, pp. 779, 783-784.)

In 1975, the Legislature removed the time limitation language from section 2231 and incorporated it into a new section, 2207. (Stats. 1975, ch. 486, § 1.8, pp. 997-998.) After this change, section 2231 then provided in pertinent part: "(a) The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207. *The state shall reimburse each school* [***39] *district only for those 'costs mandated by the state' specified in subdivision (a) of Section 2207 . . . .*" (Italics added; Stats. 1975, ch. 486, § 7, pp. 999-1000.) Subdivision (a) of section 2207 limited reimbursement solely to costs mandated by statutes enacted after January 1, 1973.

At this same juncture, the Legislature further amended section 2231 by deleting the provision for "subsequently mandated" services or programs and incorporating that provision into a new section, 2234 (Stats. 1975, ch. 486, § 9, p. 1000), the section under which LBUSD would eventually make its claim. The substance of section 2234 (see fn. 2, *ante*) remained unchanged until its repeal in 1986. (Stats. 1977, ch. 1135, § 8.6, p. 3648; Stats. 1980, ch. 1256, § 11, pp. 4251-4252; Stats. 1986, ch. 879, § 25, p. 3045.)

Next, section 2231 was amended to show that with regard to school districts, "costs mandated by the state" were now defined by a new section, 2207.5. (Stats. 1977, ch. 1135, § 7, pp. 3647-3648.) Section 2207.5 limited reimbursement to costs mandated by statutes enacted after January 1, 1973, and *executive orders issued after January 1, 1978*. (Stats. 1977, ch. 1135, § 5, pp. [***40] 3646-3647.) (No further pertinent amendments to section 2231 occurred; see Stats. 1978, ch. 794, § 1.1, p. 2546; Stats. 1980, ch. 1256, § 8, pp. 4249-4250; Stats. 1982, ch. 734, § 3, p. 2912.) The distinction between statutes and executive orders was preserved when section 2207.5 was amended in 1980 (Stats. 1980, ch. 1256, § 5, pp. 4248-4249) and was in effect at the time of the Board hearing.

(15b) This survey teaches us that with respect to the reimbursement process, the Legislature has treated school districts differently than it has treated other local government entities. The Legislature initially did not

give school districts the right to recover costs mandated by executive orders; and when this option was made available, the [**465] effective date differed from that applicable to other entities. The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of costs to be open-ended.

[*180] Because the "subsequently mandated" provision of section 2234 originally was contained in sections which set forth specific date limitations (former sections 2164.3 and 2231), we conclude [***41] the Legislature likewise intended to limit claims made pursuant to section 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs, provided the claimant meets other requirements. Since the September 1977 Executive Order falls outside the January 1, 1978, limit set by section 2207.5, section 2234 does not provide for reimbursement to LBUSD.

III. The Award

The full text of the award as provided by the judgment is set forth in an appendix to this opinion. In part, the judgment states that there are appropriated funds in budgets for the DOE, the Commission, the Reserve for Contingencies or Emergencies, and the Special Fund for Economic Uncertainties, "or similarly designated accounts" which are "'reasonably available'" to reimburse LBUSD for the state mandated costs it has incurred. (Appendix, pars. 3, 2.) The State Controller is commanded to pay the claims plus interest "at the legal rate" from the described appropriations for fiscal years 1984-1985 through 1987-1988 and "subsequently enacted State Budget Acts." (Appendix, par. 7.) The judgment declares that the deletion of funding for reimbursement [***42] of costs incurred in compliance with the Executive Order was invalid and unconstitutional. (Appendix, par. 12.) Finally, the Fines and Forfeiture Funds in the custody of the Auditor-Controller of Los Angeles County are held to be not reasonably available for reimbursement. (Appendix, par. 5.)

A. State Position

(17a) State contends the trial court's award is contrary to California law, asserting that it constitutes an invasion of the province of the Legislature and therefore a judicial usurpation of the republican form of government guaranteed by the United States Constitution, Article IV, section 4.

(18) [HN8]A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]; *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 538.) However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. (*Mandel*, at p. 540; *Carmel Valley*, at [***43] pp. 539-540.) The test is whether such funds are "reasonably available for the [*181] expenditures in question . . . ." (*Mandel*, at p. 542; *Carmel Valley*, at pp. 540-541.) Funds are "reasonably available" for reimbursement when the purposes for which those funds were appropriated are "generally related to the nature of costs incurred . . . ." (*Carmel Valley*, at p. 541.) There is no requirement that the appropriation specifically refer to the particular expenditure (*Mandel* at pp. 543-544, *Carmel Valley* at pp. 540; *Committee to Defend Reproductive Rights* v. *Cory* (1982) 132 Cal.App.3d 852, 857-858 [183 Cal.Rptr. 475]), nor must past administrative practice sanction coverage from a particular fund (*Carmel Valley*, at p. 540).

(17b) As previously stated, the trial court found the subject funds were "reasonably available." No party requested a statement of decision, and therefore it is implied that the trial court found all facts necessary to support its judgment. (*Michael* [**466] *U.* v. *Jamie B.* (1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39, 705 P.2d 362]; *Homestead Supplies, Inc.* v. *Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984 [147 Cal.Rptr. 22].) [***44] We now examine the record to ascertain whether substantial evidence supports the decision of the trial court.

The Board having approved reimbursement under the Executive Order, reported to the Legislature that "[t]he categories of reimbursable costs include, but are not limited to: (1) voluntary pupil assignment or reassignment programs, (2) magnet schools or centers, (3) transportation of pupils to alternative schools or programs, (5) [*sic*, no item (4)] racially isolated minority schools, (6) costs of planning, recruiting, administration and/or evaluation, and (7) overhead costs." The guidelines set out comprehensive steps to be taken by school districts in order to be in compliance with the Executive Order.

The peremptory writ of mandate, issued the same date as the judgment, designated funds in specific account numbers and, in addition, a special fund as available for reimbursement. We take judicial notice of the relevant budget enactments and Government Code sec-

tions 16418 and 16419 (Evid. Code, §§ 459, subd. (a), 452) and address these designations seriatim.

The line item account numbers for the DOE for fiscal years 1984-1985 through 1987-1988 set forth in the writ are [***45] as follows: 6100-001-001, 6100-001-178, 6100-015-001, 6100-101-001, 6100-114-001, 6100-115-001, 6100-121-001, 6100-156-001, 6100-171-178, 6100-206-001, 6100-226-001.

An examination of the relevant budget acts Statutes 1985, chapter 111; Statutes 1986, chapter 186; Statutes 1987, chapter 135; and final budgetary changes as published by the Department of Finance for each year, shows [*182] that appropriations in the 11 DOE line item account numbers have supported a very broad range of activities including reimbursement of costs for both mandated and voluntary integration programs, assessment programs, child nutrition, meals for needy pupils, participation in educational commissions, administration costs of various programs, proposal review, teacher recruitment, analysis of cost data, school bus driver instructor training, shipping costs for instructional materials, local assistance for school district transportation aid, summer school programs, local assistance to districts with high concentrations of limited- and non-English-speaking children, adult education, driver training, Urban Impact Aid, and cost of living increases for specific programs. Further evidence regarding the [***46] uses of these funds is found in the deposition testimony of William C. Pieper, Deputy Superintendent for Administration with the State Department of Education, who stated that local school districts were being reimbursed for the costs of desegregation programs from line item account numbers 6100-114-001 and 6100-115-001 in the 1986 State Budget Act.

Comparing the requirements of the Executive Order and guidelines with the broad range of activities supported by the DOE budget, we conclude that the subject funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of the costs incurred.

With regard to the Commission, the writ sets out three line item account numbers: 8885-001-001; 8885-101-001; and 8885-101-214. A review of the relevant budget acts shows that the first line item provides funding for support of the Commission, and line item number 8885-101-001 provides funding specifically for local assistance "in accordance with the provisions of Section 6 of Article XIII B of the California Constitution . . . ." (Stats. 1986, ch. 186.) Line item number 8885-101-214 also provides funds for "local assistance." Since the Commission [***47] was created specifically to effect reimbursements for qualifying claims, we conclude there is a general relationship between the purpose of the appropriations and the requirements of the Executive Order.

Line item 9840-001-001 of the Reserve for Contingencies or Emergencies defines "contingencies" as "proposed expenditures [**467] arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which, in the judgment of the Director of Finance, constitute cases of actual necessity." (All relevant budget acts.) In the instant case, previous to the issuance of the Executive Order, LBUSD could not have anticipated the expenditures necessary to bring it into compliance. Further, the Legislature refused to appropriate the necessary funds [*183] to directly reimburse the district for these expenditures. The necessity exists by virtue of the writ and judgment issued by the trial court. Therefore, this line item, and three others which also support the reserve (9840-001-494, 9840-001-988, 9840-011-001) are generally related to the costs. [16]

16 The costs do not come within past or current definitions of "emergency," which are, respectively, as follows. "[P]roposed expenditures arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which in the judgment of the Director of Finance require immediate action to avert undesirable consequences or to preserve the public peace, health or safety." (Fiscal years 1984-1985, 1985-1986.) "[E]xpenditure incurred in response to conditions of disaster or extreme peril which threaten the health or safety of persons or property within the state." (Fiscal years 1986-1987 forward.)

[***48] Finally the writ lists as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts . . . ." An examination of Government Code sections 16418 and 16419 relating to the special fund shows only one use of this reserve: establishment of the Disaster Relief Fund "for purposes of funding disbursements made for response to and recovery from the earthquake, aftershocks, and any other related casualty." No evidence in the record indicates a general relationship between this purpose and the costs incurred by LBUSD. We conclude, therefore, that this source of funding cannot be used for reimbursement. This source is stricken from the judgment.

The description of further sources of funding as "similarly designated accounts" fails to sufficiently identify these sources and we therefore strike this part of the judgment.

In a supplemental brief, LBUSD requests this court to take judicial notice of the Budget Acts of 1988-1989 (Stats. 1988, ch. 313) and 1989-1990 (Stats. 1989, ch. 93) pursuant to the Evidence Code (Evid. Code, §§ 451, subd. (a), 452, subd. (a), 452, subd. (c), 459) and to order that the amounts set forth in the judgment and writ be [***49] satisfied from specific line item accounts in these later budgets and from the Special Fund for Economic Uncertainties. [17]

17 LBUSD identifies the line items accounts as follows: DOE -- 6110-001-001, 6110-001-178, 6110-015-001, 6110-101-001, 6110-114-001, 6110-115-001, 6110-121-001, 6110-156-001, 6110-171-178, 6110-226-001, 6110-230-001; Commission -- 8885-001-001, 8885-101-001, 8885-101-214; Reserve for Contingencies or Emergencies -- 9840-001-001, 9840-001-494, 9840-001-988, 9840-011-001.

(19) "An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. [Citation.]" (*Carmel Valley, supra,* 190 Cal.App.3d at p. 557.)

(17c) We have reviewed the designated budget acts and conclude that the specified line item accounts for DOE, the Commission, [*184] and the Reserve for Contingencies and Emergencies provide funds for a broad range of activities similar to those set out above and therefore [***50] are generally related to the nature of the costs incurred. However, for the reasons previously discussed, we decline to designate the Special Fund for Economic Uncertainties as a source for reimbursement.

While we have concluded that certain line item accounts are generally related to the nature of the costs incurred, there must also be evidence that at the time of the order the enumerated budget items contained sufficient funds to cover the award. (Gov. Code, § 12440; *Mandel* v. *Myers, supra,* 29 Cal.3d at p. 543; *Carmel Valley, supra,* 190 Cal.App.3d at p. 541; cf. *Baggett* v. *Dunn* (1886) 69 Cal. 75, 78 [10 P. 125]; *Marshall* v. *Dunn* (1886) 69 Cal. 223, 225 [10 P. 399].) The record before [**468] us contains evidence regarding balances at various points in time for some of the line item accounts, but that evidence is primarily in the form of uninterpreted statistical data. We have not found a clear statement which would satisfy this requirement. Furthermore, not every line item was in existence every fiscal year. In addition, those which [***51] entered the budgetary process did not always survive it unscathed. Therefore, we remand the matter to the trial court to determine with regard to the line item account numbers approved above whether funds sufficient to satisfy the award were available at the time of the order. (Cf. *County of Sacramento* v. *Loeb* (1984) 160 Cal.App.3d 446, 454-455 [206 Cal.Rptr. 626].) If the trial court determines that the unexhausted funds remaining in the specified appropriations are insufficient, the trial court order can be further amended to reach subsequent appropriated funds. (*County of Sacramento* at p. 457; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 198 [182 Cal.Rptr. 387].)

(20) Having concluded that certain appropriations are generally available to reimburse LBUSD, we turn to an additional issue raised by State: that the "finding" by the Legislature that the Executive Order does not impose a "state-mandated local program" prevents reimbursement.

Unsupported legislative disclaimers are insufficient to defeat reimbursement. (*Carmel Valley, supra,* 190 Cal.App.3d at pp. 541-544.) As discussed, [***52] LBUSD, pursuant to Section 6, has a constitutional right to reimbursement of its costs in providing an increased service mandated by the state. The Legislature cannot limit a constitutional right. (*Hale* v. *Bohannon* (1952) 38 Cal.2d 458, 471 [241 P.2d 4].)

B. DOE Contentions

DOE is sympathetic to LBUSD's position. On appeal, it takes no stand on the issue whether the Executive Order constitutes a state mandate within [*185] the meaning of Section 6.

(21) The thrust of its appeal is that, if there is a mandate, the DOE budget is an inappropriate source of funding in comparison with other budget line item accounts included in the order.

We conclude to the contrary because logic dictates that DOE funding be the initial and primary source for reimbursement. As discussed, the test set forth in *Mandel* and *Carmel Valley* is whether there is a general relationship between budget items and reimbursable expenditures. Since the Executive Order was issued by DOE, it is not surprising that the evidence overwhelmingly supports the finding of the trial court that this general relationship exists with regard to the DOE budget.

While we also have concluded [***53] that certain line item accounts for entities other than DOE are also appropriate sources of funding, the record does not provide the statistical data necessary to determine how far the order will reach with regard to these additional sources of support.

DOE also contends that reimbursement for expenditures in fiscal years 1977-1978, 1978-1979, and 1979-1980 cannot be awarded under Section 6 because

the amendment was not effective until July 1, 1980. As discussed, this argument has been previously rejected. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at pp. 547-548; *City of Sacramento* v. *State of California, supra*, 156 Cal.App.3d 182, 191-194, disapproved on other grounds in *County of Los Angeles* v. *State of California, supra*, 43 Cal.3d 46, 58, fn. 10.)

(22) Finally, DOE contends that interest should have been awarded at the rate of 6 percent per annum pursuant to Government Code section 926.10 rather than at the legal rate provided under article XV, section 1, paragraph (2) of the California Constitution.

Government Code section [***54] 926.10 is part of the California Tort Claims Act (Gov. Code, § 900 et seq.) which provides a statutory scheme for the filing of claims against public entities for alleged injuries; it makes no provision for claims for reimbursement [**469] for state mandated expenditures. In *Carmel Valley* a judgment awarding interest at the legal rate was affirmed. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 553.) We decline the invitation of DOE to apply another rule.

C. Cross Appeal of LBUSD

(23) LBUSD seeks reversal of that part of the judgment holding that monies in the Fines and Forfeitures Funds in the custody and possession of [*186] cross-respondent Auditor-Controller of the County of Los Angeles (County Controller) for transfer to the state treasury are not reasonably available for reimbursement of its state mandated expenditures. [18]

> 18 In its first amended petition, LBUSD listed the following code sections as appropriate sources of reimbursement: " Penal Code Sections 1463.02, 1463.03, 1403.5A and 1464; Government Code Sections 13967, 26822.3 and 72056; Health and Safety Code Section 11502; and Vehicle Code Sections 1660.7, 42003, and 41103.5."

[***55] As previously stated, funds are "reasonably available" when the purposes for which those funds were appropriated are generally related to the nature of the costs incurred. (*Carmel Valley, supra*, 190 Cal.App.3d at pp. 540-541.) LBUSD does not cite, nor have we found, any evidence in the record showing the use of those funds once they are transmitted to the state and that those funds are then "reasonably available" to satisfy the Claim. We cannot conclude as a matter of law that a general relationship exists between those funds and the nature of the costs incurred pursuant to the Executive Order. LBUSD has failed to carry its burden of proof and the trial court correctly decided these funds were not "reasonably available" for reimbursement.

Nor have we concluded that there is any ground on which the funds could be made available to LBUSD while in the possession of the county Auditor-Controller. The instant case differs from *Carmel Valley* wherein we affirmed an order which authorized a county to satisfy its claims against the state by offsetting fines and forfeitures it held which were due the state. The *Carmel Valley, supra*, 190 Cal.App.3d 521, [***56] holding was based on the right of offset as "a long-established principle of equity." (*Id.* at p. 550.) That is a different standard than the standard of "generally related to the nature of costs incurred." In the case at bar there is no set-off relationship between county and LBUSD.

We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. Former Revenue and Tax Code section 2234 does not provide reimbursement of the subject claim.

[*187] Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against [***57] certain funds appropriated through subsequent budget acts.

We affirm the decision of the trial court that the Fines and Forfeitures Funds are not "reasonably available" to satisfy the Claim.

Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order.

The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

[*188] [**470] Appendix

The superior court judgment provides in pertinent part: "It Is Ordered, Adjudged and Decreed That: "1. The requirements contained in Title 5, California Administrative Code, Sections 90-101 constitute a reimbursable State-mandate which cannot be challenged by State

Respondents or Respondent DOE because of the doctrines of administrative collateral estoppel and waiver.

"2. There are appropriated funds from specified line items in the 1984, 1985, 1986 and 1987 budgets which are 'reasonably available' to reimburse Petitioner for State-mandated costs it has occurred [*sic*] as [***58] a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101.

"3. The funds appropriated by the Legislature for:

"(a) the support of the Department of Education, including, but not limited, to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', 'Special Fund for Economic Uncertainties' or similarly designated accounts, are 'reasonably available' and may properly be and should be encumbered and expended for the reimbursement of State-mandated costs in the amount of $ 28,014,869.00, plus applicable interest, as incurred by Petitioner and as computed by Petitioner in compliance with Parameters and Guidelines adopted by the State Board of Control.

"4. The law in effect at the time that Petitioner's claim was processed provided for the computation of a specific claim amount for specific fiscal years based on Parameters and Guidelines, or claiming instructions, adopted in April 1984 and a Statewide Cost Estimate adopted on August 23, 1984, both of which are administrative actions of the State Board of Control [***59] which have not been challenged by State Respondents. The computations made pursuant to the Parameters and Guidelines and Statewide Cost Estimate are specific and ascertainable and subject to audit by the State Controller under Government Code section 17558.

"5. The Court decrees that State funds entitled the 'Fines and Forfeitures Funds' under the custody and control of Respondent Bloodgood, are not reasonably available for satisfaction of Petitioner's claim for reimbursement of State-mandated costs.

"6. A peremptory writ of mandamus shall issue under the seal of this Court, commanding State Respondents and Respondent Doe to comply with Article XIIIB, Section 6 of the California Constitution and Government Code Section 17565 and reimburse petitioner for:

"(a) State-mandated costs in the amount of $ 24,164,593.00, incurred as a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101 during fiscal years 1977-78 through 1982-1983, plus interest at the legal rate from September 28, 1985; and

"(b) State-mandated costs in the amount of $ 3,850,276.00, incurred as a result of Petitioner's compliance with the requirements of Title 5, California [***60] Administrative Code, Sections 90-101 during fiscal years 1983-84 and 1984-85, plus interest at the legal rate from September 28, 1985.

"7. Said peremptory writ shall command Respondent Gray Davis, State Controller, or his successor-in-interest, to pay the claims of Petitioner, plus interest at the legal rate from [*189] September 28, 1985 from the appropriations in the State Budget Acts for the 1984-85, 1985-86, 1986-87 and 1987-88 fiscal years, and the subsequently enacted State Budget Acts, which include, or will include appropriations for:

"(a) the support of the Department of Education, including, but not limited to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', Special Fund for Economic [**471] Uncertainties' or similarly designated accounts, which are 'reasonably available' to be encumbered and expended for the reimbursement of State-mandated costs incurred by Petitioner and further shall compel Elizabeth Whitney, Acting State Treasurer, or her successor-in-interest, to make payments on the warrants drawn by Respondent Gray Davis, State Controller [***61] upon their presentation for payment by Petitioner without offset or attempt to offset against other monies due and owing Petitioner until Petitioner is reimbursed for all such costs.

"8. Said Peremptory Writ of Mandate also shall command Respondent Jesse R. Huff, Director of the State Department of Finance, to perform such actions as may be necessary to effect reimbursement required by other portions of this Judgment, including but not limited to, those actions specified in Chapter 135, Statutes of 1987, Section 2.00, pp. 549-553, or with respect to the Special Fund for Economic Uncertainties.

"9. Pending the final disposition of this proceeding, State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees and all persons acting in concert or participation with them, are hereby enjoined or restrained from directly or indirectly expending from the appropriations described in Paragraph No. 7 hereinabove any sums greater than that which would leave in said appropriations at the conclusion of the respective fiscal years an amount less than the reimbursement amounts claimed by Petitioner together with interest at the legal rate through [***62] payment of said reimbursement amount. Said

amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"10. Pending the final disposition of this proceeding State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly causing to revert the reimbursement award sum from the appropriations described in Paragraph No. 7 hereinabove to the general funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"11. The State Respondents and Respondent Doe have a continuing obligation to reimburse Petitioner for costs incurred in compliance with the requirements contained in Title 5, California Administrative Code, Section 90-101 in the fiscal years subsequent to it's [*sic*] claims for expenditures in fiscal years 1977-78 through 1984-85 as set forth in the First Amended Petition, as amended, and the accompanying Motion For the Issuance Of A Writ Of Mandate.

"12. The deletion of funding [***63] for reimbursement of State-mandated costs incurred in compliance with Title 5, California Administrative Code, Sections 90-101 from Chapter 1175, Statutes of 1985 was invalid and unconstitutional.

"13. Respondent Gray Davis, State Controller, shall retain the right to audit the claims and records of the Petitioner pursuant to Government Code Section 17561(d) to verify the actual dollar amount of the reimbursement award sum.

"14. The Court reserves and retains jurisdiction to effect any appropriate remedy at law or equity which may be necessary to enforce its judgment or order.

[*190] "15. Petitioner shall recover from State Respondents and Respondent DOE costs in this proceeding in the amount of 1,863.54.

"Dated: 3-2, 1988	"/s/ Weil
	"Robert I. Weil
	"Judge of The Superior Court"

TAB “18”

HELEN MORGAN, a Minor, etc., et al., Plaintiffs and Appellants, v. THE COUNTY OF YUBA, Defendant and Respondent

Civ. No. 10636

Court of Appeal of California, Third Appellate District

230 Cal. App. 2d 938; 41 Cal. Rptr. 508; 1964 Cal. App. LEXIS 949

November 30, 1964

PRIOR HISTORY: [* **1] APPEAL from a judgment of the Superior Court of Yuba County. Warren Steel, Judge.

Action for wrongful death due to alleged negligence of county sheriff and his deputies in failing to notify plaintiffs, as promised, of release of a dangerous prisoner on bail.

DISPOSITION: Reversed with directions. Judgment of dismissal after demurrer to complaint was sustained without leave to amend, reversed with directions.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff minors challenged the judgment of the Superior Court of Yuba County (California), which sustained a demurrer without leave to amend in a wrongful death action due to alleged negligence of employees of respondent, the County of Yuba, when a sheriff and his deputies failed to notify plaintiffs, as promised, of the release of a dangerous prisoner.

OVERVIEW: Plaintiff minors' decedent was killed by a released prisoner after employees of respondent, the County of Yuba, failed to warn of the prisoner's release, as promised. The trial court dismissed plaintiffs' wrongful death action as time-barred. The court held that the statute of limitations did not apply to minor heirs. Respondent claimed that it was not liable for the acts or missions charged in the complaint against its officers based on *Cal. Gov't Code §§ 845.8* and *820.2,* which immunized public employees for release of prisoners and for discretionary acts. The court held that the negligence charged was the failure to warn, as promised, of the release of a dangerous prisoner, not the release itself. Following such promise, the duty to warn was not discretionary. *Cal. Gov't Code § 820.2* rendered public employees liable, like private citizens, for acts and omissions. The giving of the warning was within the scope of employment. The court held that under the facts, plaintiffs had to plead reliance, which they did not do. The defect could be cured by amendment to the pleadings without prejudice to respondent and plaintiffs should have been permitted to do so.

OUTCOME: The court reversed the judgment in favor of respondent, the County of Yuba, and held that plaintiff minors' claim was for failure to warn of the release of a dangerous prisoner, as promised, not the release itself; the promise was a ministerial act and was within respondent's employees' scope of employment. Plaintiffs should have been permitted to amend the pleadings to allege the required reliance on the promise, and the court remanded the case.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview
[HN1] If a judgment is proper upon any grounds, it is the duty of the appellate court to affirm it.

Governments > Legislation > Statutes of Limitations > Governmental Entities
Torts > Public Entity Liability > Liability > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN2] Cal. Gov't Code § 815.2 (1963) imposes upon public entities vicarious liability for the tortious acts and omissions of their employees but excludes liability in those cases where employees are themselves immune.

Governments > Legislation > Statutes of Limitations > Governmental Entities
Governments > Local Governments > Claims By & Against
[HN3] See *Cal. Gov't Code § 815.2* (1963).

Governments > Legislation > Statutes of Limitations > Governmental Entities
Governments > Local Governments > Claims By & Against
[HN4] By *Cal. Gov't Code § 820.2* (1963) public employees are immune from liability for acts or omissions which are the result of "discretion" vested in them.

Governments > Legislation > Statutes of Limitations > Governmental Entities
Governments > Local Governments > Claims By & Against
[HN5] See *Cal. Gov't Code § 820.2* (1963).

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
Governments > Local Governments > Duties & Powers
A discretionary act is one which requires personal deliberation, decision and judgment while an act is said to be ministerial when it amounts only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own.

Governments > Local Governments > Claims By & Against
[HN7] By *Cal. Gov't Code § 820* (1963), it is provided that except as otherwise provided by statute (including *Cal. Gov't Code § 820.2)* a public employee is liable, and enjoys the same defenses, as a private person for his acts and omissions.

Governments > Local Governments > Claims By & Against
[HN8] See *Cal. Gov't Code § 820* (1963).

Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > General Overview
Torts > Negligence > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty
[HN9] In the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another. Exceptions to this rule exist, however, when there has been a voluntary or gratuitous undertaking. A person not required to perform services for another may sometimes do so, and in such case, in certain instances, is under a duty to exercise due care in performance.

Torts > Negligence > Duty > Affirmative Duty to Act > Failure to Act
[HN10] Nonfeasance may give rise to tort liability where a person, in reasonable reliance thereon, suffers harm, as by refraining from securing other necessary assistance.

Governments > Legislation > Statutes of Limitations > Governmental Entities
[HN11] A public entity is only liable for acts or omissions of the public employee within the scope of his employment. *Cal. Gov't Code § 815.2* (1963).

Torts > Vicarious Liability > Employers
[HN12] An employer's responsibility for the acts and omissions of his employee extends beyond the actual furthering or benefiting of the former's interests.

Torts > Vicarious Liability > Employers > Scope of Employment > General Overview
[HN13] The giving of reassurance and protection to members of the public who have been threatened with violence is within the scope of a policeman's and sheriff s employment, even though the officer has not been authorized to give such reassurance, or, in fact, has been expressly forbidden so to do.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Appeal--Grounds of Decision Below--Demurrer. --If a judgment dismissing the action, on sustaining a demurrer without leave to amend, is proper on any grounds, an appellate court's duty is to affirm it.

(2) Counties--Torts. --Under *Gov. Code, § 820.2,* making public employees immune from liability for acts or omissions that are the result of discretion vested in them, a deputy sheriff exercises no discretion in warning those whom he has promised to warn of the impending release of a dangerous prisoner; the simple act of reaching for a telephone or of dispatching a messenger is wholly ministerial.

(3) Id.--Torts. --Under *Gov. Code, § 820.2,* making a public employee immune from liability for acts or omissions that are the result of discretion vested in him, a discretionary act by a deputy sheriff is one that requires personal deliberation, decision and judgment, while an act is said to be ministerial when it amounts only to an obedience to orders, or the performing of a duty in which the officer is left no choice of his own.

(4) Id.--Torts. --Under *Gov. Code, § 820.2,* making a public officer immune from liability for acts or omissions that are the result of discretion vested in him, when a deputy sheriff made a theretofore unpromised decision on the question whether or not he should warn a threatened victim of a prisoner's release, once the decision had been made and the promise had been given, the act of carrying out the promise was not discretionary in any sense.

(5) Negligence--Elements--Duty. --Generally, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another.

(6) Id.--Elements--Duty. --A person not required to perform services for another may sometimes do so, and in such case, in certain instances, is under a duty to exercise due care in performance.

(7) Id.--Elements--Nonfeasance. --A nonfeasance may give rise to tort liability where a person, in reliance on a gratuitous promise, suffers harm, as by refraining from securing other necessary assistance.

(8) Torts--Persons Liable--Gratuitous Promise of Aid. --One who represents that he will extend aid to a helpless person is responsible for the harm caused by the failure to receive the aid if, but for defendant's conduct, aid would have been rendered by others.

(9) Negligence--Exercise of Care. --One who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.

(10) Counties--Actions--Pleading. --In an action against a county for the wrongful death of a woman murdered by a prisoner who had threatened her life, based on a deputy sheriffs failure to give a promised warning of the prisoner's release from custody, a demurrer to the complaint should not have been sustained without leave to amend, despite the lack of allegations of reliance, that the deputy sheriffs promise created an expectation of fulfillment, and that but for such reliance and expectation, plaintiffs could and would have taken appropriate measures themselves against the threatened assault, where such defects could easily have been cured and no harm had resulted or could result to the county due to the insufficiency of the original pleading.

(11) Counties--Torts. --A public entity, such as a county, is only liable for acts or omissions of a public employee within the scope of his employment.

(12) Master and Servant--Liability to Third Persons--Scope of Employment. --An employer's responsibility for the acts and omissions of his employee extends beyond the actual furthering or benefiting of the former's interests.

(13) Police--Duties: Sheriffs--Duties. --The giving of reassurance and protection to members of the public who have been threatened with violence is within the scope of a policeman's or sheriffs employment, even though the officer has not been authorized to give such reassurance or, in fact, has been expressly forbidden so to do.

COUNSEL: P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein and Reginald M. Watt for Plaintiffs and Appellants.

Rich, Fuidge, Dawson & Marsh, Rich, Fuidge, Dawson, Marsh, Tweedy & Morris, Thomas A. Tweedy and Joseph L. Heenan for Defendant and Respondent.

JUDGES: Pierce, P. J. Friedman, **J.,** and Van Dyke, **J., *** concurred.

* Retired Presiding Justice of the District Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

OPINION BY: PIERCE

OPINION

[*940] [**509] In this wrongful death action against the County of Yuba a demurrer was sustained without leave to amend and three of the plaintiffs, the minor children (and heirs) of decedent, appealed from the judgment of dismissal.

The ground upon which the trial court sustained the demurrer [***2] was that the action was barred by the statute of limitations [**510] (*Code Civ. Proc., § 340, subd. 3);* this because the action had not been filed within one year of the death of decedent. While this appeal was pending, *Cross v. Pacific Gas & Elec. Co. (Jan. 1964) 60 Cal.2d 690 [36 Cal.Rptr. 321, 388 P.2d 353] ,* was decided. It held, as to the heirs of a decedent who were minors, that the statute of limitations was suspended during their minority and that a judgment of dismissal against such heirs was reversible error.

Respondent concedes that because of the rule in the *Cross* case, *supra,* the judgment of dismissal cannot be sustained upon the ground stated. (1) However, [HN1] if the judgment is proper upon any grounds, our duty would be to affirm it. (*Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416 [282 P.2d 890]; Southall v. Security Title Ins. etc. Co., 112 Cal.App.2d 321 [246 P.2d 74]; Morris v. National Federation of the Blind, 192 Cal.App.2d 162 [13 Cal.Rptr. 336] .)* Respondent county now contends that it is not liable for the acts or omissions [*941] charged in the complaint against its officers in any event and therefore the judgment [* **3] was proper.

The essential allegations of the complaint can be simply stated: On September 19, 1960, a deputy sheriff of defendant Yuba County, acting on a complaint made by plaintiffs' decedent, Elizabeth Morgan, arrested one Avel Ashby. The complaint alleges that "[on] or about September 18, 1960, prior to said arrest, and again on September 20, 1960, subsequent to said arrest, the Sheriff and Deputies of the County of Yuba undertook to warn plaintiffs immediately upon said Ashby's release on bail. Said sheriff and deputies had full knowledge that said Ashby threatened the life of said ELIZABETH MORGAN." It is further alleged that the warning was not given and that as a proximate result thereof said decedent was killed by Ashby.

The contention of respondent county is that neither it nor its officers were liable. Its theory is that the acts of the sheriff and his deputies were discretionary acts for which neither they nor the county are liable either under the government tort liability legislation of 1963 (Stats. 1963, ch. 1681) or the common law -- this notwithstanding the rule in *Muskopf v. Corning Hospital Dist., 55 Cal.2d 211 [I I Cal.Rptr. 89, 359 P.2d* 457], holding [***4] that the doctrine of governmental immunity could no longer be used to shield a public entity from liability for torts for which its agents were liable.

Respondent, to justify its conclusions, treats the allegations of the complaint as charging the public officers referred to with negligence in having released a dangerous prisoner on bail and, having so construed the pleading, it urges that this is an exercise of discretion (in the determination of whether "public safety will be endangered by such release") for which neither the county nor the acting officers can be held liable. And respondent cites a provision of the 1963 legislation, *Government Code section 845.8,* which provides that neither a public entity nor its employee is liable for an injury resulting from a determination of whether to release a prisoner. Also cited is *Government Code section 820.2,* providing that a public employee is not liable for an act or omission which is "the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

As to the facts assumed by respondent, it correctly states the statutory rule and, perhaps, the common law rule (cf. *Azcona v. Tibbs, 190 [***5] Cal.App.2d 425 [12 Cal.Rptr. 232]).* But the facts stated do not accurately describe the acts or [*942] omissions charged in the complaint. Plaintiffs do not urge that the officers negligently released a dangerous prisoner. The negligence charged is the failure to warn, as promised, that a dangerous prisoner was about to be, or had been, released.

This brings the case into a new category -- the negligent omission to perform an act voluntarily assumed. And the problem for our determination is whether such an omission proximately causing a fatality is actionable against the entity for which the offending officer works.

[**511] We first discuss the problem within the framework of the 1963 legislation.

> 1 Appellants have attacked the 1963 legislation as violating both due process and equal protection of the laws. We have answered their contentions in *Flournoy v. State* (Nov. 9, 1964) *ante,* p. 520 *[41 Cal.Rptr. 190] ,* in which the legislation is held to be valid prospectively and, in some cases, retroactively. However, we find appellants' attack on the legislation in this case difficult to understand since, under the facts here, the legislation, as we read it, reaffirms the very rights they would have us enforce.

[* **6] [HN2]

Government Code section 815.2' as enacted in 1963 (Stats. 1963, ch. 1681) "imposes upon public entities vicarious liability for the tortious acts and omissions of their employees" (see Comment 4 Cal. Law Revision Com. Report (1963) p. 838), but excludes liability in those cases where employees are themselves immune.

2 [HN3] *Government Code section 815.2* provides: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

"(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

[HN4] By *Government Code section 820.2* [3] public employees are immune from liability for acts or omissions which are the result of *"discretion"* vested in them. r **71

3 [HN5] *Government Code section 820.2* provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

(2) No discretion is exercised in warning those whom one has promised to warn of the impending release of a dangerous prisoner. The simple act of reaching for a telephone or of dispatching a messenger is wholly ministerial. (3) [HN6] A discretionary act is one which requires "personal deliberation, decision and judgment" while an act is said to be ministerial when it amounts "only to an obedience to orders, or the performance [*943] of a duty in which the officer is left no choice of his own." (See Prosser, Torts (3d ed.) p. 1015.) This definition is imperfect but will suffice here. It has been criticized as "finespun and more or less unworkable" (Prosser, *op. cit.*, p. 1015) and, as regards the definition of "discretionary," [***8] it is no doubt sometimes a too-inclusive classification where the duties of "operational level" public officers are involved. (Compare *Dalehite v. United States, 346 U.S. 15 [73 S.Ct. 956, 97 L.Ed. 1427]* , with *Indian Towing Co. v. United States, 350 U.S. 61 [76 S.Ct. 122, 100 L.Ed. 48] .)* But in this case we do not have to make any "finespun" differentiation. **(4)** Whatever the policy of the law may or should be regarding the nature of the act performed, when an officer makes a theretofore - unpromised decision on the question whether or not he should warn a threatened victim of a prisoner's release, once the decision has been made and the promise has been given, the act of carrying out the promise is not discretionary *in any sense.* (See *Dillwood v. Riecks, 42 Cal.App. 602, 610 [184 P. 35] .)*

We now reach the question -- is disregard of such a nondiscretionary promise actionable?

[HN7] By *Government Code section 820* [4] of the 1963 legislation it is provided that "[except] as otherwise provided by statute (including *section 820.2)"* a public employee is liable, and enjoys the same defenses, as a private [**512] person for his acts and omissions. The comment [***9] of the California Law Revision Commission (4 Cal. Law Revision Corn. Report (1963) p. 842) regarding this section states: "This section declares the pre-existing law."

4 [HN8] *Government Code section 820* provides: "(a) Except as otherwise provided by statute (including *section 820.2),* a public employee is liable for injury caused by his act or omission to the same extent as a private person.

"(b) The liability of a public employee established by this part (commencing with section 814) is subject to any defenses that would be available to the public employee if he were a private person."

Under the facts of this case a private person would be liable.

(5) It may be stated as a general principle that " [HN9] in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." (*Richards v. Stanley, 43 Cal.2d 60, 65 [271 P.2d 23] .)* Exceptions to this rule exist, however, when there has been a voluntary or gratuitous undertaking. [***10] (6) A person not required to perform [*944] services for another may sometimes do so, and in such case, in certain instances, is under a duty to exercise due care in performance. (2 Rest., Torts, §§ 323, 324, p. 873 et seq.; *Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 389-390 [26 P.2d 485]; Griffin v. County of Colusa, 44 Cal.App.2d 915, 923 [113 P.2d 270]* (a decision of this court, rule applied to nurses employed by a county hospital); *Biondini v. Amship Corp., 81 Cal.App.2d 751, 763 [185 P.2d 94]* -- and see other cases cited 2 Witkin, Summary of Cal. Law (7th ed. 1960) Torts, § 241, p. 1436.) The foregoing cases are illustrative of instances where the officer, in addition to promising an act, *has embarked upon its performance* when the casualty occurs. These cases do not cover the facts of the instant case. But there is another exception to the rule of nonliability for an unperformed gratuitous undertaking which does fit the facts of this case. (7) It has been held that "[HN10] nonfeasance may give rise to tort liability where a person, *in reasonable reliance thereon,* suffers harm, as by refraining from securing other necessary assistance. (2

[***11] Rest., Torts, § 325; see also 65 Harv. L. Rev. 913.)" (2 Witkin, *op cit.,* p. 1437.) (Italics supplied.)

(8) In the law review article cited by Witkin (Professor Seavey, *Reliance on Gratuitous Promises or Other Conduct,* 64 Harv. L. Rev. 913) the author observes (on p. 919): "[One] who represents that he will extend aid to a helpless person is responsible for the harm caused by the failure to receive the aid if, but for the defendant's conduct, aid would have been rendered by others." (And see 2 Rest., Torts, § 325, and comment.)

We find *Fair v. United States (5th Cir. 1956) 234 F.2d 288* indistinguishable from the case at bench. There the heirs of a nurse and two other victims of a homicidal assault by an insane Air Force officer sued the government for the deaths. The alleged negligence was that of a provost marshal who with knowledge of the threats by the officer against the victims had promised the latter they would be notified if his release was proposed so that measures could be taken for their protection. In disregard of this promise the officer was released and no warning was given. The action was brought under the Federal Tort Claims Act, *28 United States* [***12] *Code Annotated sections 1346(b), 2674* and *2680(a)* excepting from entity liability "[any] claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or [*945] an employee of the Government, whether or not the discretion involved be abused." (This provision, differently worded, is identical in meaning with *Government Code, section 820.2,* quoted above, see footnote 3.) In reversing a district court dismissal of the action the circuit court held that the foregoing section did not grant immunity. (9) Quoting the United States Supreme Court in *Indian Towing Co. v. United States, supra,* the court stated (on p. 291): "that it was hornbook tort law 'that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.' s *Fair v. United States* [**513] was cited in appellants' brief and was referred to in oral argument. Respondent has made no attempt to distinguish its facts or rule.

> 5 The alleged negligence in *Indian Towing Co., supra,* was the failure of the Coast Guard to give warning that a light maintained as a navigational aid was not working. As a proximate result petitioner's tug and towed barge went aground. In the earlier case of *Dalehite v. United States, 346 U.S. 15, 42 [73 S. Ct. 956, 97 L. Ed. 1427, 1444] ,* it had been held that the "discretionary function" exception did not apply at what the court termed the "operational level." The government conceded in *Indian Towing Co.* that discretion *was* being exercised at the operational level but contended that since the function there being performed was strictly "governmental" in character -- one which private persons do not perform -- and since the statute was intended to fix liability only to the extent liability would be imposed upon a private individual under the same circumstances, no liability against the government could be imposed. The court denied this contention.

[***13] (10) We have shown above that reliance upon the promise is a necessary element of the cause of action and in the case at bench reliance has not been pleaded. It is not alleged that the promise made created an expectation of fulfillment; nor is it alleged that but for such reliance and expectation, plaintiffs could and would have taken appropriate measures themselves against Ashby's threatened assault. On the other hand, it seems obvious that these defects of pleading could easily have been remedied and that no harm has been or could result to the county because of the insufficiency of the original pleading. The demurrer was sustained without leave to amend and under the circumstances related appellants should have an opportunity to bring themselves within the rule of liability. Whether appellants will be able to prove facts showing a negligent violation of the rights of plaintiffs' decedent is another thing.

Another matter remains to be noted. (11) [HN I 1] A public entity is only liable for acts or omissions of the public employee "within the scope of his employment." *(Gov. Code,* [*946] § *815.2* -- see fn. 2.) It was suggested by counsel for the county during oral argument that the officers [***14] in promising to warn (and in omitting the fulfillment of the promise) were not acting in the public interest; that they were acting "on their own"; that if they were being "good samaritans," it was no part of their function as public officers to do so. (12) But [HN12] an employer's responsibility for the acts and omissions of his employee extends beyond the actual furthering or benefiting of the former's interests. The functioning of a sheriffs office or police department requires an association of officers with members of the public with attendant risks that "someone may be injured." In *Carr v. Wm. C. Crowell Co., 28 Cal.2d 652 [171 P.2d 5] ,* the court, quoting Justice Cardozo, says (on p. 656) that such associations "'include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness. . .'"

The bartender in charge of a cocktail lounge who assaults a customer is the familiar example of an employer, not well served, whose employee is [***15] nevertheless acting within the scope of his employment and for whose

acts the employer is liable. (*Novick v. Gouldsberry (9th Cir. 1949) 173 F.2d 496.)*

(13) [HN13] The giving of reassurance and protection to members of the public who have been threatened with violence *is* within the scope of a policeman's and sheriffs employment, even though the officer has not been authorized to give such reassurance -- or, in fact, has been expressly forbidden so to do. (See *Williams v. United States, 350 U.S. 857 [76 S.Ct. 100, 100 L. Ed. 761] ,* reversing *215 F.2d 800 (9th Cir. 1954).)*

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Received
June 17, 2011
Commission on
State Mandates

TAB “19”

TIMOTHY J. OWEN, Plaintiff and Appellant, v. STEPHEN P. SANDS, as Registrar of Contractors, etc., Defendant and Respondent.

A121809

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

176 Cal. App. 4th 985; 98 Cal. Rptr. 3d 167; 2009 Cal. App. LEXIS 1374

July 28, 2009, Filed

SUBSEQUENT HISTORY: [*1]**

The Publication Status of this Document has been Changed by the Court from Unpublished to Published August 18, 2009.

Time for Granting or Denying Review Extended *Owen (Timothy J.) v. Sands (Stephen P.), 2009 Cal. LEXIS 12050 (Cal., Nov. 6, 2009)*

Review denied by *Owen (Timothy J.) v. Sands (Stephen P.), 2009 Cal. LEXIS 12219 (Cal., Nov. 19, 2009)*

US Supreme Court certiorari denied by Owen v. Sands, 2010 U.S. LEXIS 3394 (U.S., Apr. 19, 2010)

PRIOR HISTORY: Superior Court of Alameda County, No. RG07355155, Frank Roesch, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant contractor sought review of a judgment of the Superior Court of Alameda County (California), which upheld an administrative decision from respondent, the California Registrar of Contractors, citing the contractor for six violations of state contractor law and ordering him to pay civil penalties and compensation to a homeowner.

OVERVIEW: The contractor performed work on a home before his contractor's license was issued. The homeowner pointed out defects in the work, but the contractor failed to correct them. The administrative law judge (ALJ) ruled that the applicable standard of proof was preponderance of the evidence and found each of the alleged violations to be true. The court held that the All applied the correct standard of proof. Although procedural due process of law required application of the clear and convincing evidence standard of proof in proceedings to restrict, suspend or revoke professional or vocational licenses, that standard did not apply in a citation proceeding where the only proposed sanctions were a civil penalty or an order of correction pursuant to *Bus. & Prof. Code, § 7099.* Suspension or revocation of the contractor's license could not have been ordered because no accusation had been filed under *Gov. Code, § 11503;* moreover, such an accusation was not required for a citation. Although the citation referred to *Bus. & Prof. Code, §§ 7028, 7125,* it sufficed to inform the contractor that he was being cited pursuant to the authority in *Bus. & Prof. Code, §§ 7028.7, 7125.2.*

OUTCOME: The court affirmed the trial court's judgment.

LexisNexis(R) Headnotes

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

[HN1] Where only legal issues are raised on appeal, the standard of review is de novo.

Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Governments > State & Territorial Governments > Licenses
[HN2] The clear and convincing evidence standard of proof applies in proceedings to restrict, suspend or revoke professional or vocational licenses. The clear and convincing evidence standard has been applied in a licensed contractor disciplinary hearing.

Governments > State & Territorial Governments > Licenses
[HN3] In the licensed contractor context, the California Registrar of Contractors generally has the power to cite, temporarily suspend, or permanently revoke any license or registration if the licensee is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action. *Bus. & Prof Code, § 7090.*

Governments > State & Territorial Governments > Licenses
[HN4] See *Bus. & Prof Code, § 7099.*

Governments > State & Territorial Governments > Licenses
[HN5] If a licensee appeals a citation, the California Registrar of Contractors must afford an opportunity for a hearing and thereafter issue a decision, based on findings of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief. *Bus. & Prof. Code, §§ 7099.3, 7099.5.*

Administrative Law > Agency Adjudication > Prehearing Activity
Governments > State & Territorial Governments > Licenses
[HN6] Suspension or revocation of a contractor's license cannot be ordered unless certain procedural prerequisites, such as the filing of an accusation, are satisfied.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Governments > State & Territorial Governments > Licenses
[HN7] An individual, having obtained the license required to engage in a particular profession or vocation, has a fundamental vested right to continue in that activity. A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. The independent judgment standard of review must be applied in the trial court to an administrative decision that substantially affects such a fundamental vested right. Procedural due process of law requires a regulatory board or agency to prove the allegations of an accusation filed against a licensee by clear and convincing evidence rather than merely by a preponderance of the evidence.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
[HN8] The procedural safeguards the Due Process Clause requires in an administrative proceeding are not determined solely based on whether the proceeding is disciplinary. Instead, the necessary procedural safeguards are determined through a balancing test, which includes assessing the weight of the private interest that will be affected by the official action.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
Governments > State & Territorial Governments > Licenses
[HN9] Licensed contractors cited for violations and subject only to sanctions such as correction orders or monetary penalties are not entitled to the same procedural safeguards afforded to contractors who face restriction, suspension, or revocation of their licenses.

Governments > State & Territorial Governments > Licenses
[HN10] Bus. & Prof. Code, §§ 7028, 7126 (referring back to *Bus. & Prof. Code, §§ 7125-7125.4)* define misdemeanor crimes, which may only be prosecuted in a criminal court. However, the code also expressly authorizes the California Registrar of Contractors to cite individuals for violating the statutory prohibitions.

Governments > State & Territorial Governments > Licenses
[HN11] See *Bus. & Prof. Code, § 7028, subd. (a).*

Governments > State & Territorial Governments > Licenses

[HN12] ***Bus. & Prof. Code, § 7028.2,*** authorizes a criminal complaint to be filed only by the California Attorney General, a district attorney, or a prosecuting attorney for a city. However, ***Bus. & Prof. Code, § 7028.6,*** authorizes, and ***Bus. & Prof. Code, § 7028.7,*** requires, the California Registrar of Contractors to cite an individual if the Registrar has probable cause to believe the individual is acting as a contractor without a license and expressly provides that the sanctions authorized under this section shall be separate from, and in addition to, all other remedies, either civil or criminal. Similarly, ***Bus. & Prof. Code, § 7125,*** requires the Contractors' State License Board to require contractors to file certificates of workers' compensation insurance unless specifically exempted by statute, and ***Bus. & Prof. Code, § 7126,*** provides that a licensee who fails to comply with such a requirement is guilty of a misdemeanor.

Governments > State & Territorial Governments > Licenses
[HN13] See ***Bus. & Prof. Code, § 7125.2, subd. (d).***

Administrative Law > Agency Adjudication > Prehearing Activity
Governments > State & Territorial Governments > Licenses
[11N14] ***Gov. Code, § 11503,*** only requires the filing of an accusation to initiate a hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court upheld an administrative decision from the Registrar of Contractors citing a contractor for six violations of state contractor law and ordering him to pay civil penalties and compensation to a homeowner. The contractor performed work on a home before his contractor's license was issued. The homeowner pointed out defects in the work, but the contractor failed to correct them. The administrative law judge (ALJ) ruled that the applicable standard of proof was preponderance of the evidence and found each of the alleged violations to be true. (Superior Court of Alameda County, No. RG07355155, Frank Roesch, Judge.)

The Court of Appeal affirmed the judgment, holding that the ALJ applied the correct standard of proof. Although procedural due process of law requires application of the clear and convincing evidence standard of proof in proceedings to restrict, suspend, or revoke professional or vocational licenses, that standard does not apply in a citation proceeding where the only proposed sanctions are a civil penalty or an order of correction pursuant to ***Bus. & Prof. Code, § 7099.*** Suspension or revocation of the contractor's license could not have been ordered because no accusation had been filed under ***Gov. Code, § 11503;*** such an accusation is not required for a citation. Although the citation referred to ***Bus. & Prof. Code, §§ 7028, 7125,*** it sufficed to inform the contractor that he was being cited pursuant to the authority in ***Bus. & Prof. Code, §§ 7028.7, 7125.2.*** (Opinion by Bruiniers, J.,* with Simons, Acting P. J., and Needham, J., concurring.) [*986]

* Judge of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Business and Occupational Licenses § 10--Suspension and Revocation--Standard of Proof--Contractors.--The clear and convincing evidence standard of proof applies in proceedings to restrict, suspend, or revoke professional or vocational licenses. The clear and convincing evidence standard has been applied in a licensed contractor disciplinary hearing.

(2) Business and Occupational Licenses § 10--Suspension and Revocation--Filing of Accusation--Contractors.--Suspension or revocation of a contractor's license cannot be ordered unless certain procedural prerequisites, such as the filing of an accusation, are satisfied.

(3) Business and Occupational Licenses § 10--Suspension and Revocation--Due Process--Independent Judgment Review.--An individual, having obtained the license required to engage in a particular profession or vocation, has a fundamental vested right to continue in that activity. A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. The independent judgment standard of review must be applied in the trial court to an administrative decision that substantially affects such a fundamental vested right. Procedural due process of law requires a regulatory board or agency to prove the allegations of an accusation filed against a licensee by clear and convincing evidence rather than merely by a preponderance of the evidence.

(4) Business and Occupational Licenses § 10--Suspension and Revocation--Lesser Penalties--Standard of Proof--Contractors.--Because a cita-

tion hearing on review could only have resulted in civil penalties or correction orders against a licensed contractor, and could not have resulted in orders suspending, limiting, or revoking his license, the preponderance of the evidence rather than the clear and convincing evidence standard of proof applied.

[Cal. Forms of Pleading and Practice (2009) ch. 473F, Agency Adjudication Hearings, § 473F.52; 1 Witkin, Cal. Evidence (4th ed. 2000) Introduction, § 63; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 334.]

(5) Business and Occupational Licenses § 10--Suspension and Revocation--Due Process.--The procedural safeguards the due process clause requires in an administrative proceeding are not determined solely based on whether the proceeding is disciplinary. Instead, the necessary procedural safeguards are determined through a balancing test, which includes [*987] assessing the weight of the private interest that will be affected by the official action.

(6) Business and Occupational Licenses § 10--Suspension and Revocation--Lesser Penalties--Due Process--Contractors.--Licensed contractors cited for violations and subject only to sanctions such as correction orders or monetary penalties are not entitled to the same procedural safeguards afforded to contractors who face restriction, suspension, or revocation of their licenses.

(7) Business and Occupational Licenses § 10--Suspension and Revocation--Lesser Penalties and Misdemeanors.--Bus. & *Prof Code, §§ 7028, 7126* (referring back to ***Bus. & Prof Code, §§ 7125-7125.4)*** define misdemeanor crimes, which may only be prosecuted in a criminal court. However, the code also expressly authorizes the Registrar of Contractors to cite individuals for violating the statutory prohibitions.

(8) Business and Occupational Licenses § 10--Suspension and Revocation--Lesser Penalties and Misdemeanors.--Bus. & *Prof Code, § 7028.2,* authorizes a criminal complaint to be filed only by the California Attorney General, a district attorney, or a prosecuting attorney for a city. However, ***Bus. & Prof. Code, § 7028.6,*** authorizes, and ***Bus. & Prof. Code, § 7028.7,*** requires, the Registrar of Contractors to cite an individual if the Registrar has probable cause to believe the individual is acting as a contractor without a license and expressly provides that the sanctions authorized under this section shall be separate from, and in addition to, all other remedies, either civil or criminal. Similarly, ***Bus. & Prof Code, § 7125,*** requires the Contractors' State License Board to require contractors to file certificates of workers' compensation insurance unless specifically exempted by statute, and ***Bus. & Prof. Code, § 7126,*** provides that a licensee who fails to comply with such a requirement is guilty of a misdemeanor.

(9) Business and Occupational Licenses § 11--Citation Proceeding--Accusation.-- ***Gov. Code, § 11503,*** which requires the filing of an accusation to initiate an administrative adjudication hearing, does not apply to a citation proceeding under ***Bus. & Prof Code, §§ 7099-7099.11,*** which do not seek restriction, suspension, or revocation of a contractor's license.

COUNSEL: Timothy J. Owen, in pro. per., for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, and Diann Sokoloff, Deputy Attorney General, for Defendant and Respondent.

JUDGES: Opinion by Bruiniers, J., with Simons, Acting P. J., and Needham, **J.,** concurring.

OPINION BY: Bruiniers [*988]

OPINION

[**168] **BRUINIERS, J.** '--A licensed contractor was cited for six violations of state contractor law and ordered to pay civil penalties and compensation to the injured homeowner. He challenged [**169] the citation, which was upheld by the Registrar of Contractors after an administrative hearing at which the violations were found true by a preponderance of the evidence. The contractor argues the standard of proof should have been clear and convincing evidence. We conclude the agency applied the correct standard of proof. We also reject the contractor's contention that he was improperly convicted of criminal misdemeanors through an administrative proceeding, and his argument that the administrative hearing was procedurally flawed because no accusatory pleading was filed.

> * Judge [***2] of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

BACKGROUND

The following facts are taken from the administrative law judge's findings, which are not disputed for purposes of this appeal. On June 28, 2005, Timothy J. Owen verbally agreed to replace 18 windows, install a sliding glass door, and replace the front door in a Kensington home for $ 19,000. He performed the work in July and August 2005, even though his contractor's license was not issued until September 2005. The homeowner asked other contractors

to review the quality of Owen's work, and it was found deficient. When the homeowner confronted Owen on the matter, he became angry, demanded more money, and ultimately abandoned the project. The homeowner hired another contractor to correct and complete the work at a cost of $ 13,265.

The Registrar of Contractors (Registrar) issued a citation to Owen alleging six violations of the Business and Professions Code: ' (1) engaging in the business of contractor without a license (§ *7028);* (2) willfully and materially departing from trade standards of good workmanship (§ *7109);* (3) failing to correct [***3] or complete a project for the stated contract price, causing the owner to secure the services of another contractor (§ *7113);* (4) failing to include required provisions in the contract (§ *7159);* (5) willfully or fraudulently acting in a manner that substantially injured another (§ *7116);* and (6) falsely claiming a workers' compensation insurance exemption (§ *7125, subd. (b)).* [*989] The citation imposed civil penalties totaling $ 1,600 and an order of correction requiring Owen to pay the homeowner $ 7,880.79.

1 All statutory references are to the Business and Professions Code unless otherwise indicated.

Owen contested the citation and a hearing was held before an administrative law judge (ALT) of the Contractors' State License Board. Before the hearing commenced, Owen argued that the standard of proof at the hearing should be clear and convincing evidence, but the All ruled the applicable standard of proof was preponderance of the evidence. Following four days of testimony, the ALT found each of the alleged violations to be true, and increased the civil penalties to $ 2,000 after finding Owen's conduct was deceitful, grave and egregious. The Registrar adopted the ALJ's proposed decision in September [***4] 2007 and his decision became final in October.

In November 2007, Owen filed a petition for administrative mandamus asking the court to set aside the decision on the ground that the ALJ applied the wrong standard of proof. *(Code Civ. Proc., § 1094.5.)* After briefing, the trial court ruled that the preponderance of the evidence was the correct standard of proof and denied the petition.

DISCUSSION

Owen argues the All applied the wrong standard of proof, that the ALJ improperly [**170] convicted him of misdemeanors without criminal jurisdiction, and that the hearing was procedurally flawed because it was not initiated with a formal accusatory pleading. [HN1] Because only legal issues are raised on appeal, our standard of review is de novo. *(Steinsmith v. Medical Board (2000) 85 Cal.App.4th 458, 465 [102 Cal. Rptr. 2d 115] (Steinsmith).)*

I. Standard of Proof at the AU Hearing

Owen argues the standard of proof required in all professional or vocational license disciplinary proceedings is clear and convincing proof to a reasonable certainty. We conclude the preponderance standard was appropriate in the citation proceeding because the only potential sanctions were orders of correction and civil penalties.

(1) Owen relies on a line of cases [***5] holding that [HN2] the clear and convincing evidence standard of proof applies in proceedings to restrict, suspend or revoke professional or vocational licenses. In the lead case of *Ettinger v. Board of Medical Quality Assurance,* the court held that "the proper standard of proof in an administrative hearing to revoke or suspend a doctor's license should be *clear and convincing proof to a reasonable certainty* and not a [*990] mere *preponderance of the evidence." (Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 856 [185 Cal. Rptr. 601] (Ettinger).) Ettinger* in turn relied on cases holding that this heightened standard of proof applies in proceedings to disbar an attorney or to suspend or revoke a real estate license. *(Id. at p. 855,* citing *Furman v. State Bar (1938) 12 Cal.2d 212, 229 [83 P.2d 12] (Furman); Small v. Smith (1971) 16 Cal.App.3d 450, 457 [94 Cal. Rptr. 136] (Small); Realty Projects, Inc. v. Smith (1973) 32 Cal.App.3d 204, 212 [108 Cal. Rptr. 71] (Realty Projects);* see also *Kapelus v. State Bar (1987)44 Cal.3d 179, 184, fn. 1 [242 Cal. Rptr. 196, 745 P.2d 917] (Kapelus);* cf. *San Benito Foods v. Veneman (1996) 50 Cal.App.4th 1889, 1892-1895 [58 Cal. Rptr. 2d 571]* [heightened standard of proof not required in proceeding to revoke nonprofessional food processing license]; *Mann v. Department of Motor Vehicles (1999) 76 Cal.App.4th 312, 318-320 [90 Cal. Rptr. 2d 277]* [***6] [same, with respect to vehicle salesperson's license].) Although Owen does not cite any case that holds the clear and convincing evidence standard of proof applies in a licensed contractor disciplinary proceeding, the Registrar does not dispute that the higher standard would apply in a proceeding seeking suspension, or revocation of a contractor's license. (See *Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602, 605 [257 Cal. Rptr. 320, 770 P.2d 732]* [noting that ALT applied clear and convincing evidence standard in licensed contractor disciplinary hearing without addressing whether the higher standard was required].)

(2) The question before us is whether the clear and convincing evidence standard also applies in a citation proceeding where the only proposed sanctions are a civil penalty or an order of correction, and which does not involve restriction, suspension, or revocation of a con-

tractor's license. [HN3] In the licensed contractor context, the Registrar generally has the power to "cite, temporarily suspend, or permanently revoke any license or registration if the ... licensee ... is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action." (§ *7090;* see also § *7095.)* A [***7] subset of statutes, however, provides for citation proceedings with more limited remedies. (§§ *7099-7099.11.)* [HN4] "If, upon investigation, the registrar has probable cause to believe that a licensee ... has committed any acts or omissions which are grounds for denial, [**171] revocation, or suspension of license, he or she may, in lieu of proceeding pursuant to this article, issue a citation to the licensee ... . Each citation ... may contain an *order of correction* fixing a reasonable time for correction of the violation or *an order ... for payment* of a specified sum to an injured party in lieu of correction, and may contain an assessment of a *civil penalty." (§ 7099,* italics added.) [HN5] If the licensee appeals a citation, the Registrar must afford an opportunity for a hearing and "thereafter issue a decision, based on findings [*991] of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief." (§ *7099.5;* see § *7099.3.)* [HN6] Suspension or revocation of a license cannot be ordered unless certain procedural prerequisites, such as the filing of an accusation, are satisfied. (See, e.g., *Gov. Code, § 11503.)*[2] Those procedures were not invoked here.

> 2 "A hearing to determine [***8] whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief." *(Gov. Code, § 11503.)*

Neither party has cited, and we have not found, any case law that directly addresses the appropriate standard of proof in a citation proceeding such as that described in *section 7099 et seq.* Therefore, we look to the principles underlying the *Ettinger* line of cases for guidance on the issue.

(3) In *Hughes v. Board of Architectural Examiners,* the Supreme Court linked the *Ettinger* cases to procedural [***9] due process principles. 3 *(Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788-789 [72 Cal. Rptr. 2d 624, 952 P.2d 641] .) "[W]e* often have recognized that [HN7] an individual, having obtained the license required to engage in a particular profession or vocation, has a 'fundamental vested right' to continue in that activity. [Citations.] [1[] A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. For example, this court repeatedly has held, with exceptions not pertinent here, that the 'independent judgment' standard of review must be applied [in the trial court] to an administrative decision that substantially affects such a fundamental vested right. [Citations.'" *(Id. at pp. 788-789.)* "Similarly, it has been held that procedural due process of law requires a regulatory board or agency to prove the allegations of an accusa- [*992] tion filed against a licensee by clear and convincing evidence rather than merely by [**172] a preponderance of the evidence. (See, e.g., *Kapelus[, supra, 44 Cal.3d at p.] 184,* fn. 1 *; Ettinger[, supra, 135 Cal.App.3d at p.] 856 ... ;* [citation].)" *(Id. at p. 789, fn. 9.)*

> 3 The rationale of the *Ettinger* cases [***10] themselves is not entirely clear. *Furman* relies on a disbarment case in which the Supreme Court held clear and convincing evidence was required because of the quasi-criminal nature of the proceeding and because removing or suspending a person from the practice of his or her profession deprived the person of "'personal and property rights.' *(In re Bar Association of San Francisco (1921) 185 Cal. 621, 623-624 [198 P. 7],* cited in *Furman, supra, 12 Cal.2d at p. 229.) Ettinger, Realty Projects,* and *Small* followed *Furman* based on the similarities between disbarment proceedings and the professional disciplinary proceedings at issue in those cases. *(Ettinger, supra, 135 Cal.App.3d at pp. 855-856; Realty Projects, supra, 32 Cal.App.3d at p. 212; Small, supra, 16 Cal.App.3d at pp. 457-458.)*

Although courts have not considered the appropriate standard of proof in administrative citation proceedings, courts have addressed the appropriate *trial court* standard of review (independent judgment or substantial evidence) with respect to citation proceedings. Because both procedural requirements derive from similar due process considerations, we take guidance from those cases, which have held that the heightened [***11] standard of review (independent judgment) does *not* apply. In *Handyman Connection of Sacramento, Inc. v. Sands,* the Third Appellate District held that the independent judgment standard of review did not apply on review of a citation proceeding where a licensed contractor was fined for four violations of the Contractors' State License Law (§ *7000*

et seq.). (Handyman Connection of Sacramento, Inc. v. Sands (2004) 123 Cal.App.4th 867, 871, 880 [20 Cal. Rptr. 3d 727] (Handyman).) The court explained, "In a case such as this one, where the only sanction imposed is a fine--not revocation, suspension, or restriction of the petitioner's license--no fundamental vested right is implicated and the trial court is not authorized to exercise independent judgment on the evidence." *(Id. at p. 880.) Handyman* followed *Steinsmith,* which similarly held that the independent judgment standard of review did not apply in a case where a physician was cited for aiding the unlicensed practice of medicine by others and merely fined $ *500. (Steinsmith, supra, 85 Cal.App.4th at pp. 460, 464-465.) Steinsmith* in turn followed *Steve P. Rados, Inc. v. California Occupational Safety & Health Appeals Board,* which so held in a case where a licensed contractor was cited [***12] for violating a construction safety order and assessed a civil penalty. *(Steve P. Rados, Inc. v. California Occupational Saf. & Health Appeals Bd. (1979) 89 Cal.App.3d 590, 593-594 [152 Cal. Rptr. 510] (Rados).)*

(4) Because *Hughes* indicates that application of the "independent judgment" standard of review and the "clear and convincing evidence" standard of proof both depend on the nature of the fundamental vested property right at issue in a licensee disciplinary case, we find the *Handyman, Steinsmith,* and *Rados* rationales persuasive as to the standard of proof applicable in citation proceedings. We conclude that, because the citation hearing on review could only result in civil penalties or correction orders, and could not have resulted in orders suspending, limiting, or revoking Owen's license, the preponderance of the evidence rather than the clear and convincing evidence standard of proof applied. [*993]

(5) Owen, however, argues that the citation hearing is nonetheless a "disciplinary" hearing within the meaning of the statutory scheme and thus necessarily falls under the *Ettinger* rule. He correctly observes that the statutes governing citation proceedings are codified in an article of the Business and Professions [***13] Code entitled "Disciplinary Proceedings" (div. 3, ch. 9, art. 7; Stats. 1939, ch. 37, § 1, pp. 381, 389 [article heading enacted by Legislature]), that statutes in the article seem to use the term "disciplinary action" to include both citations and suspension, or revocation of a license (§ *7090),* and that the ALJ at one point in his decision suggested he was imposing "discipline." (§§ *7090, 7099-7099.11.)* However, [HN8] Owen is incorrect that the procedural safeguards the *due process clause* requires in an administrative proceeding are determined solely based on [**173] whether the proceeding is "disciplinary." Instead, the necessary procedural safeguards are determined through a balancing test, which includes assessing the weight of " 'the private interest that will be affected by the official action ... ' " *(Saleeby v. State Bar (1985) 39 Cal.3d 547, 565 [216 Cal. Rptr. 367, 702 P.2d 525] .)* In the public employment context, the court has held that "civil service employees upon whom short suspensions had been imposed for disciplinary reasons were not entitled to full procedural presuspension protection of the kind provided before termination of employment. (See *Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal. Rptr. 14, 539 P.2d 774] .)" (Id. at p. 564.)* (6) Similarly, [***14] we join the *Handyman, Steinsmith,* and *Rados* courts in concluding that [HN9] licensed contractors cited for violations and subject only to sanctions such as correction orders or monetary penalties are not entitled to the same procedural safeguards afforded to contractors who face restriction, suspension, or revocation of their licenses.

Owen argues that his citation proceeding was equivalent to a disciplinary proceeding that could result in suspension or revocation of his license because if he fails to pay the fines and penalties assessed by the Registrar his license will be suspended or revoked by operation of law. [4] (See § *7090.1.)* We disagree. That the Registrar can enforce the correction orders and [*994] penalties in this manner does not change the fact that the greatest sanction that could be imposed in the citation proceeding itself was a fine or penalty, not suspension or revocation of his license. Critically, Owen does not argue that the fines and penalties imposed were so burdensome as to be tantamount to a suspension or revocation of his license.

4 Alternatively, Owen argues the preponderance of the evidence standard is acceptable at the citation hearing if the issue to be decided at [***15] the hearing is limited to whether there was probable cause to believe the alleged violations occurred, and that a hearing on whether the violations actually occurred would take place later and would be subject to a clear and convincing evidence standard of proof. We disagree with this creative interpretation of the statutory scheme. *Section 7099* authorizes the Registrar to *issue* a citation upon probable cause to believe a violation has occurred. (§ *7099.)* The citation alleges an actual violation: "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions alleged to have been violated." *(Ibid.)* After the hearing, the Registrar decides based on findings of fact whether to affirm, modify or vacate the citation. (§ *7099.5.)* Because the citation itself alleged that certain violations occurred, an affirmance of the citation finds that the violations in fact occurred, not that there is probable cause to believe they occurred.

5 In December 2008, Owen asked us to take additional evidence pursuant to *Code of Civil Pro-*

cedure section 909 of the Registrar's suspension of his license for failure to comply with the [***16] citation order he is challenging in this appeal. He also asked us to take judicial notice of an official record of the revocation of his license on August 25,2008, for failure to comply with the same order. In January 2009, we denied the motion to take additional evidence and deferred a ruling on the request for judicial notice. We now deny the request for judicial notice because events that take place after entry of the final administrative order under review are outside the proper scope of our review. (See *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 444, fn. 3 [58 Cal. Rptr. 2d 899, 926 P.2d 1085] .)*

6 Owen suggests that he would have had to forfeit his right to appeal the trial court's decision (by satisfying the correction order and penalty assessment) in order to avoid suspension or revocation of his license, but the case he cites refutes his contention. (See *Ryan v. California Interscholastic Federation (2001) 94 Cal.App.4th 1033, 1040 [114 Cal. Rptr. 2d 787]* ["compliance or satisfaction [of a judgment] that is compelled does not constitute a waiver of the right to appeal. Such a waiver is implied only where the satisfaction or compliance is the product of compromise or is coupled with an agreement not to appeal."].)

[**174] We [***17] conclude the All properly applied the preponderance of the evidence standard of proof at Owen's citation hearing.

II. *Criminal Jurisdiction*

Owen argues the AU effectively convicted him of two misdemeanors when it found he violated *sections 7028* and *7125,* and that it acted unlawfully in doing so because it had no jurisdiction over criminal prosecutions. This argument lacks merit.

(7) Owen correctly observes that [HN10] *sections 7028* and *7126* (which refers back to §§ *7125-7125.4)* define misdemeanor crimes, which may only be prosecuted in a criminal court. However, the code also expressly authorizes the Registrar to cite individuals for violating the statutory prohibitions. *Section 7028, subdivision (a),* provides, [BN11] "It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, unless the person is particularly exempted from the provisions of this chapter." [HN12] (8) *Section 7028.2* authorizes a criminal complaint to be filed only by the Attorney General, a district attorney or a prosecuting attorney for a city. However, *section 7028.6* authorizes and *section 7028.7 requires* the Registrar to cite an individual if the [***18] Registrar has probable cause to believe the individual is acting as a contractor without a license and expressly provides, The sanctions autho- [*995] rized under this section shall be separate from, and in addition to, all other remedies either civil or criminal." *(Ibid.)*

Similarly, *section 7125* requires the Contractors' State License Board to require contractors to file certificates of workers' compensation insurance unless specifically exempted by statute, and *section 7126* provides that a licensee who fails to comply with such a requirement is guilty of a misdemeanor. However, *section 7125.2, subdivision (d),* provides that [111\113] "with respect to an unlicensed individual acting in the capacity of a contractor who is not otherwise exempted from the provisions of this chapter, a citation may be issued by the registrar under *Section 7028.7* for failure to comply with this article and to maintain workers' compensation insurance."

Owen argues that if the Registrar intended to proceed under *sections 7028.7* and *7125.2,* he should have cited Owen under those statutes rather than for violating *sections 7028* and *7125.* However, the statutes cited by the Registrar describe the statutory requirements Owen allegedly violated. [***19] *Sections 7028.7* and *7125.2* merely authorize the Registrar to sanction the violations by way of a citation. The citations appropriately put Owen on notice of the violations he allegedly committed.

III. *Failure to File an Accusation*

(9) Owen argues the Registrar's decision must be set aside because he failed to file an accusation to initiate the hearing before the AU. This argument is forfeited because Owen did not raise the argument in the administrative proceeding or in the trial court. ' *(Ward v. Taggart (1959) 51 Cal.2d 736, 742 [336 P.2d 534] .)* In any event, the argument lacks merit. Owen correctly notes that hearings on contested citations must be conducted in accordance with the *Administrative Procedure Act's* procedures for administrative adjudications. (§ *7099.5; Gov. Code, § 11500 et seq.)* He argues that *Government Code section 11503* requires the filing [**175] of an accusation to initiate the hearing. However, [HN14] that statute only requires the filing of an accusation to initiate a "hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned." *(Ibid.)* As already explained, the citation proceeding did not seek restriction, suspension, or revocation of [***20] Owen's license.

7 Owen represents that he raised the issue in a reply brief he filed in the trial court, but that brief is not included in the appellate record.

[*996]

DISPOSITION

The judgment is affirmed. Owen shall pay the Registrar's costs on appeal.

Simons, Acting P. J., and Needham, J., concurred.

A petition for a rehearing was denied August 18, 2009, and appellant's petition for review by the Supreme Court was denied November 19, 2009, S176433.

TAB “20”

EDWARD F. PARKER, Plaintiff and Appellant, v. CITY OF FOUNTAIN VALLEY et al., Defendants and Respondents

Civ. No. 25139

Court of Appeal of California, Fourth Appellate District, Division Two

127 Cal. App. 3d 99; 179 Cal. Rptr. 351; 1981 Cal. App. LEXIS 2514

December 23, 1981

PRIOR HISTORY: r **11 Superior Court of Orange County, No. 319783, Edward J. Wallin, Judge.

DISPOSITION: The judgment is reversed and the case is remanded to the trial court with instructions to issue a peremptory writ of mandate compelling the city to set aside its decision sustaining the termination of appellant from employment with the city; to reconsider its decision, following a hearing conducted pursuant to a fair procedure which accords with the requirements of due process; and pending the hearing, to pay appellant back pay for the period between the date of his termination and the date of the hearing before the city manager.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former police officer sought review of a decision of the Superior Court of Orange County (California), which denied appellant's petition for a writ of mandate to compel respondent city to reinstate him to his permanent position in the police department. Appellant had been dismissed for using excessive force during an arrest.

OVERVIEW: Appellant, former police officer's, tenured employment was terminated by respondent city after appellant was found to have used excessive force during an arrest. Appellant was given a pre-disciplinary hearing and a post-termination administrative hearing, but did not have an opportunity to cross-examine witnesses. Appellant filed a petition for a writ of mandate, by which he sought to compel respondent to reinstate him to his permanent position. The trial court denied the writ, and appellant sought review. The court reversed and held that appellant's pretermination hearing did not fulfill minimum constitutional due process requirements, and that respondent never assumed the burden of proving the charges against appellant in the post-termination hearing. Appellant was not provided with a copy of materials upon which his termination was based and was not accorded a right to respond thereto. The record made it quite clear that respondent improperly shifted the burden of proof to appellant to disprove the charges against him.

OUTCOME: The court reversed, and remanded with direction to the trial court to issue a peremptory writ to compel respondent city to set aside its decision and hold a new hearing, because appellant police officer had been denied his fundamental due process rights in the prior proceedings and the burden of proof had been impermissibly shifted onto appellant. The court also ordered that appellant receive back pay pending the new hearing.

LexisNexis(R) Headnotes

Governments > Legislation > Statutes of Limitations > Time Limitations
Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

[11N1] Fountain Valley Municipal Code § 2.52.160, provides that any employee below department head level shall have the right of appeal to the city manager from any disciplinary action taken by his department or division head. Such appeal must be filed with the city manager within ten working days after receipt of written notice of such disciplinary action. The city manager shall cause such appeal to be investigated and shall conduct a hearing as provided in accordance with the requirements and procedures set forth in the personnel rules adopted pursuant to this chapter. The decision of the city manager shall be final except as provided in Fountain Valley Municipal Code § 2.52.200. Section 2.52.200 provides that the city council specifically reserves the right, in cases it deems exceptional, to act as the final authority.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Substantive Due Process > Scope of Protection

[IAN2] It is now established that when a person has a legally enforceable right to receive a government benefit, provided certain facts exist, this right constitutes a property interest protected by the due process provisions of both federal and state constitutions.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > State & Territorial Governments > Employees & Officials

[HN3] It is clear that due process does not require the state to provide an employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

Administrative Law > Agency Adjudication > Hearings > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN4] An administrative hearing does not fulfill the minimum constitutional requirements when an employee is not provided with a copy of materials upon which his termination is based and is not accorded a right to respond thereto.

Administrative Law > Agency Adjudication > Hearings > General Overview

[HN5] It is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges.

Administrative Law > Agency Adjudication > Hearings > General Overview
Governments > Local Governments > Police Power

[HN6] The obligation of a party to sustain the burden of proof requires the production of evidence in a evidentiary hearing held for that purpose.

Administrative Law > Agency Adjudication > Hearings > General Overview

[HN7] Where an administrative hearing is the first evidentiary inquiry into the facts giving rise to an employee's discharge, the city, not the employee, is required to bear the burden of proof.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for a writ of administrative mandamus filed by a tenured city police officer, The city police chief had terminated the officer's employment after holding a hearing on charges that the officer had used excessive force in making an arrest. On the officer's appeal to the city manager, the manager had upheld the police chiefs decision. (Superior Court of Orange County, No. 319783, Edward J. Wallin, Judge.)

The Court of Appeal reversed with directions, holding that the city had denied the officer his constitutional right to procedural due process. Though prior to the police chiefs hearing the officer was given notice of the charges, copies of the written materials upon which the action was based, and a right to respond to the charges, subsequent to the hearing the police chief terminated the officer's employment after considering new written materials which had not been provided to the officer and as to which the officer had not been given an opportunity to respond. The court held that the fact that the officer was given a right of appeal to the city manager did not satisfy the due process requirements for the pretermination procedure. Further, the court held that at the hearing before the city manager the city denied the officer due process since the city did not assume the burden of proving the charges, as it was required to do after failing to do so at the

proceeding before the police chief. At that proceeding, the police chief had considered only unsworn statements and no witness testified; thus, no evidence had been produced therein. (Opinion by Morris, **J.,** with Kaufman, Acting P. **J.,** and Tamura, **J.,** * concurring.)

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Constitutional Law § 102--Due Process--Right to Governmental Benefit. --A person's legally enforceable right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(2) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal--Administrative Hearing--Procedural Due Process--Right to Respond to Materials Forming Basis of Charges. --A city denied a tenured city police officer his constitutional right to procedural due process, where the city police chief conducted a disciplinary hearing on allegations that the officer had used excessive force in making an arrest and where, though the officer was, prior to the hearing, given notice of the charges, copies of the written materials upon which the action was based, and a right to respond to the charges, subsequent to the hearing the police chief terminated the officer's employment after considering new written materials which had not been provided to the officer and as to which the officer had not been given an opportunity to respond. The fact that the officer was given a right of appeal to the city manager did not satisfy the due process requirements for pretermination procedure. However, the police chiefs failure to include in the charges a prior incident, which had resulted in a two-day suspension of the officer for giving a karate kick to a suspect, did not also constitute a denial of procedural due process, since that incident was considered by the police chief for the limited purpose of determining the appropriate punishment, and the officer knew of that incident and did not dispute the fact of the suspension resulting therefrom.

(3) Administrative Law § 49--Administrative Actions--Adjudication--Evidence--Burden of Proof and Presumptions--Disciplinary Proceedings. --In disciplinary administrative proceedings, the burden of proving the charges rests upon the party making the charges. The obligation of the party to sustain the burden of proof requires the production of evidence for that purpose.

(4) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal--Administrative Hearing--Procedural Due Process--Burden of Proof. --In an administrative hearing at which a city manager upheld a city police chiefs prior decision to terminate a police officer's employment for cause, the city denied the officer his constitutional rights to procedural due process, where the city never assumed the burden of proving the charges. The city had not met this burden at the proceeding before the police chief, since, at that proceeding, the police chief considered only unsworn statements and no witnesses testified; thus, the city was required to bear the burden at the administrative hearing, in which proper evidence was first produced.

(5) Appellate Review § 32--Presenting and Preserving Questions in Trial Court--Effect of Failure to Assert Issue in Trial Court. --An issue or theory of a case that was not asserted in the trial court may not be raised for the first time on appeal.

(6) Appellate Review § 149--Questions of Law and Fact--Sufficiency of Evidence--Power of Court--Substantial Evidence Rule. --In reviewing evidence on appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold a verdict if possible. When a verdict is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact. When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

(7) Administrative Law § 133--Judicial Review and Relief--Scope and Extent of Review--Evidence--Independent Judgment Rule. --In a proceeding for a writ of administrative mandamus, the proper standard of review in a case involving a fundamental vested right is the independent judgment test.

COUNSEL: Silver & Kreisler and Richard M. Kreisler for Plaintiff and Appellant.

Rourke & Woodruff, Thomas L. Woodruff and Alan R. Burns for Defendants and Respondents.

JUDGES: Opinion by Morris, **J.,** with Kaufman, Acting P. **J.,** and Tamura, **J.,** * concurring.

127 Cal. App. 3d 99, *; 179 Cal. Rptr. 351, **;
1981 Cal. App. LEXIS 2514, ***

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

OPINION BY: MORRIS

OPINION

[*102] [**353] Appellant, Edward F. Parker, appeals the denial of his petition for a writ of mandate, by which he sought reinstatement to his permanent position in respondent city's [***2] police department.

On May 6, 1978, appellant was employed with respondent City of Fountain Valley as a police sergeant, and was the senior officer in charge in responding to a complaint about a party in a residential neighborhood. Appellant was subsequently charged with using excessive force in connection with the arrest of certain party-goers. Appellant was given notice of the charges, a copy of the materials upon which the charges were based, and an opportunity to respond to those charges at a predisciplinary hearing held before the Chief of Police, M. K. Fortin, on March 13, 1979. At the hearing appellant responded to written statements made by other officers who were present at the scene of the arrest, but no witnesses were called or cross-examined at the hearing.

Following the hearing, but before taking any action, Fortin reinterviewed the officers who had made statements about the incident and obtained additional written statements from two of the officers, Bean and Quinzio.

On March 16, 1979, Chief Fortin issued a notice of action, sustaining two of three charges and terminating appellant from his employment with the city police department. Thereafter, appellant requested [***3] an administrative hearing before the city manager pursuant to section 2.52.160 of the Fountain Valley Municipal Code. Appellant was provided [*103] with a copy of the "Hearing Procedure for Appeals from Disciplinary Proceedings,"[2] which procedure provides, inter alia, that an employee, appealing from a disciplinary decision of a department head, shall be allowed to appear personally, to present evidence and cross-examine witnesses, to be represented by counsel, to have a decision based upon evidence submitted at the hearing and to have findings of fact. It also provided that the burden of proof shall be on the appellant; that he shall proceed first in producing the evidence, and that the standard of proof is the "substantial evidence standard."

1 [HN1] Section 2.52.160 provides in pertinent part as follows: "Right of appeal. Any employee below department head level shall have the right of appeal to the city manager from any disciplinary action taken by his department or division head. Such appeal must be filed with the city manager within ten working days after receipt of written notice of such disciplinary action . . . . [para.] The city manager shall cause such appeal to be investigated and shall conduct a hearing as provided in accordance with the requirements and procedures set forth in the personnel rules adopted pursuant to this chapter. The decision of the city manager shall be final except as provided in Section 2.52.200."

Section 2.52.200 provides as follows: "Final authority of council. The city council specifically reserves the right, in cases it deems exceptional, to act as the final authority."

[***4]

2 This procedure is contained in the personnel rules adopted pursuant to section 2.52.160 of the Municipal Code.

Following the hearing held pursuant to these rules the city manager issued his notice of ruling, sustaining the charges upon which the disciplinary action was taken and upholding the appellant's termination from his city employment, effective March 16, 1979. The city council did not exercise its right to reconsider the action, and appellant filed his petition for a writ of administrative mandamus. This appeal is from the denial of the writ.

Appellant makes the following contentions on appeal: (1) he was denied procedural due process at the predisciplinary hearing; (2) he was not provided applicable due process protections at the administrative hearing before the city manager; (3) the hearing officer was biased; (4) the trial court failed to apply the proper standard of review, i.e., the independent judgment standard; (5) the evidence is insufficient to [**354] support the charges; (6) the penalty of termination is excessive, is based on the improper consideration of prior disciplinary [***5] action, and constitutes an abuse of discretion.

The Incident

On May 6, 1978, appellant responded to a call that a party in progress at an Azalea Avenue residence was creating a disturbance in the neighborhood. Officers Minna, Becker, Quinzio and Bean also responded. Ultimately four arrests were made. Appellant was the senior officer present and was in charge of the scene because of his rank.

When appellant and Minna, who arrived at approximately the same time, entered the residence, they gave an order to the party guests to disperse and the guests slowly began to move out of the house. When the other officers arrived appellant and Minna were already in the residence [*104] and the guests were beginning to exit the house. Quinzio, Becker and Bean remained on the

outside to assist in keeping the people moving away from the party. As appellant and Minna came out of the house, some of the guests had begun congregating on and around the front lawn of the residence.

While Quinzio, who had remained outside, was involved in a verbal confrontation with a guest named Dey, Minna began ordering the other guests to disperse away from Quinzio and Dey, and appellant became involved [***6] with a guest named O'Neal, who was verbally abusive and refusing to move away.

O'Neal was ultimately placed under arrest and handcuffed. In connection with that arrest, other officers related that they saw appellant kick O'Neal in the face and strike O'Neal while he was on the ground. Although appellant gave a conflicting version of the facts, the testimony of the other officers was in general agreement that appellant's acts were unprovoked.

Minna testified that, although O'Neal was verbally abusive, he did not do anything physically aggressive towards appellant. Minna observed appellant push O'Neal three or four times prior to Minna's attention being diverted to other confrontations. Although unaware of it at the time, Minna believes that his baton dropped from its holder at this time. He soon became aware of a scuffle between appellant and O'Neal. Minna then jumped on O'Neal's back and, with appellant's help, brought O'Neal to the ground in a face down position. O'Neal was then relatively still and did not resist as Minna commenced to handcuff him He successfully placed the handcuffs on O'Neal's right hand, but when he tried to handcuff the left hand appellant pushed Minna's [***7] hand away and struck O'Neal in the rib cage at least three times.

When Minna was confronted with discrepancies between his administrative testimony and his police report, he testified that his report was a composite of his personal observations and descriptions of events given to him by other officers, and that appellant had told him to include a statement in the report which recited that appellant had been hit by O'Neal with a police baton.

Quinzio testified that when he had finished dealing with a guest named Page who was yelling obscenities, he noticed appellant, Minna and O'Neal. At that time the baton was lying on the sidewalk. Because [*105] he feared that O'Neal might reach for it as he was taken to the ground, Quinzio struck O'Neal on the shoulder with his baton. At about that time he saw appellant push and then kick O'Neal, with the top of his foot contacting either O'Neal's chin or chest. Although Quinzio could not say whether the kick was justified, he did state that he saw no aggressive action by O'Neal between the push and the kick that would have justified the kick. Quinzio's attention was then diverted to a guest named Rodriguez and when he again looked toward [***8] appellant and O'Neal, O'Neal was in a "crouched or prone position, face down, with his head back and his hands behind him." Quinzio testified that he then saw appellant strike O'Neal in the face.

Becker testified that he saw appellant run up and push one of the guests with his open palms. During the pushing he also [**355] saw appellant kick the person in the face. A little later he saw Quinzio strike the person with his baton. Becker then found it necessary to take Rodriguez into custody, but as he turned around again he saw appellant strike the person who was then on his knees on the ground.

Bean, who responded to the scene after appellant, Minna, and Becker, walked to the middle of the street while dispersing the crowd. From there he observed the appellant kick O'Neal in the face but did not see the events leading up to the kicking. He also confirms that there was an unattended baton in the area of the confrontation, which he subsequently retrieved and stored in his vehicle.

One of the guests, James White, also testified to his recollection of the incident. His testimony was inconsistent with the testimony of the other witnesses. He saw O'Neal pushed against a car [***9] by two officers, neither being appellant. He saw some officer, not appellant, kick Rodriguez and Rodriguez was at the same time hit over the head, neck or back with a baton. He also saw O'Neal become enraged and charge one of the officers, and at this time he saw appellant "knee" O'Neal in the face.

Appellant testified that he first observed O'Neal while Becker and Rodriguez were becoming embroiled in a dispute. After advising O'Neal to leave the area he returned his attention to Becker and Rodriguez. He was then struck on his left side with some object. As he turned he saw O'Neal charging at him. In order to protect himself he raised his knee which came in contact with O'Neal's face. He then commenced trying to control O'Neal and with Minna's assistance brought [*106] O'Neal to the ground and started the handcuffing process. Appellant observed that Minna was bending O'Neal's right arm in such a manner that it might dislocate O'Neal's shoulder. Appellant warned him to stop. Minna continued, so appellant pushed Minna's hand away on two occasions. While appellant was dealing with Minna, O'Neal started lifting appellant off the ground. It was at this time that appellant [***10] struck O'Neal in the ribs to force him back on the ground.

There was testimony by Officer Morrill, who was not present at the scene of the incident, but who was present in the briefing room, that the officers by a process of elimination determined that the dropped baton belonged to Minna. She also testified that Officer Bean at that time

described one suspect as actually picking up the baton and swinging it at Officer Becker.

The charges giving rise to appellant's dismissal arose out of his handling of O'Neal. Initially appellant was charged with three acts of misconduct, to wit, (1) applying a karate kick to the face of O'Neal without provocation or justification, (2) kicking Rodriguez in the groin without provocation or justification, and (3) unnecessarily striking O'Neal while he was on the ground. The Rodriguez charge was not sustained by Chief Fortin; both of the O'Neal charges were sustained.

Contentions and Discussion

A. *The Predisciplinary Hearing*

Appellant contends that the city did not comply with procedural due process requirements before terminating him from his permanent position as police sergeant. Respondent concedes that prior to his termination [***11] appellant was a "tenured" employee who could be removed from his position only for cause.

(1) [HN2] It is now established that when a person has a legally enforceable right to receive a government benefit, provided certain facts exist, this right constitutes a property interest protected by the due process provisions of both federal and state Constitutions. ***(Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 207 [124 Cal.Rptr. 14, 539 P.2d 774] .)*** In ***Skelly*** the California Supreme Court considered the constitutional adequacy of procedures provided by state law for the taking of punitive action against a permanent civil service employee. After an exhaustive analysis of recent federal and California opinions dealing with [*107] questions of procedural due process, as applied [**356] to punitive action which results in the deprivation of a significant property interest, the court concluded: [HN3] "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, . . . due process does mandate that the employee be accorded certain procedural rights before the discipline [***12] becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (***Skelly v. State Personnel Bd., supra,*** 15 Ca1.3d 194, 215; see also ***Arnett v. Kennedy (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633];*** and see ***Pipkin v. Board of Supervisors (1978) 82 Cal.App.3d 652 [147 Cal.Rptr. 502] .)***

(2) Although this court has not been provided with any personnel rules which require a hearing which would meet the minimum requirements set forth in ***Skelly,*** it is apparent that initially there was an effort to comply. Appellant was given notice of the charges, a copy of the materials upon which the action was based, and a right to respond to the charges. However, following the hearing and before taking action, the chief of police considered new material, which had not previously been provided to appellant and as to which appellant had been given no opportunity to respond.

Appellant contends that this denied him the minimum safeguards required [***13] to satisfy due process. We agree.

The "Notice of Action" issued by Chief Fortin clearly shows that he relied on this new material in reaching his decision to terminate appellant. The notice of action reads in pertinent part as follows:

"I have considered the points raised by you and your legal counsel, have reread the statements of all officers concerned, and have re-interviewed the officers and obtained additional written statements (attached hereto) from Officers Bean and Quinzio. Based on all of the above, my determinations are as follows:

"1. Regarding the allegation that you applied a Karate kick to the face of Curtis Dale O'Neal without provocation or justification, I find this charge Sustained. I base this finding on the following statements:

[*108] "a. Officer Becker has stated that O'Neal displayed no physical provocation before he was pushed and then kicked in the face. He relates that he was standing next to you when this occurred and apparently had a clear vantage point for observation.

"b. Officer Minna, although in his written statement he only mentions that O'Neal was 'brought to the ground,' in a subsequent oral interview stated that he had observed you [***14] and O'Neal standing face to face before you began pushing O'Neal. While Minna does not claim to have seen the kick because he then became involved in another disturbance, his statement does negate your contention that O'Neal initiated the physical force.

"c. Officer Quinzio, in his first written statement and in a subsequent oral interview, originally corroborated your version of the 'charge.' However, in a subsequent written statement (attached hereto), Quinzio has changed his version of the 'charge' to a situation wherein O'Neal was 'crouching.' He also saw what he believed to be a push and a kick.

"d. Officer Bean was interviewed after our ***Skelly*** hearing. A narrative synopsis of his oral statement to me is attached hereto. In it, he states that he saw you and O'Neal standing face to face, two to three feet apart, before you kicked him in the face. He further states that there was no aggressive action on the part of O'Neal prior to the kick.

"[Charge 2 was not sustained.]

"3. Regarding the unnecessary striking of O'Neal while he was on the ground, I find this charge Sustained. I base this finding on the following:

[**357] "a. Officer Owen's statement merely confirms [***15] that some officer was striking O'Neal while he was on his knees or in a semi-prone position.

"b. Officer Becker observed you strike O'Neal while he was on his knees with his hands behind his back.

"c. Officer Minna stated that while he was attempting to handcuff O'Neal, and actually had his right hand cuffed, that you pushed away his attempt to cuff his left hand, and struck O'Neal in the body with [* 109] your hand/fist at least three times. Minna states that O'Neal was under control prior to your striking him.

"d. Officer Quinzio saw you strike O'Neal while O'Neal was down on the ground. Quinzio thinks that O'Neal may have been restrained or handcuffed at the time of the striking.

"All of the above actions occurred while you were the field supervisor/sergeant, which exacerbates the seriousness of the offenses. Additionally, I believe that enough evidence has come to light to support additional charges for falsifying police reports and for falsifying a felony charge. These, if followed up on, are more properly the subject of a supplemental investigation.

"Based on my findings on each of the charges, and based on the seriousness of those charges and the lack of mitigating [***I6] circumstances surrounding your actions, I hereby terminate you from employment with the Fountain Valley Police Department, effective immediately. (See F.V.P.D. Rules and Regulations Section 5.3.44.)

"You are advised that you have a right to appeal to the City Manager if such appeal is filed within ten (10) working days. Failure to so file an appeal is a waiver of your right to appeal. The appeal must be in writing, must be either verified before a Notary Public or made under penalty of perjury, and must state specifically the facts upon which it is based. (F.V.M.C. Section 2.52.160.)"

The notice makes it clear that (1) the decision to terminate appellant was based on the findings on each of the charges; (2) the finding concerning the kicking charge was based on statements made by Minna, Quinzio and Bean after the *Skelly* hearing; (3) the posthearing statements of these officers were substantially different from, and in some instances in conflict with, the statements of the same officers which had been furnished to appellant as the material supporting the charges; and (4) appellant was given no opportunity to respond to the charges following the receipt of these materials [***17] and prior to his termination.

The fact that he was given a right of appeal to the city manager does not satisfy the due process requirements for preremoval safeguards. In *Skelly* the applicable statutes also provided for a full evidentiary hearing within a reasonable time after the effective date of the punitive r1101 action and provided for compensation for lost wages if the action was found to be improper. However, the Supreme Court pointed out that these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing, and because of this failure to accord the employee any prior procedural protections to minimize the risk of error in the initial removal decision, held the applicable provisions of the state Civil Service Act unconstitutional.

We conclude that [HN4] the hearing accorded appellant did not fulfill the minimum constitutional requirements in that appellant was not provided with a copy of materials upon which his termination was based and was not accorded a right to respond thereto.

Appellant also contends that the preremoval procedures were defective [***18] on the additional ground that he was not provided notice and an opportunity to respond to other material considered by the police chief. The materials before the police chief included evidence that in July 1973, appellant was involved in an incident which resulted in a two-day suspension for delivering a karate kick to a suspect. This was not included in the charges and appellant was not given an opportunity to respond.

[**358] There is no merit to appellant's contention that the failure to include the 1973 incident in the charges resulted in denying him procedural due process. It is clear from the record that the 1973 disciplinary incident was considered by the chief of police for the limited purpose of considering the appropriate punishment. Appellant knew of the prior disciplinary action and had not appealed the action. He could not reopen the merits of that action. Since he does not dispute the fact of his suspension, he was not prejudiced by the failure to include the 1973 incident in the charges filed against him.

B. *The Administrative Hearing*

Appellant contends that he was denied due process at the administrative hearing before the city manager, because r**191 he was required to carry the burden of proof and the burden of producing evidence.

The rules for the hearing procedure for appeals from a disciplinary decision of a department head provided in pertinent part that: "V. The [* 111] burden of proof shall be on the party seeking to appeal the decision of the De-

partment Head" and "VI. The procedure for the hearing should be as follows: . . . [para.] B. The appellant shall make his opening statement and put on his case, followed by the City. Cross-examination will be allowed at appropriate times."

Respondent contends that the respondent did in fact carry the overall burden of proof in discharging appellant and that the "informality" of the hearing process did not deprive appellant of a fair hearing. Respondent points out that the phrase "burden of proof' may refer to the burden of producing evidence or it may refer to the burden of proof which requires a party to carry the burden of persuasion. Respondent now contends that, despite the language of the rules which appears to require the appellant to carry both burdens, the city did in fact carry the burden of persuasion so that appellant was not prejudiced by the rules.

Unfortunately, [***20] the record does not support this contention. At the beginning of the administrative hearing the assistant city attorney made the following statement:

Mr. Burns: "As to the burden of proof, the burden of proof was on the City at the time of the initial taking of the disciplinary action; namely, on the City Manager's office. At that time the burden was carried since this is now an appeal. The burden has shifted."

With respect to the production of evidence the assistant city attorney stated as follows:

Mr. Burns: "As I discussed with everyone else present except for Sergeant Parker, I'm going to sort of mix things up a little bit for convenience's sake for your witnesses, instead of calling your witnesses back twice and Mr. Stapleton putting on his case followed by mine, I'm going to make my opening statement. And I will attempt to get all my evidence in by cross examining some of the witnesses that Mr. Stapleton will call, and thereby try and cut down on the length of this proceeding.

"So with that in mind I would like to make my opening statement to the City Manager, and I ask that he take a few notes down on what I believe to be the pertinent things in this case . . . ."

[***21] [*112] A review of the administrative record reveals that the procedure as outlined was indeed followed and that *all* witnesses were initially called by appellant and were thereafter questioned by the assistant city attorney as if under cross-examination.

Moreover, there is nothing in the record to suggest that the assistant city attorney and the city manager did not believe that the burden of proof, as distinguished from the burden of producing evidence, had shifted to appellant. To the contrary, the record makes it quite clear that they did require appellant to assume the burden of proof. The statement by the assistant city attorney with respect to the burden of proof followed an objection by appellant's attorney, Mr. Stapleton, which was in pertinent part as follows:

" [**359] At this time then I would like to make some comment with commencing this hearing. On behalf of Sergeant Parker on the 13th of March, we had a meeting -- so-called meeting -- at Chief Fortin's -- Chief of Police, City of Fountain Valley -- office, which was supposed to be a Skelly hearing. At that hearing there were, of course, no cross examination of witnesses, no witnesses were present, [***22] Sergeant Parker and myself were present with the Chief and Captain Rowland and Mr. Burns. And we were allowed at that time to present Officer -- or Sergeant Parker's conception and statement as to what occurred with the incident of May the 5th of 1978, at 23:59 hours.

"We had, as I said, there were no swearing of witnesses; there was no right of cross examination; no due process as prescribed by Skelly at that time, and yet that's called a Skelly hearing.

"We're presently here today on an appeal from that decision of the Chief of Police to terminate Sergeant Parker, and we have received certain procedures from Mr. Burns in the City of Fountain Valley as to follow at this proceeding . . . .

"Also the City has told us at this point that the burden is upon us, which I believe is entirely wrong, in that in any disciplinary action such as termination or days off, the -- I believe, the burden should be on the City to sustain their allegations and charges. Not that the burden should be upon us at this time to put on our side of the case, or proceed first and put our side of the case under the present circumstances . . "

[*113] If either the assistant city attorney or the city [***23] manager did not believe the burden of proof had shifted, they should have so stated.

(3) **(4)** [HN5] It is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges. (*Layton v. Merit System Commission (1976) 60 Cal.App.3d 58, 64 [131 Cal.Rptr. 318]; Martin v. State Personnel Bd. (1972) 26 Cal.App.3d 573, 582 [103 Cal.Rptr. 306] .)*

Respondent recognizes that the city had this burden, but asserts that the burden was satisfied at the proceeding before the police chief and that thereafter the burden shifted to appellant. This could only be the case if there had been a prior evidentiary hearing. [HN6] The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose. (*Layton v. Merit System Commission, supra, 60 Cal.App.3d 58, 66.)*

Prior to the administrative hearing before the city manager, there had been no production of evidence. The statements by appellant's fellow officers, which were used as the basis of the charges, were not sworn statements and no witnesses testified at the proceeding wherein appellant was given a pretermination opportunity to answer [***24] the charges. Therefore, prior to the hearing before the city manager no evidence had been produced. (See *La Prade v. Department of Water & Power (1945) 27 Cal.2d 47, 51-52 [162 P.2d 13] .)* [HN7] Since the administrative hearing was the first evidentiary inquiry into the facts giving rise to appellant's discharge, the city, not the employee, was required to bear the burden of proof.

Although respondent argued at the administrative hearing that the proceeding before the city manager was appellate in nature and that appellant had the burden of proof, respondents now contend that by placing the charges before the city manager, the city carried the burden of proof by establishing a "prima facie" case. The contention has no merit. As previously noted, the charges and even the reports of the other officers were not evidence. They were merely the materials upon which the charges were based which, in turn, were required to be proved in order to sustain the punitive action.

City contends that the proceedings, although informal in nature, did provide appellant an adequate opportunity to respond to charges and to place all of the evidence before the city manager. The city cites two [***25] [*114] cases in support of this contention. Neither case supports respondent's position.

[**360] In *Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802 [140 Cal.Rptr. 442, 567 P.2d 1162],* a licensed physician and surgeon was notified that his hospital privileges had been suspended. There followed three hearings, as provided in hospital bylaws. The first, a preliminary hearing which is not described in the opinion; the second, a formal hearing before a judicial review committee at which evidence was presented and a court reporter was present and transcribed all proceedings; and, finally, an appellate review before the board of directors. The board upheld the decision of the judicial review committee, which had sustained the suspension, and recommended that Anton not be reappointed to the medical staff. Plaintiff contended, inter alia, that a hospital bylaw placing the burden of going forward with the evidence and the burden of proof upon him violated the common law requirement of a minimal fair procedure which is applicable to private hospitals. (*Pinker v. Pacific Coast Society of Orthodontists (1974) 12 Cal.3d 541, 549-557 [116 Cal.Rptr. 245,* [***26] *526 P.2d 253]; Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal.App.3d 507, 511 [119 Cal.Rptr. 507] .)* The Supreme Court upheld the bylaw, stating, We cannot conclude that the adoption and application of the bylaw here in question constitutes an abuse of the indicated discretion. Although it appears to place the initiative with respect to the production of evidence upon the party requesting the hearing in light of an adverse administrative recommendation, and although it further appears to require that the recommendation be sustained absent a 'clear and convincing' showing by that party that it should be overturned, it is clear that the bylaw read as a whole -- especially when viewed in conjunction with the provision setting forth the grounds for appellate review before the governing board . . . -- *contemplates a substantial showing on the part of the charging committee in support of its recommendation." (Anton v. San Antonio Community Hosp., supra, 19 Cal.3d 802, 829-830,* fn. omitted, italics added.)

In *Pipkin v. Board of Supervisors, supra, 82 Cal.App.3d 652,* the plaintiff was a deputy sheriff acting as a jail matron who was discharged. The [***27] Shasta County ordinance made no provision for a predisciplinary hearing and required the disciplined employee to carry the burden of proof at the post-termination hearing. Plaintiff contended that she was denied due process by the terms of the ordinance which required [*115] her to bear the entire burden of proving that her discharge was improper.

In discussing this contention the court made the following pertinent comments on *Anton* and the requirements of due process: The record demonstrates that the administrative proceeding was very informal, and permitted all evidence presented by the employer and plaintiff to be considered by the employee appeals board. Thus, basic due process was preserved. However, we do not mean to approve the Shasta County procedures as written. *Anton v. San Antonio Community Hosp.* does not support the placing of the burden of proof on the disciplined employee. Rather, the *Anton* court upheld the laws of a hospital which placed the burden of proof on the disciplined employees since it was 'clear that the bylaw read as a *whole* -- especially when viewed in conjunction with the provision setting forth the grounds for appellate review [***28] before the governing board . . . contemplates a substantial showing on the part of the charging committee.' (Italics added.) *(Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802, 829-830 [140 Cal.Rptr. 442, 567 P.2d 1162] .)* In footnote 28 the Supreme Court clarifies its ruling, 'the bylaw in question, by indicating that the judicial review committee shall rule against the affected person absent a clear and convincing showing on his part that the recommendation of the charging committee "was arbitrary, unreasonable or not sustained by the evidence," strongly implies that substantial evidence in support of the recommendation must appear . . . . It is thus apparent that a decision unsupported by evidence viewed by the governing board as substantial -- i.e., a decision based wholly upon the burdens of production and proof -- is not con-

templated [**361] by the bylaws.' (Italics omitted. *Anton, supra, at p. 830, fn. 28.)*

"Unlike the *Anton* regulations, the regulations set forth in the Shasta County code pertaining to employee appeals of disciplinary action merely require that 'In discharging, suspending or reducing in rank a permanent employee, the department [***29] head shall request the County Counsel to prepare an order, in writing, stating specifically the cause for such an action.' (§ 1111.) This section of the code is the only section that requires any affirmative duty on the part of the county to produce the reasons for the disciplinary action. By the code (ch. 8, Appeals), it is incumbent upon the disciplined employee to request what is in fact an initial hearing (§ 1122) and to carry the entire burden of proof (§ 1124). The applicable portions of the county code do not require the county to produce any evidence to sustain the charge. Thus, unlike the bylaw in *Anton,* section 1124 violates the axiom that, in disciplinary [*116] administrative proceedings, the burden of proving the charges rests upon the party making the charges.' [Citations.]

"The regulation, on its face, appears to violate due process." (*Pipkin v. Board of Supervisors, supra, 82 Cal.App.3d 652, 658-659.)*

Nevertheless, in *Pipkin* the court reviewed the record and found that the hearing actually afforded did not deny Pipkin due process.

Thus, both in *Anton* and *Pipkin* the court concluded that in spite of the ostensible requirement that [***30] plaintiff carry the burden of proof, the record revealed that the agency exercising the disciplinary power did in fact assume the burden at some stage of the proceeding.

Unfortunately, our review of the record in this case does not reveal that the city ever assumed the burden of proving the charges. For the reasons heretofore stated, we conclude that appellant was denied due process in the post-termination hearing.

Since appellant was at that stage given a copy of all materials upon which the charges were based, including the supplemental written reports, and was given an opportunity to examine the officers who made the reports, including the officers who gave oral statements to the chief of police, we conclude that the post-termination hearing was sufficient to satisfy the requirements of *Skelly v. State Personnel Bd., supra,* 15 Ca1.3d 194, 215. Consequently, appellant is entitled to back pay for the period between the abortive *Skelly* hearing and the hearing before the city manager. Whether he will be entitled to pay for the period thereafter will depend upon the result of proceedings to be taken pursuant to the writ issued herein.

Although the failure to afford appellant [***31] due process requires reversal of the trial court's order denying appellant's petition for writ of mandate, we consider appellant's additional contentions for the guidance of the parties in further proceedings in the case.

C. *Bias*

Appellant contends that he was denied a fair hearing because the hearing officer was biased. He cites two reasons for the alleged bias, as follows: (1) the fact that Dr. Neal, the city manager, appeared in court in connection with a lawsuit regarding the 1973 incident involving appellant, [*117] and (2) the fact that several party guests at the recent incident have filed a civil suit against the city and various police officers.

The possible bias of the hearing officer resulting from these two facts is purely speculative. Even appellant concedes that the factual situation relating to the prior court appearance was "neither referred to or elaborated upon either at the administrative hearing or at the trial court level." (5) The mere allegation of bias in the trial court without any evidence to support the allegation is insufficient to overcome the general rule that an issue or theory of the case that was not asserted in the trial court may not [***32] be raised for the first time [**362] on appeal. (See *Corcoran v. S.F. etc. Retirement System (1952) 114 Cal.App.2d 738 [251 P.2d 59].)* The reason for the rule is that if the issue is placed in issue in the trial court the opposing side will have an opportunity to rebut it. Where no evidence is produced, there is no opportunity to present rebuttal evidence.

D. *Sufficiency of Evidence to Show Use of Unnecessary Force*

Appellant contends that there was insufficient evidence to support the findings that his use of force against O'Neal was without sufficient provocation.

(6) Appellant simply argues the credibility of the witnesses based upon the conflicting testimony, inconsistencies in the testimony of witnesses, the extent of their capacity to perceive or recollect the incident, and possible motive to fabricate because of their own involvement in the civil lawsuit. These are all matters of credibility for the trier of fact and subject to the rule that "'In reviewing the evidence . . . all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principle [***33] of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any ***substantial*** evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) [Citation.] The rule quoted is

as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." (*Estate of Bristol (1943) 23 Cal.2d 221, 223 [143 P.2d 689].)*

[*118] If the findings had resulted after a fair administrative hearing at which appellant had been accorded due process, we could not hold that any essential finding in this case is unsupported.

E. *The Standard of Review in the Trial Court*

Appellant contends that the trial court erroneously applied the substantial evidence test in reviewing the administrative record.

(7) The parties agree that the proper standard of review is the independent judgment test, because the case involves a fundamental vested right. (*Strumsky v. [***34] San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29*].)

The trial court's finding of fact No. 2 reveals that the trial court also correctly perceived the independent judgment test to be the proper standard for review of the administrative record. However, in finding of fact No. 18 the court stated that, "based on a review of the administrative record, the findings of the hearing officer are supported by substantial evidence, more specifically•" The findings then set forth the factual findings with respect to the kicking and striking incident. Further, in finding No. 19, the court stated that "because the findings are supported by substantial evidence, the hearing officer did not abuse his discretion in ruling the way he did."

It is therefore unclear which standard of review the trial court actually employed. However, since the judgment must in any event be reversed, it is unnecessary for us to resolve this problem. Presumably, if the matter again reaches the superior court, the proper standard will be used.

Appellant's remaining contentions refer to the propriety of the disciplinary action. Since a new hearing may not [***35] produce the same record, no further review of this record would serve any useful purpose.

The judgment is reversed and the case is remanded to the trial court with instructions to issue a peremptory writ of mandate compelling the city to set aside its decision sustaining the termination of appellant from employment with the city; to reconsider its decision, following a hearing conducted pursuant to a fair procedure which accords with the requirements of due process; [**363] and pending the hearing, to pay appellant back [*119] pay for the period between the date of his termination and the date of the hearing before the city manager.

TAB “21”

LexisNexis'

Caution
As of: Jun 02, 2011

HECTOR G. PERALES, Plaintiff and Appellant, v. DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT et al., Defendants and Respondents

Civ. No. 1630

Court of Appeal of California, Fifth Appellate District

32 Cal. App. 3d 332; 108 Cal. Rptr. 167; 1973 Cal. App. LEXIS 984

May 14, 1973

SUBSEQUENT HISTORY: [* **1] Appellant's petition for a hearing by the Supreme Court was denied July 25, 1973.

PRIOR HISTORY: Superior Court of Stanislaus County, No. 108835, Francis W. Halley, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant worker had filed a claim for unemployment compensation benefits which was denied at each level of review on the grounds that he had left his last work voluntarily and without good cause. Appellant sought review of the denial of a writ of mandamus from the Superior Court of Stanislaus County (California), and contended that leaving work to enroll in English language classes was good cause.

OVERVIEW: Appellant worker had filed a claim for unemployment compensation benefits which was denied. Appellant sought review of the trial court's denial of a writ of mandamus, alleging that quitting work to attend English language classes to improve his chances for future employment was not good cause within the meaning of *Cal. Unemp. Ins. Code § 1256.* The court affirmed and held that although it may have been commendable for appellant to attend school, it was not an imperative and compelling reason of such magnitude as to render him eligible for benefits. The court further held that § *1256* established a rebuttable rather than a conclusive presumption for discharge, which may be rebutted by facts disclosed by the claimant or by the employer pursuant to *Cal. Unemp. Ins. Code §§ 1327, 1328.*

OUTCOME: The court affirmed the denial of appellant worker's application for unemployment compensation benefits because quitting work to attend school was not good cause within the meaning of the California Unemployment Insurance Code.

LexisNexis(R) Headnotes

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Good Cause
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Involuntary Unemployment
RIN11 See *Cal. Unemp. Ins. Code § 1256.*

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Involuntary Unemployment
[FIN2] See *Cal. Unemp. Ins. Code § 100.*

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview
[HN3] Whether an employee has quit his employment without good cause is a question of law. Normally, good cause has some relationship to the job. For instance, a 25 percent wage reduction is good cause for quitting a job.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Good Cause
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Voluntary Unemployment
[HN4] Under compelling circumstances quitting for personal reasons unrelated to the employment may also bring one within the ambit of good cause to justify the collection of unemployment insurance benefits. *Cal. Unemp. Ins. Code § 1032* provides that an employer's unemployment insurance account is not to be charged if the claimant left his employ voluntarily and without good cause.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Benefit Entitlements
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview
[HN5] See *Cal. Unemp. Ins. Code § 1256.*

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures
[HN6] See *Cal. Unemp. Ins. Code § 1327.*

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Benefit Entitlements
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures
[HN7] See *Cal. Unemp. Ins. Code § 1328.*

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied the petition of one seeking a writ of mandate to compel the Department of Human Resources Development and others to grant his claim for unemployment insurance benefits. The applicant had left his employment as a tree pruner, when there were still three days of work left, in order to attend English classes. One of the grounds for denial of his claim was that he had left his last work voluntarily and without good cause. (Superior Court of Stanislaus County, No. 108835, Francis W. Halley, Judge.)

The Court of Appeal affirmed, holding that the applicant had left his job without good cause within the meaning of *Unemp. Ins. Code, § 1256,* providing for disqualification in such cases. The court rejected a contention that the presumption created by that statute that an employee did not voluntarily leave his work "without good cause unless his employer has given written notice to the contrary .. . within five days after the termination of service" may be rebutted only by the employer giving written notice to the director of the department within five days after termination of service, setting forth facts sufficient to overcome the presumption. It held that the presumption may be rebutted by facts disclosed in the application for benefits, other documents signed by the applicant or his interviews, or by independent investigations by the department or by the employer. In that connection the court noted *Unemp. Ins. Code, §§ 1327, 1328,* providing for consideration of facts submitted by the employer within 10 days after the mailing of a notice to the filing of a claim. (Opinion by Franson, **J.,** with Brown (G. A.), P. **J.,** and Gargano, **J.,** concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to McKinney's Digest

(1) Unemployment Insurance § **2--Object and Purpose.** --The purpose of the unemployment insurance law is to insure a diligent worker against the vicissitudes of enforced unemployment not voluntarily created without good cause.

(2) Unemployment Insurance § **3--Construction of Statutes.** --Whether an employee has quit his employment without good cause within the meaning of the unemployment insurance law is a question of law. Normally "good cause" has some relationship to the job, but under compelling circumstances quitting for personal reasons

unrelated to the employment may also bring one within the ambit of good cause.

(3) Unemployment Insurance § 18.5--Right to Benefits--Forfeiture--Leaving Employment Without Good Cause. --The Department of Human Resources Development properly found that an applicant for unemployment insurance benefits had left his last employment without good cause within the meaning of *Unemp. Ins. Code, § 1256,* providing for disqualification in such a case, where he had quit while there was still work available in order to attend school. However great may be society's interest in furthering a workingman's education, there is nothing in the unemployment insurance law to sanction such objective, and, though the statute must be afforded a liberal construction so as to effect all the relief that the Legislature intended to grant, the limits of the statutory intent cannot be exceeded.

(4a) (4b) *Unemployment Insurance §* **3--Construction of Statutes--Presumption.** --The provision of *Unemp. Ins. Code, § 1256,* that an individual is presumed to have been discharged for reasons other than misconduct and not to have voluntarily left his work without good cause unless his employer has given written notice to the contrary within five days after the termination of service, establishes a rebuttable rather than a conclusive presumption, and the presumption may be rebutted by facts disclosed by the application for benefits, other documents signed by the applicant or his interviews, or by independent investigation by the Department of Human Resources Development or by the employer. The statute does not declare the presumption conclusive, and to hold it conclusive would contravene the policy of providing benefits only to those who do not quit without good cause or are discharged for reasons other than misconduct connected with the job; *Unemp. Ins. Code, §§ 1327, 1328,* provides for consideration of facts submitted by the employer within 10 days after the mailing of a notice of the filing of a claim; and all agencies charged with enforcement of the Unemployment Insurance Code have consistently construed the presumption to be a rebuttable one.

(5) **Statutes § 180(2)--Construction and Interpretation--Aids to Construction--Contemporaneous Construction--Departmental Construction.** --Unless clearly erroneous the administrative interpretation of a statute by those charged with its enforcement is entitled to great weight.

COUNSEL: Gene Livingston and Jonathan B. Steiner for Plaintiff and Appellant.

Levy & Van Bourg, Abe F. Levy and Jack Levine as Amici Curiae on behalf of Plaintiff and Appellant.

Evelle J. Younger, Attorney General, Edmund E. White, Melvin R. Segal and N. Eugene Hill, Deputy Attorneys General, and Gary Stetzel for Defendants and Respondents.

Gibson, Dunn & Crutcher, Willard Z. Carr, Jr., and Richard Chernick as Amici Curiae on behalf of Defendants and Respondents.

JUDGES: Opinion by Franson, **J.,** with Brown (G. A.), P. J., and Gargano, J., concurring.

OPINION BY: FRANSON

OPINION

[*334] [**169] Appellant petitioned the superior court for a writ of mandate, pursuant to *Code of Civil Procedure section 1094.5,* directing respondents to grant his claim for unemployment insurance benefits. He appeals from a judgment denying the writ.

During the 1969 canning season appellant was employed by Hunt-Wesson [*335] Foods, Inc., where he earned sufficient wages to qualify for unemployment insurance [***2] benefits. After the canning season ended he went to work pruning peach trees for a farmer near Waterford, California. Appellant pruned trees for about nine days; he was paid 75 cents a tree and earned from $ 20 to $ 35 per day. On January 7, 1970, he quit his pruning job to attend English classes although there were three days of pruning work left. '

> 1 Prior to January 1970 appellant had applied to attend English classes offered to Spanish-speaking workers. He desired to improve his ability to read, write and speak English, hoping that he would be able to advance himself to a foreman's position at the cannery and obtain year-round employment. The classes were on a daily basis (presumably five days a week) from 9 a.m. to 3:30 p.m., and began on January 8, 1970 and continued to about April 29, 1970.

While attending school, appellant filed a claim for unemployment compensation benefits. His claim was denied by the Department of Human Resources Development on the ground, among others, that he had left his [***3] last work voluntarily and without good cause. Appellant appealed to a referee, who affirmed the department's decision, and then appealed to the Unemployment Insurance Appeals Board, which affirmed the referees decision. He sought [**170] mandamus in the superior court; after independently reviewing the administrative record the court concluded that the weight of the evidence supported the appeals board decision.

2 [HN1] *Unemployment Insurance Code section 1256* provides, in part: "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work."

Appellant contends that he left his last employment, pruning peach trees, with good cause within the meaning of *Unemployment Insurance Code section 1256* in that he quit to attend school so that he could improve his chances for future employment. He also contends that the department's denial [***4] of unemployment compensation benefits violates the provisions of *section 1256* because the statutory presumption that an individual has not voluntarily left his work without good cause may be *rebutted only* by the employer giving written notice to the director within five days after termination of service, setting forth facts sufficient to overcome the presumption. We hold both contentions to be without merit.

3 All future references to code sections are to the Unemployment Insurance Code unless otherwise indicated.

[HN2] *Section 100* defines the policy of the unemployment insurance law, in part, as follows: ". . . for a system of unemployment insurance providing benefits for persons *unemployed through no fault of their own,* and to reduce *involuntary unemployment . . .* to a minimum." (Italics added.)

[*336] (1) The basic purpose of the law is to insure a diligent worker against the vicissitudes of enforced unemployment not voluntarily created without good cause. *(Unemp. Ins. Code, §§ 100, 1256; Cal.* [***5] *Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board, 178 Cal.App.2d 263, 269-270 [3 Cal.Rptr. 37].)*

(2) [HN3] Whether an employee has quit his employment without good cause is a question of law. *(Cal.* Portland Cement Co. v. *Cal. Unemp. Ins. Appeals Board, supra,* at p. 274.) Normally, "good cause" has some relationship to the job. For example, in *Bunny's Waffle Shop v. Cal. Emp. Corn., 24 Cal.2d 735 [151 P.2d 224],* it was held that the employee had good cause to quit because the employer cut the employee's wages by 25 percent.

[BN4] Under compelling circumstances quitting for personal reasons unrelated to the employment may also bring one within the ambit of good cause. In *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board, supra, 178 Cal.App.2d 263,* it was held that leaving a job to take another job was *not* without good cause within the meaning of *Unemployment Insurance Code section 1032* which provides that an employer's unemployment insurance account is not to be charged if the claimant left his employ "voluntarily and without good cause," even though the employer introduced evidence which supported an inference that it was not responsible for [***6] the employee's quitting. The reviewing court, in upholding the administrative decision, noted that the employer had not met its burden of proving that the employee did not have a compelling reason for quitting. The court stated that the Legislature intended that good cause for leaving a job may include causes personal to the claimant, citing section 1264. *(Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board,* at p. 272.)

Section 1264 provides that an employee who quits his or her employment to be married or to accompany his or her spouse to a place from which it is impractical to commute to such employment, or whose marital or domestic duties cause a spouse to resign from his or her employment, shall not be eligible for unemployment insurance benefits for the duration of the ensuing period of unemployment unless the employee at the time of leaving and at the time of filing his claim for benefits "is the sole or major support of his or her family." By this statute the Legislature in effect has declared that quitting a job for [**171] the personal reasons therein enumerated may constitute good cause unless the income from the job is secondary or incidental to the [***7] support of the family. Where the employee who quits to get married or to join a spouse or to perform a necessary marital or domestic duty is the [*337] sole or major support of his or her family, the quitting is apparently deemed by the Legislature to be so necessitous as to be in fact "involuntary."

(3) Turning to the facts of the case at bench, we cannot say that quitting a job to attend school, no matter how personally commendable the step may be, is an imperative and compelling reason of such magnitude as to render the claimant eligible for unemployment benefits, at least in the absence of explicit legislative authority. If this were good cause within the meaning of *section 1256,* untold numbers of persons could quit their jobs to attend school while receiving unemployment compensation benefits. However great may be society's interest in furthering a workingman's education, we find nothing in the unemployment insurance law to sanction this objective. Although we must afford a liberal construction to this statute so as to effect all the relief that the Legislature intended to grant *(Cal. Emp. Corn. v. Butte County etc. Assn., 25 Cal.2d 624, 630 [154 P.2d* 892]) we [***8] cannot exceed the limits of the statutory intent. (*California Emp. Corn. v. Kovacevich, 27 Cal.2d 546, 549-550 [165 P.2d 917] .)* The unemployment insurance system cannot be used to subsidize an employee's education.

We conclude that appellant quit his pruning job without good cause.

(4a) We turn now to the question of the legal effect of the presumption created by *section 1256.* [HN5] *Section 1256* provides, in part: "An individual is presumed to have been discharged for reasons other than misconduct in connection with his work and not to have voluntarily left his work without good cause unless his employer has given written notice to the contrary to the director within five days after the termination of service, setting forth facts sufficient to overcome the presumption. If the employer files such notice, the question shall immediately be determined in the same manner as benefit claims."

Appellant contends that the statute provides the sole method for rebutting the presumption and unless that method is followed the presumption is determinative of the question of discharge or quitting for good cause. He asserts that whether an employee voluntarily quits without good cause or is discharged [***9] for misconduct is not an issue to be determined by the department unless the employer has, within five days after the termination of the employment, filed written notice alleging facts that the employee either quit voluntarily without good cause or was discharged for misconduct.

What appellant indeed is saying is that the *section 1256* presumption is conclusive unless the employer files the prescribed notice within five days.

[*338] It is persuasive that the statute itself does not declare the presumption conclusive. *Evidence Code section 620* provides: "The presumptions established by this article, and all other presumptions *declared by law to be conclusive,* are conclusive presumptions." (Italics added.) [4]

4 The Evidence Code states only four such conclusive presumptions *(Evid. Code, §§ 621- 624),* none of which apply here.

Evidence Code section 601 provides in substance that all presumptions that are not conclusive are rebuttable.

A conclusive presumption is actually a substantive rather than an [* **10] evidentiary rule of law. (*Kusior v. Silver, 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657] .)* We cannot arbitrarily declare a rule of substantive law unsupported by sound policy or reason. Examining *section 1256,* we find no overriding public interest to be [**172] served by indisputably presuming from the failure of an employer to file the five-day pre-claim notice of termination that the claimant did not quit his job without good cause or was discharged for reasons other than misconduct. To the contrary, it is the policy of the state to provide benefits only to those who did not quit without good cause or were discharged for reasons other than misconduct connected with the job. *(Unemp. Ins. Code, § 1256.)* To hold the presumption conclusive would contravene the clear policy of the act.

We must construe *section 1256* in the context of *sections 1327* and *1328.* [5] These sections provide as follows:

[HN6] Section 1327: "A notice of the filing of a new or additional claim shall be given to the employing unit by which the claimant was last employed immediately preceding the filing of such claim, and the employing unit so notified shall submit within 10 days after the mailing [***11] of such notice any facts then known which may affect the claimant's eligibility for benefits."

[HN7] Section 1328: "The facts submitted by an employer pursuant to *Section 1327 shall be considered* and a determination made as to the claimant's eligibility for benefits. The claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to *Section 1327* and authorized regulations shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within 10 days from mailing or personal service of notice of [*339] the determination. The 10-day period may be extended for good cause. The director shall be an interested party to all appeals." (Italics added.)

5 The present language of *sections 1327* and *1328* was first enacted by Statutes 1951, chapter 1694, page 3901; the basic concept of these statutes was first enacted by Statutes 1947, chapter 1436, page 3003.

It should be noted that the *section 1256* presumption was added by Statutes 1939, chapter 674, page 2151, § 14.

[***12] Whatever the Legislature's intent or purpose might have been at the time of the enactment of *section 1256,* when *sections 1327* and *1328* were subsequently enacted the Legislature obviously intended the *section 1256* presumption to be a rebuttable one. These later sections mandate that the claimant's last employing unit be notified of the filing of a claim for benefits and the employing unit so notified shall submit *within 10 days of such notice (§ 1327)* any facts bearing upon the claimant's eligibility, and the facts so submitted *shall be considered in the determination of the claimant's eligibility for benefits (§ 1328). Section 1328* manifestly contemplates that the determination of eligibility is to be made on the merits of the claimant's application rather than on the basis of an employer's failure to file the five-day notice under *section 1256.* [6]

6 The California unemployment insurance program was intended to comply with federal standards. (See § 101.) The United States Secretary of Labor is authorized to certify payment of federal funds to the individual states provided the state

has an unemployment compensation law approved by the secretary. *(42 U.S.C. § 502.)* The secretary is not authorized to certify payment of funds to a state unless he finds that the law of such state includes provision for administrative procedures "reasonably calculated to insure full payment of unemployment compensation when due. . ." *(42 U.S.C. § 503(a)(1).) Section 503* also contemplates determination of claims on their merits. (See *California Human Resources Dept. v. Java, 402 U.S. 121 [28 L.Ed.2d 666, 91 S.Ct. 1347] .)*

[***13] Under accepted principles of statutory interpretation we must construe *section 1256,* if reasonably possible, in a manner consistent with *sections 1327* and *1328. (Bilyeu v. State Employees' Retirement System, 58 Cal.2d 618, 627-628 [24 Cal.Rptr. 562, 375 P.2d 442];* see *Warner v. Kenney, 27 Cal.2d 627, 629 [165 P.2d 889] .)* We can do this by construing the 1256 presumption as rebuttable. To hold otherwise [**173] would be to nullify the administrative procedures for determining a claimant's eligibility as established by *sections 1327* and *1328.*

We further note that respondents and all other agencies charged with enforcement of the Unemployment Insurance Code for many years consistently have construed the *section 1256* presumption to be a rebuttable one. **' (5)** Unless clearly erroneous the administrative interpretation of [*340] a statute by those charged with its enforcement is entitled to great weight. (*Cannon v. Industrial Acc. Comm., 53 Cal.2d 17, 22 [346 P.2d 1] .)*

7 Affidavits of Thomas Hannah, Chief of the Benefits Section of the Department of Human Resources Development, included as part of amici curiae briefs on behalf of respondents show that pursuant to *sections 1327* and *1328* an employer may properly present facts bearing upon a claimant's eligibility even though no *section 1256* pre-claim notice was filed. For the year 1970, for example, only 632 pre-claim notices were filed in the entire state. About 1,180,483 valid claims were filed in that same period. Of those claimants 173,116 were disqualified for having voluntarily quit without good cause or were discharged by reason of misconduct in connection with their work. Approximately 72 of those 173,116 claimants had pre-claim notices filed against them by their last employers; thus the department found approximately 170,000 other claimants were ineligible for benefits by virtue of evidence other than disclosed by a *section 1256* pre-claim notice.

[***14] **(4b)** To hold that an employer's failure to file a *section 1256* pre-claim notice renders the department powerless to deny benefits where the claimant's ineligibility appears from his own statements or from facts which the department establishes by their own investigation, would be contrary to the department's clear duty to administer the law according to its basic purpose as declared by the Legislature.

8 The case at bench provides a clear example of the manner in which unwarranted payments would result if the *section 1256* presumption was conclusive. Hunts, appellant's last employer who was subject to the unemployment insurance provisions, could not properly file a *section 1256* five-day notice because appellant was involuntarily laid off from his job at the cannery. The unidentified farmer, appellant's last employer, is not subject to the unemployment insurance law and had no reason to file a notice.

We can also imagine an atypical situation where a claimant himself states that he was discharged for misconduct, e.g., that he had embezzled funds of his employer, or that he had become unemployed voluntarily without good cause simply because he preferred receiving unemployment benefits to working; would anyone suggest that the department would be powerless to find the claimant disqualified? (See *37 Ops.Cal.Atty.Gen. 18.)*

***15]** For the reasons stated, we hold that *section 1256* establishes a rebuttable rather than a conclusive presumption, and that the presumption may be rebutted by facts disclosed by the claimant in his application or in other documents signed by him when applying for benefits, or disclosed by him during interviews with department personnel, or disclosed after independent investigation by the department, or by the employer pursuant to *sections 1327* and *1328.*

Because the presumption is established to implement the public policy of prompt payment of benefits to the unemployed so as to reduce the suffering caused thereby (*§ 100),* we conclude that the presumption affects the burden of proof. [9] *(Evid. Code, § 605.)* It imposes upon the parties against whom it operates, the employer and the department, the burden of proving the nonexistence of the presumed fact *(Evid. Code, § 606).* This means that to overcome presumption the employer or [*341] the department must prove *by a preponderance of the evidence* that the claimant quit without probable cause or was discharged for misconduct in connection with his work. *(Evid. Code, § 115;* Assembly Committee on Judiciary comment to West's [***16] [**174] Evid. Code Aim., § *606.)* In the case at bench the department met the burden of proof; the trial court's findings are supported by substantial evidence.

9 *Section 1256* requires the employer's notice to set forth "facts sufficient to overcome the presumption." This language indicates that the Legislature intended the presumption to effect the burden of proof.

Finally, appellant complains of the trial court's failure to make a finding as to whether appellant's last employer filed a written notice as required by *section 1256.* Appellant alleged in his petition that the required notice was not given, and respondent did not deny this allegation. Material allegations of the complaint which are not controverted are taken as true *(Code Civ. Proc., § 431.20, subd. (a))* and as facts admitted are not issues in the case, a finding regarding the employer's notice was not required. *(Johnston v. Security Ins. Co., 6 Cal.App.3d 839, 844 [86 Cal.Rptr. 133] .)*

*[***17]* The judgment is affirmed.

TAB “22”

REGINALD 0. PEREYDA, Plaintiff and Appellant, v. STATE PERSONNEL BOARD, Defendant and Appellant

Civ. No. 12556

Court of Appeal of California, Third Appellate District

15 Cal. App. 3d 47; 92 Cal. Rptr. 746; 1971 Cal. App. LEXIS 872

February 4, 1971

SUBSEQUENT HISTORY: [*1]** The petition of the defendant and appellant for a hearing by the Supreme Court was denied March 31, 1971.

PRIOR HISTORY: Superior Court of San Joaquin County, John B. Cechini, Judge.

DISPOSITION: That portion of the judgment denying Pereyda's request for back pay is reversed. The judgment ordering a writ of mandate to issue commanding the State Personnel Board to annul Pereyda's dismissal and to reinstate him in his position is affirmed. Plaintiff-appellant Pereyda is to recover costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant state personnel board (board) filed an appeal from the decision of the Superior Court, San Joaquin County (California), which granted a writ of mandate ordering the board to vacate its dismissal of plaintiff employee and to restore him to his employment as a correctional officer. Plaintiff appealed from that portion of the amended judgment that denied his request for back pay.

OVERVIEW: The issue before the court was whether the mere presence and possession of empty alcoholic containers, with no trace of alcoholic beverages, in view of plaintiff employee's explanation of their presence, was sufficient to justify the hearing officer's finding that plaintiff brought alcoholic beverages into a restricted area. Defendant board appealed from that portion of the judgment restoring plaintiff to his position, and plaintiff appealed from that portion denying him back pay. The charge against plaintiff was that he was guilty of willful disobedience within the meaning of *Cal. Gov't Code § 19572(o).* The court found that plaintiffs story, true or untrue, did not prove that the containers contained liquor when brought onto the premises. Plaintiffs story undoubtedly raised a suspicion that the containers had contained alcohol, but suspicion was not evidence; it merely raised a possibility. The court reversed that portion of the judgment denying plaintiffs back pay. The judgment ordering a writ of mandate to issue to command the board to annul plaintiffs dismissal and to reinstate him in his position was affirmed.

OUTCOME: The court reversed that portion of the judgment denying plaintiff employee's back pay and affirmed the judgment ordering a writ of mandate to issue commanding defendant board to annul plaintiffs dismissal and to reinstate him in his position because suspicion was not evidence, and plaintiffs story did not prove that the containers had alcohol in them when they were brought to the restricted area.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Governments > Local Governments > Administrative Boards
[HN1] Since the State Personnel Board is a constitutional agency for all its adjudicatory activities, Cal. Const. art. XXIV, its decision may be set aside only if it is found to be unsupported by any substantial evidence. All reasonable inferences must be drawn in support of the findings of the board. The findings and determination of the board come before the reviewing court with a strong presumption as to their correctness and regularity. The court may not take into account whatever evidence detracts from the weight of other evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
[HN2] The court may not substitute a decision contrary to that made by the department, even though such decision is equally or more reasonable, if the determination by the department is one which could have been made by reasonable people. Inferences based upon circumstantial evidence are sufficient to support a finding.

Administrative Law > Agency Adjudication > General Overview
[HN3] Suspicion is not evidence, it merely raises a possibility. This is not a sufficient basis for an inference of fact.

Administrative Law > Agency Adjudication > Hearings > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
[I-IN4] *Cal. Evid. Code § 520* states that a party who is guilty of wrongdoing has the burden of proof on that issue.

Administrative Law > Agency Adjudication > Hearings > General Overview
[HN5] Although the burden of proof in criminal cases is much higher than that in civil actions, the ruling in criminal cases that in order to prove a person guilty of a crime there must be evidence of the crime other than a mere false story by the defendant must necessarily apply in a civil proceeding in which a person is charged with wrongdoing.

Evidence > Documentary Evidence > Best Evidence Rule
Evidence > Relevance > Sex Offenses > Rape Shield Laws
[HN6] *Cal. Evid. Code § 412* provides that if weaker and less satisfactory evidence is offered when it is within the power of the party to produce stronger and more satisfactory evidence, the evidence should be viewed with distrust.

SUMMARY:

A mandamus proceeding was brought to compel the State Personnel Board to vacate its dismissal of petitioner from his employment as a correctional officer and to restore him to such employment with back pay. Petitioner had been dismissed on the charge that he brought alcoholic beverages on the correctional facility grounds in violation of departmental regulations, based on the fact that empty wine and beer containers were found in his quarters. The board disbelieved petitioner's explanation by which he denied that there was any alcohol in the containers when he brought them to his quarters. The court granted the writ but denied petitioner's request for back pay. (Superior Court of San Joaquin County, John B. Cechini, Judge.)

On appeal by both parties, the Court of Appeal reversed that portion of the judgment denying petitioner back pay, and affirmed the judgment in all other respects. The court held that, notwithstanding any suspicions arising from petitioner's "bizarre" explanation of the presence of the containers in his quarters, there was no substantial evidence to support the board's finding that there was alcohol in the containers at the crucial time when they were brought to his quarters. (Opinion by Bray, J., * with Pierce, P. **J.,** and Regan, J., concurring.)

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to McKinney's Digest

(1) Civil Service § 13(5)-- Discharge -- Judicial Review -- Substantial Evidence Rule. --A decision of the State Personnel Board, when subjected to judicial review, may be set aside only if it is found to be unsupported by any substantial evidence; all reasonable inferences must be drawn in support of the findings of the board.

(2) Civil Service § 12(6)-- Dismissal -- Hearing -- Evidence. --In a dismissal hearing before the State Personnel Board, there was no substantial evidence to support the board's finding that petitioner, a correctional officer,

brought alcoholic beverages on the grounds of the correctional facility in violation of departmental rules, where, though it was shown that petitioner had empty wine and beer containers in his quarters, and though his own explanation of their presence, by which he denied that they contained alcohol when brought to his quarters, was somewhat bizarre and justified the board's disbelief, the containers when found contained no vestige of alcohol and there was no evidence whatsoever that they contained alcohol when brought to the quarters; the mere fact that the board did not believe petitioner's explanation did not supply evidence of the contents of the containers at the crucial time.

(3) Evidence § 571 -- Degree of Proof -- Where Wrongdoing Is Involved. --Even though the burden of proof in criminal cases is much higher than that in civil actions, the ruling in criminal cases that in order to prove a person guilty of a crime there must be evidence of the crime other than a mere false story by defendant, must necessarily apply in a civil proceeding in which a person is charged with wrongdoing.

(4) Civil Service § 13(5)-- Dismissal -- Judicial Review -- Findings. --Where it was correctly found in a mandamus proceeding that petitioner was improperly discharged from employment by the State Personnel Board, the court's denial of petitioner's request for back pay was error.

COUNSEL: Van Dyke & Shaw and James C. Van Dyke for Plaintiff and Appellant.

Thomas C. Lynch and Evelle J. Younger, Attorneys General, and Anthony S. DaVigo, Deputy Attorney General, for Defendant and Appellant.

JUDGES: Opinion by Bray, **J.,*** with Pierce, P. J., and Regan, J., concurring.

> * Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

OPINION BY: BRAY

OPINION

[*49] [**747] Defendant-appellant State Personnel Board appeals from that portion of an amended judgment granting a writ of mandate ordering the "Board" to vacate its dismissal of plaintiff-appellant Pereyda and to restore him to his employment as a correctional officer. Pereyda [***2] appeals from that portion of said amended judgment denying his request for back pay.

Question Presented

Is the mere presence and possession of empty alcoholic containers, with no trace of alcoholic beverages, in view of Pereyda's explanation of their presence, sufficient to justify the hearing officer's finding that Pereyda did bring alcoholic beverages into the restricted area?

Record

At the time crucial herein, Pereyda held the position of correctional officer, Deuel Vocational Institution. On September 12, 1968, the Director of the Department of Corrections caused to be filed with the State Personnel Board and served upon Pereyda its notice of punitive action of dismissal effective September 16. Pereyda appealed from that notice and requested a hearing thereon. The matter was heard before Robert L. Hill, hearing officer, State Personnel Board, and evidence was taken. The hearing officer sustained without modification the punitive action of dismissal. Thereafter the State Personnel Board approved and adopted the findings of fact and proposed decision of the hearing officer.

Pereyda then filed in the San Joaquin County Superior Court a petition for writ of mandate seeking [***3] reversal of the action of the State Personnel Board and his restoration to his position as correctional officer. At the hearing thereon, the administrative record was received in evidence. Thereafter the court entered judgment in favor of Pereyda's petition, followed by an amended judgment. This judgment ordered the State Personnel Board to restore Pereyda to his former position but denied his request for accrued back pay. The State Personnel Board appealed from that portion of the amended judgment restoring respondent to his position, and Pereyda appealed from that portion denying him back pay.

The Law

It is important to consider the rules applicable to an appeal to the courts from an administrative determination of the kind involved here.

[IAN1] [*50] (1) Since the State Personnel Board is a constitutional agency for all its adjudicatory activities (Cal. Const., art. XXIV; *Boren v. State Personnel Board (1951) 37 Cal.2d 634 [234 P.2d 981]),* its decision, which is the subject of this review, may be set aside only if it is found to be [**748] unsupported by any substantial evidence. All reasonable inferences must be drawn in support of the findings [***4] of the Board (*Hingsbergen v. State Personnel Bd. (1966) 240 Cal.App.2d 914 [50 Cal.Rptr. 59]; Neely v. California State Personnel Bd. (1965) 237 Cal.App.2d 487 [47 Cal.Rptr. 64]).* The findings and determination of the Board come before the reviewing court with a strong presumption as to their correctness and regularity. (*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal.2d 317, 330-331 [253 P.2d 659];*

Gong v. City of Fremont (1967) 250 Cal.App.2d 568, 573-574 [58 Cal.Rptr. 664] .) The court may not take into account whatever evidence detracts from the weight of other evidence. (*Neely v. California State Personnel Bd., supra, at p. 489.)*

"[BN2] The court may not substitute a decision contrary to that made by the department, even though such decision is equally or more reasonable, if the determination by the department is one which could have been made by reasonable people. . . ." (*Kirby v. Alcoholic Bev. etc. App. Bd. (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] .)*

Inferences based upon circumstantial evidence are sufficient to support a finding. [***5] (*People v. Goldstein (1956) 139 Cal.App.2d 146, 155 [293 P.2d 495] .)*

With these rules in mind, we examine the charge against Pereyda and the evidence to support it. Incidentally, there is no conflict in the evidence, unless it be in the inferences to be drawn from it.

Did Respondent Bring Alcoholic Beverages Into the Restricted Area?

The charge against Pereyda which the State Personnel Board found was substantiated was that he was guilty of willful disobedience within the meaning of *section 19572, subdivision (o), Government Code,* in that in violation of section D5225 of the Rules for Personnel of the Department of Corrections he brought alcoholic beverages on the grounds of Deuel Vocational Institution.

In pertinent part that rule provides No employee shall bring any kind of liquors of whatever alcoholic content . . . upon the grounds of any correctional institution. . . ." Pereyda admitted he understood this rule.

He admitted that on or about August 30, 1968, he had in his quarters on the institution grounds six empty wine bottles and about 20 empty beer cans. [*51] The containers contained no alcohol. He denied that he had consumed the alcohol [***6] which had at one time been in the containers or that at any time while the containers were in his premises they had contained alcohol. His story of how they came to be in his quarters seems somewhat bizarre and justified the Board's disbelief in its veracity. Pereyda said he had a lady friend who told him that her landlord was religious. She asked Pereyda to take the containers plus two boxes of trash for disposal. He placed these articles in the trunk of his car. Pereyda refused to identify the woman because "she is recently married." At various points in his testimony Pereyda related that some of the beer cans were in paper bags while others were loose; that the containers were brought onto the premises in paper bags, that "most of it" was in paper bags; that "some of them must have been in . . . six pack containers" and that "two empty six packs was in two bags and I think there were three or four scattered ones."

Although Pereyda had intended to take the items to the dump, they remained in his possession for "several days or a week or two"; that he had obtained them "just a few days" prior to their discovery by the institution authorities; that they had been in his room for [***7] a "good number of days." Just how much of the time the containers were in his possession they were in the trunk of his car does not appear, but they were there until he needed the space to pack some clothes that his exwife had told him to pick up. He then placed them in his [**749] closet "to keep them out of sight until . . . [he] could get them back to the dump." Pereyda had had difficulty in getting these clothes so he was in a hurry to obtain them when his exwife told him to come and get them. He did not replace the containers in the trunk because it was full of clothes, and he did not like the idea of open containers in his auto. Pereyda did not drink wine but occasionally drank beer.

It was while Pereyda was on a two-day leave from the institution that the containers were discovered in his closet. Pereyda gave no explanation of why during all the period the containers remained in his possession he did not take them to the dump.

When found the containers contained no vestige of alcohol. They had been washed clean of their former contents. There was no evidence whatsoever that when brought into Pereyda's quarters, there was alcohol in the containers. (2) [***8] The finding of the Board that there was alcohol in them is based solely upon the inferences drawn by the Board to that effect from the facts that ordinarily one does not bring empty containers of this kind into his room and that Pereyda gave a rather weird explanation concerning their presence. The Board, of course, did not have to believe this explanation. But does the fact that the Board did not believe the explanation supply [*52] evidence of the contents of the containers at the crucial time? We do not believe so.

In *People v. Carswell (1957) 149 Cal.App.2d 395, 402 [308 P.2d 852] ,* it was held that an explanation of possession of stolen goods which is rejected by the jury is sufficient corroboration of the fact that the defendant was implicated in the burglary in which the goods were obtained. But there the crime was proved by the evidence of the burglary, and the defendant's rejected explanation of his possession of the stolen goods did not serve to prove the crime, it served to prove his connection therewith. Thus, the burglary was proved whether the defendant's story was true or untrue. In the instant case Pereyda's story, true or untrue, did [***9] not prove that the containers contained liquor when brought on the premises. There still is no evidence that they did.

Pereyda's story undoubtedly raised a suspicion that the containers had contained alcohol but [HN3] "[suspicion] is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]" (*People v. Redmond (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321];* to the same effect see *People v. Draper (1945) 69 Cal. App.2d 781, 786 [160 P.2d 80],* where the court pointed out that although the defendant was not truthful, raising the finger of suspicion against him, that was not enough to prove his guilt.)

In *People v. Draper, supra, at page 785,* the court stated that the untruthfulness of the defendants justified the jury in disbelieving their stories, but did not relieve the prosecution of proving their guilt.

[HN4] *Evidence Code section 520* states that a party who is guilty of wrongdoing has the burden of proof on that issue. The proceeding before the Board is a civil one, and hence the burden of proof requires only a preponderance [***10] of evidence. However, that fact does not mean that mere suspicion of a person's wrongdoing meets that burden.

In *Davis v. State (1960) 40 Ala.App. 609 [119 So.2d 236],* the court held that possession of empty beer cans did not establish a charge of possession of beer.

In *Davis v. State (1928) 199 Ind. 739 [161 N.E.* 2], the court held that the finding at the defendant's home of an empty pitcher and glass, which "had the odor of alcohol," without other evidence that there had been any alcohol in either, was not sufficient to support a finding of guilt of possession of intoxicating liquor.

(3) [HN5] Although the burden of proof in criminal cases is much higher than that in civil actions, the ruling in criminal cases [**750] that in order to prove a [*53] person guilty of a crime there must be evidence of the crime other than a mere false story by the defendant must necessarily apply in a civil proceeding in which a person is charged with wrongdoing.

[HN6] *Section 412 of the Evidence Code* provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger [***11] and more satisfactory evidence, *the evidence should be viewed with distrust."* (Italics added.)

State Personnel Board contends that this section applies to Pereyda's refusal to identify the woman whom he claims gave him the bottles. But viewing this fact with distrust is no different from refusing to believe Pereyda's story. It does not prove that the bottles contained liquor when brought on the premises. For the same reason section 413, referring to a party's failure to explain evidence, does not apply. Pereyda did not deny the evidence. He admitted the only evidence in the case, namely, that he brought empty bottles on the premises, which, of course, was no violation of any rules. Likewise, he explained their presence there; the failure of the board to accept such explanation, as we have hereinbefore stated, did not prove any wrongdoing. Here, as said by the court in *Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770, 777 [30 Cal.Rptr. 639],* concerning the appellant there, Pereyda's interest in the outcome of the proceeding and his story "might have evoked skepticism in the trier of fact; yet there was no other evidence to fasten him with [***12] guilty knowledge."

The superior court correctly found that there was no substantial evidence to support the Board's finding and order. (4) Obviously, as Pereyda was improperly discharged, the judgment denying his request for back pay is erroneous.

That portion of the judgment denying Pereyda's request for back pay is reversed. The judgment ordering a writ of mandate to issue commanding the State Personnel Board to annul Pereyda's dismissal and to reinstate him in his position is affirmed. Plaintiff-appellant Pereyda is to recover costs.

Received
June 17, 2011
Commission on
State Mandates

TAB “23”

DONNA PIPKIN, Plaintiff and Appellant, v. BOARD OF SUPERVISORS OF SHASTA COUNTY et al., Defendants and Respondents

Civ. No. 16995

Court of Appeal of California, Third Appellate District

82 Cal. App. 3d 652; 147 Cal. Rptr. 502; 1978 Cal. App. LEXIS 1709

July 10, 1978

PRIOR HISTORY: [*1]** Superior Court of Shasta County, No. 55789, Clyde H. Small, Judge.

DISPOSITION: The judgment is reversed and remanded to the trial court with directions that the Shasta County Employee Appeals Board be ordered to compute and award plaintiff accrued salary in accord with this opinion. The judgment is otherwise affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff deputy sheriff appealed a judgment from the Superior Court of Shasta County (California), which denied a writ of mandate when defendant, the Shasta County Employee Appeals Board, refused to order plaintiffs case after she was dismissed as a matron of a jail for rudeness and insubordination.

OVERVIEW: Plaintiff deputy sheriff was dismissed as a matron of a jail for rudeness and insubordination. Subsequently, defendant board refused to order her case and the trial court denied plaintiffs petition for a writ of mandate filed in response. Plaintiff appealed. The court reversed a salary determination and remanded to the trial court to award plaintiff her accrued salary because plaintiff was not given an opportunity to explain the charges. However, the court affirmed plaintiffs dismissal because defendant's decision was supported by substantial evidence. The court ruled that plaintiff was not deprived of her due process rights. The evidence in support of the charge that she gave false reasons for absence from duty was supplied by her own admission and was confirmed by her husband's testimony so that defendant's finding on that charge was supported by substantial evidence. The finding that plaintiff was rude and insulting, used profanity, and was insubordinate was established by the testimony of fellow employees who witnessed the incidents and by her admission that she engaged in a personal dispute and used profanity with another deputy.

OUTCOME: The court affirmed the denial of a writ of mandate to command defendant board to order plaintiff deputy sheriffs case for wrongful termination because the decision was supported by substantial evidence. However, the court reversed the salary determination and remanded for a computation of plaintiffs accrued salary because plaintiff was not given an opportunity to explain the charges against her.

LexisNexis(R) Headnotes

Administrative Law > Agency Adjudication > Hearings > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN1] An agency seeking to impose discipline must afford an employee some opportunity to explain charges prior to the effective date of the discipline.

Administrative Law > Agency Adjudication > Hearings > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN2] Due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, due process does not mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons thereafter, a copy of the respond, either or in writing, to the authority initially imposing discipline.

Administrative Law > Agency Adjudication > Hearings > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN3] The taint of dismissal is limited inasmuch as the remedy afforded a person who has been denied the opportunity to explain the charges is restricted to an award of salary for the period from the effective date of discipline until the date of final decision after a fair hearing.

Administrative Law > Agency Adjudication > Hearings > General Overview
Governments > Local Governments > Employees & Officials
[11N4] The regulations set forth in Shasta County Code § 1111 pertaining to employee appeals of disciplinary action merely require that In discharging, suspending or reducing in rank a permanent employee, the department head shall request the County Counsel to prepare an order, in writing, stating specifically the cause for such an action. This section of the code is the only section that requires any affirmative duty on the part of the county to produce the reasons for the disciplinary action. By the Shasta County Code, ch. 8, Appeals, it is incumbent upon the disciplined employee to request what is in fact an initial hearing, Shasta County Code § 1122, and to carry the entire burden of proof. Shasta County Code § 1124. The applicable portions of the county code do not require the county to produce any evidence to sustain the charge.

Administrative Law > Agency Adjudication > Hearings > General Overview
[HN5] In disciplinary administrative proceedings, the burden of proving the charges rests upon the party making the charges.

Administrative Law > Judicial Review > Standards of Review > General Overview
Governments > Local Governments > Administrative Boards
Pensions & Benefits Law > Governmental Employees > County Pensions
[HN6] Where an agency possesses judicial authority under the California Constitution, the decision of the agency, even if affecting a fundamental right, is entitled to all the deference and respect due a judicial decision. However, if the agency does not possess judicial powers, the scope of review is determined by the nature of the right affected.

Governments > Local Governments > Charters
Governments > Local Governments > Duties & Powers
[HN7] With respect to charter cities and counties such powers and procedures are prescribed by means of legislative approval or disapproval of the charter presented to the legislature. In each case, however, the legislature is limited in the nature and extent of the powers which it may grant. With respect to legislative powers, the question is one of proper delegation of powers vested in the legislature itself by Cal. Const. art. W.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Governments > Local Governments > Administrative Boards
[HN8] As the powers bestowed on counties in the California Constitution do not mention judicial powers if the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under Cal. Civil Code § 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record.

Administrative Law > Judicial Review > Standards of Review > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN9] In California, the courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review. In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation. In determining whether a right is vested or fundamental the courts have considered the degree to which that right is already possessed by the individual. The courts have held the loss of it sufficiently vital to require independent review. The abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.

Administrative Law > Judicial Review > Standards of Review > General Overview
Constitutional Law > Separation of Powers
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN10] The basis for applying different standards of review in disciplinary actions can be traced to their ultimate source in one of the most fundamental constitutional doctrines, that of separation of powers. As persons charged with the exercise of a power, either, legislative, executive, or judicial, cannot exercise any other power unless expressly authorized by the California Constitution, a court, in reviewing a decision of an agency vested with judicial power under the constitution, must afford the determination of that agency all the deference and respect due to a judicial decision.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN11] The court's review of a trial court proceeding is limited to an examination of the record to determine whether substantial evidence supports the decision of the trial court.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A former deputy sheriff sought a writ of mandate to compel her reinstatement as a matron at the county jail. She had received notice of dismissal followed by an informal post-termination hearing at which reinstatement had been denied. The superior court reviewed the evidence in support of the charges under both the independent review and the substantial evidence standards, and denied the petition. (Superior Court of Shasta County, No. 55789, Clyde H. Small, Judge.)

The Court of Appeal reversed with directions to order an award of salary for the period from the date of dismissal to the final decision following the hearing. The court upheld the lower court's determination that the charges against the deputy had been supported by the preponderance of the evidence, noting that the independent judgment test was applicable on the ground that the agency's determination had affected a fundamental vested right. (Opinion by Evans, *J.,* with Reynoso, *J.,* concurring. Puglia, P. **J.,** concurred in the judgment.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Public Officers and Employees § 30--Duration and Termination of Tenure--Removal From Office--Due Process--Right to Pretermination Hearing. --Prior to disciplinary action against an employee, due process requires that an agency provide certain procedural rights, including notice of the proposed action and the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority imposing discipline. Thus, a county ordinance that did not provide a hearing until after the effective date of a dismissal, and failed to provide any opportunity to explain the charges prior to dismissal, was unconstitutional.

(2) Constitutional Law § 109--Procedural Due Process--Hearing--Discipline of Public Employee--Sufficiency of Predisciplinary Discussion With Supervisor. --A discussion between a county employee and her supervisor several months before the employee's dismissal did not satisfy the due process requirement of notice and an opportunity to be heard prior to disciplinary action where the employee was not warned during the discussion of the possibility of dismissal, no discipline was imposed at that time, and the employee thereafter corrected her behavior as to the specific violations discussed.

(3) Public Officers and Employees § 30--Duration and Termination of Tenure--Removal From Office--Due Process--Right to Pretermination Hearing--Remedy. --The remedy afforded a former county employee who had been denied the opportunity to explain the charges upon which dismissal was based was restricted to an award of salary from the effective date of discipline until the date of final decision after a fair hearing.

(4) Administrative Law § 49--Administrative Actions--Adjudication--Evidence--Burden of Proof and

Presumptions--Discipline of Public Employee. --In disciplinary administrative proceedings, the burden of proving the charges rests upon the party making the charges rather than upon the person disciplined.

(5a) (5b) Public Officers and Employees § 30--Duration and Termination of Tenure--Removal From Office--Due Process--Informal Hearing. --Procedures in an informal disciplinary proceeding against a county employee were sufficient to protect her due process rights where all evidence presented by both the employer and the employee was considered by the board and substantial evidence was presented without reliance on hearsay, notwithstanding that the ordinance under which the hearing was conducted did not require the employer to present substantial evidence and placed the burden of proof on the employee.

(6) Administrative Law § 132--Judicial Review--Scope and Extent--Evidence--Substantial Evidence Rule--Constitutional Agencies Exercising Judicial Power. --Where an agency possesses judicial authority under the Constitution, the decision of the agency, even if affecting a fundamental right, is entitled to all the deference and respect due a judicial decision. However, if the agency does not possess judicial powers, the scope of review is determined by the nature of the right affected.

(7) Administrative Law § 134--Judicial Review--Scope and Extent--Evidence--Independent Judgment Rule--Nonconstitutional Agencies--Fundamental Rights. --Where the decision or order of a county agency substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. However, where a fundamental vested right is not affected, the trial court's inquiry is limited to a determination of whether the findings are supported by substantial evidence in light of the whole record.

(8) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Scope and Nature--Federal Decisions--Weight and Authority. --Decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

(9) Administrative Law § 133--Judicial Review--Scope and Extent--Independent Judgment Rule--Fundamental Rights. --In California, the courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review. In determining whether the right is fundamental, the courts do not weigh only the economic aspects, but also the effect in human terms and the importance to the individual in the life situation.

(10) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Scope and Nature--Right to Continued Employment. --The right to continued permanent employment is so important and so substantially affects the individual that it is a fundamental right.

(11) Counties § 7--Officers, Agents and Employees--Permanent Employees--Right to Continued Employment. --The full rights of continued employment are vested in a permanent county employee upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in proceedings consistent with due process. Thus, a deputy sheriffs status as a permanent employee was not contradicted by the sheriffs use of a system of semi-annual performance reports for evaluating employees.

(12) Counties § 7--Officers, Agents and Employees--Disciplinary Proceedings--Judicial Review--Merit System of Employment. --The proper standard for reviewing a county agency's decision to discipline a public employee was not affected by the fact that a merit system, rather than a civil service system, was involved.

(13) Administrative Law § 138--Judicial Review--Appellate Courts--Standard of Review. --The standard for review of a trial court's determination that a county agency's decision to discipline an employee was proper is whether substantial evidence supports the decision of the trial court.

COUNSEL: Marsh, Mastagni & Marsh, Harry M. Marsh and William E. Gasbarro for Plaintiff and Appellant.

Robert A. Rehberg, County Counsel, for Defendants and Respondents.

JUDGES: Opinion by Evans, **J.,** with Reynoso, **J.,** concurring. Puglia, P. **J.,** concurred in the judgment.

OPINION BY: EVANS

OPINION

[*655] [**504] Plaintiff, Donna Pipkin, a permanent deputy sheriff acting as a matron in the Shasta County jail, received notice that she was to be [*656] dismissed effective six days later. The factual bases for the dismissal order were that she had given false infor-

mation in explanation of her absence from work; that she entered an area in the jail carrying keys without another matron standing by, and fraternized with the prisoners; and that her fraternization standing by, and fraternized with the prisoners; and that it caused disputes between the prisoners. She was also [***2] alleged to be insubordinate, rude, and insulting to fellow workers in the presence of others. She was discharged without having an opportunity to explain the charges against her. The Shasta County ordinance provides only for a post-termination hearing to contest the action. After an informal hearing the Shasta County Employee Appeals Board refused to order her case, she petitioned for a writ of mandate pursuant to Code of Civil Procedure section 109.5. Upon denial of the petition this appeal ensued.

(1) (2) Plaintiff correctly maintains that the procedure used to dismiss her was violative of her constitutional right due process of law in that prior to the effective date of the dismissal, she was not afforded an opportunity to explain the charges. *Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 215 [124 Cal.Rptr. 14, 539 P.2d 774] ,* requires that the RIN11 agency seeking to impose discipline afford the employee some opportunity to explain the charges *prior* to the effective date of the discipline. (See also, *Cansdale v. Board of Administration (1976) 59 Cal.App.3d 656, 665 [130 Cal.Rptr. 880]; Keely v. State Personnel Board (1975) 53 Cal.App.3d 88, 98 [125* [***3] *Cal.Rptr. 398]; Carrera v. Bertaini (1976) 63 Cal.App.3d 721, 727 [134 Cal.Rptr. 14]; Ng. v. State Personnel Bd. (1977) 68 Cal.App.3d 600, 605 [137 Cal.Rptr. 387] .)*

Defendant's claim that the charges were discussed with plaintiff prior to her dismissal and that the discussion satisfied the pre-termination due process requirement reveals a fanciful interpretation of the record and is without merit. The record reveals that several months prior to plaintiffs dismissal Lieutenant Austin discussed some incidents with plaintiff involving her failure to follow the directions of her superior officer concerning feeding the inmates, her fraternization with them, and a letter received by the sheriff from the inmates which the officers felt had been written with plaintiffs assistance. The record does not contain any indication that Pipkin was warned that she would be dismissed if the violations continued, nor was any punishment imposed. Austin testified that, after his conversation with plaintiff, he believed she corrected those deficiencies, and her conduct did not warrant discipline until the false absence report. Finally, Pipkin's direct testimony was that prior [***4] to the [*657] effective date of the dismissal she was not afforded an opportunity to discuss the charges with the sheriff. The record supports her testimony. The notice of dismissal fails to mention any right the employee may have to discuss the action with her superiors. The mere fact that the dismissal was not immediately effective does not cure [* *505] the procedural infirmity; the reason the dismissal was not made immediately effective was that plaintiff had accrued vacation and compensatory time.

"It is clear that [HN2] due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, . . . due process does not mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons thereafter, a copy of the respond, either or in writing, to the authority initially imposing discipline." (*Skelly v. State Personnel Bd. supra, 15 Cal.3d at p. 215.)*

Shasta County Ordinance chapter 8, sections 1122 ad 1123, although recognizing a right of appeal, [***5] do not provide for a hearing until *after* the effective date of the dismissal and fail to provide the employee with any opportunity to explain the charges to the agency initiating the action.

As the ordinances do not provide for any pre-termination hearing, they fail to comport with the minimal federal and state constitutional requirements held to be applicable by the United States Supreme Court in *Arnett v. Kennedy (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S. Ct. 1633]* and the California Supreme Court in *Skelly, supra, at page 215.* Therefore, to that extent those provision of the ordinance are unconstitutional and the dismissal of plaintiff was affected thereby.

(3) However, [11N3] the taint of the dismissal is limited inasmuch as the remedy afforded a person who has been denied the opportunity to explain the charges is restricted to an award of salary for the period from the effective date of discipline until the date of final decision after a fair hearing. (*Barber v. State Personnel Bd. (1976) 18 Cal.3d 395, 402-403 [134 Cal.Rptr. 206, 556 P.2d 306]; Ng v. State Personnel Bd., supra,* 68 Cal.App.3d 600.)

(4) (5a) Plaintiff contends she was denied due process by the [***6] terms of the ordinance which required her to bear the entire burden of proving that her discharge was improper.

[*658] The record demonstrates that the administrative proceedings was very informal, and permitted all evidence presented by the employer and plaintiff to be considered by the employee appeals board. Thus, basic due process was preserved. However, we do not mean to approve the Shasta County procedures as written. *Anton v. San Antonio Community Hosp.* does not support the placing of the burden of proof on the disciplined employee. Rather, the *Anton* court upheld the laws of a

hospital which placed the burden of proof on the disciplined employees since it was "clear that the bylaw read as a *whole* -- especially when viewed in conjunction with the provision setting forth the grounds for appellate review before the governing board . . . contemplates a substantial showing on the part of the charging committee." (Italics added.) (*Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802, 829-830 [140 Cal.Rptr. 442, 567 P.2d 1162] .)* In footnote 28 the Supreme Court clarifies its ruling, the bylaw in question by indicating that the judicial review [***7] committee shall rule against the affected person absent a clear and convincing showing on his part that the recommendation of the charging committee 'was arbitrary, unreasonable or not sustained by the evidence,' strongly implies that substantial evidence in support of the recommendation must appear. . . . It is thus apparent that a decision unsupported by evidence viewed by the governing board as substantial -- i.e., a decision based wholly upon the burdens of production and proof -- is not contemplated by the bylaws." (Italics omitted. *Anton, supra, at p. 830, fn. 28.)*

Unlike the *Anton* regulations, [IIN4] the regulations set forth in the Shasta County code pertaining to employee appeals of disciplinary action merely require that "In [**506] discharging, suspending or reducing in rank a permanent employee, the department head shall request the County Counsel to prepare an order, in writing, stating specifically the cause for such an action." (§ 1111.) This section of the code is the only section that requires any affirmative duty on the part of the county to produce the reasons for the disciplinary action. By the code (ch. 8, Appeals), it is incumbent upon the disciplined [***8] employee to request what is in fact an initial hearing (§ 1122) and to carry the entire burden of proof (§ 1124). The applicable portions of the county code do not require the county to produce any evidence to sustain the charge. Thus, unlike the bylaw in *Anton,* section 1124 violates the axiom that, "[HN5] in disciplinary administrative proceedings, the burden of proving the charges rests upon the party making the charges." *(Martin v. State Personnel Bd. (1972) 26 Cal.App.3d 573, 582 [103 Cal.Rptr. 306]; Johnstone v. City of Daly City* (1958) 156 Cal.App.2d k506, 515 *[319 P.2d 756] .)*

[*659] The regulation, on its face, appears to violate due process.

However, our review of the record convinces us that plaintiff in fact was not deprived of her due process right.

We also consider whether there was substantial evidence to support the under *both* the independent judgment and the substantial evidence test. As the trial court stated in a signed minute order: ". . . the Court did out of greater caution reweigh the evidence and determine that the respondents' action was not only supported by substantial evidence, but by the preponderance of the evidence." [***9] Additional support for the determination that the court applied the proper standard of review is found in a finding of fact which states "The Court has reviewed the transcript of the administrative proceedings held before the Employee Appeals Board, . . . " The contention that the trial court applied an improper standard of review is without merit.

The scope of review is determined by the constitutional powers granted the agency under the Constitution. (6) [HN6] Where an agency possesses judicial authority under the Constitution, the decision of the agency, even if affecting a fundamental right, is entitled to all the deference and respect due a judicial decision. (*Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, [112 Cal.Rptr. 805, 520 P.2d 29] .)* However, if the agency does not possess judicial powers, the scope of review is determined by the nature of the right affected. *(Id., at p. 32.)*

" [BN7] With respect to charter cities and counties such powers and procedures are prescribed by means of legislative approval or disapproval of the charter presented to the Legislature. In each case, however, the Legislature is limited in the nature and extent of [***10] the powers which it may grant. With respect to legislative powers, the question is one of proper delegation of powers vested in the Legislature itself by article IV." (*Id., at p. 40.)* It is limited by the powers bestowed in other branches of government in article V and VI. The amendment of article VI had the effect of withdrawing from the Legislature the ability to vest judicial power in *any* body and of concentrating in the court system all judicial power not expressly bestowed elsewhere by the Constitution.

[*660] (7) [HN8] As the powers bestowed on countries in the Constitution do not mention judicial powers "[if] the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially [**507] affect a fundamental vested right, the trial court's inquiry will be limited to a determination [***11] of whether or not the findings are supported by substantial evidence in light of the whole record." (*Id., at p. 32.)*

(8) In considering this issue, the trial court was under the basic misapprehension, apparently created by counsel for defendant, that because a fundamental right may not exist under the federal Constitution, a finding of such a right under the California Constitution is precluded.

[Decisions] of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.' [Citations.] " (*Serrano v. Priest (1976) 18 Cal.3d 728, 764 [135 Cal.Rptr. 345, 557 P.2d* 929]; see also *Cal.Const., art. I, § 24.)* Therefore, were we to conclude, as defendant suggests, that *Bishop v. Wood (1976) 426 U.S. 341 [48 L.Ed.2d 684, 96 S. Ct. 2074]* stands for the proposition that a public employee does not have a property right in continued public employment, it would not resolve the issue created by the provisions of the California Constitution which, although substantially equivalent [***12] to the federal constitutional protections, are possessed of an independent vitality. (*Serrano v. Priest, supra, at p. 764.)* The trial court, erroneously concluded that decisions such as *Bishop v. Wood, supra,* control the determination of whether the plaintiff was a possessor of a property right under the California Constitution and that the court was precluded from any inquiry into the matter. It is readily apparent that greater protection for the individual is afforded by viewing the right to be protected from arbitrary or capricious discharge from public employment as a property right; the California decisions and Constitution are here dispositive.

(9) [HN9] In California, "The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review." *(Bixby v. Pierno (1971) 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242] .)* "'In determining whether the right is fundamental the courts [*661] do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation.'" [***13] (*Strumsky, supra, at p. 45.)* In determining whether a right is "vested" or "fundamental" the courts have considered the degree to which that right is already possessed by the individual. The courts have held the loss of it sufficiently vital to require independent review. "The abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction." (*Bixby v. Pierno, supra, 4 Cal.3d at p. 144.)*

(10) It is beyond question that the right of continued employment is so important and so substantially affects the individual that it is a fundamental right. Whether the employment right of plaintiff was vested requires only minimal discussion. It is to be emphasized that this case does not present the simple nonrenewal of a probationary employee's contract, but rather the discharge of an already permanent employee. In the former situation as in *Turner v. Board of Trustees (1976) 16 Cal.3d 818 [129 Cal.Rptr. 443, 548 P.2d 1115] ,* no fundamental vested right exists; in the latter such fundamental vested right does. It is undisputed that plaintiff was a permanent employee of the Shasta County Sheriffs Department. *Turner v.* [***14] *Board of Trustees, supra,* which defendants urge controls this case, is distinguishable as it dealt with the nonrenewal of a probationary employee's contract. In addition, since that case was dealing with a teacher, there were important policy considerations favoring the nonrenewal of an unsatisfactory teacher who was frustrating the primary purpose of the school system in educating the young. (*Id., at p. 825.)*

[**508] (11) Contrary to defendants' contentions, merely because the sheriff utilized a system of semiannual performance reports for evaluating employees, plaintiff s employment may not be rendered probationary or tentative in effect. (*Anton v. San Antonio Community Hosp., supra, 19 Cal.3d at p. 824.)* The full rights of continued employment *vest* upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements. Defendants' contention that since county ordinance section 1110 requires a statement of reasons for disciplinary action, an employee may not be tenured, is patently absurd. The statute merely specifies that dismissals must be [***15] effected in accord wit due process. In addition, plaintiffs duties do not suggest that she served in a confidential position at the pleasure of the appointing authority nor has it been suggested that any other statute exists which expressly provides that her employment was at the pleasure of her employer. In fact, statutes or ordinances providing that employment shall [*662] be at the pleasure of the appointing authority generally contain terminology vesting the employer with the unabridged right to remove any employee without specification of reasons. (See *Bogacki v. Board of Supervisors (1971) 5 Cal.3d 771, 775 [97 Cal.Rptr. 657, 489 P.2d 537]; Healdsburg Police Officers Assn. v. City of Healdsburg (1976) 57 Cal.App.3d 444, 451 [129 Cal.Rptr. 216]; Hollon v. Pierce (1967) 257 Cal.App.2d 468, 478, fn. 4 [64 Cal.Rptr. 808]; Abel v. Cory (1977) 71 Cal.App.3d 589, 594 [135 Cal.Rptr. 555] .)* The findings are conclusive that plaintiff was a permanent employee, and as such had a fundamental vested right in continued employment. Therefore, the independent judgment test was applicable.

(12) We reject defendants' attempted distinction of the proper [***16] scope for review of disciplinary actions taken under a civil service system and a merit system, as a distinction without a difference. [HN10] The basis for applying different standards of review "can be traced to their ultimate source in one of our most fundamental constitutional doctrines, that of separation of powers." *(Strumsky, supra, at p. 35.)* As persons charged with the exercise of a power, either, legislative, executive, or judicial, cannot exercise any other power unless expressly

authorized by the Constitution, a court, in reviewing a decision of an agency vested with judicial power under the Constitution, must afford the determination of that agency all the deference and respect due to a judicial decision. (*Strumsky, supra, at pp. 35-36.)*

The trial court out of a justifiable abundance of caution utilized the independent review standard.

Defendants' claim that power under a merit system is reposed in the electorate, not an administrative agency, misconstrues the source of origin of the powers of countries. It is the state, not the counties, in whom the electorate has vested power. (See *Cal. Const. art. IV, § 1; art. XI, § 1, subds. (a)* and (b); art. II, § 1.) The [***17] counties, as legal subdivisions of the state, derive their power from the power delegated by the People to the state, and specifically delegated to the Legislature, which in turn has authorized the counties to create either a civil service system or limited civil service system. (See art. XI, § 1, subd. (a); *Gov. Code, §§ 31100- 31110.)* Finally, it should be noted that a contention that *Skelly* is applicable only to civil service employees and not to employees who are employed for an indefinite term, was rejected in *Mendoza v. Regents of University of California (1978) 78 Cal.App.3d 168, 173 [144 Cal.Rptr. 117]* . [*663] There, as here, "[defendant's] contentions are predicated on an obvious misconception of law." *(Ibid.)*

(5b) (13) [HN11] Our review of the trial court proceeding is limited to an examination of the record to determine whether substantial evidence supports the decision of the trial court. (*Bixby v. Pierno, supra, 4 Cal.3d at p. 143, fn. 10; LeVesque v. Workmen's Comp. App. Bd.* [**509] *(1970) 1 Cal.3d 627, 637 [83 Cal.Rptr. 208, 463 P.2d 432]; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, [***18] 95 [84 Cal.Rptr. 113, 465 P.2d 1] .)*

Plaintiff was charged with three distinct courses of conduct warranting dismissal, which the board found to be supported by the evidence: first, she was charged with falsely informing the sheriffs office of the reason for an absence on July 3 and 4, 1976; second, that she fraternized with the prisoners on numerous occasions thereby hindering effective administration of the jail and creating a danger that her keys might be taken from her while with the prisoners inside the day room; and third, that she was rude and insulting to other employees, directed profanity toward them, and was insubordinate to her superiors.

Plaintiff maintains that the decision of the board may not be affirmed and was based solely on hearsay. (*Nardoni v. McConnel (1957) 48 Cal.2d 500, 504 [310 P.2d 644]; Layton v. Merit System Commission (1976) 60 Cal.App.3d 58, 67-68 [131 Cal.Rptr. 318];* see also *Gov. Code, § 11513, subd. (c).)* Her contention is not supported by the record. It appears that the trial court and the board did find and consider substantial credible evidence in support of the dismissal without reliance on hearsay.

The evidence in support [***19] of the charge that she gave false reasons for her absence from duty was supplied by her own admission and was confirmed by her husband's testimony. The board's finding on that charge is supported by substantial evidence.

The finding that plaintiff was rude and insulting, used profanity, and was insubordinate was established by the testimony of fellow employees who witnessed the incidents and by her admission that she engaged in a personal dispute and used profanity with Deputy Johanson.

The finding that plaintiff fraternized with the prisoners, disclosed information about the administration of the jail, and entered the "tank" with her keys, thus constituting a hindrance to the effective administration [*664] of the jail, is troublesome. Direct evidence supporting that finding was elicited from admittedly biased inmates and a memorandum, written by a deputy (deceased at the time of the hearing), detailing an incident which happened seven months previously. In February plaintiff was advised (without imposition of discipline) that such conduct was unsatisfactory and must be stopped. Thereafter, it appears plaintiff did comport herself in a satisfactory manner, and no further [***20] information of continued fraternization which would justify disciplinary action was received. Inasmuch as the alleged fraternization was apparently not repeated following the warning, a question as to the propriety of the dismissal predicated upon those charges is presented. However, it is a question going to the weight of the evidence, and in reviewing the record it does not appear than an abuse of discretion resulted. (*Skelly, supra, at p. 217.)* We note that inmates Connors and Miller testified that plaintiff entered the cell area without another guard standing by, played cards with the inmates, and discussed and talked about, other matrons with them. Connors, who admitted she disliked plaintiff, testified that she observed plaintiff give keys to other inmates; that plaintiff was nicknamed "Ducky" by the inmates, and that plaintiff helped the inmates write a letter praising plaintiffs conduct. Additionally, plaintiff admitted entering the cell and playing cards with the inmates and another matron. Matron O'Quinn testified that she saw plaintiff playing cards in the cell but couldn't remember the date, and that inmates told her about plaintiffs conversations with other [***21] inmates concerning the jail staff.

We conclude the board's decision is supported by substantial evidence.

Received
June 17, 2011
Commission on
State Mandates

TAB “24”

CITY OF RANCHO CUCAMONGA, Plaintiff and Appellant, v. REGIONAL WATER QUALITY CONTROL BOARD-SANTA ANA REGION et al., Defendants and Respondents; COUNTY OF SAN BERNARDINO et al., Real Parties in Interest and Respondents.

E037079

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

135 Cal. App. 4th 1377*; *38 Cal. Rptr. 3d 450*; *2006 Cal. App. LEXIS 86*; *2006 Cal. Daily Op. Service 845*; *2006 Daily Journal DAR 1126*; *36 ELR 20026

January 26, 2006, Filed

NOTICE:

As modified Feb. 27, 2006.

SUBSEQUENT HISTORY: Modified by *City of Rancho Cucamonga v. Reg'l Water Quality, 2006 Cal. App. LEXIS 246 (Cal. App. 4th Dist., Feb. 27, 2006)*

PRIOR HISTORY: [***1] APPEAL from the Superior Court of San Bernardino County, No. RCV 071613, Shahla Sabet, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city's action challenged the procedure by which a federal regulatory permit was adopted and also challenged the permit's conditions limiting the quantity and quality of water runoff that could be discharged from storm sewer systems. The trial court sustained demurrers by the State Water Resources Control Board and a regional water quality control board. The regional board had issued a municipal storm sewer permit governing 18 local public entities. (Superior Court of San Bernardino County, No. RCV071613, Shahla Sabet, Judge.)

The Court of Appeal affirmed the judgment. The court held that the trial court properly sustained without leave to amend the state board's demurrer. Even if the city had identified any cognizable claim against the state board, the claim would have been barred by the 30-day statute of limitations for challenging an improperly-adopted state board policy or regulation. Because the city was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it could not successfully argue it was relieved of the obligation to object to the administrative record at the time of the hearing. The court agreed with the regional board that the permit properly allocated some inspection duties to the permittees. Federal law, either expressly or by implication, requires permittees under the National Pollutant Discharge Elimination System to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-stormwater discharges; permit compliance; and local ordinance compliance. (Opinion by Gaut J., with Hollenhorst, Acting P. J., and Richl, J., concurring.) [*1378]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.--*Gov. Code, § 11352, subd. (b)*, makes the issuance of a permit under the National Pollutant Discharge Elimination System exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding. The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.

(2) Pleading § 90--Motions to Strike.--A court may strike all or part of a pleading under *Code Civ. Proc., §§ 431.10* and *436*.

(3) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits--Storm Sewer Discharge.--*33 U.S.C. § 1342* of the Clean Water Act requires a permit under the National Pollutant Discharge Elimination System to be issued for any storm sewer discharge, whether there is any actual impairment in a particular region.

(4) Administrative Law § 131--Judicial Review--Scope--Substantial Evidence Rule.--An agency may rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence.

(5) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.--*33 U.S.C. § 1342(p)(3)(B)(iii)* of the Clean Water Act authorizes the imposition of permit conditions, including management practices, control techniques and system, design and engineering methods, and such other provisions as the administrator of the state determines appropriate for the control of such pollutants. The act authorizes states to issue permits with conditions necessary to carry out its provisions, as provided by *33 U.S.C. § 1342(a)(1)*. The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants.

(6) Pollution and Conservation Laws § 5--Water--National Pollutant Discharge Elimination System--Issuance of Permits.--A municipal storm sewer permit properly allocated some inspection duties to the permittees. *Wat. Code, § 13383*, provides that as part of compliance with [*1379] the Clean Water Act, the regional board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires permittees under the National Pollutant Discharge Elimination System to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-stormwater discharges; permit compliance; and local ordinance compliance, as provided by *40 C.F.R. 122.26(d)* and *(g) (2005);33 U.S.C. § 1342(p)(3)(B)(ii)*. Under *40 C.F.R. § 122.42(c)(6) (2005)*, permittees must report annually on their inspection activities.

[9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 63; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 893, 896.]

COUNSEL: James L. Markman; Richards, Watson & Gershon, John J. Harris and Evan J. McGinley for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Richard Magasin and Jennifer F. Novak, Deputy Attorneys General, for Defendants and Respondents.

JUDGES: Gaut J., with Hollenhorst, Acting P. J. and Richli J., concurring.

OPINION BY: GAUT

OPINION

[**452] **GAUT, J.**--

1. Introduction

This case involves environmental regulation of municipal storm sewers that carry excess water runoff to the Santa Ana River as it passes through San Bernardino County on its way to the Pacific Ocean. Federal and state laws impose regulatory controls on storm sewer discharges. Municipalities are required to obtain and comply with a federal regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this instance, the Regional Water Quality Control Board for the Santa Ana Region (the Regional Board) conducted public hearings and then issued a comprehensive 66-page [***2] municipal storm sewer permit governing 18 local [*1380] public entities. Two permittees, the City of Rancho Cucamonga and the City of Upland, among others, filed an administrative appeal with the State Water Resources Control Board (the State Board.) The State Board summarily dismissed the appeal. The Cities of Rancho Cucamonga and Upland [1] then filed a petition for writ of mandate and complaint against the State Board and the Regional Board.

1 Upland is not a party to this appeal.

The trial court sustained without leave to amend the demurrer of the State Board to the entire action. It sustained the demurrer as to four causes of action and granted the motion to strike of the Regional Board. After a hearing, the trial court denied the petition for writ of mandate.

Both procedurally and substantively, the City of Rancho Cucamonga challenges the conditions imposed

by the NPDES [2] permit and waste discharge requirements (the 2002 permit). It contends the procedure by which the 2002 permit was adopted was not legal, that [***3] the 2002 permit's conditions are not appropriate for the area, and that the permit's requirements are too expensive. Because we conclude the permit was properly adopted and its conditions and requirements are appropriate, we reject these contentions.

2 The National Pollutant Discharge Elimination System.

2. The National Pollutant Discharge Elimination System

California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862]* (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128]* (*Building Industry*); *Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76]* (*Communities*); *WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1451-1453* [**453] *[126 Cal. Rptr. 2d 389]*).

[***4] For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: "Part of the Federal Clean Water Act [*33 U.S.C. § 1251 et seq.*] 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 [(1992) 503 U.S.* [*1381] *91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]].*) The NPDES sets out the conditions under which the federal [Environmental Protection Agency] or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (*33 U.S.C. § 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.*)" (*Burbank, supra, 35 Cal.4th at p. 621.*)

California's Porter-Cologne Act (*Wat. Code, § 13000 et seq.*) establishes a statewide program for water quality control. Nine regional boards, overseen by the State Board, administer the program in their respective regions. (*Wat. Code, §§ 13140*, [***5] *13200 et seq.*, *13240*, and *13301.*) *Water Code sections 13374* and *13377* authorize the Regional Board to issue federal NPDES permits for five-year periods. (*33 U.S.C. § 1342, subd.(b)(1)(B).*)

As discussed more fully in part 6 *post*, the state-issued NPDES permits are subject to the informal hearing procedures set forth for administrative adjudications. (*Gov. Code, § 11445.10 et seq.*; *Cal. Code Regs., tit. 23, § 647 et seq.*) The issuance of permits is specifically excluded from the procedures for administrative regulations and rulemaking. (*Gov. Code, §§ 11340 et seq.*, *11352.*)

3. Factual and Procedural Background

The Regional Board issued the first NPDES permit for San Bernardino County in 1990. The principal permittee was the San Bernardino Flood Control District (the District). The 1990 permit required the permittees to develop and implement pollution control measures, using "best management practices" and monitoring programs, to eliminate illegal discharges [***6] and connections, and to obtain any necessary legal authority to do so. The management programs could be existing or new.

In 1993, the District developed the NPDES drain area management program (DAMP).

The second NPDES permit was issued in 1996 and was based on the report of waste discharge (ROWD) prepared by the principal permittee and copermittees, including Rancho Cucamonga. The 1996 permit proposed extending the existing program, which included inspections of industrial and commercial sources; policies for development and redevelopment; better public education; and implementation of a monitoring program. It offered a commitment to reduce pollutants to the "maximum extent practicable."

In 2000, the permittees submitted another ROWD to renew their NPDES permit. The 2000 ROWD proposed continuing to implement and develop water quality management and monitoring programs.

[*1382] Based on the 2000 ROWD, the Regional Board staff created five successive drafts of the 2002 permit, incorporating written comments by Rancho Cucamonga and others and comments made during two public workshops. Some of the comments addressed the economic considerations of anticipated prohibitive compliance costs.

[***7] The notice of the public hearing to consider adoption of the 2002 permit hearing [**454] announced: "relevant Regional Board files are incorporated into the record;" the governing procedures were those for an informal hearing procedure as set forth in "*Title 23, California Code of Regulations, Section 647 et seq.*;" and "Hearings before the Regional Water Board are not conducted pursuant to *Government Code section 11500 et*

seq.," the alternative formal hearing procedure for administrative adjudication. The notice was mailed to all permittees. The accompanying "fact sheet," which was publicly circulated, offered further information about the conduct and nature of the hearing and the legal and factual grounds for the Regional Board's recommendation to adopt the 2002 permit.

The informal public hearing was conducted on April 26, 2002. Neither Rancho Cucamonga nor any of the permittees objected to the form or substance of the hearing. Ultimately, after a staff presentation and testimony, including a statement from Rancho Cucamonga's counsel, the Regional Board adopted the 2002 permit. After the State Board dismissed their administrative appeal, [***8] Rancho Cucamonga and Upland filed the instant action.

The operative pleading is the second amended petition for writ of mandate and complaint. The petition alleges that the State Board and the Regional Board acted illegally and in excess of their jurisdiction in developing, adopting and implementing the 2002 permit. Based on 26 pages of general allegations, the petition asserts eight causes of action, alleging the State Board and the Regional Board violated *sections 13241*, *13263*, and *13360 of the Water Code* (the Porter-Cologne Act); the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*); the California Administrative Procedure Act (*Gov. Code, §§ 11340-11529*); the California Constitution; and the federal Clean Water Act; and seeking declaratory and injunctive relief.

The State Board successfully opposed the action on demurrer. The Regional Board eliminated four causes of action, the fourth, fifth, seventh, and eighth by demurrer and motion to strike. On the remaining four causes of action, the trial court found in favor of the Regional Board.

[*1383] 4. State Board's Demurrer

Rancho Cucamonga maintains the [***9] trial court should not have sustained the demurrer of the State Board without leave to amend because the State Board is the ultimate authority on state-issued NPDES permits, and, therefore, was properly joined as a party: "Because the State Board has for all intents and purposes adopted the rules and policies of general application upon which the Permit is based, it is clearly a proper party to this action."

The difficulty with Rancho Cucamonga's theory of liability against the State Board is, to quote Gertrude Stein about the City of Oakland, "There is no there there." (Stein, Everybody's Autobiography (1937).) In other words, Rancho Cucamonga's allegations against the State Board lack any substance. Instead, Rancho Cucamonga launches an unspecific attack on the State Board without identifying any particular problems. The petition makes the unexceptional allegation that the State Board formulates general water control policy which it implements and enforces through regional boards. It also alleges the State Board has not complied with the Administrative Procedure Act but it does not identify any objectionable policies or how there is no compliance. Instead the petition complains [***10] about a State Board letter directing that all NPDES permits follow consistent principles regarding standard urban storm water mitigation plans. [**455] Additionally, the petition maintains the 2002 permit included new reporting requirements and increased costs of compliance.

But the foregoing allegations did not articulate any improper State Board conduct. The 2002 permit, issued by the Regional Board and not by the State Board, is not subject to formal rulemaking procedures. (*Gov. Code, § 11352, subd. (b)*.) The State Board's letter, explaining a precedential decision concerning mitigation plans, is not an example of formal rulemaking. (*Gov. Code, § 11425.60, subd. (b)*.) By dismissing Rancho Cucamonga's administrative appeal concerning the 2002 permit, the State Board declined to become involved and the Regional Board's decision to issue the permit became final and subject to judicial review. (*People ex rel Cal. Regional Wat. Quality Control Bd. v. Barry (1987) 194 Cal.App.3d 158, 177 [239 Cal. Rptr. 349]*.) But the State Board was not made a proper party by reason of its dismissal of the administrative appeal.

[***11] Furthermore, even if Rancho Cucamonga had identified any cognizable claim against the State Board, it would have been barred by the 30-day statute of limitations for challenging an improperly adopted State Board regulation or order. (*Wat. Code, § 13330*; *Gov. Code, § 11350*.)

[*1384] We hold the trial court properly sustained without leave to amend the State Board's demurrer to the second amended petition for writ of mandate and complaint.

5. Standard of Review for Petition for Writ of Mandate

In deciding a petition for writ of mandate, the trial court exercises its independent judgment. (*Code Civ. Proc., § 1094.5, subd. (c)*; *Wat. Code, § 13330, subd. (d)*; *Building Industry, supra, 124 Cal.App.4th at p. 879*.) But, "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings ... . [¶] ... [¶] ... Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Fukuda v. City of Angels (1999) 20 Cal.4th*

805, 817-818 [85 Cal. Rptr. 2d 696, 977 P.2d 693] (*Fukuda*).)

[***12] On appeal, the reviewing court determines whether substantial evidence supports the trial court's factual determinations. (*Fukuda, supra, 20 Cal.4th at p. 824*; *Building Industry, supra, 124 Cal.App.4th at p. 879*.) The trial court's legal determinations receive a de novo review with consideration being given to the agency's interpretations of its own statutes and regulations. (*Building Industry, supra, at p. 879*; *Nasha v. City of Los Angeles (2004) 125 Cal.App.4th 470, 482 [22 Cal. Rptr. 3d 772]*.)

6. Rancho Cucamonga's Objections to the Administrative Record and Lack of Notice

The notice of the administrative hearing for adoption of the 2002 permit included the statement that the Regional Board's files would be incorporated as part of the record. Before trial on the writ petition, Rancho Cucamonga attempted to raise an omnibus objection to the entire administrative record and a specific objection to four documents, three studies about marine pollution and one economic study. The trial court ruled the objections had been waived by not making them before or at the time of the hearing. Applying the presumption of administrative [***13] regularity, we affirm the trial court's evidentiary ruling. (*Mason v. Office of Admin.* [**456] *Hearings (2001) 89 Cal.App.4th 1119, 1131 [108 Cal. Rptr. 2d 102]*.)

The reasons given by Rancho Cucamonga as to why the trial court should have sustained its objections to all or part of the administrative record are that it did not waive its objections to the record because Rancho Cucamonga did not know the hearing was adjudicative; the Regional Board did not provide [*1385] notice of an informal hearing (*Gov. Code, § 11445.30*); and Rancho Cucamonga never had an opportunity to object to the administrative record.

(1) As noted previously, *Government Code section 11352, subdivision (b)*, makes the issuance of an NPDES permit exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding: "The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." (*Sommerfield v. Helmick (1997) 57 Cal.App.4th 315, 320 [67 Cal. Rptr. 2d 51]*; see *City of Santee v. Superior Court (1991) 228 Cal.App.3d 713, 718 [279 Cal. Rptr. 22]*.)

[***14] Instead, the Regional Board correctly followed the administrative adjudication procedures (*Gov. Code, § 11445.10 et seq.*) and the companion regulations at *California Code of Regulations, title 23, sections 647-648.8* for informal adjudicative public hearings. These procedures were announced in the notice of hearing which also stated that *Government Code section 11500 et seq.*, governing formal administrative adjudication hearings, would not apply, thus satisfying *Government Code section 11445.30* requiring notice of an informal hearing procedure. At the time of the hearing, Rancho Cucamonga did not object to the informal procedure. Rancho Cucamonga's effort to argue that federal notice requirements (*40 C.F.R. § 124.8, subd. (b)(6)(ii)* (2005)) should also have been followed fails because this involved a state-issued NPDES permit adopted according to California procedures.

Because Rancho Cucamonga was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it cannot successfully argue it was relieved of the obligation to object to the administrative record [***15] at the time of the hearing. An informal administrative adjudication contemplates liberality in the introduction of evidence. (*23 Cal. Code Regs., tit. 23, §§ 648, subd. (d)*, *648.5.1*.) If Rancho Cucamonga wished to object to the informal hearing procedures, including the liberal introduction of evidence, it should have raised its objections as provided by statute and regulation before or at the time of the hearing (*Gov. Code, §§ 11445.30*, *11445.40*, *11445.50*; *23 Cal. Code Regs., tit. 23, § 648.7*), not a year later in the subsequent civil proceeding.

7. Economic Considerations for Issuance of NPDES Permit

Rancho Cucamonga's next assignment of error is that the Regional Board failed to consider the economic impact of the requirements of the 2002 permit by not conducting a cost-benefit analysis. Rancho Cucamonga relies on the California Supreme Court's *Burbank* opinion, in which the court held: "When ... a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal [***16] law [*1386] requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance." (*Burbank, supra, 35 Cal.4th at p. 618*.) Rancho Cucamonga contends that the 2002 permit exceeds federal requirements and that, therefore, this case should be remanded for a consideration of [**457] economic factors. (See *ibid.*; *Wat. Code, § 13241, subd. (d)*.)

The two problems with this argument are the trial court found there was no evidence that the 2002 permit exceeded federal requirements and Rancho Cucamonga does not explain now how it does so. There was also evidence that the 2002 permit was based on a fiscal analysis and a cost-benefit analysis. In the absence of the foundational predicate and in view of evidence that cost

was considered, Rancho Cucamonga's contention on this point fails.

(2) We also reject Rancho Cucamonga's related procedural argument that the Regional Board's motion to strike was impermissible as piecemeal adjudication. (*Regan Roofing v. Superior Court (1994) 24 Cal.App.4th 425, 432-436*; *Lilienthal & Fowler v. Superior Court (1993) 12 Cal.App.4th 1848, 1851-1855 [16 Cal. Rptr. 2d 458]*.) [***17] It is well recognized a court may strike all or part of a pleading as it did in this instance. (*Code Civ. Proc., §§ 431.10*, *436*; *PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682-1683 [40 Cal. Rptr. 2d 169]*.)

8. Substantial Evidence

Rancho Cucamonga also challenges the trial court's independent factual determination that sufficient evidence supports the findings of the Regional Board. Rancho Cucamonga's main contention is that the 2002 permit was not distinctively crafted for San Bernardino County but, instead, copied a similar permit for other counties without identifying any particular water quality impairment in San Bernardino County caused by the permittees. In other words, no evidence in the record supports issuance of the 2002 permit and the trial court did not identify any such evidence in its statement of decision.

(3) One problem with Rancho Cucamonga's foregoing argument is that the Clean Water Act requires an NPDES permit to be issued for *any* storm sewer discharge, whether there is any actual impairment in a particular region. (*33 U.S.C. § 1342*; *Communities, supra, 109 Cal.App.4th at pp. 1092-1093*.) [***18] Therefore, Rancho Cucamonga's contention that the permit fails to identify impaired water bodies in the region is beside the point.

In its statement of decision, the trial court discussed the inadequacy of the arguments and evidence cited by Rancho Cucamonga and concluded: "The San Bernardino Permit is based in part on the Basin Plan for this region. It is [*1387] also based on the permittees' own reports and monitoring within this region ... . It incorporates the permittees' management program, which is unique to these cities and county." The trial court included a citation to the 1993 DAMP report's "Geographic Description of the Drainage Area," which discusses the specific conditions present in San Bernardino County.

On appeal, Rancho Cucamonga faults the trial court for not presenting a more detailed description of the evidence supporting the issuance of the permit. We do not think the trial court, or this court, must bear that burden.

(4) First, "[a]n agency may ... rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence. (*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com. (1976) 55 Cal.App.3d 525, 535-536 [127 Cal. Rptr. 775]*.)" [***19] (*Browning-Ferris Industries v. City Council (1986) 181 Cal.App.3d 852, 866 [226 Cal. Rptr. 575]*.) Here the Regional Board adopted the recommendation of its staff in issuing the permit. And, as the record shows, the staff's recommendation was based on the previous 1990 and 1996 permits, the 1993 DAMP [**458] report and the 2000 ROWD, the permittees' application for renewal of the 1996 permit, as well as more general water quality factors. The evidence contradicts Rancho Cucamonga's assertion, that "the Regional Board simply copied verbatim the NPDES Permit for North Orange County, a coastal region with markedly different water quality conditions and problems."

As part of the trial court's consideration of the petition for writ of mandate, Rancho Cucamonga and the Regional Board directed the court to review specific items of evidence contained in the administrative record. In its opposing brief, the Regional Board offered a detailed account of the evidence supporting the issuance of the permit. The trial court indicated it had reviewed the parties' submissions before ruling. It discussed the evidence at the hearing on the petition and referred to it in its statement of decision. [***20] (*Lala v. Maiorana (1959) 166 Cal.App.2d 724, 731 [333 P.2d 862]*.) Rancho Cucamonga had the burden of showing the Board abused its discretion or its findings were not supported by the facts. (*Building Industry, supra, 124 Cal.App.4th at pp. 887-888*.) To the extent it attempted to do so at the trial court level, it was not successful.

This court has independently reviewed the record with particular attention to the evidence as emphasized by the parties. We do not, however, find it incumbent upon us or the trial court to review the many thousands of pages submitted on appeal and identify the particular evidence that constitutes substantial evidence. Instead, we deem the trial court's findings sufficient and not affording any grounds for reversal. (*Building Industry, supra, 124 Cal.App.4th at p. 888*; see *Weisz Trucking Co., Inc. v. Emil R. Wohl* [*1388] *Construction (1970) 13 Cal.App.3d 256, 264 [91 Cal. Rptr. 489]*, citing *Perry v. Jacobsen (1960) 184 Cal.App.2d 43, 50 [7 Cal. Rptr. 177]*.)

9. Safe Harbor Provision

As it did repeatedly below, Rancho Cucamonga maintains the 2002 permit violates section 402(k) of the Clean [***21] Water Act (*33 U.S.C. § 1342(k)*), because the permit does not include "safe harbor" language, providing that, if a permittee is in full compliance with the terms and conditions of its permit, it cannot be found

in violation of the Clean Water Act. (*U.S. Public Interest v. Atlantic Salmon (1st Cir. 2003) 339 F.3d 23, 26*; *EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 205 [48 L.Ed.2d 578, 96 S.Ct. 2022]*.) The trial court found there was no statutory right to a "safe harbor" provision to be included as the term of the permit. We agree.

This seems like much ado about nothing because *33 United States Code section 1342 (k)*, already affords Rancho Cucamonga the protection it seeks: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of *sections 1319* and *1365* of this title, with *sections 1311*, *1312*, *1316*, *1317*, and *1343* of this title, except any standard imposed under *section 1317* of this title for a toxic pollutant injurious to human health." Rancho Cucamonga does not cite any persuasive authority as to why this statutory protection had to [***22] be duplicated as a provision in the 2002 permit.

Furthermore, the 2002 permit complied with the State Board's water quality order No. 99-05, a precedential decision requiring NPDES permits to omit "safe harbor" language used in earlier permits. A permit without "safe harbor" language was upheld in *Building Industry, supra, 124* [**459] *Cal.App.4th at page 877*. The trial court did not err.

10. Maximum Extent Practicable

Rancho Cucamonga protests that the 2002 permit's discharge limitations/prohibitions exceed the federal requirement that storm water dischargers should "reduce the discharge of pollutants to the maximum extent practicable." (*33 U.S.C. § 1342(p)(3)(B)(iii)*.) The trial court, however, found there was no evidence presented that the 2002 permit exceeded federal requirements. Because there is no evidence, the issue presented is hypothetical and, therefore, premature. (*Building Industry, supra, 124 Cal.App.4th at p. 890*.)

Additionally, as Rancho Cucamonga recognizes, *Building Industry* rejected the contention that a "regulatory permit violates federal law because it allows the Water Boards to impose municipal [***23] storm sewer control measures more [*1389] stringent than a federal standard known as 'maximum extent practicable.' [Citation.] [Fn. omitted.] ... [W]e ... conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards." (*Building Industry, supra, 124 Cal.App.4th at p. 871*.) The *Burbank* case, allowing for consideration of economic factors when federal standards are exceeded, does not alter the analysis in this case where there was no showing that federal standards were exceeded and where there was evidence that economic factors were considered. Furthermore, like the permit in *Building Industries*, the 2002 permit contemplates controlling discharge of pollutants to the maximum extent practicable through a "cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards." (*Building Industry, supra, at p. 890*.) The 2002 permit does not exceed the maximum extent practicable standard.

11. The Requirements of the 2002 Permit

Rancho Cucamonga lastly complains the requirements of the 2002 permit are "overly prescriptive," [***24] illegally dictating the manner of compliance and improperly delegating to the permittees the inspection duties of the State Board and the Regional Board. Rancho Cucamonga's arguments contradict the meaning and spirit of the Clean Water Act.

(5) In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. (*National Resources Defense Council, Inc. v. Costle (D.C. Cir. 1977) 186 U.S. App.D.C. 147 [568 F.2d 1369, 1375]*.) The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (*33 U.S.C. § 1342(p)(3)(B)(iii)*.) The act authorizes states to issue permits with conditions necessary to carry out its provisions. (*33 U.S.C. § 1342(a)(1)*.) The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. (*National Resources Defense Council v. U.S. EPA (1992) 966 F.2d 1292, 1308*.) [***25] That is what the Regional Board has created in the 2002 permit.

Rancho Cucamonga's reliance on *Water Code section 13360* is misplaced because that code section involves enforcement and implementation of state water quality law, (*Wat. Code, § 13300 et seq.*) not compliance with the Clean Water Act (*Wat. Code, § 13370 et seq.*) The federal law [**460] preempts the state law. (*Burbank, supra, 35 Cal.4th at p. 618*.) The Regional Board must comply with federal law requiring detailed conditions for NPDES permits.

[*1390] Furthermore, the 2002 permit does afford the permittees discretion in the manner of compliance. It is the permittees who design programs for compliance, implementing best management practices selected by the permittees in the DAMP report and approved by the Regional Board. Throughout the permit, the permittees are granted considerable autonomy and responsibility in maintaining and enforcing the appropriate legal authori-

ty; inspecting and maintaining their storm drain systems according to criteria they develop; establishing the priorities for their own inspection requirements; and establishing programs [***26] for new development. The development and implementation of programs to control the discharge of pollutants is left largely to the permittees.

More particularly, we agree with the Regional Board that the permit properly allocated some inspection duties to the permittees. As part of their ROWD application for a permit, the permittees proposed to "Conduct Inspection, Surveillance, and Monitoring. Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal storm drain system." The ROWD also discussed continuing existing inspection programs.

(6) *Water Code section 13383* provides that as part of compliance with the Clean Water Act, the Regional Board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; nonstormwater discharges; permit compliance; and local [***27] ordinance compliance. (*40 C.F.R. 122.26(d), (g)* (2005); *33 U.S.C. § 1342(p)(3)(B)(ii).*) Permittees must report annually on their inspection activities. (*40 C.F.R. § 122.42(c)(6)* (2005).)

Rancho Cucamonga claims it is being required to conduct inspections for facilities covered by other state-issued general permits. 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(d)(2)* (2005).)

[*1391] 12. Disposition

Rancho Cucamonga is the only of the original 18 permittees still objecting to the 2002 NPDES permit. It has not successfully demonstrated that substantial evidence does not support the trial court's factual determinations or the [***28] trial court erred in its interpretation and application of state and federal law.

We affirm the judgment and order the prevailing parties to recover their costs on appeal.

Hollenhorst, Acting P. J., and Richli, J., concurred.

On February 27, 2006, the opinion was modified to read as printed above.

Received
June 17, 2011
Commission on
State Mandates

TAB “25”

D.E. RICE, Trustee for the Rice Family Living Trust; KAREN RICE, Trustee for the Rice Family Living Trust, Plaintiffs-Appellants, versus HARKEN EXPLORATION COMPANY, Defendant-Appellee.

No. 99-11229

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

250 F.3d 264; 2001 U.S. App. LEXIS 7462; 52 ERC (BNA) 1321; 31 ELR 20599

April 25, 2001, Decided

SUBSEQUENT HISTORY: **[**1]** Rehearing and Rehearing En Banc Denied June 14, 2001, Reported at: *2001 U.S. App. LEXIS 15970.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Texas. 2:97-CV-402. Mary Lou Robinson, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, trustees for a family trust, appealed from an order of the United States District Court for the Northern District of Texas granting defendant oil lessee's motion for summary judgment in part and holding that the Oil Pollution Act of 1990, *33 U.S.C.S. §§ 2701-2720,* did not apply to alleged pollution of ground water. The district court remanded plaintiffs' other claims to state court.

OVERVIEW: Plaintiff trustees for a family trust that owned the surface rights to ranch property sued defendant, the oil and gas properties operator on the ranch, asserting that defendant was discharging hydrocarbons, produced brine, and other pollutants onto the property, in violation of Oil Pollution Act of 1990 (OPA), *33 U.S.C.S. §§ 2701-2720.* Plaintiffs appealed the district court's determination that the term "navigable waters" excluded groundwater, and also claimed the pollution would reach a nearby river. The court of appeals relied on judicial interpretation and Congressional intent expressed with respect to the Clean Water Act, 33 *U.S. C.S. § 1251 et seq.,* which used analogous language to the OPA. While an inland river would qualify as navigable waters, ground water did not, and the court declined to extend the reach of the statute to cover pollutants that were not directly affecting navigable waters.

OUTCOME: Summary judgment affirmed, because the clear Congressional intent of the federal statute in issue was not to govern discharges on to dry land that seeped into ground water, and there was no evidence in the record of any discharge of oil directly into any body of surface water, which would have violated the statute.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] An appellate court reviews an order granting summary judgment de novo. Summary judgment is proper if there is no genuine issue as to any material fact

and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c).* Summary judgment is appropriate if a non-moving party has failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to that party, does not suffice to establish a viable claim. Where a proper motion for summary judgment has been made, the non-moving party, in order to avoid summary judgment, must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial.

Energy & Utilities Law > Federal Oil & Gas Leases > Alaskan Interests & Leases > General Overview
Energy & Utilities Law > Oil Industry > General Overview
Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > Liability
[HN2] The Oil Pollution Act of 1990 (OPA), *33 U.S.C.S. §§ 2701-2720* imposes strict liability on parties responsible for the discharge of oil. Each responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for the removal costs and damages specified in subsection (b) that result from such incident. *33 U.S. C.S. § 2702(a).* The OPA thus concerns facilities which discharge, or pose a substantial threat to discharge, oil into or upon navigable waters, and liability under the OPA is therefore governed by the impact of such a discharge on navigable waters. The OPA and its related regulations define navigable waters to mean the waters of the United States, including the territorial sea. *33 U.S.C.S. § 2701(21); 15 C.F.R. § 990.30.*

Environmental Law > Natural Resources & Public Lands > Wetlands Management
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
Environmental Law > Water Quality > Clean Water Act > Wetlands
[HN3] The Supreme Court has endorsed an interpretation of "navigable waters" as used in the Clean Water Act, *33 U.S.C.S. § 1251 et seq.,* under which waters and wetlands need not always actually be navigable in fact to be protected.

Environmental Law > Natural Resources & Public Lands > Wetlands Management
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
Environmental Law > Water Quality > Clean Water Act > Wetlands
[HN4] See *33 C.F.R. § 328.3(b) (2000).*

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
[HN5] Ground waters are not protected waters under the Clean Water Act, *33 U.S. C.S. § 1251 et seq.*

Environmental Law > Water Quality > Clean Water Act > Enforcement > General Overview
[HN6] Congress did not intend the Clean Water Act, *33 U.S.C.S. § 1251 et seq.,* to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states.

COUNSEL: For D M RICE, KAREN RICE, Plaintiffs - Appellants: James H Wood, Channy Ferris Wood, The Wood Law Firm, Amarillo, TX.

For HARKEN EXPLORATION COMPANY, Defendant - Appellee: Kenneth Edwin Carroll, Kelli Michelle Hinson, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX.

UNITED STATES OF AMERICA, Amicus Curiae: Joan M Pepin, US Department of Justice, Environment & Natural Resources Division, Washington, DC. Anne R Traum, US Attorney's Office, Las Vegas, NV.

THE STATE OF TEXAS, Amicus Curiae: Thomas H Edwards, Office of the Attorney General of Texas, Austin, TX.

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, TEXAS OIL AND GAS ASSOCIATION, NORTH TEXAS OIL & GAS ASSOCIATION, Amicus Curiae: Joseph D Lonardo, John W Wilmer, Jr, Vorys, Sater, Seymour & Pease, Washington, DC.

JUDGES: Before GARWOOD, HIGGINBOTHAM, and STEWART, Circuit Judges.

OPINION BY: GARWOOD

OPINION

[*265] GARWOOD, Circuit Judge:

Plaintiffs-appellants D.E. and Karen Rice (the Rices) filed this suit against defendant-appellee Harken Exploration Company (Harken) alleging that Harken discharged oil into or upon "navigable waters" in violation of the Oil Pollution Act of 1990, *33 U.S.C. §§ 2701-2720 (OPA),* and also asserting several related state law claims. Harken moved for summary judgment on all claims and the district court granted its motion in part, on the ground that under the court's interpretation of the OPA and the facts alleged plaintiffs could not sustain a cause of action under the OPA. In the same order the district court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and remanded those claims to state court. The Rices now appeal the district court's grant of summary judgment, and request that their OPA claim be remanded for trial. We affirm.

Facts and Proceedings Below

Plaintiffs D.E. Rice and Karen Rice are trustees for the [**2] Rice Family Living Trust. The trust owns the surface rights to the property known as Big Creek Ranch in Hutchinson County, Texas. Harken Exploration Company is a Delaware corporation with its principal place of business in Irving, Texas. The Rice Family Living Trust purchased Big Creek Ranch for $ 255,000 in 1995.

Harken owns and operates oil and gas properties pursuant to leases on Big Creek Ranch. Under these leases, Harken maintains various structures and equipment on the property for use in exploration and pumping, processing, transporting, and drilling for oil. Harken began its operations on Big Creek Ranch in January 1996. Prior to Harken's operations, the Big Creek Ranch property had been used for oil and gas production for several decades.

Big Creek is a small seasonal creek on the Rices' property. Big Creek runs across the ranch to the Canadian River, which is the southern boundary of Big Creek Ranch. The Canadian River is down gradient from Harken's oil and gas flow lines, tank batteries, and other production equipment. The Canadian River flows into the Arkansas River, which flows into the Mississippi River, which empties into the Gulf of Mexico. While the exact nature [**3] of Big Creek is unclear from the record, Harken does not dispute that the Canadian River is legally a "navigable water."

The Rices allege that Harken has discharged and continues to discharge hydrocarbons, produced brine, and other pollutants onto Big Creek Ranch and into "Big Creek," "unnamed tributaries of Big Creek" and other "independent ground and surface waters." They claim that Harken has contaminated or threatened 9,265.24 acre feet of groundwater and over ninety noncontiguous surface areas of the ranch. The plaintiffs do not allege that there has been any major event or events resulting in the discharge of oil onto Big Creek Ranch. Rather, the Rices allege that Harken damaged their land as a result of a series of smaller discharges that occurred over a considerable period of time. They allege that the cost to remediate the contamination of the soil and groundwater is $ 38,537,500.

Harken admits that there have been instances in which oil or produced brine was [*266] spilled or leaked from their tanks and other oil production equipment. Harken claims, however, that these discharges were of the sort that inevitably accompany any oil production operation and that in any case none [* *4] of the discharges ever threatened "navigable waters" within the meaning of the OPA.

Harken moved for summary judgment in the district court, claiming, *inter alia,* that the OPA was not intended to cover spills of oil onto dry land that occurred hundreds of miles from any coast or shoreline. The district court essentially agreed, and held that the Rices could not sustain a cause of action under the OPA on the facts shown. The district court dismissed the Rices' related state law claims without prejudice. This appeal followed.

Discussion

[HN1] We review an order granting summary judgment *de novo. Hernandez v. Reno, 91 F.3d 776, 779 (5th Cir. 1996).* Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).* Summary judgment is appropriate in this case if the Rices have failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to the Rices, do not suffice to establish a viable OPA claim. Where, as here, a proper motion for summary judgment has been made, the non-movant, in order to avoid summary judgment, [**5] must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994).* On all material matters at issue here the Rices would bear the burden of proof at trial.

The OPA was enacted in 1990 in response to the Exxon Valdez oil spill in Prince William Sound, Alaska, and was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry. Senate Report No. 104-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723. [11N2] The OPA imposes strict liability on parties responsible for the discharge of oil: "Each responsible party for ... a facility from which oil is discharged, or which poses the sub-

stantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines ... is liable for the removal costs and damages specified in subsection (b) that result from such incident. [**6] " ' *33 U.S.C. § 2702(a).* The OPA thus concerns facilities which discharge (or pose a substantial [*267] threat to discharge) oil into or upon . . . navigable waters," and liability under the OPA is therefore governed by the impact of such a discharge on "navigable waters." The OPA and its related regulations define navigable waters to mean "the waters of the United States, including the territorial sea." *33 U.S.C. § 2701(21); 15 C.F.R. § 990.30.* The scope of the OPA is an issue of first impression for this Court.

1 Removal costs incurred by an injured party are only recoverable by a private party if they are consistent with the National Contingency Plan. *33 U.S.C. § 2702(b)(1)(B).* The "National Contingency Plan" refers to the responsibility of the President of the United States under *33 U.S.C. § 1321 (c)* and *(d)* to publish a national plan for the removal of oil and hazardous substances from the waters of the United States where "a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States...." *33 U.S.C. § 1321(c)(2)(A).* The purpose of the Plan is to "provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges...." *Id.* at § *1321(d)(2).* Because of our resolution of this case, we do not reach the question of whether the Rices' proposed remediation is consistent with the National Contingency Plan.

[**7] The Rices argue that the district court's interpretation of the term "navigable waters" in the OPA was erroneous. They claim the court erred by refusing to apply the OPA to inland areas.[2] Since Congress used the same language in both the OPA and the Clean Water Act, the Rices argue, the scope of both Acts should be similar and the OPA should apply to discharges into "waters of the United States" regardless of the distance of those waters from an ocean or similar body of water. The Rices also argue that the district court improperly excluded groundwater from "waters of the United States." Congress, the Rices claim, intended to extend its regulatory power to all waters that could affect interstate commerce when it enacted the OPA. Accordingly, the Rices would have this Court construe the OPA as imposing liability on facilities that discharge oil and related wastes into groundwater (or any other body of water) that affects interstate commerce. The Rices argue that under the proper interpretation of "navigable waters" they have a viable OPA claim since the groundwater under the ranch and the surface waters on the ranch have been impacted by Harken's discharges of oil. The Rices request [**8] that we remand this case to the district court for trial.

2 The district court appears to have construed the OPA as applying only to coastal or marine oil spills: "The Panhandle of Texas is hundreds of miles from costal waters or ocean beaches. Discharges of oil and salt water onto land in the Panhandle of Texas are not the type of oil and waste-water spills targeted by the OPA. ... Plaintiffs have no Oil Pollution Act cause of action under the facts of this case." *Rice v. Harken Exploration Co., 89 F. Supp. 2d 820, 827 (N.D. Tex. 1999).*

3 *33 U.S.C. § 1251 et seq.*

Although there have been few cases construing the OPA definition of "navigable waters," there is a substantial body of law interpreting that term as used in the Clean Water Act, *33 U.S.C. § 1251 et seq. (CWA).* The CWA is also limited to "navigable waters," which is defined in both statutes as "waters of the United States." *Compare 33 U.S.C. § 2701* [**9] *(21) with 33 U.S.C. § 1362(7).* The House Conference Report on the OPA reads: "The terms 'navigable waters,' person,' and 'territorial seas' are re-stated verbatim from section 502 of the [CWA]. In each case, these [CWA] definitions shall have the same meaning in this legislation as they do under the [CWA] and shall be interpreted accordingly." House Conference Report No. 101-653, *reprinted in* 1990 U.S.C.C.A.N. 779, 779-80. The Senate Report is similar, and adds that the OPA is intended to cover inland waters as well: "The [OPA] covers all the bodies of water and resources covered by section 311 [of the CWA], including the inland waters of the United States...." Senate Report No. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 733.

The legislative history of the OPA and the textually identical definitions of "navigable waters" in the OPA and the CWA strongly indicate that Congress generally intended the term "navigable waters" to have the same meaning in both the OPA and the CWA. Accordingly, the existing case law interpreting the CWA is a significant [*268] aid in our present task of interpreting the OPA.

[HN3] The Supreme Court has endorsed an interpretation [**10] of "navigable waters" as used in the CWA under which waters and wetlands need not always actually be navigable in fact to be protected under that Act. *See United States v. Riverside Bayview Homes, 474 U.S. 121, 133, 106 S. Ct. 455, 462-63, 88 L. Ed. 2d 419 (1985)* (upholding regulations that CWA restricts discharges into

non-navigable "wetlands" adjacent to an open body of navigable water). We have adopted a similarly broad interpretation of the language of the CWA. *See Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).* Other courts have also adopted expansive interpretations of "navigable waters" under the CWA. *See, e.g., Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), cert. denied, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791* (1986)(holding that non-navigable creeks and arroyos are covered by the CWA where intense rainfall could create surface connections with navigable streams); *United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1329 (6th Cir. 1974)* (holding that the CWA prohibited discharges into a non-navigable tributary three waterways removed from a navigable stream).

> 4 "Wetlands" as used in *Riverside Bayview Homes* referred to those areas described as "wetlands" in the Army Corps of Engineers regulations, *33 C.F.R. § 323.2 (1985). Riverside Bayview Homes, 106 S. Ct. at 458.* The current Corps regulations, [HN4] *33 C.F.R. § 328.3(b) (2000),* contain essentially the same definition,
>
> viz:
>
> "(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."
>
> There is no evidence nor any claim that any "wetlands" are involved in this case.

[**11] However, more recently, the Supreme Court has limited the scope of the CWA. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001),* the Court held that an Army Corps of Engineers regulation defining "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce" exceeded the scope of the Corps' regulatory power under the CWA as applied to the petitioner's land under a regulation known as the "Migratory Bird Rule." *See 121 S. Ct. at 678* (quoting 33 *C.F.R. § 328.3(a)(3)).* The "Migratory Bird Rule" states that the CWA covers any intrastate water which could be used by migrating birds that cross state lines or which could be used to irrigate crops sold in interstate commerce. *See 51 Fed. Reg. 41217.* The case involved several ponds that had formed in pits that were originally part of a sand and [**12] gravel mining operation. *Solid Waste Agency, 121 S. Ct. at 678.* The Court refused to interpret the CWA as extending the EPA's regulatory power to the limits of the *Commerce Clause,* and held that the application of the CWA to the petitioner's land exceeded the authority granted to the Corps under the CWA. *Id.* at 684. The Court distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable: "We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect' and went on [*269] to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word a limited meaning and quite another to give it no effect whatever." *Id. at 682-83.* Under *Solid Waste Agency,* it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water. *See id. at 680* ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. [**13] But we conclude that the text of the statute will not allow this.")

Nevertheless, under this standard the term "navigable waters" is not limited to oceans and other very large bodies of water. If the OPA and CWA have identical regulatory scope, the district court's conclusion that the OPA cannot apply to *any* inland waters was erroneous. However, the district court's reluctance to apply an Act targeted at disasters like the Exxon Valdez oil spill to Harken's dry land operations in the Texas Panhandle is certainly understandable. Under any definition of "navigable waters" there still must be a discharge of oil into a protected body of water for liability under either statute to attach.

The Rices point to two categories of waters which, they argue, are protected under the OPA. They claim that Harken has discharged oil into Big Creek and other surface waters on the ranch, and also into the groundwater underneath the ranch. The OPA provides the Rices with a remedy only if they can demonstrate that Harken has discharged oil into any waters that are protected by the OPA. We address groundwater and surface water in turn.

Groundwater

The Rices urge this Court to apply the CWA [**14] definition of "navigable waters" to the OPA. But, even that definition is not so expansive as to include groundwater within the class of waters protected by the CWA. The law in this Circuit is clear that [HN5] ground waters are not protected waters under the CWA. *' Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977).* In *Exxon,* we held that the legislative history of the CWA belied any intent to impose direct federal control over any phase of pollution of subsurface waters. *Id.* [6]

> 5 The Seventh Circuit has reached a similar conclusion. *Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994).*
>
> 6 We based our rejection of the EPA's claim that the CWA granted it authority over discharges into deep water wells on clear evidence that congressional intent was to the contrary:
>
> > "...the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because 'it is contrary to congressional intentions.'
>
> *Exxon, 554 F.2d at 1322* (quoting *EPA v. State Water Res. Control Bd., 426 U.S. 200, 227, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)).*

*[**15]* The Rices seek to avoid a similar construction of the OPA by arguing that in enacting the OPA Congress intended to exert its power under the *Commerce Clause* to the fullest possible degree, and that therefore groundwater, if it affects interstate commerce, should be protected under the Act. But, the Rices do not point to any portion of the Act itself or to any part of the legislative history of the Act to justify their claim that Congress intended to depart from its decision not to regulate groundwater under the CWA. The Rices' [*270] theory would extend coverage under the OPA to waters that we have explicitly held are not covered by the CWA. *Exxon, 554 F.2d at 1322.* The Rices have presented us with no reason to construe the term "waters of the United States" more expansively in the OPA than in the CWA. We hold that subsurface waters are not "waters of the United States" under the OPA. Accordingly, the Rices have no cause of action under the OPA for discharges of oil that contaminate the groundwater under Big Creek Ranch.

Surface Water

The Rices do not confine their claims to groundwater contamination. They also allege that the Canadian River, Big Creek, and other [**16] surface waters on the ranch are directly threatened by Harken's discharges into the groundwater under Big Creek Ranch. There is substantial evidence of a variety of leaks and minor discharges from Harken's equipment onto the soil surrounding its Big Creek Ranch facilities. It appears from our review of the record that Harken's various discharges were all onto dry land. There is no evidence in the record of any discharge of oil directly into any body of surface water. Instead, the Rices appear to claim that Harken's discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water.

There is arguably some evidence in the record that some naturally occurring surface waters on Big Creek Ranch have actually been contaminated with oil. John Drake, the Rices' expert geologist, prepared a preliminary report on water contamination on Big Creek Ranch and was deposed by Harken. Although the report mentions surface waters, Drake's report focuses almost entirely on the impact of Harken's oil production activities on the soil and on the groundwater under Big Creek Ranch. Drake's report does state that several surface water samples were taken [**17] in which petroleum hydrocarbons were found.' But, the presence of oil does not grant jurisdiction under the Act. Instead, a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water.

7 Drake's report states:

> "In order to more accurately characterize the site, surface water where present was sampled and analyzed using standard EPA protocol. In all thirteen (13) surface water samples were collected from various surface locations across the site. These samples consisted of four (4) spring, five (5) stock pond, one (1) stormwater, and three (3) stream locations. Several of the surface water samples showed impact by hydrocarbons...."

> This statement appears to be consistent with a table, attached to the Rices' motion opposing summary judgment, that summarizes the water samples taken on Big Creek Ranch, although the information provided in that table is somewhat cryptic. It is unclear from the report exactly which samples were taken from naturally occurring surface waters and which were taken from excavated trenches or wells. We are also unsure from the record of the level of impact hydrocarbons have had on the surface waters described in the report.

[**18] The bodies of water the Rices seek to protect are consistently referred to in the record as intermittent streams which only infrequently contain running water. There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself. It is described several times in various depositions as a "seasonal creek" that often has no running water at all. And, apparently, some of the time that water does flow in it, all the water is underground. There is no detailed information about how often the creek runs, about how much water flows through it [*271] when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA. And, as noted, there is no evidence of any oil discharge directly into Big Creek or any other intermittent creek containing above ground water on the ranch; only that there were [**19] oil discharges into the ground, some part of which may have, over some undetermined period of time, seeped through the ground into ground water and thence into Big Creek or other intermittent creek (either as an underground or surface body of water).

Although Big Creek and the other intermittent streams located on the ranch do not qualify as "navigable waters," the Rices also allege that the Canadian River is directly threatened by Harken's discharges of oil. The parties agree that the Canadian River is a "navigable water" within the meaning of the OPA. The river is allegedly threatened with contamination by Harken's operations through subsurface flow from the contaminated groundwater under the ranch into the river.

This Court has not yet decided whether discharges into groundwater that migrate into protected surface waters are covered under either the CWA or the OPA. In *Exxon,* we held that the text and legislative history of the CWA "belied an intention to impose direct federal control over any phase of pollution of subsurface waters." *Exxon, 554 F.2d at 1322.* But, in that case the EPA did not argue that the pollutants at issue would migrate from ground water [**20] into surface waters and we expressed "no opinion on what the result would be if that were the state of facts." *Id. at 1312 n. 1.* We have therefore not yet addressed whether discharges into groundwater may be actionable under the CWA or OPA if those discharges result in the contamination of some body of protected surface water.

So far as here relevant, the "discharges" for which the OPA imposes liability are those "into or upon the navigable waters." As noted, "navigable waters" do not include groundwater. It would be an unwarranted expansion of the OPA to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a "discharge" "into or upon the navigable waters."

> 8 The Seventh Circuit has also concluded that the CWA does not assert authority over ground water simply because those waters may be hydrologically connected to protected surface waters. *Village of Oconomowoc Lake, 24 F.3d at 965.* In *Kelley v. United States, 618 F. Supp. 1103 (WD. Mich. 1985),* the court held that a CWA claim was not stated by a complaint which alleged "that the pollutants released into the ground at the Air Station not only contaminated the ground water, but are naturally discharging into the Grand Traverse Bay-an undisputed navigable body of water." *Id. at 1106.* In so holding the court relied on our opinion in *Exxon* as well as its own similar reading of the CWA legislative history. Expressly addressing footnote 1 of our *Exxon* opinion the court stated *(618 F. Supp. at 1106-07):*
>
> > "The Fifth Circuit did not concede that discharges into the soil will be subject to the regulatory provisions of CWA if the groundwater contaminated thereby eventually migrates into navigable waters. On the contrary, it specifically 'expressed no opinion on what the result would be [under the CWA] if that were the state of facts.' Exxon, *554 F.2d at 1312 n.1.* Moreover, the remainder of the *Exxon* opinion and the unmistakably clear legislative history both demonstrate that [HN6] Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination.

> Rather, such authority was to be left to the states."

Kelly and *Exxon* are both relied on in this respect by *Village of Oconomuwoc Lake. Village of Oconomuwoc Lake, 24 F.3d at 965.*

[* *21] In *Exxon,* we noted that Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA. *Exxon, 554 F.2d at 1325.* [*272] The issue in *Exxon* was whether the EPA, as an incident to its power under the CWA to issue permits authorizing the discharge of pollutants into protected surface waters, [9] had the authority to place conditions in such permits that regulated the disposal of pollutants into deep wells. We concluded that EPA did not have that authority, basing that holding on our reading of the statute as well as a detailed examination of the legislative history of the CWA, which we held "demonstrated conclusively that Congress believed it was not granting the [EPA] any power to control disposals into groundwater." *Id. at 1329.*

9 *See 33 U.S.C. § 1344(a).*

In light of Congress's decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe [**22] the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of "navigable waters." We must construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater to the States. Accordingly, we hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA. In this connection, we also note that such a construction is entirely consistent with the occasion which prompted the Act's passage.

The Rices have offered significant evidence that the groundwater under Big Creek Ranch has been contaminated by oil discharges onto the surface of ranch land. But, the only evidence the Rices have produced of the hydrological connection between this groundwater and the Canadian River is a general assertion by their expert that the Canadian River is down gradient from Big Creek Ranch. Drake's report briefly mentions a hydrological connection between the groundwater and the Canadian River, but there is nothing [**23] in the report or in Drake's deposition to indicate the level of threat to, or any actual oil contamination in, the Canadian River. There is no discussion of flow rates into the river, and no estimate of when or to what extent the contaminants in the groundwater will affect the Canadian River. There is also no evidence of any present or past contamination of the Canadian River. The only evidence in the record that any protected body of water is threatened by Harken's activities is Drake's general assertion that eventually the groundwater under the ranch will enter the Canadian river. The ground water under Big Creek Ranch is, as a matter of law, not protected by the OPA. And, the Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA. Summary judgment for Harken was appropriate.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

TAB “26”

LEXSEE

Positive
As of: Jun 25, 2010

SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; CALIFORNIA DEPARTMENT OF FINANCE, Real Party in Interest and Appellant.

S109125

SUPREME COURT OF CALIFORNIA

33 Cal. 4th 859; 94 P.3d 589; 16 Cal. Rptr. 3d 466; 2004 Cal. LEXIS 7079; 2004 Daily Journal DAR 9404

August 2, 2004, Filed

PRIOR HISTORY: Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge. Court of Appeal, Fourth Dist., Div. One, No. D038027.
San Diego Unified School Dist. v. Commission on State Mandates, 99 Cal. App. 4th 1270, 122 Cal. Rptr. 2d 614, 2002 Cal. App. LEXIS 4369 (Cal. App. 4th Dist., 2002)

DISPOSITION: Judgment of the Court of Appeal affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Appeal of California, Fourth Appellate District, Division One, affirmed a judgment providing that plaintiff San Diego Unified School District was entitled to full reimbursement of costs related to hearings triggered by mandatory expulsion recommendations and hearings resulting from discretionary expulsion recommendations. Defendant Commission on State Mandates and real party in interest California Department of Finance appealed.

OVERVIEW: The court granted review to consider whether the hearing costs incurred as a result of the mandatory actions related to expulsions that were compelled by Cal. Educ. Code § 48915 were fully reimbursable. The court also considered whether any hearing costs incurred in carrying out expulsions that were discretionary under § 48915 were reimbursable. The court concluded that § 48915, insofar as it compelled suspension and mandated a recommendation of expulsion for certain offenses, constituted a "higher level of service" under Cal. Const. art. XIII B, § 6, and imposed a reimbursable state mandate for all resulting hearing costs, even those costs attributable to procedures required by federal law. The court also concluded that no hearing costs incurred in carrying out expulsions that were discretionary under § 48915 were reimbursable. To the extent that § 48915 made expulsions discretionary, it did not reflect a new program or a higher level of service. Moreover, Cal. Educ. Code § 48918 did not trigger any right to reimbursement because the hearing provisions that assertedly exceeded federal requirements were merely incidental to fundamental federal due process requirements.

OUTCOME: The court affirmed the judgment insofar as it provided for full reimbursement of all costs related to hearings triggered by the mandatory expulsion recommendations. The court reversed the judgment insofar as it provided for reimbursement of any costs related to hearings triggered by the discretionary expulsion recommendations.

CORE TERMS: expulsion, pupil, mandatory, school districts, reimbursement, reimbursable, level of service, state mandate, discretionary, firearm, suspension, federal law, recommendation, mandated, new program, local agencies, triggered, local governments, federal mandate, nonreimbursable, notice, incur, governing board, executive order, expelled, expel, hearing procedures, existing program, time relevant, fiscal

LexisNexis(R) Headnotes

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN1]See Cal. Const. art. XIII B, § 6.

Education Law > Students > Disciplinary Proceedings > Notice
Education Law > Students > Disciplinary Proceedings > Right to Counsel
Education Law > Students > Discipline Methods > Expulsions
[HN2]Public school districts in California are governed by statutes that regulate the expulsion of students. Cal. Educ. Code § 48900 et seq. Whenever an expulsion recommendation is made (and before a student may be expelled), the district is required by Cal. Educ. Code § 48918 to afford the student a hearing with various procedural protections -- including notice of the hearing and the right to representation by counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the district to expend funds, for which the district asserts a right to reimbursement from the state pursuant to Cal. Const. art. XIII B, § 6, and implementing legislation, Cal. Gov't Code § 17500 et seq.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN3]Cal. Educ. Code § 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under Cal. Const. art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs -- even those costs attributable to procedures required by federal law.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance
[HN4]No hearing costs incurred in carrying out those expulsions that are discretionary under Cal. Educ. Code § 48915 -- including costs related to hearing procedures claimed to exceed the requirements of federal law -- are reimbursable. To the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program.

Education Law > Students > Disciplinary Proceedings > Due Process
Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
[HN5]Cal. Educ. Code § 48918 does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. Such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying federal mandate and not as a state mandate.

Education Law > Students > Discipline Methods > Expulsions
[HN6]Cal. Educ. Code § 48918 specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must follow when conducting such a hearing.

Education Law > Students > Disciplinary Proceedings > Time Limitations
Education Law > Students > Discipline Methods > Expulsions
[HN7]In identifying the right to a hearing, Cal. Educ. Code § 48918(a) declares that a student is "entitled" to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.

Education Law > Students > Disciplinary Proceedings > Time Limitations
Education Law > Students > Discipline Methods > Expulsions
[HN8]See Cal. Educ. Code § 48918(a).

Education Law > Students > Disciplinary Proceedings > General Overview
Education Law > Students > Discipline Methods > Expulsions

Education Law > Students > Discipline Methods > Suspensions
[HN9]Former Cal. Educ. Code § 48915(b) compelled a school principal to immediately suspend any student found to be in possession of a firearm at school or at a school activity off school grounds and mandated a recommendation to the school district governing board that the student be expelled. The provision further required the governing board, upon confirmation of the student's knowing possession of a firearm, either to expel the student or "refer" him or her to an alternative education program housed at a separate school site.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview
Criminal Law & Procedure > Criminal Offenses > Property Crimes > Receiving Stolen Property > General Overview
Education Law > Students > Discipline Methods > Expulsions
[HN10]Former Cal. Educ. Code § 48915(c) (subsequently § 48915(d), currently § 48915(e)) recognized that a principal possesses discretion to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board "may" order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct.

Education Law > Students > Discipline Methods > Expulsions
[HN11]See former Cal. Educ. Code § 48915(c).

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN12]See Cal. Educ. Code § 48900(f) through (l).

Education Law > Discrimination > Gender & Sex Discrimination > Sexual Harassment
Education Law > Students > Discipline Methods > Expulsions
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employment Practices > Discharges & Failures to Hire
[HN13]See Cal. Educ. Code § 48900.2.

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN14]See Cal. Educ. Code § 48900.3.

Education Law > Students > Discipline Methods > Expulsions
Education Law > Students > Discipline Methods > Suspensions
[HN15]See Cal. Educ. Code § 48900.4.

Administrative Law > Judicial Review > General Overview
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Governments > Local Governments > Claims By & Against
[HN16]Procedures governing the constitutional requirement of reimbursement under Cal. Const. art. XIII B, § 6, are set forth in Cal. Gov't Code § 17500 et seq. The Commission on State Mandates (Commission), Cal. Gov't Code § 17525, is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. Cal. Gov't Code § 17551. Cal. Gov't Code § 17561(a) provides that the state shall reimburse each school district for all costs mandated by the state, as defined in Cal. Gov't Code § 17514. Section 17514, in turn, defines "costs mandated by the state" to mean, in part, any increased costs which a school district is required to incur as a result of any statute which mandates a new program or higher level of service of an existing program within the meaning of Cal. Const. art. XIII B, § 6. Finally, Cal. Gov't Code § 17556 sets forth circumstances in which there shall be no reimbursement, including, under § 17556(c), circumstances in which the statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

Governments > Local Governments > Elections
Governments > Local Governments > Finance

Governments > State & Territorial Governments > Finance

[HN17]The intent underlying Cal. Const. art. XIII B, § 6, was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.

Governments > Local Governments > Finance
Governments > Public Improvements > General Overview
Governments > State & Territorial Governments > Finance

[HN18]Simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting "service to the public" under Cal. Const. art. XIII B, § 6, and Cal. Gov't Code § 17514.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance

[HN19]California Courts of Appeal have found a reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance

[HN20]See Cal. Gov't Code § 17556.

Education Law > Funding > Allocation
Education Law > Students > Discipline Methods > Expulsions

[HN21]See 20 U.S.C.S. § 7151.

Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance

[HN22]For purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate.

Education Law > Students > Discipline Methods > Expulsions
Governments > Local Governments > Finance
Governments > State & Territorial Governments > Finance

[HN23]All hearing costs incurred under Cal. Educ. Code § 48918, triggered by a school district's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Cal. Gov't Code § 17556(c).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district filed a test claim with the Commission on State Mandates, asserting entitlement to reimbursement for the costs of hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. After holding hearings on the district's claim, the commission determined that Ed. Code, § 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession constituted a new program or higher level of service, and found that because costs related to some of the resulting hearing provisions set forth in Ed. Code, § 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. As to the vast majority of the remaining hearing procedures triggered by Ed. Code, § 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession--for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion--the commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Gov. Code, § 17556, subd. (c), and did not impose a reimbursable state mandate. The commission further found that with respect to Ed. Code, § 48915's discretionary expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not mandated by the state, but instead represent a choice by the principal and the school board. The district then brought a proceeding for an administrative writ of mandate, challenging the commission's decision. The trial court issued a writ commanding the com-

mission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to [*860] the limited extent that required hearing procedures exceed federal due process mandates. (Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D038027, affirmed the judgment rendered by the trial court.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it provided for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Ed. Code, § 48915, but reversed the judgment insofar as it provided for reimbursement of any costs related to hearings triggered by the discretionary provision of § 48915. The court held that to the extent that § 48915 compels suspension and mandates a recommendation of expulsion for certain offenses, it constitutes a higher level of service under Cal. Const., art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. The immediate suspension and mandatory expulsion of a student who possesses a firearm on school property provides a higher level of service to the public in that it enhances the safety of those who attend public schools. The court held, however, that to the extent Ed. Code, § 48915, makes expulsions discretionary, it does not constitute a higher level of service related to an existing program, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when § 48915 was first enacted. Even if any of the hearing procedures set forth in Ed. Code, § 48918, and applicable to mandatory and discretionary and mandatory expulsions under Ed. Code, § 48915, constitute a higher level of service, the statute does not trigger any right to reimbursement. The hearing procedures of Ed. Code, § 48918, should be considered to have been adopted to implement a federal due process mandate and hence are nonreimbursable under Cal. Const., art. XIII B, § 6, and Gov. Code, § 17556, subd. (c). (Opinion by George, C. J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) **State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.**--Ed. Code, § 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a higher level of service under Cal. Const., art. XIII B, § 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. [*861]

(2) **State of California § 11--Fiscal Matters--Nonreimbursable State Mandate--No Higher Level of Service--Discretionary Suspension or Expulsion of Student--Hearing Procedures Excepted From Reimbursement as Federal Mandate.**--No hearing costs incurred in carrying out expulsions that are discretionary under Ed. Code, § 48915--including costs related to hearing procedures claimed to exceed the requirements of federal law--are reimbursable. To the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing procedures set forth in Ed. Code, § 48918, constitute a new program or higher level of service, the statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. Such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying federal mandate and not as a state mandate.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 549; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A.]

(3) **Schools § 61--Students--Suspension or Expulsion--Expulsion Hearing Mandated.**--In identifying the right to a hearing, Ed. Code, § 48918, subd. (a), declares that a student is entitled to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.

(4) **Schools § 61--Parents and Students--Suspension or Expulsion--Mandatory and Discretionary Expulsion.**--Discrete subdivisions of Ed. Code, § 48915, address circumstances in which a principal must recommend to the school board that a student be expelled, and circumstances in which a principal may recommend that a student be expelled.

(5) **State of California § 11--Fiscal Matters--Reimbursable State Mandate.**--Procedures governing the constitutional requirement of reimbursement

under Cal. Const., art. XIII B, § 6, are set forth in Gov. Code, § 17500 et seq. The Commission on State Mandates (Gov. Code, § 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov. [*862] Code, § 17551.) Gov. Code, § 17561, subd. (a), provides that the state shall reimburse each school district for all costs mandated by the state, as defined in Gov. Code, § 17514. Section 17514, in turn, defines costs mandated by the state to mean, in relevant part, any increased costs which a school district is required to incur as a result of any statute which mandates a new program or higher level of service of an existing program within the meaning of Cal. Const., art. XIII B, § 6. Finally, Gov. Code, § 17556, sets forth circumstances in which there shall be no reimbursement, including, under Gov. Code, § 17556, subd. (c), circumstances in which the statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(6) State of California § 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Alternative Tests.--The requirement for increased or higher level of service under Cal. Const., art. XIII B, § 6, is directed to state mandated increases in the services provided by local agencies in existing programs. The Constitution's phrase "new program or higher level of service" refers to either of two alternatives--(1) programs that carry out the governmental function of providing services to the public, or (2) laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(7) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Increase in Costs.--Simply because a state law or order may increase the costs borne by local government in providing services does not necessarily establish that the law or order constitutes an increased or higher level of the resulting service to the public under Cal. Const., art. XIII B, § 6, and Gov. Code, § 17514.

(8) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Increase in Level or Quality of Governmental Services Provided.--A reimbursable higher level of service concerning an existing program exists when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided.

(9) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--The statutory requirements of Ed. Code, § 48915--immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation [*863] upon the ensuing options of the school board (expulsion or referral)--provide a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme; and (ii) the requirements were intended to provide an enhanced service to the public--safer schools for the vast majority of students.

(10) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. The mandatory suspension and expulsion recommendation requirements of Ed. Code, § 48915, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under Cal. Const., art. XIII B, § 6, and the implementing statutes.

(11) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--State Requires School District to Incur Costs of an Expulsion Hearing.--In the absence of the operation of Ed. Code, § 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law and codified in Ed. Code, § 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Ed. Code, § 48915, appears to constitute a state mandate in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

(12) Schools § 61--Parents and Students--Suspension or Expulsion--Expulsion Hearings--Not Federal Mandate.--Ed. Code, § 48918, sets out requirements for expulsion hearings that must be held when a district seeks to expel a student--but neither § 48918 nor federal law requires that any such expulsion recommendation be made in the first place. Section 48918 does not imple-

ment any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, the so-called exception to reimbursement described in Gov. Code, § 17556, subd. (c), is inapplicable in this context of a mandatory hearing. [*864]

(13) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--Hearing Costs Triggered by Mandatory Expulsion.--When it is state law (Ed. Code, § 48915's mandatory expulsion provision), and not federal due process law, that requires a school district to take steps that in turn require it to incur hearing costs, the hearing costs incurred by a school district, triggered by the mandatory provision of Ed. Code, § 48915, do not constitute a nonreimbursable federal mandate. Under the statutes in effect through mid-1994, all such hearing costs--those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements--were, with respect to the mandatory expulsion provision of § 48915, state mandated costs, fully reimbursable by the state.

(14) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.--All hearing costs triggered by Ed. Code, § 48915's mandatory expulsion provision constitute reimbursable state mandated expenses under the statutes in effect through mid-1994. 20 U.S.C. § 7151, or its predecessor, 20 U.S.C. § 8921, may lead to a different conclusion when applied to versions of Ed. Code, § 48915, effective in years 1995 and thereafter.

(15) State of California § 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Discretionary Suspension or Expulsion of Student: Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Cost of Proceedings Not Reimbursable.--The discretionary expulsion provision of Ed. Code, § 48915, does not constitute a new program or higher level of service related to an existing program, under Cal. Const., art. XIII B, § 6, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when the provision was first enacted.

(16) Schools § 61--Parents and Students--Suspension or Expulsion--Hearing Procedures--Federal Due Process Mandate--Nonreimbursable State Mandate.--All hearing procedures set forth in Ed. Code, § 48918, properly should be considered to have been adopted to implement a federal due process mandate, and hence all such hearing costs are nonreimbursable under Cal. Const., art. XIII B, § 6, and Government Code § 17557, subd. (c).

(17) State of California § 11--Fiscal Matters--Reimbursable State Mandate--Implementation of Federal Law--Discretionary Suspension or [*865] **Expulsion of a Student: Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Mandate to Provide a Hearing.**--An initial discretionary decision to seek expulsion of a student in turn triggers a federal constitutional mandate to provide an expulsion hearing. The Legislature, in adopting specific statutory procedures under Ed. Code, § 48918, to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. For purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Gov. Code, § 17556, subd. (c).

(18) Schools § 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Due Process Requirements--Not Reimbursable As State Mandate.--All hearing costs incurred under Ed. Code, § 48918, triggered by a school district's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Gov. Code, § 17556, subd. (c).

COUNSEL: Paul M. Starkey, Camille Shelton and Katherine A. Tokarski for Defendant and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Pamela Smith-Steward, Chief Assistant Attorney General, Andrea Lynn Hoch, Assistant Attorney General, Louis R. Mauro and Susan R. Oie, Deputy Attorneys General, for Real Party in Interest and Appellant.

Jo Anne Sawyerknoll, Tad Seth Parzen, Jose A. Gonzales and Arthur M. Palkowitz for Plaintiff and Respondent.

Lozano Smith, Diana McDonough, Harold M. Freiman, Jan E. Tomsky and Gregory A. Floyd for California

School Boards Association Education Legal Alliance as Amicus Curiae on behalf of Plaintiff and Respondent.

[*866] Steven M. Woodside, County Counsel (Sonoma) as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: George, C. J., expressing the unanimous view of the court.

OPINION BY: GEORGE [***467]

OPINION

[**591] **GEORGE, C. J.**--Article XIII B, section 6, of the California Constitution provides: [HN1]"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ... ." [1] (Hereafter article XIII B, section 6.)

> 1 The provision continues: "except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." (Cal. Const., art. XIII B, § 6.)

Plaintiff San Diego Unified School District (District), like all other [HN2]public school districts in the state, is, and was at the time relevant in this proceeding, governed by statutes that regulate the expulsion of students. (Ed. Code, § 48900 et seq.) Whenever an expulsion recommendation is made (and before a student may be expelled), the District is required by Education Code section 48918 to afford the student a hearing with various procedural protections--including notice of the hearing and the right to representation by [***468] counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the District to expend funds, for which the District asserts a right to reimbursement from the state pursuant to article XIII B, section 6, and implementing legislation, Government Code section 17500 et seq.

We granted review to consider two questions: (1) Are the hearing costs incurred as a result of the *mandatory* actions related to expulsions that are compelled by Education Code section 48915 fully reimbursable--or are those hearing costs reimbursable only to the extent such costs are attributable to hearing procedures that exceed the procedures required by federal law? (2) Are any hearing costs incurred in carrying out expulsions that are *discretionary* under Education Code section 48915 reimbursable? After we granted review and filed our decision in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727 [134 Cal. Rptr. 2d 237, 68 P.3d 1203] (*Kern High School Dist.*), we added the following preliminary question to be addressed: Do the Education Code [*867] statutes cited above establish a "new program" or "higher level of service" under article XIII B, section 6? Finally, we also asked the parties to brief the effect of the decision in *Kern High School Dist., supra,* 30 Cal.4th 727, on the present case.

(1) We conclude that Education Code section 48915, [HN3]insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under article XIII B, section 6, and imposes a reimbursable state mandate for *all* resulting hearing costs--even those costs attributable to procedures required by federal law. In this respect, we shall affirm the judgment of the Court of Appeal.

(2) We also conclude that [HN4]*no* hearing costs incurred in carrying out those expulsions that are *discretionary* under Education Code section 48915--including costs related to hearing procedures claimed to exceed the requirements of federal law--are reimbursable. As we shall explain, to the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures* set forth in Education Code section *48918* constitute a new program or higher level of service, we conclude that [HN5]*this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate. Accordingly, we shall reverse the judgment of the Court of Appeal insofar as it compels reimbursement [**592] of any costs incurred pursuant to discretionary expulsions.

I

A. *Education Code sections 48918 and 48915*

We first describe the relevant provisions of two statutes--Education Code sections 48918 and

48915--pertaining to the expulsion of students from public schools.

Education Code section 48918 [HN6]specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must [*868] follow when conducting [***469] such a hearing. (Stats. 1990, ch. 1231, § 2, pp. 5136-5139.) [2]

2 For purposes of our present inquiry, Education Code, section 48918, at the time relevant here (mid-1993 through mid-1994) read essentially as it had for the prior decade, and as it has in the ensuing decade. That provision first was enacted in 1975 (see Stats. 1975, ch. 1253, § 4, pp. 3277-3278) as Education Code, former section 10608. (This enactment apparently was a response to the United States Supreme Court's decision in *Goss v. Lopez* (1975) 419 U.S. 565, 581 [42 L. Ed. 2d 725, 95 S. Ct. 729] (*Goss*) [recognizing due process requirements applicable to public school students who are suspended for more than 10 days].) The statute was renumbered as Education Code, former section 48914 in 1976 (Stats. 1976, ch. 1010, § 2, pp. 3589-3590) and was substantially augmented in 1977 (Stats. 1977, ch. 965, § 24, pp. 2924-2926). After relatively minor amendments in 1978 and 1982, the section in 1983 was substantially restated, further augmented, and renumbered as Education Code section 48918 (Stats. 1983, ch. 498, § 91, p. 2118). Amendments adopted in 1984 and 1988 made relatively minor changes, and further similar modifications were made in 1990, reflecting the version of the statute here at issue. Subsequent amendments in 1995, 1996, 1998, and 1999 made further changes that are irrelevant to the issue presented in the case now before us.

[HN7](3) In identifying the right to a hearing, subdivision (a) of Education Code, section 48918, declares that a student is "entitled" to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. [3] *In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.* [4]

3 The provision reads: [HN8]"The pupil shall be entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900 ... ." (Ed. Code, § 48918, subd. (a).). (Subdivision (b) of section 48900 presently includes--as it did at the time relevant here--the offense of possession of a firearm.)

4 Of course, if a student does not invoke his or her entitlement to such a hearing, and instead waives the right to such a hearing, the hearing need not be held.

In specifying the substantive and procedural requirements for such an expulsion hearing, Education Code section 48918 sets forth rules and procedures, some of which, the parties agree, codify requirements of federal due process and some of which may exceed those requirements. [5] These rules and procedures govern, among other things, notice of a hearing and the right to representation by counsel, preparation of findings of fact, notices related to the expulsion and the right of appeal, and preparation of a hearing record. (See § 48918, subds. (a) through former subd. (j), currently subd. (k).)

5 See *Goss, supra,* 419 U.S. 565, 581; *Gonzales v. McEuen* (C.D.Cal. 1977) 435 F. Supp. 460, 466-467 (concluding that former Education Code section 10608 [current § 48918] met federal due process requirements pertaining to expulsions from public schools); 7 Witkin, Summary of California Law (9th ed. 1988), Constitutional Law, section 549, page 754 (noting that Education Code section 48918 and related legislation were enacted in response to the decision in *Goss*).

[*869] (4) The second statute at issue in this matter is Education Code section 48915. Discrete subdivisions of this statute address circumstances in which a principal *must* recommend to the school board that a student be expelled, and circumstances in which a principal *may* recommend that a student be expelled.

First, there is what the parties characterize as the "mandatory expulsion provision," Education Code section 48915, former subdivision (b). As it read during the time relevant in this proceeding (mid-1993 [***470] through mid-1994), [HN9]this subdivision (1) compelled a school principal to *immediately suspend* any [**593] student found to be in possession of a firearm at school or at a school activity off school grounds, and (2) mandated a *recommendation* to the school district governing board that the student be *expelled.* The provision further required the governing board, upon confirmation of the student's knowing possession of a firearm, either to expel the student or "refer" him or her to an alternative education program housed at a separate school site. [6] (Compare this former provision with *current* Ed. Code, § 48915, subds. (c), (d).) [7]

6 An earlier and similar, albeit broader, version of the provision--extending not only to possession of firearms but also to possession of explosives and certain knives--existed briefly and was effective for approximately two and one-half months in late 1993. That initial statute, former section 48915, subdivision (b) (as amended Stats. 1993, ch. 1255, § 2, pp. 7284-7285), which was effective only from October 11, 1993 through December 31, 1993, provided: "The principal or the superintendent of schools shall immediately suspend pursuant to Section 48911, and shall recommend to the governing board the expulsion of, any pupil found to be in possession of a firearm, knife of no reasonable use to the pupil, or explosive at school or at a school activity off school grounds. The governing board shall expel that pupil or, as an alternative, refer that pupil to an alternative education program, whenever the principal or the superintendent of schools and the governing board confirm that: [¶] (1) The pupil was in knowing possession of the firearm, knife, or explosive. [¶] (2) Possession of the firearm, knife of no reasonable use to the pupil, or explosive was verified by an employee of the school district. [¶] (3) There was no reasonable cause for the pupil to be in possession of the firearm, knife, or explosive."

As subsequently amended by Statutes 1993, chapter 1256, section 2, pages 7286-7287, effective January 1, 1994, Education Code section 48915, former subdivision (b), read: "The principal or the superintendent of schools shall immediately suspend, pursuant to Section 48911, any pupil found to be in possession of a firearm at school or at a school activity off school grounds and shall recommend expulsion of that pupil to the governing board. The governing board shall expel that pupil or refer that pupil to a program of study that is appropriately prepared to accommodate students who exhibit discipline problems and is not provided at a comprehensive middle, junior, or senior high school or housed at the schoolsite attended by the pupil at the time the expulsion was recommended to the school board, whenever the principal or superintendent of schools and the governing board confirm the following: [¶] (1) The pupil was in knowing possession of the firearm. [¶] (2) An employee of the school district verifies the pupil's possession of the firearm."

7 The current subdivisions of Education Code section 48915 set forth a list of mandatory expulsion conduct broader than that set forth in former subdivision (b), and require a school board both to *expel and refer* to other institutions all students found to have committed such conduct. The present subdivisions read: "(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶] (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. [¶] (2) Brandishing a knife at another person. [¶] (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code. [¶] (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900. [¶] (5) Possession of an explosive. [¶] (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets all of the following conditions: [¶] (1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. [¶] (2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school. [¶] (3) Is not housed at the schoolsite attended by the pupil at the time of suspension." (Stats. 2001, ch. 116 § 1.)

[*870] [***471] This provision, as it read at the time relevant here, did not mandate expulsion per se [8]--but it *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed [**594] a firearm would be removed from the school site by limiting disposition to either expulsion or "referral" to an alternative school). Moreover, as noted above, whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision as *mandating* immediate suspension, a recommendation of expulsion, *and hence, an expulsion hearing*. For convenience, we accept the parties' description of this aspect of Education Code section 48915 as constituting a "mandatory expulsion provision."

8 As the Department of Finance observed in an August 22, 1994, communication to the Commission on State Mandates in this matter, "nothing in [Education Code section 48915] ... requires a district governing board or a county board of education to expel a pupil," and even "unauthorized and knowing possession of a firearm, does not result in mandated expulsion. Section 48915 subdivision (b) provides for the choice of the governing board to either expel the pupil in possession of a firearm, or refer the pupil to an alternative program of study. ..."

The second aspect of Education Code section 48915 relevant here consists of what we shall call the "discretionary expulsion provision." (*Id.*, former subd. (c), subsequently subd. (d), currently subd. (e).) During the period relevant in this proceeding (as well as currently), [HN10]this subdivision of Education Code section 48915 recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board "may" order a student expelled upon finding that the [*871] student, while at school or at a school activity off school grounds, engaged in such conduct. [9]

9 Education Code, section 48915, former subdivision (c) (as amended Stats. 1992, ch. 909, § 3, p. 4226; amended and redesignated as former subd. (d) by Stats. 1993, ch. 1255, § 2, pp. 7284-7285; further amended Stats. 1993, ch. 1256, § 2, p. 7287, and Stats. 1994, ch. 1198, § 7, p. 7271) provided, at the time relevant here: [HN11]"Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board *may* order a pupil expelled upon finding that the pupil violated subdivision (f), (g), (h), (i), (j), (k), or (l) of Section 48900, or Section 48900.2 or 48900.3, and either of the following: [¶] (1) That other means of correction are not feasible or have repeatedly failed to bring about proper conduct. [¶] (2) That due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." (Italics added.)

At the time relevant here, subdivisions (f) through (l) of Education Code section 48900 (as amended Stats. 1992, ch. 909, § 1, pp. 4224-4225; Stats. 1994, ch. 1198, § 5, pp. 7269-7270) provided: [HN12]"A pupil shall *not* be suspended from school or recommended for expulsion *unless* the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [¶] ... [¶] (f) Caused or attempted to cause damage to school property or private property. [¶] (g) Stolen or attempted to steal school property or private property. [¶] (h) Possessed or used tobacco, or any products containing tobacco or nicotine products ... . However, this section does not prohibit use or possession by a pupil of his or her own prescription products. [¶] (i) Committed an obscene act or engaged in habitual profanity or vulgarity. [¶] (j) Had unlawful possession of, or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code. [¶] (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. [¶] (l) Knowingly received stolen school property or private property." (Italics added.)

At the time relevant here, Education Code, section 48900.2 (Stats. 1992, ch. 909, § 2, p. 4225) provided: [HN13]"In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5. [¶] For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive."

Education Code, section 48900.3 (Stats. 1994, ch. 1198, § 6, p. 7270), at the time relevant here, provided: [HN14]"In addition to the reasons specified in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of,

hate violence, as defined in subdivision (e) of [former] Section 33032.5 [current section 233]."

In addition, Education Code, section 48900.4 (Stats. 1994, ch. 1017, § 1, p. 6196) provided, at the time relevant here: [HN15]"In addition to the grounds specified in Sections 48900 and 48900.2, a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against a pupil or group of pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of that pupil or group of pupils by creating an intimidating or hostile educational environment."

(All of these current provisions--sections 48915, subdivision (e), 48900, 48900.2, 48900.3, and 48900.4--read today substantially the same as they did at the time relevant in the present case.)

[*872] [**595]

[***472] B. *Proceedings Under Government Code section 17500 et seq.*

[HN16](5) Procedures governing the constitutional requirement of reimbursement under article XIII B, section 6, are set forth in Government Code section 17500 et seq. The Commission on State Mandates (Commission) (Gov. Code, § 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov. Code, § 17551.) Government Code section 17561, subdivision (a), provides that the "state shall reimburse each ... school district for all 'costs mandated by the state,' as defined in section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" to mean, in relevant part, "any increased costs which a ... school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." Finally, Government Code section 17556 sets forth circumstances in which there shall be no reimbursement, including, under subdivision (c), circumstances in which "[t]he statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or [***473] executive order mandates costs which exceed the mandate in that federal law or regulation."

In March 1994, the District filed a "test claim" with the Commission, asserting entitlement to reimbursement for the costs of hearings provided with respect to both categories of cases described above--that is, those hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. (See Gov. Code, § 17521; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-333 [285 Cal. Rptr. 66, 814 P.2d 1308].) [10] The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

10 As observed by amicus curiae California School Boards Association, a "test claim is like a class action--the Commission's decision applies to all school districts in the state. If the district is successful, the Commission goes to the Legislature to fund the statewide costs of the mandate for that year and annually thereafter as long as the statute is in effect."

In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994), the Commission issued a "Corrected Statement of Decision" in which it determined that Education Code section 48915's requirement of suspension and a [*873] mandatory recommendation of expulsion for firearm possession constituted a "new program or higher level of service," and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. [11] As to the vast majority of the remaining [**596] hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession--for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion--the Commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Government Code section 17556, subdivision (c), and [***474] did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not *mandated* by the state, but in-

stead represent a choice by the principal and the school board.

> 11 The Commission concluded that the costs incurred in providing the following state-mandated procedures under Education Code section 48918 exceeded federal due process requirements, and were reimbursable: (i) adoption of rules and regulations pertaining to pupil expulsions (§ 48918, first par. & *passim*); (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing (§ 48918, subd. (b)); (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing (§ 48918, subd. (b)); (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion (§ 48918, former subd. (i), currently subd. (j)); (v) maintenance of a record of each expulsion, including the cause thereof (§ 48918, former subd. (j), currently subd. (k)); and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls) (§ 48918, former subd. (j), currently subd. (k)).

In October 1999, the District brought this proceeding for an administrative writ of mandate challenging the Commission's decision. The trial court issued a writ commanding the Commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to the limited [*874] extent that required hearing procedures exceed federal due process mandates. The Commission (defendant) and the Department of Finance (real party in interest, hereafter Department) appealed, and the Court of Appeal affirmed the judgment rendered by the trial court.

II

A. *Costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations*

1. *"New program or higher level of service"?*

We address first the issue that we asked the parties to brief: Does Education Code section 48915, former subdivision (b) (current subds. (c) & (d)), which mandated suspension and an expulsion recommendation for those students who possess a firearm at school or at a school activity off school grounds, and which also required a school board, if it found the charge proved, either to expel or to "refer" such a student to an alternative educational program housed at a separate school site, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We addressed the meaning of the Constitution's phrase "new program or higher level of service" in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal. Rptr. 38, 729 P.2d 202] (*County of Los Angeles*). That case concerned whether local governments are entitled to reimbursement for costs incurred in complying with legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide for their employees. We stated:

(6) "Looking at the language of [article XIIIB, section 6] then, it seems clear that by itself the term 'higher level of service' is meaningless. It must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIIIB. What programs [**597] then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term--[(1)] programs that carry out the governmental function of providing services to the public, or [(2)] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents [***475] and entities in the state." (*County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

[*875] We continued in *County of Los Angeles*: "The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIIIB explained section 6 to the

voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase 'to force programs on local governments' confirms that [HN17]*the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.*" (*County of Los Angeles, supra,* 43 Cal.3d 46, 56-57, italics added.)

It was clear in *County of Los Angeles, supra,* 43 Cal.3d 46, that the law at issue did not meet the second test for a "program or higher level of service"--it did not implement a state policy by imposing unique requirements upon local governments, but instead applied workers' compensation contribution rules generally to all employers in the state. Nor, we held, did the law requiring local agencies to shoulder a general increase in workers' compensation benefits amount to a reimbursable "program or higher level of service" under the first test described above. (*Id.,* at pp. 57-58.) The law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public.

We reaffirmed and applied the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, in *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830 [244 Cal. Rptr. 677, 750 P.2d 318] (*Lucia Mar*). The state law at issue in *Lucia Mar* required local school districts to pay a portion of the cost of educating pupils in *state* schools for the severely handicapped--costs that the state previously had paid in full.

We determined that the contributions called for under the law were used to fund a "program" within both definitions of that term set forth in *County of Los Angeles.* (*Lucia Mar, supra,* 44 Cal.3d 830, 835.) We stated: "[T]he education of handicapped children is clearly a governmental function providing a service to the public, and the [state law] imposes requirements on school districts not imposed on all the state's residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are [*876] concerned, since at the time [the state law] became effective they were not required to contribute to the education of students from their districts at such schools. [¶] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. ... Section 6 was intended to preclude the state from shifting to local agencies the [***476] financial responsibility for providing public services in view of ... restrictions on the taxing and spending power of the local entities." (*Lucia Mar, supra,* 44 Cal.3d 830, 835-836; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98 [61 Cal. Rptr. 2d [**598] 134, 931 P.2d 312] [legislation excluding indigents from Medi-Cal coverage transferred obligation for such costs from state to counties, and constituted a reimbursable "new program or higher level of service"].)

We again applied the alternative tests set forth in *County of Los Angeles, supra,* 43 Cal.3d 46, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal. Rptr. 139, 785 P.2d 522] (*City of Sacramento*). In that case we considered whether a state law implementing federal "incentives" that encouraged states to extend unemployment insurance coverage to all public employees constituted a program or higher level of service under article XIII B, section 6. We concluded that it did not because, as in *County of Los Angeles,* (1) providing unemployment compensation protection to a city's own employees was not a service to the public; and (2) the statute did not apply uniquely to local governments--indeed, the same requirements previously had been applied to most employers, and extension of the requirement (by eliminating a prior exemption for local governments) merely placed local government employers on the same footing as most private employers. (*City of Sacramento, supra,* 50 Cal.3d at pp. 67-68.)

Subsequently, the Court of Appeal in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [75 Cal. Rptr. 2d 754] (*City of Richmond*), following *County of Los Angeles, supra,* 43 Cal.3d 46, and *City of Sacramento, supra,* 50 Cal.3d 51, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees' Retirement System (PERS) and the workers' compensation system, did not constitute a higher level of service to the public. The Court of Appeal arrived at that determination even though--as might also have been argued in *County of Los Angeles* and *City of Sacramento*--such benefits may "generate a higher quality of local safety officers" and thereby, in a general and indirect sense, provide the public with a "higher level of service" by its employees. (*City of Richmond, supra,* 64 Cal.App.4th 1190, 1195.)

(7) Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that [HN18]simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law [*877]

or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [12]

> 12 Indeed, as the court in *City of Richmond, supra*, 64 Cal.App.4th 1190, observed: "Increasing the cost of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 ... . A higher cost to the local government for compensating its employees is not the same as a higher cost of providing [an increased level of] services to the public." (*Id.*, at p. 1196; accord, *City of Anaheim v. State of California* (1987) 189 Cal. App. 3d 1478, 1484 [235 Cal. Rptr. 101] [temporary increase in PERS benefit to retired employees, resulting in higher contribution rate by local government, does not constitute a higher level of service to the public].)

[***477] **(8)** By contrast, [HN19]Courts of Appeal have found a reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal. App. 3d 521, 537-538 [234 Cal. Rptr. 795] (*Carmel Valley*), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56. Similarly, in *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, 173 [**599] [275 Cal. Rptr. 449] (*Long Beach*), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a "higher level of service" to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under prior governing law.

The District and the Commission assert that the "mandatory" aspect of Education Code section 48915, insofar as it compels suspension and mandates an expulsion recommendation for firearm possession (and thereafter restricts the board's options to expulsion or referral to an off-site alternative school), carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program under the first alternative test of *County of Los Angeles, supra*, 43 Cal.3d 46, 56. They argue, in essence, that the present matter is more analogous to the latter cases (*Carmel Valley, supra*, 190 [*878] Cal. App. 3d 521, and *Long Beach, supra*, 225 Cal. App. 3d 155)--both of which involved measures designed to increase the level of governmental service provided to the public--than to the former cases (*County of Los Angeles, supra*, 43 Cal.3d 46, *City of Sacramento, supra*, 50 Cal.3d 51, and *City of Richmond, supra*, 64 Cal.App.4th 1190)--in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased. As we shall explain, we agree with the District and the Commission.

(9) The statutory requirements here at issue--immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation upon the ensuing options of the school board (expulsion or referral)--reasonably are viewed as providing a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 (Assem. Bill No. 342 (1993-1994 Reg. Sess.) (Assembly Bill No. 342)) and 1256 (Senate Bill [***478] No. 1198 (1993-1994 Reg. Sess.) (Senate Bill No. 1198)); and (ii) the requirements were intended to provide an enhanced service to the public--*safer schools for the vast majority of students* (that is, those who are not expelled or referred to other school sites). In other words, the legislation was premised upon the idea that by removing potentially violent students from the general school population, the safety of those students who remain thereby is increased. (See, e.g., Stats. 1993, ch. 1255, § 4, pp. 7285-7286 ["In order to ensure public safety on school campuses ... it is necessary that this act take effect immediately"]; Sen. Com. on Education (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Education (July 14, 1993), Analysis of Sen. Bill No. 1198, p. 1 [noting legislative purpose to remove those who possess firearms from the general school population by increasing the frequency of expulsion for such conduct].)

In challenging this conclusion, the Department relies upon *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal. App. 3d 1538 [263 Cal. Rptr. 351] (*Department of Industrial Relations*). In that case, the state enacted enhanced statewide safety regulations that governed all public and private elevators, and thereafter the County of Los Angeles sought reimbursement

for the costs of complying with the new regulations. The Court of Appeal found that the regulations constituted neither a new program nor a higher level of service concerning an existing program under either of the two alternative tests set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56. The court concluded that the elevator regulations did not meet the first alternative test, because the regulations did not carry out a governmental function of providing services to the public; the court found instead that [*879] "[p]roviding elevators equipped with fire and earthquake [**600] safety features simply is not a 'government function of providing services to the public.' " (*Department of Industrial Relations, supra,* 214 Cal. App. 3d at p. 1546.) Moreover, the court found, the second ("uniqueness") test was not met--the regulation applied to all elevators, not only those owned or operated by local governments.

(10) The Department asserts that *Department of Industrial Relations, supra,* 214 Cal. App. 3d 1538, is analogous, and argues that the "service" afforded by mandatory suspensions followed by a required expulsion recommendation, etc., is "not qualitatively different from the safety regulations at issue in [*Department of Industrial Relations*]. School districts carrying out such expulsions are not providing a service to the public ... ." We disagree. Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here, unlike the situation in *Department of Industrial Relations,* the law implementing this state policy applies uniquely to local public schools. We conclude that *Department of Industrial Relations* does not conflict with the conclusion that the mandatory suspension and expulsion recommendation requirements, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under the constitutional provision and the implementing statutes.

Of course, even if, as we have concluded above, a statute effectuates an increased or higher level of governmental service to the public concerning an existing program, this "does not necessarily lead to the conclusion that the program is a *state* mandate [***479] under California Constitution, article XIIIB, section 6." (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818 [38 Cal. Rptr. 2d 304], italics added (*County of Los Angeles II*).) We turn to the question whether the hearing costs at issue, flowing from compulsory suspensions and mandatory expulsion recommendations, are mandated by the state.

2. *Are the hearing costs state mandated?*

As noted above, a compulsory suspension and a mandatory recommendation of expulsion under Education Code section 48915 in turn trigger a mandatory expulsion hearing. All parties agree that any such resulting expulsion hearing must comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence. (See *ante,* fn. 5.) But as also noted above, article XIII B, section 6, and the implementing statutes [*880] (Gov. Code, § 17500 et seq.), by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs. The Commission and the Department assert that this circumstance raises the question: Do all or some of a district's costs in complying with the mandatory expulsion provision of Education Code section 48915 constitute a nonreimbursable *federal* mandate?

(11) In the absence of the operation of Education Code section 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law pursuant to *Goss, supra,* 419 U.S. 565, and related cases, and codified in Education Code section 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

The Department and the Commission agree to a point, but argue that a district's costs incurred in complying with this state mandate are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process. In support, they rely upon Government Code section 17556, [**601] which--in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state--provides that [HN20]"[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] ... [¶] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation." [13]

13 Government Code section 17556 reads in full: "The commission shall not find costs mandated by the state, as defined in Section 17514, in

any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district 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 or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph. [¶] (b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts. [¶] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation. [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. [¶] (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. [¶] (f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election. [¶] (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[*881] [***480] **(12)** We agree with the District and the Court of Appeal below that, as applied to the present case, it cannot be said that Education Code section 48915's mandatory expulsion provision "*implemented a federal law or regulation.*" (Italics added.) Education Code section 48915, at the time relevant here, did not implement any federal law; as explained below, federal law did not *then* mandate an expulsion recommendation--or expulsion--for firearm possession. [14] Moreover, although the Department argues that in this context Government Code section 17556, subdivision (c)'s phrase "the statute" should be viewed as referring not to Education Code section 48915's mandatory expulsion recommendation requirement, but instead to the mandatory due process hearing under Education Code section 48918 that is triggered by such an expulsion recommendation, it still cannot be said that section 48918 itself required the District to incur any costs. As noted above, Education Code section 48918 sets out requirements for expulsion hearings that must be held when a district seeks to expel a student--but neither section 48918 nor federal law requires that any such expulsion recommendation be made in the first place, and hence section 48918 does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, we conclude that the so-called exception to reimbursement described in Government Code section 17556, subdivision (c), is inapplicable in this context.

14 Subsequent amendments to federal law may alter this conclusion with regard to future test claims concerning Education Code section 48915's mandatory expulsion provision--see *post*, pages 882-883.

(13) Because it is state law (Education Code section 48915's mandatory expulsion provision), and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude [**602] that under the statutes existing at the time of the test claim in this case (state legislation in effect through [***481] mid-1994), *all* such hearing costs--those designed to satisfy the minimum requirements of federal due process, and those that may exceed [*882] those requirements--are, with respect to the mandatory expulsion provision of section 48915, state-mandated costs, fully reimbursable by the state. [15]

15 In exhibit No. 1 to its claim, the District presented the declaration of a District official, estimating that in order to process "350 proposed expulsions" during the period spanning July 1, 1993, to June 30, 1994, the District would incur approximately $ 94,200 "in staffing and other costs"--yielding an average estimated cost of approximately $ 270 per hearing during the relevant period. It is unclear from the record how many of these 350 hearings would be triggered by Education Code section 48915's mandatory expulsion provision (and constitute state-mandated costs subject to reimbursement under article XIII B, section 6), and how many of these 350 hearings

would be triggered by Education Code section 48915's discretionary provision (and, as explained *post*, in part II.B., constitute a nonreimbursable *federal* mandate).

We note that in the proceedings below, the Commission did not confine reimbursement only to those matters as to which the District on its own initiative would not have sought expulsion in the absence of the statutory requirement that it seek expulsion--and the Department has not raised that point in the trial court or on appeal.

Against this conclusion, the Department, in its supplemental briefing, offers a wholly new theory, not advanced in any of the proceedings below, in support of its belated claim that *all* hearing costs triggered by Education Code section 48915's mandatory expulsion provision are in fact nonreimbursable *federal* mandates, and not, as we have concluded above, reimbursable state mandates. As we shall explain, we reject the Department's contention, as applied to the test case here at issue (involving state statutes in effect through mid-1994).

The Department cites 20 United States Code section 7151, part of the federal No Child Left Behind Act of 2001, which provides, as relevant here: [HN21]"Each State receiving Federal funds under any [subchapter of this chapter] shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing." [16]

16 "Firearm," as defined in 18 United States Code section 921, includes guns and explosives.

The Department further asserts that more than $ 2.8 billion in federal funds under the No Child Left Behind Act are included "for local use" in the 2003-2004 state budget. (Cal. State Budget, 2003-2004, Budget Highlights, p. 4.) The Department argues that in light of the requirements set forth in 20 United States Code section 7151, and the amount of federal program funds at issue under the No Child Left Behind Act, the financial consequences to the state and to the school districts of failing to comply with 20 United States Code section 7151 are such that as a practical matter, Education Code section [*883] 48915's mandatory expulsion provision in reality constitutes an implementation of federal law, and hence resulting costs are nonreimbursable except to the extent they exceed the requirements of federal law. (See Gov. Code, § 17556, subd. (c); see also *Kern High School Dist., supra*, 30 Cal.4th 727, 749-751; *City of Sacramento, supra*, 50 Cal.3d 51, 70-76.) Moreover, the Department asserts, to the extent school districts are [***482] compelled by federal law, through Education Code section 48915's mandatory expulsion provision, to hold hearings pursuant to section 48918 in cases of firearm possession on school grounds, under 20 United States Code section 7164 (defining prohibited uses of program funds), *all* costs of such hearings properly may be paid out of federal program funds, and hence we should "view the ... provision of program funding as satisfying, in advance, any reimbursement requirement." (*Kern High School Dist., supra*, 30 Cal.4th 727, 747.)

[**603] Although the Department asserts that this federal law and program existed at the time relevant in this matter (that is, through mid-1994), our review of the statutes and relevant history suggests otherwise. Title 20 of the United States Code, section 7151, and the remainder of the No Child Left Behind Act, became effective on January 8, 2002. The predecessor legislation cited by the Department--the Gun-Free Schools Act of 1994 (former 20 U.S.C. § 8921(a)), although containing a substantially identical mandatory expulsion provision (*id.*, § 8921(b)(1)) [17]--was not effective until July 1, 1995 (108 Stat. 3518, § 3). In turn, the predecessor legislation to *that* act cited by the Department, the Elementary and Secondary Education Act of 1965 (former 20 U.S.C. § 6301 et seq.) as it existed at the time relevant here (July 1, 1993, through June 30, 1994)--contained no such mandatory expulsion provision. Accordingly, it appears that despite the Department's late discovery of 20 United States Code section 7151, at the time relevant here (regarding legislation in effect through mid-1994), neither 20 United States Code section 7151, nor either of its predecessors, compelled states to enact a law such as Education Code section 48915's mandatory expulsion provision. Therefore, we reject the Department's assertion that, during the time period at issue in this case, Education Code section 48915's mandatory expulsion provision constituted an implementation of a federal, rather than a state, mandate.

17 The prior law stated: "Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." (Pub.L. No.

103-382, § 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

(14) Although we conclude that all hearing costs triggered by Education Code section 48915's mandatory expulsion provision constitute reimbursable state-mandated expenses under the statutes as they existed during the period [*884] covered by the District's present test claim, we do not foreclose the possibility that 20 United States Code section 7151 or its predecessor, 20 United States Code section 8921, may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter. Indeed, we note that at least one subsequent test claim that has been filed with the Commission may raise the federal statutory issue advanced by the Department. [18]

18 See Pupil Expulsions II (4th Amendment), CSM No. 01-TC-18 (filed June 3, 2002). This claim, filed by the San Juan Unified School District, asserts reimbursable state mandates with respect to, among numerous other statutes, Education Code section 48915, as amended effective in 2002.

B. *Costs associated with hearings triggered by discretionary expulsion recommendations*

We next consider whether reimbursement is required for the costs associated [***483] with hearings triggered under discretionary expulsion provisions. Again, we address first the issue that we asked the parties to brief: Does the discretionary expulsion provision of Education Code section 48915 (former subd. (c), thereafter subd. (d), currently subd. (e)), which, as noted above, recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing property, using or selling illicit drugs, possessing tobacco or drug paraphernalia, etc.), and further specified that the school district governing board "may" order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

(15) We answer this question in the negative. The discretionary expulsion provision of Education Code section 48915 does not constitute a "new" program or higher level of service, because provisions recognizing discretion to suspend or expel were set forth in statutes predating 1975. (See Educ. Code, former § 10601, Stats. 1959, ch. 2, § 3, p. 860 [**604] [providing that a student may be suspended for good cause]; *id.*, former § 10602, Stats. 1970, ch. 102, § 102, p. 159 [defining "good cause"]; *id.*, former section 10601.6, Stats. 1972, ch. 164, § 2, p. 384 [further defining "good cause"].) [19] Accordingly, the discretionary expulsion provision of Education Code section 48915 is not a "new" program under article XIII B, section 6, and the implementing statutes, [*885] nor does it reflect a higher level of service related to an existing program. (*County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

19 As the Commission observed in its Corrected Statement of Decision in this matter: "The authorization for governing boards to expel pupils from school for inappropriate behaviors has been in existence since before 1975. The behaviors defined as inappropriate under current law, subdivisions (a) though (l) of section 48900, 48900.2, and 48900.3, meet prior laws' definitions of 'good cause' and 'misconduct' as reasons for expulsion." (Italics deleted.)

The District maintains, nevertheless, that once it elects to pursue expulsion, it is obligated to abide by the procedural hearing requirements of Education Code section 48918 and accordingly is mandated by that section to incur costs associated with such compliance. The District asserts that in this respect, *section 48918* constitutes a "new program or higher level of service" related to an existing program under article XIII B, section 6 and under Government Code section 17514. We shall assume for analysis that this is so. [20]

20 The requirements of Education Code section 48918 would appear to be "new" for purposes of the reimbursement provisions, in that they did not exist prior to 1975 and were enacted in that year and subsequently. (See *ante*, fn. 2.) The requirements also would appear to meet both alternative tests set forth in *County of Los Angeles, supra*, 43 Cal.3d 46, 56--that is, by implementing procedures that direct and guide the process of expulsion from public school, the statute appears to carry out a governmental function of providing services to public school students who face expulsion; or, it would seem, section 48918 constitutes a law that, to implement state policy, imposes unique requirements on local governments.

The District recognizes, of course, that under Government Code, section 17556, subdivision (c), it is not entitled to reimbursement to the extent Education Code section 48918 merely implements federal due process law, but the District argues that it has a right to reimbursement for its costs of complying with section 48918 *to* [***484] *the extent* those costs are attributable to hearing procedures that *exceed* federal due process re-

quirements. (See Gov. Code, § 17556, subd. (c).) The District asserts that its costs in complying with various notice, right of inspection, and recording requirements (see *ante*, fn. 11) fall into this category and are reimbursable.

The Department and the Commission argue in response that any right to reimbursement for hearing costs triggered by discretionary expulsions--even costs limited to those procedures that assertedly exceed federal due process hearing requirements--is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist., supra*, 30 Cal.4th 727, and *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777 [200 Cal. Rptr. 642] (*City of Merced*).

In *Kern High School Dist., supra*, 30 Cal.4th 727, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once [*886] school districts *elected* to participate in the underlying state and federal programs, the districts had no option but to hold program-related committee meetings and abide by the challenged notice and agenda requirements. (*Id.*, at p. 742.) We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis. (*Id.*, [**605] at p. 745.) [21]

> 21 We also proceeded to hold that in any event, because the school districts were free to use program funds to pay for the challenged increased costs, the districts had, in practical effect, already been given funds by the Legislature to cover the challenged costs. (*Kern High School Dist., supra*, 30 Cal.4th at pp. 748-754.)

In reaching that conclusion in *Kern High School Dist., supra*, 30 Cal.4th 727, we discussed *City of Merced, supra*, 153 Cal. App. 3d 777. In that case, the city wished either to purchase or to condemn, pursuant to its eminent domain authority, certain privately owned real property. The city elected to proceed by eminent domain, under which it was required by then recent legislation (Code Civ. Proc., § 1263.510) to compensate the property owner for loss of "business goodwill." The city so compensated the property owner and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced, supra*, 153 Cal. App. 3d at p. 780.) The Court of Appeal concluded that the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*Id.*, at pp. 781-783.) The court reasoned: "[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is* [***485] *exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.*" (*Id.*, at p. 783, italics added.)

Summarizing this aspect of *City of Merced, supra*, 153 Cal. App. 3d 777, in *Kern High School Dist., supra*, 30 Cal.4th 727, we stated: "[T]he core point articulated by the court in *City of Merced* is that *activities undertaken at the option or discretion of a local government entity* (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) *do not trigger a state mandate and hence do not require reimbursement 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.*" (*Kern High School Dist.*, at p. 742, italics added.)

The Department and the Commission argue that in the present case the District, like the claimants in *Kern High School Dist.*, errs by focusing upon [*887] the final result--a school district's legal obligation to comply with statutory hearing procedures--rather than focusing upon whether the school district has been *compelled* to put itself in the position in which such a hearing (with resulting costs) is required.

The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced, supra*, 153 Cal. App. 3d 777, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist., supra*, 30 Cal.4th 727. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program. [22]

> 22 Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra*, 153 Cal. App. 3d 777, in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victims' Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982),

states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ... , the incurring of [hearing] costs [under Education Code section 48918] cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to [seek to] expel a student under [Education Code section 48915's discretionary provision] for damaging or stealing school or private property, using or selling illicit drugs, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."

Building upon this theme, amicus curiae on behalf of the District, California School Boards Association, argues that based upon article I, section 28, subdivision (c), of the state Constitution, together with Education Code section 48200 et seq. and article IX, section 5 of the state Constitution (establishing and implementing a right of public education), *no* expulsion recommendation is "truly discretionary." Indeed, amicus curiae argues, school districts may not, "either as a matter of law or policy, realistically choose to [forgo] expelling [a] student [who commits one of the acts, other than firearm possession, referenced in Education Code section 48915's discretionary provision], because doing so would fail to meet that school district's legal obligations to provide a safe, secure and peaceful learning environment for the other students."

[**606] Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement [***486] under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section [*888] 6 of the state Constitution and Government Code section 17514 [23] and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra*, 190 Cal. App. 3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra*, 153 Cal. App. 3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

23 As we observed in *Kern High School Dist., supra*, 30 Cal.4th 727, 751-752, "article XIII B, section 6's '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.' "

(16) In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis. As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that *all* hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6, and Government Code section 17557, subdivision (c).

In this regard, we find the decision in *County of Los Angeles II, supra*, 32 Cal.App.4th 805, to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections--namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable [**607] state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitu-

tional law, and that "even in the [*889] absence of [Penal Code] section 987.9, ... [***487] counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and [under] the Sixth Amendment ... ." (32 Cal.App.4th at p. 815.) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute--requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request--were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. (*Id.*, at p. 817, fn. 7.) Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety--that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*--constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.

(17) We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c). We reach the same conclusion here.

Indeed, to proceed otherwise in the context of a reimbursement claim would produce impractical and detrimental consequences. The present case demonstrates the point. The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstance that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain [*890] respects the various provisions (as observed *ante*, footnote 11, predominantly concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.

Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not only from the circumstance that, as noted, the case law [***488] in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are--and should be-- [**608] wary of venturing pronouncements (especially concerning matters of constitutional law).

In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II, supra,* 32 Cal.App.4th 805: [HN22]for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law--and whose costs are, in context, de minimis--should be treated as part and parcel of the underlying federal mandate.

(18) Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions (see *ante*, footnote 11--primarily, as noted, various notice, right of inspection, and recording rules) fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, [HN23]all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c). [24]

24 We do not foreclose the possibility that a local government might, under appropriate facts,

demonstrate that a state law, though codifying federal requirements in part, also imposes more than "incidental" or "de minimis" expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

[*891] III

The judgment of the Court of Appeal is affirmed insofar as it provides for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Education Code section 48915. The judgment of the Court of Appeal is reversed insofar as it provides for reimbursement of any costs related to hearings triggered by the discretionary provision of section 48915. All parties shall bear their own costs on appeal.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred.

TAB “27”

SCHAFFER, a minor, by his parents and next friends, SCHAFFER, et vir, et al. v. WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.

No. 04-698

SUPREME COURT OF THE UNITED STATES

546 U.S. 49*; *126 S. Ct. 528*; *163 L. Ed. 2d 387*; *2005 U.S. LEXIS 8554*; *74 U.S.L.W. 4009*; *19 Fla. L. Weekly Fed. S 1

October 5, 2005, Argued
November 14, 2005, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.
Weast v. Schaffer, 377 F.3d 449, 2004 U.S. App. LEXIS 15617 (4th Cir. Md., 2004)

DISPOSITION: Affirmed.

DECISION:

[***387] Party--whether child with disability or school district--seeking relief at administrative hearing of challenge to individualized education plan created under Individuals with Disabilities Education Act (20 U.S.C.S. §§ 1400 et seq.) held to have burden of persuasion.

SUMMARY:

The Individuals with Disabilities Education Act (IDEA), as amended (*20 U.S.C.S. §§ 1400 et seq.*), (1) in *§ 1414(d)*, required public school districts to create an individualized education program (IEP) for each child with a disability in the district; and (2) in *§ 1415(f)*, authorized parents who believed that their child's IEP was inappropriate to request an "impartial due process hearing." However, IDEA's text was silent as to which party bore the burden of persuasion at such a hearing.

Parents whose minor child suffered from learning disabilities and speech-language impairments initiated, against a Maryland public school district on behalf of the child, a due-process hearing in which the parents, in challenging their child's IEP, sought compensation for the cost of enrolling the child in a private school as a result of the parents' dissatisfaction with the IEP. The state administrative law judge (ALJ) who conducted the hearing (1) held that the parents bore the burden of persuasion, and (2) ruled for the district.

In the parents' civil action challenging the ALJ's decision, the United States District Court for the District of Maryland reversed and remanded after concluding that the burden of persuasion was on the school district (*86 F. Supp. 2d 538*). On reconsideration, the ALJ, deeming the evidence in "equipoise," ruled in favor of the parents. The District Court reaffirmed its [***388] ruling that the school district had the burden of persuasion (*240 F. Supp. 2d 396*).

The United States Court of Appeals for the Fourth Circuit reversed, as the Court of Appeals concluded that the parents had offered no persuasive reason to depart from the normal rule of allocating the burden to the party seeking relief (*377 F. 3d 449*).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ., it was held that the burden of persuasion in an administrative hearing of a challenge to an IEP was properly placed on the party--whether a child with a disability or a school district--seeking relief, as:

(1) Absent some reason to believe that Congress intended otherwise, the court would conclude that the burden of persuasion lay where it usually fell, upon the party seeking relief.

(2) Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting evidence, where (a) IDEA was silent about whether marginal dollars should

be allocated to litigation and administrative expenditures or to educational services, and (b) there was reason to believe that a great deal was already spent on IDEA administration.

(3) IDEA did not support a conclusion that every IEP was invalid until the school district demonstrated that it was not, for IDEA (a) relied heavily on school districts' expertise, and (b) included a "stay-put" provision requiring a child to remain in the current educational placement during pendency of an IDEA hearing.

(4) Congress had addressed school districts' "natural advantage" in information and expertise by obliging schools to safeguard the procedural rights of parents and to share information with them.

(5) After the proceedings below, Congress had added to IDEA provisions requiring school districts to (a) answer the subject matter of a complaint in writing, and (b) provide parents with a detailed description of the factors that the district used in making its IEP decision.

(6) Perhaps most importantly, parents were allowed to recover attorneys' fees if they prevailed in an IEP challenge.

Stevens, J., concurring, said that the court should presume that public school officials were properly performing their difficult responsibilities under IDEA.

Ginsburg, J., dissenting, expressed the view that policy considerations, convenience, and fairness called for assigning the burden of persuasion to the school district in the instant case, for the district (1) as the proponent of the child's IEP, was properly called upon to demonstrate the IEP's adequacy; and (2) being familiar with the full range of educational facilities in the area, and informed by its experiences with other, similarly-disabled children, was in a better position to demonstrate that it had fulfilled its statutory obligation than the parents were in to show that the district had failed to do so.

[***389] Breyer, J., dissenting, expressed the view that (1) Congress had left to the states the decision of the "burden of persuasion question" in an administrative hearing of a challenge to an IEP, as IDEA (a) in *§ 1415(a)*, said that the establishment of procedures was a state matter, (b) in *§ 1415(f)(1)(A)*, said that an administrative hearing was to be conducted by the state or local educational agency, and (c) as a whole, foresaw state implementation of federal standards; and (2) the case ought to have been remanded for determination by the Maryland ALJ how state law concerning the burden of persuasion applied to the case.

Roberts, Ch. J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

SCHOOLS §10

-- individualized education program for child with disability -- challenge -- burden of persuasion

Headnote: [1A][1B][1C][1D][1E][1F]

The party--whether a child with a disability or the public school district in which the child resided--seeking relief at a hearing of an administrative challenge to an individualized education plan (IEP) created under the Individuals with Disabilities Education Act (IDEA), as amended (*20 U.S.C.S. §§ 1400 et seq.*), had the burden of persuasion. as:

(1) Absent some reason to believe that Congress intended otherwise, the United States Supreme Court would conclude that the burden of persuasion lay where it usually fell, upon the party seeking relief, since decisions that placed the entire burden of persuasion on the opposing party at the outset of a proceeding were extremely rare.

(2) Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting evidence, where (a) IDEA was silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services, and (b) there was reason to believe that a great deal was already spent on IDEA administration.

(3) IDEA did not support a conclusion that every IEP was invalid until the school district demonstrated that it was not, for IDEA (a) relied heavily on school districts' expertise, and (b) included a "stay-put" provision requiring a child to remain in the current educational placement during pendency of an IDEA hearing.

(4) Congress had addressed school districts' "natural advantage" in information and expertise by obliging schools to safeguard the procedural rights of parents and to share information with them.

(5) After the proceedings below, Congress had added to IDEA provisions requiring school districts to (a) answer the subject matter of a complaint in writing, and (b) provide parents with (i) the reasoning behind the disputed action, (ii) details about the other options considered and rejected by the IEP team, and (iii) a description of all evaluations, reports, and other factors that the district used in making its IEP decision.

(6) Perhaps most importantly, parents were allowed to recover attorneys' [***390] fees if they prevailed in an IEP challenge.

(O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

[***LEdHN2]

STATUTES §123.5

-- burden of persuasion

Headnote: [2]

For purposes of determining who had the burden of persuasion in a hearing of a challenge to an individualized education program created under the Individuals with Disabilities Education Act (IDEA), as amended (*20 U.S.C.S. §§ 1400 et seq.*), the United States Supreme Court began with the ordinary default rule that plaintiffs bore the risk of failing to prove their claims, as the plain text of IDEA was silent on the allocation of the burden. (O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

[***LEdHN3]

EVIDENCE §90

-- shifting of burden of persuasion

Headnote: [3A][3B]

The ordinary default rule that plaintiffs bear the risk of failing to prove their claims admits of exceptions, as for example, (1) the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions; and (2) under some circumstances, the United States Supreme Court has even placed the burden of persuasion over an entire claim on the defendant. (O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

[***LEdHN4]

EVIDENCE §88

-- burden of persuasion

Headnote: [4]

Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment. (O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

[***LEdHN5]

STATUTES §125

-- construction -- effect of courts' opinions

Headnote: [5]

For purposes of determining who had the burden of persuasion in a hearing of a challenge to an individualized education program created under the Individuals with Disabilities Education Act (IDEA), as amended (*20 U.S.C.S. §§ 1400 et seq.*), the fact that Congress had written directly into IDEA a number of the procedural safeguards from two Federal District Court opinions did not allow the United States Supreme Court to conclude that Congress had intended to adopt the ideas from the two opinions that Congress had failed to write into the text of IDEA. (O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

[***LEdHN6]

EVIDENCE §89

-- burden of persuasion -- adversary's knowledge

Headnote: [6]

The ordinary rule, based on considerations of fairness, that does not place the burden on a litigant of establishing facts peculiarly within the knowledge of the litigant's adversary (1) is far from being universal, and (2) has many qualifications on its application. (O'Connor, J., joined by Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.)

SYLLABUS

[***391] To ensure disabled children a "free appropriate public education," *20 U.S.C. § 1400(d)(1)(A)(2000 ed. Supp. V)*, the Individuals with Disabilities Education [***392] Act (IDEA or Act) requires school districts to create an "individualized education program" (IEP) for each disabled child, *§ 1414(d)*, and authorizes parents challenging their child's IEP to request an "impartial due process hearing," *§ 1415(f)*, but does not specify which party bears the burden of persuasion at that hearing. After an IDEA hearing initiated by petitioners, the Administrative Law Judge held that they bore the burden of persuasion and ruled in favor of respondents. The District Court reversed, concluding that the burden of persuasion is on the school district. The Fourth Circuit reversed the District Court, concluding that petitioners had offered no persuasive reason to depart from the normal rule of allocating the burden to the party seeking relief.

Held:

The burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district.

(a) Because IDEA is silent on the allocation of the burden of persuasion, this Court begins with the ordinary

default rule that plaintiffs bear the burden regarding the essential aspects of their claims. Although the ordinary rule admits of exceptions, decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding--as petitioners urge the Court to do here--are extremely rare. Absent some reason to believe that Congress intended otherwise, the Court will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

(b) Petitioners' arguments for departing from the ordinary default rule are rejected. Petitioners' assertion that putting the burden of persuasion on school districts will help ensure that children receive a free appropriate public education is unavailing. Assigning the burden to schools might encourage them to put more resources into preparing IEPs and presenting their evidence, but IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. There is reason to believe that a great deal is already spent on IDEA administration, and Congress has repeatedly amended the Act to reduce its administrative and litigation-related costs. The Act also does not support petitioners' conclusion, in effect, that every IEP should be assumed to be invalid until the school district demonstrates that it is not. Petitioners' most plausible argument--that ordinary fairness requires that a litigant not have the burden of establishing facts peculiarly within the knowledge of his adversary, *United States v. New York, N. H. & H. R. Co., 355 U.S. 253, 256, n. 5, 78 S. Ct. 212, 2 L. Ed. 2d 247* --fails because IDEA gives parents a number of procedural protections that ensure that they are not left without a realistic chance to access evidence or without an expert to match the government.

377 F.3d 449, affirmed.

COUNSEL: William H. Hurd argued the cause for petitioners.

Gregory G. Garre argued the cause for respondents.

David B. Salmons argued the cause for the United States, as amicus curiae, by special leave of the Court.

JUDGES: O'Connor, J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, Souter, and Thomas, JJ., joined. Stevens, J., filed a concurring opinion, *post*, p. 62. Ginsburg, J., *post*, p. 63, and Breyer, J., *post*, p. 67, filed dissenting opinions. Roberts, C. J., took no part in the consideration or decision of the case.

OPINION BY: O'CONNOR

OPINION

[*51] [**531] [***393] Justice **O'Connor** delivered the opinion of the Court.

[***LEdHR1A] [1A] The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, *20 U.S.C. § 1400 et seq. (2000 ed. and Supp. V)*, is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a free appropriate public education," *§ 1400(d)(1)(A) (2000 ed. and Supp. V)*. Under IDEA, school districts must create an "individualized education program" (IEP) for each disabled child. *§ 1414(d)*. If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." *§ 1415(f)*. The Act is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief.

I

A

Congress first passed IDEA as part of the Education of the Handicapped Act in 1970, 84 Stat. 175, and amended it [*52] substantially in the Education for All Handicapped Children Act of 1975, 89 Stat. 773. At the time the majority of disabled children in America were "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out,'" H. R. Rep. No. 94-332, p 2 (1975). IDEA was intended to reverse this history of neglect. As of 2003, the Act governed the provision of special education services to nearly 7 million children across the country. See Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/tables27th/ar_aa9.htm (as visited Nov. 9, 2005, and available in Clerk of Court's case file).

IDEA is "frequently described as a model of 'cooperative federalism.'" *Little Rock School Dist. v. Mauney, 183 F.3d 816, 830 (CA8 1999)*. It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 183, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)*. For example, the Act mandates cooperation and reporting between state and federal educational authorities. Participating States must certify [**532] to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions. *20 U.S.C. § 1412(a)*. (Unless otherwise noted, all citations to the Act are to the pre-2004 version of the statute because this is the version that was in effect during the proceedings below. We note, however, that nothing in the recent 2004 amendments, 118

Stat. 2674, appears to materially affect the rule announced here.) State educational agencies, in turn, must ensure that local schools and teachers are meeting the State's educational standards. *§§ 1412(a)(11)*, *1412(a)(15)(A)*. Local educational agencies (school boards or other administrative bodies) can receive IDEA funds only if they certify to a state educational [*53] agency that they are acting in accordance with the State's policies and procedures. *§ 1413(a)(1)*.

[***394] The core of the statute, however, is the cooperative process that it establishes between parents and schools. *Rowley, supra, at 205-206, 102 S. Ct. 3034, 73 L. Ed. 690* ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"). The central vehicle for this collaboration is the IEP process. State educational authorities must identify and evaluate disabled children, *§§ 1414(a)-(c)*, develop an IEP for each one, *§ 1414(d)(2)*, and review every IEP at least once a year, *§ 1414(d)(4)*. Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. *§ 1414(d)(1)(A)*.

Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. *§ 1414(c)(3)*. Parents are included as members of "IEP teams." *§ 1414(d)(1)(B)*. They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child." *§ 1415(b)(1)*. They must be given written prior notice of any changes in an IEP, *§ 1415(b)(3)*, and be notified in writing of the procedural safeguards available to them under the Act, *§ 1415(d)(1)*. If parents believe that an IEP is not appropriate, they may seek an administrative "impartial due process hearing." *§ 1415(f)*. School districts may also seek such hearings, as Congress clarified in the 2004 amendments. See S. Rep. No. 108-185, p 37 (2003). They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated. As a practical matter, [*54] it appears that most hearing requests come from parents rather than schools. Brief for Petitioners 7.

Although state authorities have limited discretion to determine who conducts the hearings, *§ 1415(f)(1)*, and responsibility generally for establishing fair hearing procedures, *§ 1415(a)*, Congress has chosen to legislate the central components of due process hearings. It has imposed minimal pleading standards, requiring parties to file complaints setting forth "a description of the nature of the problem," *§ 1415(b)(7)(A)(ii)*, and "a proposed resolution of the problem to the extent known and available . . . at the time," *§ 1415(b)(7)(B)(iii)*. At the hearing, all parties may be accompanied by counsel, and may "present evidence and confront, cross-examine, and compel the attendance of witnesses." *§§ 1415(h)(1)-(2)*. After the hearing, any aggrieved party may bring a civil action in state or federal court. *§ 1415(i)(2)*. Prevailing parents may also [**533] recover attorney's fees. *§ 1415(i)(3)(B)*. Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.

B

This case concerns the educational services that were due, under IDEA, to petitioner Brian Schaffer. Brian suffers from learning disabilities and speech-language impairments. From prekindergarten through seventh grade he attended a private school [***395] and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted respondent Montgomery County Public Schools System (MCPS) seeking a placement for him for the following school year.

MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian [*55] needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.

In Maryland, IEP hearings are conducted by administrative law judges (ALJs). See *Md. Educ. Code Ann. § 8-413(c)* (Lexis 2004). After a 3-day hearing, the ALJ deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district. The parents brought a civil action challenging the result. The United States District Court for the District of Maryland reversed and remanded, after concluding that the burden of persuasion is on the school district. *Brian S. v. Vance, 86 F. Supp. 2d 538 (2000)*. Around the same time, MCPS offered Brian a placement in a high school with a special learning center. Brian's parents accepted, and Brian was educated in that program until he graduated from high school. The suit remained alive, however, because the parents sought compensation for the private school tuition and related expenses.

Respondents appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal was pending, the ALJ reconsidered the case, deemed the evi-

dence truly in "equipoise," and ruled in favor of the parents. The Fourth Circuit vacated and remanded the appeal so that it could consider the burden of proof issue along with the merits on a later appeal. The District Court reaffirmed its ruling that the school district has the burden of proof. *240 F. Supp. 2d 396 (Md. 2002)*. On appeal, a divided panel of the Fourth Circuit reversed. Judge Michael, writing for the majority, concluded that petitioners offered no persuasive reason to "depart from the normal rule of allocating the burden to the party seeking relief." *377 F.3d 449, 453 (2004)*. We granted certiorari *543 U.S. 1145, 543 U.S. 1145, 125 S. Ct. 1300, 161 L. Ed. 2d 104 (2005)*, to resolve the following [*56] question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?

II

A

The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." 2 J. Strong, McCormick on Evidence § 342, p 433 (5th ed. 1999) (hereinafter McCormick). Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," *i.e.*, which party [**534] loses if the evidence is closely balanced, and the "burden of production," *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272,* [***396] *114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)*. We note at the outset that this case concerns only the burden of persuasion, as the parties agree, Brief for Respondents 14; Reply Brief for Petitioners 15, and when we speak of burden of proof in this opinion, it is this to which we refer.

[***LEdHR2] [2] [***LEdHR3A] [3A] When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. McCormick § 337, at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion"); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

[*57] Thus, we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims. For example, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, does not directly state that plaintiffs bear the "ultimate" burden of persuasion, but we have so concluded. *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)*; *id., at 531, 113 S. Ct. 2742, 125 L. E.d 2d 407* (Souter, J., dissenting). In numerous other areas, we have presumed or held that the default rule applies. See, *e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (standing); *Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999)* (Americans with Disabilities Act); *Hunt v. Cromartie, 526 U.S. 541, 553, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999)* (equal protection); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588, 593, 121 S. Ct. 1776, 149 L. Ed. 2d 845 (2001)* (securities fraud); *Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)* (preliminary injunctions); *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)* (*First Amendment*). Congress also expressed its approval of the general rule when it chose to apply it to administrative proceedings under the Administrative Procedure Act, *5 U.S.C. § 556(d)*; see also *Greenwich Collieries, supra, at 271, 114 S. Ct. 2251, 129 L. Ed. 2d 221*.

[***LEdHR1B] [1B] [***LEdHR3B] [3B] The ordinary default rule, of course, admits of exceptions. See McCormick § 337, at 412-415. For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions. See, *e.g., FTC v. Morton Salt Co., 334 U.S. 37, 44-45, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)*. Under some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant. See *Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 494, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)*. But while [***397] the normal default rule does not solve all cases, it certainly solves most of them. Decisions that place the *entire* burden of persuasion [**535] on the opposing party at the *outset* of a proceeding--as petitioners urge us to do here--are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, [*58] we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

B

[***LEdHR4] [4] Petitioners contend first that a close reading of IDEA's text compels a conclusion in their favor. They urge that we should interpret the sta-

tutory words "due process" in light of their constitutional meaning, and apply the balancing test established by *Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*. Even assuming that the Act incorporates constitutional due process doctrine, *Eldridge* is no help to petitioners because "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne, 424 U.S. 577, 585, 96 S. Ct. 1010, 47 L. Ed. 2d 249 (1976)*.

[***LEdHR5] [5] Petitioners next contend that we should take instruction from the lower court opinions of *Mills v. Board of Education, 348 F. Supp. 866 (DC 1972)*, and *Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971)* (hereinafter *PARC*). IDEA's drafters were admittedly guided "to a significant extent" by these two landmark cases. *Rowley, 458 U.S., at 194, 102 S. Ct. 3034, 73 L. Ed. 2d 690*. As the court below noted, however, the fact that Congress "took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act" does not allow us to "conclude . . . that Congress intended to adopt the ideas that it failed to write into the text of the statute." *377 F.3d, at 455*.

[***LEdHR1C] [1C] Petitioners also urge that putting the burden of persuasion on school districts will further IDEA's purposes because it will help ensure that children receive a free appropriate public education. In truth, however, very few cases will be in evidentiary equipoise. Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting their evidence. But IDEA is silent about whether marginal dollars should [*59] be allocated to litigation and administrative expenditures or to educational services. Moreover, there is reason to believe that a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately $8,000 to $12,000 per hearing. See Department of Education, J. Chambers, J. Harr, & A. Dhanani, What Are We Spending on Procedural Safeguards in Special Education 1999-2000, p 8 (May 2003) (prepared under contract by American Institutes for Research, Special Education Expenditure Project). Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes. § 615(e) of IDEA, as added by § 101 of the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 90, *20 U.S.C. § 1415(e)*. In 2004, Congress added a mandatory [***398] "resolution session" prior to any due process hearing. § 615(f)(1)(B) of IDEA, as added by § 101 of the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2720, *20 U.S.C. A. § 1415(f)(1)(B) (Supp. 2005)*. It also made new findings that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be [**536] relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes." *§§ 1400(c)(8)-(9)*.

Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals. It also includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. *§ 1415(j)*. Congress could have required that a [*60] child be given the educational placement that a parent requested during a dispute, but it did no such thing. Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances. See *Rowley, supra, at 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690* (noting the "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP").

[***LEdHR1D] [1D] [***LEdHR6] [6] Petitioners' most plausible argument is that "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, N. H. & H. R. Co., 355 U.S. 253, 256, n. 5, 78 S. Ct. 212, 2 L. Ed. 2d 247 (1957)*; see also *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 626, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)*. But this "rule is far from being universal, and has many qualifications upon its application." *Greenleaf's Lessee v. Birth, 31 U.S. 302, 6 Pet. 302, 312, 8 L. Ed. 406 (1832)*; see also McCormick § 337, at 413 ("Very often one must plead and prove matters as to which his adversary has superior access to the proof"). School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. See *School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)*. As noted above, parents have the right to review all records that the school possesses in relation to their child. *§ 1415(b)(1)*. They also have the right to an "independent educational evaluation of the[ir] child." *Ibid.* The regulations clarify this

entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." *34 CFR § 300.502(b)(1) (2005)*. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school [*61] must make available, and who can give an independent opinion. They are not left to [***399] challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

[***LEdHR1E] [1E] Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. § 615(c)(2)(B)(i)(I) of IDEA, as added by § 101 of Pub. L. 108-446, § 615(c)(2)(B)(i)(I), 118 Stat. 2718, *20 U.S.C. § 1415(c)(2)(B)(i)(I) (2000 ed., Supp. V)*. Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon. *20 U.S.C. § 1415(f)(2)*. IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. [**537] IDEA, in fact, requires state authorities toorganize hearings in a way that guarantees parents and children the procedural protections of the Act. See *§ 1415(a)*. Finally, and perhaps most importantly, parents may recover attorney's fees if they prevail. *§ 1415(i)(3)(B)*. These protections ensure that the school bears no unique informational advantage.

III

Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g., Minn. Stat. § 125A.091, subd. 16* (2004); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6) (Supp. 2004); Alaska Admin. Code, tit. 4, § 52.550(e)(9) (2003); *Del. Code Ann., Tit. 14, § 3140 (1999)*. Because no such law or regulation exists in Maryland, we need not decide this issue [*62] today. Justice Breyer contends that the allocation of the burden ought to be left *entirely* up to the States. But neither party made this argument before this Court or the courts below. We therefore decline to address it.

[***LEdHR1F] [1F] We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed.

It is so ordered.

The **Chief Justice** took no part in the consideration or decision of this case.

CONCUR BY: STEVENS

CONCUR

Justice **Stevens,** concurring.

It is common ground that no single principle or rule solves all cases by setting forth a general test for ascertaining the incidence of proof burdens when both a statute and its legislative history are silent on the question. See *Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 494, n. 17,* [***400] *124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)*; see also *ante, at 57, 163 L. Ed. 2d, at 396*; *post, at 1-2, 163 L. Ed. 2d, at 400-401* (Ginsburg, J., dissenting). Accordingly, I do not understand the majority to disagree with the proposition that a court, taking into account "'policy considerations, convenience, and fairness,'" *post, at 63, 163 L. Ed. 2d, at 400* (Ginsburg, J., dissenting), could conclude that the purpose of a statute is best effectuated by placing the burden of persuasion on the defendant. Moreover, I agree with much of what Justice Ginsburg has written about the special aspects of this statute. I have, however, decided to join the Court's disposition of this case, not only for the reasons set forth in Justice O'Connor's opinion, but also because I believe that we should presume that public school officials [*63] are properly performing their difficult responsibilities under this important statute.

DISSENT BY: GINSBURG; BREYER

DISSENT

Justice **Ginsburg,** dissenting.

When the legislature is silent on the burden of proof, courts ordinarily allocate the burden to the party initiating the proceeding and seeking relief. As the Fourth Circuit recognized, however, "other factors," prime among them "policy considerations, convenience, and fairness," may warrant a different allocation. *377 F.3d 449, 452 (2004)* (citing 2 J. Strong, McCormick on Evidence § 337, p 415 (5th ed. 1999) (allocation of proof burden "will depend upon the weight . . . given to any one or more of several factors, including: . . . special policy considerations[,] [**538] convenience,[and]

fairness")); see also 9 J. Wigmore, Evidence § 2486, p 291 (J. Chadbourn rev. ed. 1981) (assigning proof burden presents "a question of policy and fairness based on experience in the different situations"). The Court has followed the same counsel. See *Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 494, n. 17, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)* ("No 'single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." (quoting Wigmore, *supra*, § 2486, p 288; emphasis deleted)). For reasons well stated by Circuit Judge Luttig, dissenting in the Court of Appeals, *377 F.3d, at 456-459*, I am persuaded that "policy considerations, convenience, and fairness" call for assigning the burden of proof to the school district in this case.

The Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § 1400 et seq.*, was designed to overcome the pattern of disregard and neglect disabled children historically encountered in seeking access to public education. See *§ 1400(c)(2)* (congressional findings); S. Rep. No. 94-168, pp 6, 8-9 (1975); *Mills v. Board of Ed. of District of Columbia, 348 F. Supp. 866 (DC 1972)*; *Pennsylvania Asso. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971)*, [*64] and *343 F. Supp. 279 (ED Pa. 1972)*. Under typical civil rights and social welfare legislation, the complaining party must allege and prove discrimination or qualification for statutory benefits. See, *e.g.*, *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)* (Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 270,* [***401] *114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)* (Black Lung Benefits Act, *30 U.S.C. § 901 et seq.*). The IDEA is atypical in this respect: It casts an affirmative, beneficiary-specific obligation on providers of public education. School districts are charged with responsibility to offer to each disabled child an individualized education program (IEP) suitable to the child's special needs. *20 U.S.C. §§ 1400(d)(1)*, *1412(a)(4)*, *1414(d)*. The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy.

Familiar with the full range of education facilities in the area, and informed by "their experiences with other, similarly-disabled children," *377 F.3d, at 458* (Luttig, J., dissenting), "the school district is . . . in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so," *id., at 457*. Accord *Oberti v. Board of Ed. of Borough of Clementon School Dist., 995 F.2d 1204, 1219 (CA3 1993)* ("In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents."); *Lascari v. Board of Ed. of Ramapo Indian Hills Regional High School Dist., 116 N. J. 30, 45-46, 560 A.2d 1180, 1188-1189 (1989)* (in view of the school district's "better access to relevant information," parent's obligation "should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that [*65] the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory [**539] schemes."). [1]

1 The Court suggests that the IDEA's stay-put provision, *20 U.S.C. § 1415(j)*, supports placement of the burden of persuasion on the parents. *Ante, at 59-60, 163 L. Ed. 2d, at 398*. The stay-put provision, however, merely preserves the status quo. It would work to the advantage of the child and the parents when the school seeks to cut services offered under a previously established IEP. True, Congress did not require that "a child be given the educational placement that a parent requested during a dispute." *Ibid.* But neither did Congress require that the IEP advanced by the school district go into effect during the pendency of a dispute.

Understandably, school districts striving to balance their budgets, if "[l]eft to [their] own devices," will favor educational options that enable them to conserve resources. *Deal v. Hamilton County Bd. of Ed., 392 F.3d 840, 864-865 (CA6 2004)*. Saddled with a proof burden in administrative "due process" hearings, parents are likely to find a district-proposed IEP "resistant to challenge." *377 F.3d, at 459* (Luttig, J., dissenting). Placing the burden on the district to show that its plan measures up to the statutorily mandated "free appropriate public education," *20 U.S.C. § 1400(d)(1)(A)*, will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs. [2]

2 The Court observes that decisions placing "the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding . . . are extremely rare." *Ante, at 57, 163 L. Ed. 2d, at 397*. In cases of this order, however, the persuasion burden is indivisible. It must be borne *entirely* by one side or the other: Either the school district must establish the adequacy of the IEP it has proposed or the parents must demonstrate the plan's inadequacy.

The Court acknowledges that "[a]ssigning [***402] the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs." *Ante, at 58, 163 L. Ed. 2d, at 397*. Curiously, the Court next suggests that resources spent on developing IEPs rank as "administrative expenditures" not as expenditures for "educational services." *Ante, at 59, 163 L. Ed. 2d, at 398*. Costs entailed in the preparation of suitable IEPs, however, are [*66] the very expenditures necessary to ensure each child covered by the IDEA access to a free appropriate education. These outlays surely relate to "educational services." Indeed, a carefully designed IEP may ward off disputes productive of large administrative or litigation expenses.

This case is illustrative. Not until the District Court ruled that the school district had the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs. See *ante, at 55, 163 L. Ed. 2d, at 395*; Tr. of Oral Arg. 21-22 (Counsel for the Schaffers observed that "Montgomery County . . . gave [Brian] the kind of services he had sought from the beginning . . . once [the school district was] given the burden of proof."). Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided.

Notably, nine States, as friends of the Court, have urged that placement of the burden of persuasion on the school district best comports with the IDEA's aim. See Brief for Commonwealth of Virginia et al. as *Amici Curiae*. If allocating the burden to school districts would saddle school systems with inordinate costs, it is doubtful that these States would have filed in favor of petitioners. Cf. Brief for United States as *Amicus Curiae* Supporting Appellees Urging Affirmance in No. 00-1471 (CA4), p 12 ("Having to carry the burden of proof regarding the adequacy of its proposed IEP . . . should not substantially increase the workload for [**540] the school."). [3]

3 Before the Fourth Circuit, the United States filed in favor of the Schaffers; in this Court, the United States supported Montgomery County.

One can demur to the Fourth Circuit's observation that courts "do not automatically assign the burden of proof to the side with the bigger guns," *377 F.3d, at 453*, for no such reflexive action is at issue here. It bears emphasis that "the vast majority of parents whose children require the benefits and protections provided in the IDEA" lack "knowledg[e] [*67] about the educational resources available to their [child]" and the "sophisticat[ion]" to mount an effective case against a district-proposed IEP. *Id., at 458* (Luttig, J., dissenting); cf. *20 U.S.C. § 1400(c)(7)-(10)*. See generally Department of Education, M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and their Households (Sept. 2002), (prepared under contract by SRI International, Special Education Elementary Longitudinal Study), http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited Nov. 8, 2005, and available in Clerk of Court's case file). In this setting, "the party with the 'bigger guns' also has better access to information, greater expertise, and an affirmative obligation to provide the contested services." *377 F.3d, at 458* (Luttig, J., dissenting). Policy considerations, convenience, and fairness, I think it plain, point [***403] in the same direction. Their collective weight warrants a rule requiring a school district, in "due process" hearings, to explain persuasively why its proposed IEP satisfies IDEA's standards. *Ibid.* I would therefore reverse the judgment of the Fourth Circuit.

Justice **Breyer,** dissenting.

As the majority points out, the Individuals with Disabilities Education Act (Act), *20 U.S.C. § 1400 et seq.*, requires school districts to "identify and evaluate disabled children, . . . develop an [Individualized Education Program] for each one . . ., and review every IEP at least once a year." *Ante, at 53, 163 L. Ed. 2d, at 394*. A parent dissatisfied with "any matter relating [1] to the identification, evaluation, or educational placement of the child," or [2] to the "provision of a free appropriate public education" of the child, has the opportunity "to resolve such disputes through a mediation process." *20 U.S.C. §§ 1415(a), (b)(6)(A), (k) (2000 ed., Supp. V)*. The Act further provides the parent with "an opportunity for an impartial [*68] due process hearing" provided by the state or local education agency. *§ 1415(f)(1)(A)*. If provided locally, either party can appeal the hearing officer's decision to the state educational agency. *§ 1415(g)*. Finally, the Act allows any "party aggrieved" by the results of the state hearing(s) "to bring a civil action" in a federal district court. *§ 1415(i)(2)(A)*. In sum, the Act provides for school board action, followed by (1) mediation, (2) an impartial state due process hearing with the possibility of state appellate review, and (3) federal district court review.

The Act also sets forth minimum procedures that the parties, the hearing officer, and the federal court must follow. See, *e.g., § 1415(f)(1)* (notice); *§ 1415(f)(2)* (disclosures); *§ 1415(f)(3)* (limitations on who may conduct the hearing); *§ 1415(g)* (right to appeal); *§ 1415(h)(1)* ("the right to be accompanied and advised by counsel"); *§ 1415(h)(2)* ("the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"); *§ 1415(h)(3)* (the right to a transcript of the proceeding); *§ 1415(h)(4)* ("the right to written . . .

findings of fact and decisions"). Despite this detailed procedural scheme, the Act is silent on the question of [**541] who bears the burden of persuasion at the state "due process" hearing.

The statute's silence suggests that Congress did not think about the matter of the burden of persuasion. It is, after all, a relatively minor issue that should not often arise. That is because the parties will ordinarily introduce considerable evidence (as in this case where the initial 3-day hearing included testimony from 10 witnesses, 6 qualified as experts, and more than 50 exhibits). And judges rarely hesitate to weigh evidence, even highly technical evidence, and to decide a matter on the merits, even when the case is a close one. Thus, cases in which an administrative law judge (ALJ) finds the evidence in precise equipoise should be few and far between. Cf. *O'Neal v. McAninch, 513 U.S. 432, 436-437, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).* See also Individuals with Disabilities Education Improvement [*69] Act of 2004, Pub. L. 108-446, §§ 615(f)(3)(A)(ii)-(iv), 118 Stat. 2721, *20 U.S.C. §§ 1415(f)(3)(A)(ii)-(iv) (2000 ed., Supp. V)* (requiring appointment [***404] of ALJ with technical capacity to understand Act).

Nonetheless, the hearing officer held that before him was that *rara avis*--a case of perfect evidentiary equipoise. Hence we must infer from Congress' silence (and from the rest of the statutory scheme) which party--the parents or the school district--bears the burden of persuasion.

One can reasonably argue, as the Court holds, that the risk of nonpersuasion should fall upon the "individual desiring change." That, after all, is the rule courts ordinarily apply when an individual complains about the lawfulness of a government action. *E.g., ante, at 56-61, 163 L. Ed. 2d, at 395-399* (opinion of the Court); *377 F.3d 449 (CA4 2004)* (case below); *Devine v. Indian River County School Bd., 249 F.3d 1289 (CA11 2001).* On the other hand, one can reasonably argue to the contrary, that, given the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information, the risk of nonpersuasion ought to fall upon the district. *E.g., ante, at 63, 163 L. Ed. 2d, at 400-403* (Ginsburg, J., dissenting); *377 F.3d, at 456-459* (Luttig, J., dissenting); *Oberti v. Board of Ed. of Borough of Clementon School Dist., 995 F.2d 1204 (CA3 1993)*; *Lascari v. Board of Ed. of Ramapo Indian Hills High Scool Dist., 116 N. J. 30, 560 A.2d 1180 (1989).* My own view is that Congress took neither approach. It did not decide the "burden of persuasion" question; instead it left the matter to the States for decision.

The Act says that the "establish[ment]" of "procedures" is a matter for the "State" and its agencies. *§ 1415(a).* It adds that the hearing in question, an administrative hearing, is to be conducted by the "State" or "local educational agency." *20 U.S.C. § 1415(f)(1)(A) (2000 ed., Supp. V).* And the statute as a whole foresees state implementation of federal standards. *§ 1412(a)*; *Cedar Rapids Community School Dist. v.* [*70] *Garret F., 526 U.S. 66, 68, 119 S. Ct. 992, 143 L. Ed. 2d 154 (1999)*; *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 208, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).* The minimum federal procedural standards that the Act specifies are unrelated to the "burden of persuasion" question. And different States, consequently and not surprisingly, have resolved it in different ways. See, *e.g.*, Alaska Admin. Code, tit. 4, § 52.550(e)(9) (2003) (school district bears burden); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6)(ii)(I) (Supp. 2004) (same); Conn. Agencies Regs. § 10-76h-14 (2005) (same); *Del. Code Ann., Tit. 14, § 3140* (1999) (same); 1 D. C. Mun. Regs., tit. 5, § 3030.3 (2003) (same); W. Va. Code Rules § 126-16-8.1.11(c) (2005) (same); Ind. Admin. Code, tit. 511, Rule 7-30-3 (2003) (incorporating by reference *Ind. Code § 4-21.5-3-14* [**542] (West 2002)) (moving party bears burden); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, § 7(4) (2004) (incorporating by reference *Ky. Rev. Stat. Ann. § 13B.090(7)* (Lexis 2003)) (same); Ga. Comp. Rules & Regs., Rule 160-4-7-.18(1)(g)(8) (2002) (burden varies depending upon remedy sought); *Minn. Stat. Ann. § 125A.091, subd. 16* (West Supp. 2005) (same). There is no indication that this lack of uniformity has proved harmful.

Nothing in the Act suggests a need to fill every interstice of the Act's [***405] remedial scheme with a uniform federal rule. See *Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* (citations omitted). And should some such need arise--*i.e.*, if nonuniformity or a particular state approach were to prove problematic--the Federal Department of Education, expert in the area, might promulgate a uniform federal standard, thereby limiting state choice. *20 U.S.C. § 1406(a) (2000 ed., Supp. V)*; *Irving Independent School Dist. v. Tatro, 468 U.S. 883, 891-893, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984)*; see also *Barnhart v. Walton, 535 U.S. 212, 217-218, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002)*; *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-257, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995)*; *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).*

[*71] Most importantly, Congress has made clear that the Act itself represents an exercise in "cooperative federalism." See *ante , at 52-53, 163 L. Ed. 2d, at*

393-394 (opinion of the Court). Respecting the States' right to decide this procedural matter here, where education is at issue, where expertise matters, and where costs are shared, is consistent with that cooperative approach. See *Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 495, 122 S. Ct. 962, 151 L. Ed. 2d 935 (2002)* (when interpreting statutes "designed to advance cooperative federalism[,] . . . we have not been reluctant to leave a range of permissible choices to the States"). Cf. *Smith v. Robbins, 528 U.S. 259, 275, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)*; *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932)* (Brandeis, J., dissenting). And judicial respect for such congressional determinations is important. Indeed, in today's technologically and legally complex world, whether court decisions embody that kind of judicial respect may represent the true test of federalist principle. See *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 420, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)* (Breyer, J., concurring in part and dissenting in part).

Maryland has no special state law or regulation setting forth a special IEP-related burden of persuasion standard. But it does have rules of state administrative procedure and a body of state administrative law. The state ALJ should determine how those rules, or other state law, applies to this case. Cf., *e.g.*, Ind. Admin. Code, tit. 511, Rule 7-30-3 (2003) (hearings under the Act conducted in accord with general state administrative law); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, Section 7(4) (same). Because the state ALJ did not do this (*i.e.*, he looked for a federal, not a state, burden of persuasion rule), I would remand this case.

REFERENCES

29 Am Jur 2d, Evidence §§ 155 , *158*; *68 Am Jur 2d, Schools §§ 347*, *348*

20 U.S.C.S. §§ 1414(d), *1415(f)*

L Ed Digest, Schools § 10

L Ed Index, Education of Handicapped Act; Individuals with Disabilities Education Act; Presumptions and Burden of Proof

Annotation References

Parents' remedies, under Individuals with Disabilities Education Act provisions (*20 U.S.C.S. §§ 1415(e)(2)* and *1415(e)(3)*), for school officials' failure to provide free appropriate public education for child with disability--Supreme Court cases. *126 L. Ed. 2d 731*.

What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act (IDEA) (*20 U.S.C.A. §§ 1400 et seq.*). 161 A.L.R. Fed. 1.

What statute of limitations applies to civil actions brought in federal court under Education of the Handicapped Act (*20 U.S.C.S. §§ 1400 et seq.*) to challenge findings and decisions of state administrative agencies. 107 A.L.R. Fed. 758.

Construction of "stay-put" provision of Education of the Handicapped Act (*20 U.S.C.S. § 1415(e)(3)*), that handicapped child shall remain in current educational placement pending proceedings conducted under *section 103* A.L.R. Fed. 120.

Appropriateness of state administrative procedures under § 615 of Education for All Handicapped Children Act (*20 U.S.C.S. § 1415*). 64 A.L.R. Fed. 792.

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State Mandates

TAB “28”

JOHN F. SKELLY, Plaintiff and Appellant, v. STATE PERSONNEL BOARD et al., Defendants and Respondents

S.F. No. 23241

Supreme Court of California

15 Cal. 3d 194*; *539 P.2d 774*; *124 Cal. Rptr. 14*; *1975 Cal. LEXIS 226

September 16, 1975

SUBSEQUENT HISTORY: Respondents' petition for a rehearing was denied October 15, 1975. Richardson, J., did not participate therein.

PRIOR HISTORY: Superior Court of Sacramento County, No. 232477, Lloyd Allan Phillips, Jr., Judge.

DISPOSITION: The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd Allan Phillips, Jr., Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his allotted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (*Gov. Code, § 18500 et seq.*), including, in particular, *Gov. Code, § 19574*, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Permanent Employee Status as Protected by Due Process. --The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) Constitutional Law § 102--Due Process--Right to Governmental Benefit as Protected by Due Process. --A person's legally enforceable right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Due Process. --Due process does

not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

(4) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Statutes--Constitutionality. --Provisions of the State Civil Service Act (*Gov. Code, § 18500 et seq.*), including, in particular, *Gov. Code, § 19574*, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of *U.S. Const. 5th* and 14th Amends. and of *Cal. Const., art. I, §§ 7*, *15*.

(5) Administrative Law § 114--Judicial Review--Limited Nature--Review of State Personnel Board's Findings. --Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers from the state Constitution, the board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.

(6) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal--Judicial Review--Sufficiency of Evidence. --The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) Public Officers and Employees § 27--Duration and Termination of Tenure--Administrative Body's Discretion. --Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal--Judicial Review--Abuse of Discretion. --In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his allotted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL: Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent.

JUDGES: In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J., * concurred.

* Assigned by the Chairman of the Judicial Council.

OPINION BY: SULLIVAN

OPINION

[*197] [**776] [***16] Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department). [1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the *due process clauses of the Fifth* and *Fourteenth Amendments to the United States Constitution* and *article I, sections 7* and *15, of the California Constitution*.

1 Petitioner also named as defendants the Department and its director.

In July 1972 petitioner was employed by the Department as a medical consultant. [2] He held that position for about seven years and was a permanent civil service employee of the state. (See *Gov. Code, § 18528*.) [3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance,

(2) inexcusable absence without leave, and (3) other failure of good behavior [**777] [***17] during duty hours which caused discredit to the Department. [4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action [*198] would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the Board.

2 Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

3 *Government Code section 18528* provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (*Gov. Code, § 19170*.)

Hereafter, unless otherwise indicated, all section references are to the Government Code.

4 Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not [*199] return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home. [5] He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

5 Moore apparently was not available at that particular time.

[**778] [***18] Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior [6] and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

6 The reports prepared during petitioner's probationary period similarly rated his work.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance.

[*200] On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four-hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[appellant] is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety [**779] [***19] and denied a petition for rehearing. [7] These proceedings followed.

7 The foregoing administrative actions conformed with the procedure prescribed by *sections 19574- 19588* for the dismissal of a permanent civil service employee.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without [*201] requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases: First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state *Constitution. Article XXIV, section 1, subdivision (b)*, describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on *merit* . . . ." [8] (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once "'[abolishes] the so-called spoils system, and [at the same time] . . . [increases] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] . . . ." (*Steen v. Board of Civil Service Commrs. (1945) 26 Cal.2d 716, 722 [160 P.2d 816]*.) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees. [9]

8 Under the prescribed constitutional scheme, "[the] civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (*Cal. Const., art. XXIV, § 1, subd. (a).*) *Article XXIV, section 4*, lists those categories of officers and employees who are exempt from the civil service.

9 The composition of the Board is described in *article XXIV, section 2, subdivision (a), of the California Constitution* as follows: "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."

The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

[*202] To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors. [10] Under section 19500, "[the] tenure of every permanent [**780] [***20] employee holding a position is *during good behavior*. Any such employee may be . . . permanently separated [from the state civil service] through resignation or *removal for cause* . . . or terminated for medical reasons . . . ." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action, [11] are statutorily defined. (§ 19572.)

10 In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, *ante*) and we limit our discussion accordingly.

11 *Section 19570* provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)

Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

The procedure by which a permanent employee may be dismissed or otherwise disciplined is described in *sections 19574 through 19588*. Under *section 19574*, [12] the "appointing power" [13] or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken. [14] (*California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]*; Personnel Transactions Man., March 1972.) [*203] No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days *after* the effective date of the action, the appointing power *must* serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (*§ 19574.*) [15]

12 *Section 19574* provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discip-

line specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

13 Under *section 18524*, "'[appointing] power' means a person or group having authority to make appointments to positions in the State civil service."

14 For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

15 See footnote 12, *ante*.

In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

Except in cases involving minor disciplinary matters, [16] the employee has a right to an evidentiary hearing to challenge the action taken against him. [17] To obtain such a [**781] [***21] hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof. [18] The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (*§ 19575*; see fn. 18, *ante*.) Failure to file an answer within the specified time period results in the punitive action becoming final. (*§ 19575*.)

16 Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

17 *Section 19578* provides that "[whenever] an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of *Section 11513 of the Government Code*, except that the employee and other persons may be examined as provided in *Section 19580*, and the parties may submit all proper and competent evidence against or in support of the causes."

18 *Section 19575* describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

[*204] In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (*§ 19578*; see fn. 17, *ante*.) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing [19] and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (*§ 19583*.) [20] If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (*§ 19583*; see fn. 20, *ante*.) The employee is entitled to the

payment of salary for any period of time during which the punitive action was improperly in effect. (*§ 19584*.) [21]

19 At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

20 Under the terms of *section 19583*, "[the] board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

21 *Section 19584* provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

[**782] [***22] In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.) [22] As an alternative or in addition to the rehearing procedure, the employee may seek review of [*205] the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (*§ 19588*; *Boren v. State Personnel Board (1951) 37 Cal.2d 634, 637 [234 P.2d 981]*.) [23]

22 Section 19586 provides in pertinent part that "[within] thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition."

23 *Section 19588* provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."

The judicial review proceedings are governed by *Code of Civil Procedure section 1094.5*. (*Boren v. State Personnel Board, supra, at p. 637*.)

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the *Fifth* and *Fourteenth Amendments to the United States Constitution* and *article I, sections 7* and *15 of the California Constitution*. His contention is that these provisions authorize a deprivation of property without a *prior* hearing or, for that matter, without any of the *prior* procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (*§§ 19578*, *19580*, *19581*), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (*§ 19574*; see fn. 12, *ante*.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue.

In *Arnett v. Kennedy (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633]*, the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (*5 U.S.C. § 7501*.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (*5 U.S.C. § 7501 (a)*.) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension.

[*206] Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (*5 U.S.C. § 7501 (b)*; *5 C.F.R. § 752.202 (a)*, *(b)*, *(f)*.) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (*5 C.F.R. §§ 752.202 (b)*, *752.203*, 771.205, 771.208, 771.210-771.212, 772.305 [**783] [***23] (c).) The timing of this hearing -- *after*, rather than *before* the removal decision becomes effective -- constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

(1) We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In *Board of Regents v. Roth (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701]*, the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (*Id., at pp. 571-572 [33 L.Ed.2d at p. 557*].) Rather, "[the] Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms." (*Id ., at p. 576 [33 L.Ed.2d at p. 560*].)

Expanding upon its explanation, the *Roth* court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement [*207] to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id., at p. 577 [33 L.Ed.2d at p. 561*].)

(2) Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg v. Kelly (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]*; see *Geneva Towers Tenants Org. v. Federated Mortgage Inv. (9th Cir. 1974) 504 F.2d 483, 495-496* (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that . . . justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,'" has a property interest in such continued employment within the purview of the due process clause. (*Perry v. Sindermann (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]*; see also *Board of Regents v. Roth, supra, 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562*].) And, in *Arnett v. Kennedy, supra, 416 U.S. 134*, six members of the court, relying upon the principles set forth in *Roth*, concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (*Id., at p. 167 [40 L.Ed.2d at pp. 40-41*] (concurring opn., Justice Powell); *id., at p. 185 [40 L.Ed.2d at p. 51*] (concurring and dissenting opn., Justice White); *id., at p. 203 [40 L.Ed.2d at p. 61*] (dissenting opn., Justice Douglas); *id., at p. 211 [40 L.Ed.2d at p. 66*] (dissenting opn., Justice Marshall).)

[**784] [***24] The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees

may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these [*208] punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of *Roth*. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with *Sniadach v. Family Finance Corp. (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820]*, and continuing with *Fuentes v. Shevin (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983]*, and the line of California decisions following *Sniadach* and *Fuentes* adhered to a rather rigid and mechanical interpretation of the due process clause. Under these decisions, every significant deprivation -- permanent or merely temporary -- of an interest which qualified as "property" was required under the mandate of due process to be *preceded* by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (*Fuentes v. Shevin, supra, 407 U.S. 67, 82, 88, 90-91 [32 L.Ed.2d 556, 570-571, 574-576]*; *Bell v. Burson (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]*; *Boddie v. Connecticut (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]*; *Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]*; *Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]*; *Randone v. Appellate Department (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]*; *Blair v. Pitchess (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]*; *McCallop v. Carberry (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122]*.) These authorities uniformly held that such hearing must meet certain minimum procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (*Brooks v. Small Claims Court, supra, 8 Cal.3d at pp. 667-668*; *Rios v. Cozens (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979]*, vacated *sub nom. Dept. Motor Vehicles of California v. Rios (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019]*, new dec. *Rios v. Cozens (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]*; see also *Goldberg v. Kelly (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011]*.)

[*209] However, as we noted a short time ago in *Beaudreau v. Superior Court (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713]*, more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial-type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (*North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975) 419 U.S. 601, 606, [42 L.Ed.2d 751, 757, 95 S.Ct. 719]*; *Goss v. Lopez (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, 95 S.Ct. 729]*; *Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]*; *Arnett v. Kennedy, supra, 416 U.S. 134, 164 [40 L.Ed.2d 15, 39]* [**785] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the *timing* and *content* of the notice and *the nature of the hearing* will depend on an appropriate accommodation of the competing interests involved." (*Goss v. Lopez, supra, 419 U.S. 565, 579 [42 L.Ed.2d 725, 737]*, italics added; see also *Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415*]; *Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43*] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a *prior* hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (*Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415*]; *Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43*] (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see

Beaudreau v. Superior Court, supra, 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In *Mitchell v. W. T. Grant Co., supra, 416 U.S. 600*, [*210] the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized, [24] that the creditor's interest might be seriously jeopardized by preseizure notice and hearing, [25] and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor. [26] On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (*North Georgia Finishing, Inc. v. Di-Chem, Inc., supra, 419 U.S. 601, 606 [42 L.Ed.2d 751, 757]*.) In reaching its decision, the court emphasized that "[the] Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (*Id., at p. 607 [42 L.Ed.2d at p. 757*].)

24 Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (*Id., at pp. 605-606 [40 L.Ed.2d at pp. 412-413*].)

25 The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (*Id., at pp. 608-609 [40 L.Ed.2d at pp. 413-415*].)

26 The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his property and to an award of any damages. (*Id., at pp. 606-610 [40 L.Ed.2d at pp. 412-415*].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In *Goss v. Lopez, supra, 419 U.S. 565*, [***26] [**786] the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (*Id., at pp. 574-581 [42 L.Ed.2d at pp. 734-739*].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (*Id., at pp. 581-582 [42 L.Ed.2d at p. 738-739*].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (*Id., at p. 583 [42 L.Ed.2d at p. 740*].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process [*211] Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (*Id., at p. 583 [42 L.Ed.2d at p. 740*].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in *Arnett v. Kennedy, supra, 416 U.S. 134*, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (*Id., at pp. 153-155 [40 L.Ed.2d at pp. 32-34*].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (*Id., at pp. 153-154 [40 L.Ed.2d at pp. 32-33*].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the

limitations on the procedures which are to be employed in determining that right . . . ." (*Id., at pp. 153-154 [40 L.Ed.2d at p. 33*].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. *at p. 211 [40 L.Ed.2d at p. 66*]; see also Justice [*212] Powell's concurring *opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41]*, and Justice White's concurring and dissenting opn. at *pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51*].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (*Id., at p. 167 [40 L.Ed.2d at pp. 40-41*] (concurring opn., Justice Powell), *p. 185 [40 L.Ed.2d p. 51*] [**787] (concurring and dissenting opn., Justice White), *p. 211 [40 L.Ed.2d p. 66*] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (*Id., at p. 167 [40 L.Ed.2d at pp. 40-41*] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [*40 L.Ed.2d at p. 51*], and Justice Marshall's dissenting opn. at p. 211 [*40 L.Ed.2d at p. 66*].)

In *Arnett*, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee maybe *finally* terminated for misconduct." (*Id., at p. 185 [40 L.Ed.2d at p. 51*], italics added (concurring and dissenting opn., Justice White); see also, Justice Powell's concurring [opn. at *p. 167 40 L.Ed.2d at pp. 40-41*], and Justice Marshall's dissenting opn. at p. 212 [*40 L.Ed.2d at pp. 66-67*].) The question then narrowed to whether such a hearing had to be afforded *prior* to the time that the *initial* removal decision became effective. (*Id., at p. 167 [40 L.Ed.2d at pp. 40-41*] (concurring opn., Justice Powell), *p. 186 [40 L.Ed.2d at pp. 51-52*] (concurring and dissenting opn., Justice White), *p. 217 [40 L.Ed.2d at pp. 69-70*] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee . . . against the interest of the affected employee in continued public employment." (*Id., at pp. 167-168 [40 L.Ed.2d at p. 41*] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. *at p. 188 [40 L.Ed.2d at pp. 52-53*], and Justice Marshall's dissenting *opn. at p. 212 [40 L.Ed.2d at pp. 66-67*].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is [*213] to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (*Id., at p. 168 [40 L.Ed.2d at p. 41*] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting *opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56*] and Justice Marshall's dissenting *opn. at pp. 223-225 [40 L.Ed.2d at pp. 73-74*].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, . . . a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]" [27] (*Id., at pp. 219-220 [40 L.Ed.2d at p. 71*] [**788] [***28] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at *pp. 194-195 [40 L.Ed.2d at pp. 56-57]* and Justice Powell's concurring *opn. at p. 169 [40 L.Ed.2d at p. 42*].)

27 Under California law, "[an] individual is disqualified for unemployment compensation benefits if the director finds that . . . he has been discharged for misconduct connected with his most recent work." (*Unemp. Ins. Code, § 1256.*) Thus, a state civil service employee who has been discharged for cause may be disqualified from

receiving unemployment compensation in some circumstances.

The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensation [*214] guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; *5 U.S.C. § 5596*. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]." (*Id., at p. 170 [40 L.Ed.2d at p. 42*].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "[concluded] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (*Id., at pp. 195-196 [40 L.Ed.2d at p. 57*].) [28]

28 Justice White's dissent was based upon his view that the employee in *Arnett* had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (*Id., at p. 199 [40 L.Ed.2d at p. 59*].)

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing." [29] (*Id., at p. 222 [40 L.Ed.2d at pp. 72-73*], quoting from *Fuentes v. Shevin, supra, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576*]; see also Justice Marshall's dissenting *opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73*].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (*Id., at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75]*.)

29 Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in *Arnett* had been fired for exercising his right of free speech, and therefore that the discharge violated the *First Amendment to the United States Constitution*. (*Id., at pp. 203-206 [40 L.Ed.2d at pp. 61-63*].)

[*215] Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. **(3)** It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which [**789] [***29] the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

California statutes governing punitive action provide the permanent employee with none of these prior procedural rights. Under *section 19574*, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days *after* the effective date of the punitive action. (*§ 19574*.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (*§ 19578*), and is compensated for lost wages if the Board determines that the punitive action was improper. (*§ 19584*.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. **(4)** Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (*Arnett v.*

Kennedy, supra, 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell)), we hold that the provisions of the State Civil Service Act, including in particular *section 19574*, governing the taking of punitive action against a permanent civil service employee violate the *due process clauses of the Fifth* and *Fourteenth Amendments to the United States Constitution* and of *article I, sections 7* and *15 of the California Constitution*.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate *Arnett v. Kennedy, supra, 416 U.S. 134*, defendants first contend that we must apply a different and less stringent standard of due [*216] process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in *Arnett v. Kennedy, supra, 416 U.S. 134*, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to *section 19574.5*, [30] which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute [**790] [***30] but necessitating similar prompt action may conceivably arise under *section 19574* (see fn. 12, *ante*). In answering this argument, we need only point out that *section 19574* is not limited to the extraordinary circumstances which defendants conjure up. (*Sniadach v. Family Finance Corp., supra, 395 U.S. 337, 339 [23 L.Ed.2d 349, 352]*; *Randone v. Appellate Department, supra, 5 Cal.3d at pp. 541, 553*; *Blair v. Pitchess, supra, 5 Cal.3d at p. 279*.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt removal. (*Sniadach, supra, 395 U.S. at p. 339 [23 L.Ed.2d at p. 352*].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (*Randone v. Appellate Department, supra, 5 Cal.3d at p. 541*.)

30 *Section 19574.5* provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of *Section 19574*, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action."

[*217] II

(5) (See fn. 31.) Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review [31] the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

31 The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution . . . [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (*Shepherd v. State Personnel Board (1957) 48 Cal.2d 41, 46 [307 P.2d 4]*; see also *Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29]*.)

(6) The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, peti-

tioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[in] a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (*Magit v. Board of Medical Examiners (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]*; see also *Nightingale v. State Personnel Board (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]*; *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]*; *Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337]*.) **(7)** Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal [*218] discretion, which is, in the circumstances, judicial discretion." (*Harris, supra*, citing *Martin, supra*, and *Bailey v. Taaffe (1866) 29 Cal. 422, 424*.) In considering whether such abuse occurred in [**791] [***31] the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[harm] to the public service." (*Shepherd v. State Personnel Board, supra, 48 Cal.2d 41, 51*; see also *Blake v. State Personnel Board (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50]*.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (*Blake, supra, at p. 554*.)

(8) Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service. [32] To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions, [33] it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

32 Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

33 Apparently, petitioner's unexcused absence on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful, [*219] extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [para.] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we [**792] [***32] imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismis-

sal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the *Fifth* and *Fourteenth Amendments to the United States Constitution*, and *article I, sections 7* and *15, of the California Constitution*; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its [*220] decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion. [34]

34 As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

TAB “29”

Received
June 17, 2011
Commission on
State Mandates

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L. Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.	Case No.: 07-TC-09 *Discharge of Stormwater Runoff - Order No. R9-2007-0001* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on March 26, 2010*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

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

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

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- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

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Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

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

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[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

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

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

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

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> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

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

[7] *Id.* at page 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements." (Wat. Code, § 13263).

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

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

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

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

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

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conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

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

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

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

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> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

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

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[17]

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

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

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

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

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In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

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

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

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continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

[21] California Code of Regulations, title 23, section 2235.4.

[22] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

[23] *Id.* at page 870.

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almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

[29] The Principal Permittee is the County of San Diego.

[30] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

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Claimants stated that the Copermittees' costs to comply with this activity was $131,250 in fiscal year 2007-2008.

C. Hydromodification[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

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[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]…[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

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where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

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category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

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[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). … Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

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(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

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filtration, biological uptake, media absorption or any other physical, biological, or chemical process."

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

[47] According to Attachment C of the permit, May 1 through September 30 is the dry season.

[48] Attachment C of the permit defines "anthropogenic litter" as "trash generated from human activities, not including sediment."

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

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Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

[51] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

[55] Section A is "Prohibitions and Receiving Water Limitations."

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Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[56] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

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abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears … they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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

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As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

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

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

State Water Resources Control Board: The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

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Interested Party Comments

Bay Area Stormwater Management Agencies Association (BASMAA): In comments submitted February 4, 2009, BASMAA speaks generally about California's municipal stormwater permitting program, stating that "increased requirements entail both new programs and higher levels of service." BASMAA also states:

> [T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State's assertion that its 'discretion to exceed MEP [the maximum extent practicable standard] originates in federal law' and 'requires [it], as a matter of law, to include other such permit provisions as it deems appropriate' is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work "proactively and collaboratively" with local governments in "prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues."

League of California Cities (League) and California State Association of Counties (CSAC): The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it "and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees."

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated "because no private development impact have generated the need for the projects."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

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

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

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crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

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

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

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

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

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

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decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

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

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants' discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

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

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

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

[71] Water Code section 13200 et seq.

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and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

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

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge.[73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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

[73] The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

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

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

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In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

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

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

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

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state … and … federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

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[77] The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

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

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Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances … owned or operated by a State, city, town, borough, county, parish, district, association, or other public body …." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority. [82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

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[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

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

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

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Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

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

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

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

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

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

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

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

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elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. …[T]he executive Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

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

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

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

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

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

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[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

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

> system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

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

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

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. …[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

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

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

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> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

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[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

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

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

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

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

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[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]…[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

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will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

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

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

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

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

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

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

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> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. …

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. … controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

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

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

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

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures …" as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

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[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

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

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

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]…[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) <u>HMP Reporting</u>

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

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required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

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[111] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra,* 124 Cal.App.4th 866, 870.

[112] The Fact Sheet/Technical Report was attached to the test claim.

[113] According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

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the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it … did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

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MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

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

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

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

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

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[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[119] Part D.1.d.(5) of the permit lists source control BMP requirements.

[120] Part D.1.d.(6) of the permit lists treatment control BMP requirements.

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> (b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.
>
> (c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:
>
> i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
>
> ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

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did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

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specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

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

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

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

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And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xiii. Identification of the total distance of curb-miles swept.
>
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
>
> xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

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were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]…[¶]
>
> F.3.a.(4) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

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The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

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

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

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

> vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
>
> vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
>
> viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls…." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** … requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

> priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

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manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

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Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the … educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

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

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

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

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Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[135] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

> **Laws, Regulations, Permits, & Requirements:** Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board's General NPDES Permit for Ground Water Dewatering; Regional Board's 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).
>
> **Best Management Practices:** Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimized the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.
>
> **General Urban Runoff Concepts:** Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.
>
> **Other Topics:** Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

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Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

> [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: [¶]…[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

> least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

> (d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development … of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

> iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
>
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
>
> v. Current advancements in BMP technologies.
>
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  > Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

- Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

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- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
    - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

[137] Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

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

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

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

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below:
[¶]…[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." … Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]…[¶]

> The 2007 Permit imposes standards far beyond those listed in … the 2001 Permit …. The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

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[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

[144] San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

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A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]…[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]…[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. …[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

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[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

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education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

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

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

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

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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[152] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" [40 CFR § 122.26 (b)(4).]

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

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> management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 …, the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

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

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

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

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I … [that] … support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

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[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

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Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

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> submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:
>
> (1) The status of implementing the components of the storm water management program that are established as permit conditions;
> (2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
> (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
> (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
> (5) Annual expenditures and budget for year following each annual report;
> (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
> (7) Identification of water quality improvements or degradation.

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quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

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

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

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

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

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[165] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

[169] Section A is "Prohibitions and Receiving Water Limitations."

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The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

[171] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

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The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]…[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

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[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

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Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

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or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

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

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

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

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

> constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.
>
> e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). … The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program … [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]…[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling … the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

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[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

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

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

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

> 1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> (a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]
>
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
>
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
>
> (4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;
>
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
>
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
>
> (7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

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[182] The Principal Permittee is the County of San Diego.

[183] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

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Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

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

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

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Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

[185] The County and city declarations are attached to the test claim.

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

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

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

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

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

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

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

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

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

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> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

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[188] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487. Emphasis in original.

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

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

1. Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

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[191] *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[192] *Id.* at page 1358-1359.

[193] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

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[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

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

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

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

[198] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 875-877.

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

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

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

[202] *Id.* at 952.

[203] *Ibid.*

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

[205] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

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[206] *Id.* at page 1480.

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

[208] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

[209] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830.

[210] *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

[211] *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

[212] *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

[213] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

[214] *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

[215] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

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approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

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

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court*,[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell*.

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

[216] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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

[218] *Id.* at page 401.

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to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

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[219] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

[221] California Constitution, article XIII D, section 1, subdivision (b).

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decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v.City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except … hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

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The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

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[226] *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

[227] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[228] Government Code section 66000, subdivision (b).

[229] Government Code section 66000, subdivision (d).

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

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a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

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section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

[231] Government Code section 66005, subdivision (a).

[232] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[233] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

[234] Government Code section 66000, subdivision (d).

[235] Government Code section 66000, subdivision (d).

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order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause … impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

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[236] *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

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

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

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[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

> which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

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[240] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

[242] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

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[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

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[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

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Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities …. [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

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

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
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> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

[250] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

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means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

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

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

[252] The County and city declarations are attached to the test claim.

Received
June 17, 2011
Commission on
State Mandates

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

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[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection…." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xiii. Identification of the total distance of curb-miles swept.
xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
xv. Amount of material (tons) collected from street and parking lot sweeping.

Conveyance system cleaning (D.3.a.(3)):

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]…[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

IV. Program Effectiveness Assessment (parts I.1 & I.2)

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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[257] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban

Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

[261] Section A is "Prohibitions and Receiving Water Limitations."

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]…[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

TAB “30”

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Quality Control Board Order No. 01-182 Permit CAS004001 Parts 4C2a., 4C2b, 4E & 4F5c3 Filed September 2, 2003, (03-TC-04) September 26, 2003 (03-TC-19) by the County of Los Angeles, Claimant Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants	Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 *Municipal Stormwater and Urban Runoff Discharges* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 31, 2009)*

STATEMENT OF DECISION

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

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

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

Summary of Findings

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

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

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

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

BACKGROUND

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

History of the test claims

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

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

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

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

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

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

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

Municipal stormwater

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

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

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

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

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

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

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

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

California law

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

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

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

Federal law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General state-wide permits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Co-Claimants' Position

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

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

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

Claimant County asserts that this permit condition requires the following:

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

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

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

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

a) Commercial Facilities

(1) Restaurants

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

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

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

(2) Automotive Service Facilities

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

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

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

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

(3) Retail Gasoline Outlets and Automotive Dealerships

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

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

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

b) Phase I Facilities[33]

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

Frequency of Inspection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.

c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

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

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

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

State Agency Positions

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

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

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

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

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

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

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

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

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

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

Interested Party Positions

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

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

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

COMMISSION FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[52] Water Code section 13200 et seq.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] Water Code section 13376.

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

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

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

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

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

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

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

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[60] *Id.* at page 918.

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

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

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

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

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

[66] *Id.* at page 173.

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

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

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

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

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

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

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

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

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

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

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

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

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

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

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

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

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

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

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

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

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

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

And the federal stormwater statute states that the permits:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[83] *Id.* at page 3.

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

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

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

The applicable federal regulations state as follows:

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

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

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

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

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

> and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:
>
> (A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]
>
> (3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

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

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

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

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

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

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

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

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

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

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

[93] *Id.* at page 173.

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

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

[96] *Ibid.*

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

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

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

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

Part 4F5c3 of the permit states as follows:

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

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

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

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

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

(2) Automotive Service Facilities

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

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

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

(3) Retail Gasoline Outlets and Automotive Dealerships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Phase I Facilities[102]

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

Frequency of Inspection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -
>
> (1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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[108] Permit, page 11, paragraph 22.

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

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

b) Phase I Facilities[111]

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

Frequency of Inspection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  For construction sites one acre or greater:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[143] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)
>
> When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

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

> (d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.
>
> (B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.
>
> (C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]
>
> (2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.
>
> (B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[156] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[160] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

TAB “31”

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND; PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT; CITY OF TACOMA; PORT OF SEATTLE; SNOHOMISH COUNTY; CLARK COUNTY; PACIFICORP; and PUGET SOUND ENERGY,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PHASE I

PCHB NOS. 07-021, 07-026, 07-027
07-028, 07-029, 0-030,
07-037

These consolidated appeals involve the regulation of stormwater discharges from municipal storm sewer systems under a National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit (State Waste Permit). In these appeals, multiple parties challenge the validity of the Department of Ecology's (Ecology) 2007 Phase I Municipal Stormwater General Permit (Phase I Permit). This permit was issued pursuant to the

Federal Water Pollution Control Act, commonly known as the "Clean Water Act" (CWA), 33 U.S.C. § 1251 *et seq.* and the state Water Pollution Control Act, (WPCA), Chapter 90.48 RCW.

The Pollution Control Hearings Board (Board) held a multiple day hearing between April 29, 2008 and May 8, 2008. Attorneys Todd True and Jan Hasselman represented Appellants Puget Soundkeeper Alliance and People for Puget Sound (PSA). Attorney Tad H. Shimazu represented Appellant Pierce County. Assistant City Attorney Doug Mosich represented Appellant City of Tacoma. Attorneys Susan Ridgley and Tanya Barnett represented Appellant Port of Seattle. Catherine A. Drews and Elizabeth E. Anderson, Deputy Prosecuting Attorneys, represented Appellant Snohomish County. E. Bronson Potter, Senior Deputy Prosecuting Attorney and Rodney Swanson, Clark County Department of Public Works represented Appellant Clark County. Attorneys Loren R. Dunn and Blake Mark-Dias represented Appellants Pacificorp and Puget Sound Energy (Utilities). Ronald L. Lavigne, Senior Counsel, and Thomas J. Young, Assistant Attorney General represented Respondent Ecology. Assistant City Attorney Theresa R. Wagner represented Intervenor City of Seattle. Senior Deputy Prosecuting Attorney Joseph B. Rochelle and Deputy Prosecutor Verna P. Bromley represented Intervenor King County. Attorney Carolyn Lake represented Intervenor Port of Tacoma. Stephen Klasinski, Assistant Attorney General represented Intervenor Washington State Department of Transportation (WSDOT).

Chair, Kathleen D. Mix, William H. Lynch, and Andrea McNamara Doyle comprised the Board. Administrative Appeals Judge Kay M. Brown, presided for the Board. Randi Hamilton

and Kim L. Otis of Gene Barker and Associates of Olympia, Washington provided court reporting services.

PROCEDURAL BACKGROUND

On January 17, 2007, Ecology issued the Phase I Permit for discharges from large and medium municipal separate storm sewer systems (called MS4s). The Phase I Permit went into effect on February 16, 2007.

PSA, Pierce County, City of Tacoma, Port of Seattle, Snohomish County, Clark County, and the Utilities appealed the Phase I Permit.[1] The Board conducted pre-hearing conferences, and entered pre-hearing orders for the Phase I Appeal. The parties raised multiple issues. The Board addressed many of these issues in a separate summary judgment order[2] and has resolved others through orders on summary judgment and after a hearing on the merits related to the Permit's Special Condition S4.[3] The parties also withdrew some of the issues. This decision resolves the remaining issues, which include the following:[4]

C. Special Condition 8 re: Monitoring (challenged only by Clark and Pierce County)[5]

[1] City of Pacific (PCHB No. 07-031), Whatcom County (PCHB No. 07-032), and Sammamish Plateau Water & Sewer District (PCHB No. 07-024) filed additional appeals, but they are not part of this consolidated action.
[2] See Order on Dispositive Motions (Phase I Municipal Stormwater Permit), issued on April 7, 2008.
[3] See Order on Dispositive Motions: Condition S4, issued on April 2, 2008 and Findings of Fact, Conclusions of Law and Order, Condition S4, issued on August 7, 2008.
[4] The numbering of these issues was retained from the numbering system used in the Third Pre-Hearing Order issued on December 11, 2007.
[5] All of the permittee appellants initially raised issues related to the S8 monitoring provisions. These issues were resolved through an agreement between Ecology and all of the permittee appellants except Clark and Pierce County. *See* Ex. Ecy 11 (Phase I). The agreement also resolves issues raised by Snohomish County related to Special Condition S7.

1. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to achieve the goals of the statutory municipal stormwater permit program?

3. Whether the monitoring requirements imposed in Special Condition S8 are overly broad, overly prescriptive, and cost-ineffective so that requiring implementation of such requirements as written is unlawful, impracticable, and/or unreasonable?

E. Issues Specific to the Ports of Seattle and Tacoma

5. Whether the requirement in Special Condition S6.E.7 to prepare and implement SWPPP(s) for "all Port-owned lands," regardless of their capacity to generate pollutants or other site-specific characteristics, is unlawful, unreasonable, unjust, or invalid?

F. Joint Environmental Legal Issues

1. Low-Impact Development:

a. Does the permit fail to require maximum on site dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully cause or contribute to violations of water quality standards?

b. Does the permit fail to require maximum onsite dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully allow permittees to discharge pollutants that have not been treated with all known available and reasonable methods of treatment ("AKART"), and/or fail to reduce the discharge of pollutants to the maximum extent practicable ("MEP")?

2. Existing Development:

a. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully cause or contribute to violations of water quality standards?

b. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully allow permittees to discharge pollutants that have not been treated with AKART, and/or fail to reduce the discharge of pollutants to MEP?

3. Monitoring: Is the monitoring required under Permit Condition S.8 unlawful because it is inadequate to determine whether: (i) the permittee is in compliance with water quality standards; (ii) discharges are causing or contributing to violations of water quality standards; or (iii) discharges are being treated with AKART and/or MEP?[6]

4. Water Quality Standards Violations:

   a. Does the Phase I permit fail to ensure that discharges will not cause or contribute to violations of water quality standards?[7]

5. Compliance:

   a. Does the permit unlawfully provide for compliance with permit terms on a schedule that is indefinite and unenforceable, not as expeditious as possible, and/or in excess of statutory deadlines?
   b. Does the permit unlawfully allow a permittee to create and implement permit requirements without Ecology's oversight or involvement?

Based on pre-filed testimony, multiple days of sworn testimony of witnesses, extensive exhibits submitted into the record, and argument from counsel representing the numerous parties that participated in these consolidated appeals, and having fully considered the record, the Board enters the following decision:

[6] PSA is not challenging the monitoring provisions of the permit. This issue is brought by the Utilities only.
[7] This issue also includes the issue originally stated as S4.6: Does the prohibition on violations of water quality standards contained in Permit Condition S4 unlawfully or unreasonably conflict with the other provisions of the permit?

SUMMARY OF THE DECISION

The Board concludes that the monitoring program established in Special Condition S8 and required of all permittees is a valid exercise of Ecology's technical expertise and discretion. (Issues C.1 and 3, and F.5). The Board upholds the permit term requiring that Stormwater Pollution Prevention Plans (SWPPPs) be prepared on all port-owned lands, but directs that Ecology modify the condition to exempt environmental mitigation sites owned by the Port of Tacoma from the SWPPP preparation requirement. (Issue E.5). The Board concludes that the Phase I Permit fails to require that the municipalities control stormwater discharges to the maximum extent practicable, and does not require application of all known, available, and reasonable methods to prevent and control pollution, because it fails to require more extensive use of low impact development (LID) techniques. (Issue F.1.b). To remedy this problem, the Board directs Ecology to make specific changes to some provisions in the permit, and also remands the permit with direction to Ecology to require the permittees to develop methods for use of low impact development at parcel and subdivision levels in their jurisdictions. The Board concludes that permittees must provide information in their annual report to Ecology on the extent to which basin planning is being undertaken or should be considered in their jurisdiction in order to assist with future phases of the permit. The areas identified should be relatively undeveloped where new development is occurring, and from which discharges may impact aquatic resources. The Board concludes that the structural stormwater control program provisions of the permit, as drafted, constitute impermissible self regulation. (Issues F.2 and F.5.b). To remedy this deficiency, the Board directs modification of the permit to require

permittees to describe the prioritization of their selected structural control projects. The Board affirms the source control program requirements without change. Finally, the Board concludes that PSA and the Utilities failed to prove that any of the conditions of the permit violate the timing requirements of 33 U.S.C. § 1342 (p)(4)(A) (Issue F.5.a).

FINDINGS OF FACT

A. History of Phase I Permit

1.

Ecology developed the current Phase I Permit through an eight year long process. The 2007 Phase I Permit replaced the first municipal stormwater NPDES and State Waste Permits, which were issued in 1995 and expired in July of 2000. *Testimony of Wessel, Moore, Exs. Muni 0002, p. 17, 0006, 0007, 0008, 0009.*

2.

On January 19, 1999, Ecology filed a Notice of Intent to reissue the 1995 permits. *Ex. Muni 0002, p. 6.* Ecology formed an advisory committee, which included representatives from cities, counties, state and federal agencies, environmental groups, and the public, to assist with development of the revised permit. This committee met several times during 1999 and 2000. *Testimony of Wessel, Moore, Exs. Muni 0002, p. 6-7.* The 1995 Phase I Permit closely followed the EPA Phase I Regulations, which allowed the permittees to propose what was contained within their own stormwater programs. Ecology was dissatisfied with this approach and decided that more detailed requirements were needed for the 2007 Phase I Permit. *Testimony of Moore.*

3.

Completion of the new permit was delayed at several junctures as a result of a number of intervening events and shifting priorities, including the federal listing of Puget Sound Chinook Salmon in 1999, the adoption of EPA's Phase II rules, and Ecology's decision to revise the state's Stormwater Management Manuals and develop the first Phase II municipal stormwater permits in tandem with the Phase I permit update. *Testimony of Wessel, Moore, Exs. ECY 6 (Phase I), Muni 0002, p. 7.*

4.

In response to legislative interest in the new federal requirements for municipal stormwater permits, Ecology convened two advisory groups during the summer of 2003: one for Eastern Washington and one for Western Washington. Each advisory group submitted a report of its findings to Ecology in early December, 2003. Ecology developed its own recommendations and published these, together with the recommendations from both advisory groups, in a report to the Legislature dated January, 2004. *Testimony of Moore, Exs. ECY 6 (Phase I), Muni 0002, p. 7.*

5.

Ecology filed a notice of intent to issue the Phase I and Phase II Permits in June of 2004. The agency released the first preliminary draft of the Phase I Permit for public comment in May, 2005, and the first formal draft in February, 2006. *Exs. PSA 018, Muni-0100.* Ecology received and reviewed thousands of pages of public comment, and responded to those comments in a 205 page document when it released the revised, final permit in January, 2007. *Exs. Muni 002, p. 7-*

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*** CURRENT THROUGH PL 112-13, APPROVED 5/12/2011 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
RESEARCH AND RELATED PROGRAMS

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33 USCS § 1251

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act *[33 USCS §§ 1251* et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 *USCS §§ 1251* et seq.]--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act *[33 USCS §§ 1251* et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act [33 *USCS §§ 1251* et seq.]. It is the policy of Congress that the States manage the construction grant program under this Act *[33 USCS §§ 1251* et seq.] and implement the permit programs under sections 402 and 404 of this Act *[33 USCS §§ 1342, 1344].* It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall

take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer *33 USCS §§ 1251* et seq. Except as otherwise expressly provided in this Act *[33 USCS §§ 1251* et seq.], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act *[33 USCS §§ 1251* et seq.].

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act *[33 USCS §§ 1251* et seq.] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing *33 USCS §§ 1251* et seq. It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act *[33 USCS §§ 1251* et seq.] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [33 *USCS §§ 1251* et seq.]. It is the further policy of Congress that nothing in this Act [33 *USCS §§ 1251* et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

HISTORY:
(June 30, 1948, ch 758, Title I, § 101, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 816; Dec. 27, 1977, P.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, P.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
The Federal Water Pollution Control Act, contained in this chapter, was originally enacted by Act June 30, 1948, ch 758, 62 Stat. 1155, and amended by Acts July 17, 1952, ch 927, 66 Stat. 755; July 9, 1956, ch 518, 70 Stat. 498; June 25, 1959, P.L. 86-70, 73 Stat. 141; July 12, 1960, P.L. 86-624, 74 Stat. 411; July 20, 1961, P.L. 87-88, 75 Stat. 204; Oct. 2, 1965, P.L. 89-234, 79 Stat. 903; Nov. 3, 1966, P.L. 89-753, 80 Stat. 1246; April 3, 1970, P.L. 91-224, 84 Stat. 91; Dec. 31, 1970, P.L. 91-611, 84 Stat. 1818; July 9, 1971, P.L. 92-50, 85 Stat. 124; Oct. 13, 1971, P.L. 92-137, 85 Stat. 379; March 1, 1972, P.L. 92-40, 86 Stat. 47. It formerly appeared as *33 USC §§ 466* et seq. and then was transferred to *33 USC §§ 1151* et seq. The Act is shown as having been added by Act Oct. 18, 1972, without reference to intervening amendments because of the extensive amendment, reorganization and expansion of the Act's provisions by Act Oct. 18, 1972.

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b), inserted It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act."; and added subsec. (g).

1987. Act Feb. 4, 1987, in subsec.,(a), in para. (5), deleted "and" following "each State;", in para. (6), substituted "; and" for the concluding period, and added para. (7).

Short titles:

Act June 30, 1948, ch 758, Title V, § 519 [518], as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 896 and amended Feb. 4, 1987, P.L. 100-4, Title V, § 506, in part, 101 Stat. 76; Dec. 27, 1977, P.L. 95-217, § 2, 91 Stat. 1566 provided: "This Act *[33 USCS §§ 1251* et seq.] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act).".

Act Oct. 18, 1972, P.L. 92-500, § 1, 86 Stat 816, provided: "This Act [33 *USCS §§ 1251* et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972' "

Act Dec. 27, 1977, P.L. 95-217, § 1, 91 Stat. 1566, provided: "This Act may be cited as the 'Clean Water Act of 1977'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 29, 1981, P.L. 97-117, § 1, 95 Stat. 1623, provided: "This Act may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'.". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 4, 1987, P.L. 100-4, § 1(a), 101 Stat. 7, provides: "This Act may be cited as the 'Water Quality Act of 1987'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 14, 1988, P.L. 100-653, Title X, § 1001, 102 Stat. 3835, provides: "This title may be cited as the 'Massachusetts Bay Protection Act of 1988'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, § 1, 104 Stat. 3000, provides: "This Act may be cited as the 'Great Lakes Critical Programs Act of 1990'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title II, § 201, 104 Stat. 3004, provides: "This part [Title II of Act Nov. 16, 1990, P.L. 101-596] may be cited as the 'Long Island Sound Improvement Act of 1990'.". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title III, § 301, 104 Stat. 3006, provides: "This title may be cited as the 'Lake Champlain Special Designation Act of 1990'.". For full classification of such title, consult USCS Tables volumes.

Act Oct. 31, 1994, P.L. 103-431, § 1, 108 Stat. 4396, provides: "This Act may be cited as the 'Ocean Pollution Reduction Act'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 10, 2000, P.L. 106-284, § 1, 114 Stat. 870, provides: "This Act may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'.". For full classification of such. Act, consult USCS Tables volumes.

Act Nov. 7, 2000, P.L. 106-457, Title II, § 201, 114 Stat. 1967, provides: "This title [amending 33 *USCS § 1267* and appearing in part as a note to such section] may be cited as the 'Chesapeake Bay Restoration Act of 2000'.".

Act Nov. 7, 2000, P.L. 106-457, Title IV, § 401, 114 Stat. 1973, provides: "This title [amending 33 *USCS § 1269]* may be cited as the 'Long Island Sound Restoration Act'.".

Act Nov. 7, 2000, P.L. 106-457, Title V, § 501, 114 Stat. 1973, provides: "This title [adding *33 USCS § 1273]* may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'.".

Act Nov. 7, 2000, P.L. 106-457, Title VI, § 601, 114 Stat. 1975, provides: "This title [adding *33 USCS § 1300]* may be cited as the 'Alternative Water Sources Act of 2000'.".

Act Nov. 27, 2002, P.L. 107-303, § 1(a), 116 Stat. 2355, provides: "This Act may be cited as the 'Great Lakes and Lake Champlain Act of 2002'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 27, 2002, P.L. 107-303, Title I, § 101, 116 Stat. 2355, provides: "This title [amending *33 USCS § 1268* and appearing in part as *33 USCS § 1271a]* may be cited as the 'Great Lakes Legacy Act of 2002'.".

Act Nov. 27, 2002, P.L. 107-303, Title II, § 201, 116 Stat. 2358, provides: "This title [amending *33 USCS § 1270]* may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'.".

Act July 30, 2008, P.L. 110-288, § 1, 122 Stat. 2650, provides: "This Act [amending *33 USCS §§ 1322, 1342,* and *1362]* may be cited as the 'Clean Boating Act of 2008'.".

Act Oct. 8, 2008, P.L. 110-365, § 1, 122 Stat. 4021, provides: "This Act [amending *33 USCS §§ 1268* and *1271a]* may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'.".

Other provisions:

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TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT

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33 *USCS* § *1311*

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act *[33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344],* the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--
(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 *USCS* § *1314(b)],* or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act *[33 USCS § 1317];* and
(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act *[33 USCS § 1283]* prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act *[33 USCS § 1314(d)(1)];* or,
(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 *USCS* § *1370])* or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.
(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act *[33 USCS § 1314(b)(2)],* which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 *[33 USCS § 1325]),* that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 *USCS* § *1314(b)(2)],* or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act *[33 USCS § 1317];*

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 *USCS § 1314(b)],* and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act *[33 USCS § 1317]* which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 *USCS § 1314(b)],* and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 *USCS § 1314(b)],* and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act *[33 USCS § 1314(a)(4)]* shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act *[33 USCS § 1314(b)(4)];* and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) *[33 USCS § 1314(b)],* and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) *[33 USCS § 1342(a)(1)]* in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 *USCS § 1312]* shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act *[33 USCS §§ 1251* et seq.].

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical waste. Notwithstanding any other provisions of this Act [33 *USCS §§ 1251* et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants.

(1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act *[33 USCS § 1314(a)(4)],* toxic pollutants subject to section 307(a) of this Act *[33 USCS § 1317(a)],* and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [33 *USCS § 1317(a)].*

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) *[33 USCS § 1317(a)],* the Administrator shall list the pollutant as a toxic pollutant under section 307(a) *[33 USCS § 1317(a)].*

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 *USCS § 1314];*

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 *[33 USCS § 1314].*

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 *[33 USCS § 1342]* which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act *[33 USCS § 1314(a)(6)];*

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 304(a)(1) of this Act *[33 USCS § 1314(a)(1)]* after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act *[33 USCS § 1251(a)(2)]*. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act *[33 USCS §§ 1251* et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act *[33 USCS § 1342]* or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of en-

actment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act *[33 USCS § 1281(b)-(g)],* section 307 of this Act *[33 USCS § 1317],* and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [33 *USCS §§ 1251* et seq.].

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act [33 *USCS §§ 1251* et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 *[33 USCS § 1342]* to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act [33 *USCS §§ 1251* et seq.].

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [33 *USCS § 1284],* and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) *[33 USCS § 1317(a),* (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 *[33 USCS § 1314]* or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act *[33 USCS §§ 1251* et seq.], unless in the judgment of the Ad-

ministrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this Act [33 *USCS §§ 1251* et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [33 *USCS §§ 1251* et seq.].

(4) Deadline for subsection (g) decision. An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline.

(A) In general. In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application. An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions. The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A

(D) Preliminary decision deadline. The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology. In the case of any facility subject to a permit under section 402 [33 *USCS § 1342]* which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 *[33 USCS § 1342],* in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industry-wide application.

(l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act *[33 USCS § 1317(a)(1)].*

(m) Modification of effluent limitation requirements for point sources.

(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 *[33 USCS § 1342]* which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 *[33 USCS § 1343],* with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 *[33 USCS § 1343]* exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act *[33 USCS §§ 1251* et seq.];

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [33 *USCS* § *1251(a)(2)];*

(G) the applicant accepts as a condition to the permit a contractural [contractual] obligation to use funds in the amount required (but not less than $ 250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act *[33 USCS §§ 1251* et seq.] applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided,* That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors.

(1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) *[33 USCS § 1317(b)]* for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information. The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act *[33 USCS § 1311* or *1314]* or any national categorical pretreatment standard under section 307(b) of this Act *[33 USCS § 1317(b)]* filed before, on, or after such date of enactment [enacted Feb. 7, 1987].

(o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act *[33 USCS §§ 1311(c),* (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations.

(1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) *[33 USCS § 1342(b)],* may issue a permit under section 402 *[33 USCS § 1342]* which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations. The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act *[33 USCS § 1313].*

(3) Definitions. For purposes of this subsection--

(A) Coal remining operation. The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area. The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) Pre-existing discharge. The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws. Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

HISTORY:

(June 30, 1948, ch 758, Title III, § 301, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 844; Dec. 27, 1977, P.L. 95-217, §§ 42-47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, P.L. 97-117, §§ 21(a) in part, (b), 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, P.L. 97-440, 96 Stat. 2289; Feb. 4, 1987, P.L. 100-4, Title III, §§ 301(a)-(e), 302(a)-(d), 303(a), (b)(1), (c)-(f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, P.L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(b), 109 Stat. 727.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

With respect to the Committee on Public Works and Transportation of the House of Representatives, referred to in this section, § 1(a)(9) of Act June 3, 1995, P.L. 104-14, which appears as a note preceding 2 *USCS § 21,* provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to the Committee on Transportation and Infrastructure of the House of Representatives.

The "Surface Mining Control and Reclamation Act of 1977", referred to in this section, is Act Aug. 3, 1977, P.L. 95-87, which appears generally as *30 USCS §§ 1201* et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "than" has been inserted in subsec. (j)(1)(A) as the word probably intended by Congress.

The bracketed word "contractual" has been inserted in subsec. (m)(1)(G) as the word probably intended by Congress.

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b)(2), in subpara. (A), substituted "for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph," for "not later than July 1, 1983," and substituted the concluding semicolon for "; and", in subpara. (B), substituted the concluding semicolon for a period, and added subparas. (C)-(F); and added subsecs. (g)-(1).

1981. Act Dec. 29, 1981, in subsec. (b)(2), deleted subpara. (B) which read: "(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act;"; in subsec. (i), substituted "July 1, 1988" for "July 1, 1983" wherever appearing.

Such Act further (effective as provided by § 22(e) of such Act, which appears as a note to this section), in subsec. (h), in the introductory matter, deleted "in an existing discharge" after "any pollutant", in para. (7), substituted the final period for a semi-colon, deleted para. (8) which read: "any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) or to carry out the

requirements of this subsection.", and in the concluding matter, inserted the sentences beginning "A municipality .. ." and "No permit"; and substituted subsec. (j)(1)(A) for one which read "subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977;".

1983. Act Jan. 8, 1983 added subsec. (m).

1987. Act Feb. 4, 1987, in subsec. (b)(2), in subpara. (C), substituted "as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989" for "not later than July 1, 1984,", in subpara. (D), substituted "as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989" for "not later than three years after the date such limitations are established", in subpara. (E), substituted "as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989, compliance with" for "not later than July 1, 1984," and in subpara. (F), substituted "as expeditiously as practicable but in no case" for "not" following "subparagraph (A) of this paragraph" and "and in no case later than March 31, 1989." for "or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.", and added para. (3); in subsec. (j)(1)(A), inserted ", except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987"; in subsec. (k), inserted "or (b)(2)(E)" in two places and substituted "two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection," for "July 1, 1987,"; and added subsec. (p).

Such Act further (applicable as provided by § 302(e) of such Act, which appears as a note to this section), substituted subsec. (g) for one which read:

"(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act [33 *USCS § 1314(a)(4)],* toxic pollutants subject to section 307(a) of this Act *[33 USCS § 1317(a)],* and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that--

"(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

"(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

"(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

"(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.";

and, in subsec. (j), in para. (2), substituted "Subject to paragraph (3) of this section, any" for "Any", and added paras. (3) and (4).

Such Act further (applicable as provided by § 303(b)(2) of such Act, which appears as a note to this section), in subsec. (h)(3), inserted ", and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge".

Such Act further (applicable as provided by § 303(g) of such Act, which appears as a note to this section), in subsec. (h), in para. (2), substituted "the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources," for "such modified requirements will not interfere", added a new para. (6), redesignated former paras. (6) and (7) as paras. (7) and (8), respectively, in para. (8) as redesignated, substituted a semicolon for the concluding period and added para. (9), and in the concluding matter, inserted the sentences

beginning For the purposes of paragraph (9) . ..", In order for a permit . . .", "No permit issued under this subsection .. .", The prohibition contained in the preceding . . ." and "Notwithstanding any other provisions . . .".

Such Act further (applicable as provided by § 304(b) of such Act, which appears as a note to this section), in subsec. (i)(1), substituted of the Water Quality Act of 1987." for of this subsection.".

Such Act further (applicable as provided by § 306(c) of such Act, which appears as 33 *USCS § 1342* note), in subsec. (1), substituted "Other than as provided in subsection (n) of this section, the" for "The"; and added subsecs. (n) and (o).

1988. Act Nov. 18, 1988, in subsec. (f), substituted ", any high-level radioactive waste, or any medical waste," for "or high-level radioactive waste".

1994. Act Oct. 31, 1994, in subsec. (j), in para. (1)(A), inserted ", and except as provided in paragraph (5)", and added para. (5).

1995. Act Dec. 21, 1995, in subsec. (n)(8), substituted By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure" for "Every 6 months after the date of the enactment of this subsection, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation".

Other provisions:

Certain municipal compliance deadlines unaffected; exception. Act Dec. 29, 1981, **P.L.** 97-117, 21(a) in part, 95 Stat. 1631, provided: "The amendment made by this subsection [amending subsec (i) of this section] shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act [subsec. (b)(1)(B) or (C) of this section] beyond schedules for compliance in effect as of the date of enactment of this Act, except in cases where reductions in the amount of financial assistance under this Act [for classification, consult USCS Tables volumes] or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by **July 1, 1983.".**

Effective date of 1981 amendments of subsecs. (h) and (j)(1)(A). Act Dec. 29, 1981, **P.L.** 97-117, § 22(e), 95 Stat. 1632, provided: "The amendments made by this section [amending subsecs. (h) and (j)(1)(A) of this section] shall take effect on the date of enactment of this Act, except that no applicant, other than the City of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act [subsec. (h) of this section] which modifies the requirements of subsection (b)(1)(B) of section 301 of the such Act [subsec. (b)(1)(B) of this section] shall receive such permit during the one-year period which begins on the date of enactment of this Act.".

Discharges from point sources in United States Virgin Islands attributable to manufacture of rum; exemption from Federal water pollution control requirements; conditions. Act Aug. 5, 1983, P.L. 98-67, Title II, Subtitle A, § 214(g), 97 Stat. 393, effective upon enactment on Aug. 5, 1983, as provided by § 218(a) of such Act, which appears as *19 USCS § 2706(a),* provided: "Any discharge from a point source in the United States Virgin Islands in existence on the date of the enactment of this subsection which discharge is attributable to the manufacture of rum (as defined in paragraphs [paragraph] (3) of *section 7652(c) of the Internal Revenue Code of 1954 [26 USCS § 7652(c)(3)])* shall not be subject to the requirements of section 301 [this section] (other than toxic pollutant discharges), section 306 or section 403 of the Federal Water Pollution Control Act *[33 USCS § 1316* or *1343]* if--

"(1) such discharge occurs at least one thousand five hundred feet into the territorial sea from the line of ordinary low water from that portion of the coast which is in direct contact with the sea, and

"(2) the Governor of the United States Virgin Islands determines that such discharge will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities.".

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit

program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a

source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons

for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of

reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or

otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken

interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

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

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

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

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

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

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

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

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree

issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

33 USCS § 1342

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TAB “35”

LEXSTAT 33 USC 1370

*** CURRENT THROUGH PL 111-191, APPROVED 6/15/2010 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

33 USCS § 1370

§ 1370. State authority

Except as expressly provided in this Act [*33 USCS §§ 1251* et seq.], nothing in this Act [*33 USCS §§ 1251* et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [*33 USCS §§ 1251* et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [*33 USCS §§ 1251* et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

HISTORY:
(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 893.)

TAB “36”

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LEXSTAT 40 CFR 122.26

*** THIS SECTION IS CURRENT THROUGH THE JUNE 17, 2010 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

Go to the CFR Archive Directory

40 CFR 122.26

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems. (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions. (1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the

interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the

past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with *5 U.S.C 552*(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or the Office of the Federal Register, 800 N. Capitol Street N.W. Suite 700, Washington, DC. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed basedon a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE
OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage	. Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. . Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE
OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewersystems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

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

(i) Except as provided in § 122.26(c)(1)(ii)-(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under § 122.21(g)(7) (vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under § 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

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

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification. (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) Discharge characterization. (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents

(or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, in-

cluding an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with § 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of stormwater discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii) (A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD[sub]5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

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

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

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

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

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this programdescription shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

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

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

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

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

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

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

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity. (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) Part 1. (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2. (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submittted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) Rejected facilities. (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) Petitions. (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations. (i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

HISTORY: *[55 FR 48063,* Nov. 16, 1990, as amended at *56 FR 12100,* Mar. 21, 1991; *56 FR 56554,* Nov. 5, 1991; *57 FR 11412,* Apr. 2, 1992; *57 FR 60447,* Dec. 18, 1992; *60 FR 40235,* Aug. 7, 1995; *64 FR 68722, 68838,* Dec. 8, 1999; *65 FR 30886, 30907,* May 15, 2000; *68 FR 11325, 11329,* Mar. 10, 2003; *70 FR 11560, 11563,* Mar. 9, 2005; *71 FR 33628, 33639,* June 12, 2006]

AUTHORITY: The Clean Water Act, *33 U.S.C. 1251* et seq.

NOTES: [EFFECTIVE DATE NOTE: *71 FR 33628, 33639,* June 12, 2006, revised paragraphs (a)(2) and (e)(8), effective June 12, 2006.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: *61 FR 41698,* Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
American Mining Congress v United States EPA (1992, CA9) 965 F2d 759, 92 CDOS 4465, 92 Daily Journal DAR 7079, 35 Envt Rep Cas 1032, 22 ELR 21135, 121 OGR 375
Envtl. Def. Ctr., Inc. v EPA (2003, CA9 Cal) 344 F3d 832, 57 Envt Rep Cas 1039, 33 ELR 20269, cert den *(2004) 541 US 1085, 124 S Ct 2811, 159 L Ed 2d 246, 59 Envt Rep Cas 1160*

14690 words

TAB “37”

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 123 -- STATE PROGRAM REQUIREMENTS
SUBPART A -- GENERAL

Go to the CFR Archive Directory

40 CFR 123.1

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System -- NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within theState's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

HISTORY: *[48 FR 14178,* Apr. 1, 1983, as amended at *54 FR 256,* Jan. 4, 1989; *54 FR 18784,* May 2, 1989; *58 FR 67981,* Dec. 22, 1993; *59 FR 64343,* Dec. 14, 1994; *63 FR 45114, 45122,* Aug. 24, 1998]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
Clean Water Act, *33 U.S.C. 1251* et seq.

NOTES: [EFFECTIVE DATE NOTE: *63 FR 45114, 45122,* Aug. 24, 1998, revised paragraphs (a) and (c), effective Sept. 23, 1998.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at *65 FR 47323, 47324, 47325,* Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: *71 FR 25504,* May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: *74 FR 66496,* Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: *75 FR 49556,* Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Reorganizations, see: *62 FR 61170,* Nov. 14, 1997.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

Riverkeeper, Inc. v United States EPA (2004, CA2) 358 F3d 174, 57 Envt Rep Cas 1961, 34 ELR 20017

Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) *2005 US App LEXIS 6533*

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June 17, 2011
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State Mandates

TAB “38”

Federal Register

Thursday,
May 18, 2000

Part III

Environmental Protection Agency

40 CFR Part 131

Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL–6587–9]

RIN 2040–AC44

Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This final rule promulgates: numeric aquatic life criteria for 23 priority toxic pollutants; numeric human health criteria for 57 priority toxic pollutants; and a compliance schedule provision which authorizes the State to issue schedules of compliance for new or revised National Pollutant Discharge Elimination System permit limits based on the federal criteria when certain conditions are met.

EPA is promulgating this rule based on the Administrator's determination that numeric criteria are necessary in the State of California to protect human health and the environment. The Clean Water Act requires States to adopt numeric water quality criteria for priority toxic pollutants for which EPA has issued criteria guidance, the presence or discharge of which could reasonably be expected to interfere with maintaining designated uses.

EPA is promulgating this rule to fill a gap in California water quality standards that was created in 1994 when a State court overturned the State's water quality control plans which contained water quality criteria for priority toxic pollutants. Thus, the State of California has been without numeric water quality criteria for many priority toxic pollutants as required by the Clean Water Act, necessitating this action by EPA. These Federal criteria are legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for all purposes and programs under the Clean Water Act.

EFFECTIVE DATE: This rule shall be effective May 18, 2000.

ADDRESSES: The administrative record for today's final rule is available for public inspection at the U.S. Environmental Protection Agency, Region 9, Water Division, 75 Hawthorne Street, San Francisco, California 94105, between the hours of 8:00 a.m. and 4:30 p.m. For access to the administrative record, call Diane E. Fleck, P.E., Esq. at 415 744–1984 for an appointment. A reasonable fee will be charged for photocopies.

FOR FURTHER INFORMATION CONTACT: Diane E. Fleck, P.E., Esq. or Philip Woods, U.S. Environmental Protection Agency, Region 9, Water Division, 75 Hawthorne Street, San Francisco, California 94105, 415–744–1984 or 415–744–1997, respectively.

SUPPLEMENTARY INFORMATION: This preamble is organized according to the following outline:

A. Potentially Affected Entities

Citizens concerned with water quality in California may be interested in this rulemaking. Entities discharging pollutants to waters of the United States in California could be affected by this rulemaking since water quality criteria are used by the State in developing National Pollutant Discharge Elimination System (NPDES) permit limits. Categories and entities that ultimately may be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to surface waters in California or to publicly-owned treatment works.
Municipalities	Publicly-owned treatment works discharging pollutants to surface waters in California

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility might be affected by this action, you should carefully examine the applicability criteria in § 131.38(c). If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Introduction and Overview

1. Introduction

This section introduces the topics which are addressed in the preamble and provides a brief overview of EPA's basis and rationale for promulgating Federal criteria for the State of California. Section C briefly describes the evolution of the efforts to control toxic pollutants; these efforts include the changes enacted in the 1987 CWA Amendments, which are the basis for this rule. Section D summarizes California's efforts since 1987 to implement the requirements of CWA section 303(c)(2)(B) and describes EPA's procedure and actions for determining whether California has fully implemented CWA section 303(c)(2)(B). Section E provides the rationale and approach for developing this final rule, including a discussion of EPA's legal basis for this final rule. Section F describes the development of the criteria included in this rule. Section G summarizes the provisions of the final rule and discusses implementation issues. Sections H, I, J, K, L, M, N, O, P, and Q briefly address the requirements of Executive Order 12866, the Unfunded Mandates Reform Act of 1995, the Regulatory Flexibility Act, the Paperwork Reduction Act, the Endangered Species Act, the Congressional Review Act, Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, the National Technology Transfer and Advancement Act, and Executive Order 13132, Federalism, respectively.

The proposal for this rulemaking was published in the Federal Register on August 5, 1997. Changes from the proposal are generally addressed in the body of this preamble and specifically addressed in the response to comments document included in the administrative record for this rulemaking. EPA responded to all comments on the proposed rule, including comments received after the September 26, 1997, deadline. Although EPA is under no legal obligation to respond to late comments, EPA made a policy decision to respond to all comments.

Since detailed information concerning many of the topics in this preamble was published previously in the Federal Register in preambles for this and other rulemakings, references are frequently made to those preambles. Those rulemakings include: Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Proposed Rule, 62 FR 42159, August 5, 1997 (referred to as the "proposed CTR"); Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants, 57 FR 60848, December 22, 1992 (referred to as the "National Toxics Rule" or "NTR"); and the NTR as amended by Administrative Stay of Federal Water Quality Criteria for Metals and Interim Final Rule, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance—Revision of Metals Criteria, 60 FR 22228, May 4, 1995 (referred to as the "National Toxics Rule [NTR], as amended"). The NTR, as amended, is codified at 40 CFR 131.36. A copy of the proposed CTR and its preamble, and the NTR, as amended, and its preambles are contained in the administrative record for this rulemaking.

EPA is making this final rule effective upon publication. Under the Administrative Procedure Act, 5 U.S.C. 553(d)(3), agencies must generally publish a rule no more than 30 days prior to the effective date of the rule except as otherwise provided for by the Agency for good cause. The purpose of the 30-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect. See *Omnipoint Corp.* v. *F.C.C.*, 78 F.3d 620, 630–631 (D.C. Cir. 1996); *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992).

In this instance, EPA finds good cause to make the final rule effective upon publication. In order to find good cause, an Agency needs to find that the 30-day period would be: (1) Impracticable, (2) unnecessary, or (3) contrary to the public interest. Here EPA is relying on the second reason to support its finding of good cause. EPA also notes that the State has requested EPA to make the rule immediately effective.

EPA finds that in this instance, waiting 30 days to make the rule effective is unnecessary. As explained in further detail elsewhere in this preamble, this rule is not self implementing; rather it establishes ambient conditions that the State of California will implement in future permit proceedings. These permit proceedings will, by regulation, take longer than 30 days to complete. This means that although the rule is immediately effective, no discharger's conduct would be altered under the rule in less than 30 days, and therefore the 30-day period is unnecessary.

2. Overview

This final rule establishes ambient water quality criteria for priority toxic pollutants in the State of California. The criteria in this final rule will supplement the water quality criteria promulgated for California in the NTR, as amended. In 1991, EPA approved a number of water quality criteria (discussed in section D), for the State of California. Since EPA had approved these criteria, it was not necessary to include them in the 1992 NTR for these criteria. However, the EPA-approved criteria were subsequently invalidated in State litigation. Thus, this final rule contains criteria to fill the gap created by the State litigation.

This final rule does not change or supersede any criteria previously promulgated for the State of California in the NTR, as amended. Criteria which EPA promulgated for California in the NTR, as amended, are footnoted in the final table at 131.38(b)(1), so that readers may see the criteria promulgated in the NTR, as amended, for California and the criteria promulgated through this rulemaking for California in the same table. This final rule is not intended to apply to waters within Indian Country. EPA recognizes that there are possibly waters located wholly or partly in Indian Country that are included in the State's basin plans. EPA will work with the State and Tribes to identify any such waters and determine whether further action to protect water quality in Indian Country is necessary.

This rule is important for several environmental, programmatic and legal reasons. Control of toxic pollutants in surface waters is necessary to achieve the CWA's goals and objectives. Many of California's monitored river miles, lake acres, and estuarine waters have elevated levels of toxic pollutants. Recent studies on California water bodies indicate that elevated levels of toxic pollutants exist in fish tissue which result in fishing advisories or bans. These toxic pollutants can be attributed to, among other sources, industrial and municipal discharges.

Water quality standards for toxic pollutants are important to State and EPA efforts to address water quality problems. Clearly established water quality goals enhance the effectiveness of many of the State's and EPA's water programs including permitting, coastal water quality improvement, fish tissue quality protection, nonpoint source controls, drinking water quality protection, and ecological protection. Numeric criteria for toxic pollutants allow the State and EPA to evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Numeric criteria also provide a more precise basis for deriving water quality-based effluent limitations (WQBELs) in

National Pollutant Discharge Elimination System (NPDES) permits and wasteload allocations for total maximum daily loads (TMDLs) to control toxic pollutant discharges. Congress recognized these issues when it enacted section 303(c)(2)(B) to the CWA.

While California recognizes the need for applicable water quality standards for toxic pollutants, its adoption efforts have been stymied by a variety of factors. The Administrator has decided to exercise her CWA authorities to move forward the toxic control program, consistent with the CWA and with the State of California's water quality standards program.

Today's action will also help restore equity among the States. The CWA is designed to ensure all waters are sufficiently clean to protect public health and/or the environment. The CWA allows some flexibility and differences among States in their adopted and approved water quality standards, but it should be implemented in a manner that ensures a level playing field among States. Although California has made important progress toward satisfying CWA requirements, it has not satisfied CWA section 303(c)(2)(B) by adopting numeric water quality criteria for toxic pollutants. This section was added to the CWA by Congress in 1987. Prior to today, the State of California had been the only State in the Nation for which CWA section 303(c)(2)(B) had remained substantially unimplemented after EPA's promulgation of the NTR in December of 1992. Section 303(c)(4) of the CWA authorizes the EPA Administrator to promulgate standards where necessary to meet the requirements of the Act. The Administrator determined that this rule was a necessary and important component for the implementation of CWA section 303(c)(2)(B) in California.

EPA acknowledges that the State of California is working to satisfy CWA section 303(c)(2)(B). When the State formally adopts, and EPA approves, criteria consistent with statutory requirements, as envisioned by Congress in the CWA, EPA intends to stay this rule. If within the applicable time frame for judicial review, the States' standards are challenged, EPA will withdraw this rule after such judicial review is complete and the State standards are sustained.

C. Statutory and Regulatory Background

The preamble to the August 5, 1997, proposed rule provided a general discussion of EPA's statutory and regulatory authority to promulgate water quality criteria for the State of California. See 62 FR 42160–42163. EPA is including that discussion in the record for the final rule. Commenters questioned EPA's authority to promulgate certain aspects of the proposal. EPA is responding to those comments in the appropriate sections of this preamble, and in the response to comments document included in the administrative record for this rulemaking. Where appropriate, EPA's responses expand upon the discussion of statutory and regulatory authority found in the proposal.

D. California Water Quality Standards Actions

1. California Regional Water Quality Control Board Basin Plans, and the Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP) of April 1991

The State of California regulates water quality through its State Water Resources Control Board (SWRCB) and through nine Regional Water Quality Control Boards (RWQCBs). Each of the nine RWQCBs represents a different geographic area; area boundaries are generally along watershed boundaries. Each RWQCB maintains a Basin Plan which contains the designated uses of the water bodies within its respective geographic area within California. These designated uses (or "beneficial uses" under State law) together with legally-adopted criteria (or "objectives" under State law), comprise water quality standards for the water bodies within each of the Basin areas. Each of the nine RWQCBs undergoes a triennial basin planning review process, in compliance with CWA section 303. The SWRCB provides assistance to the RWQCBs.

Most of the Basin Plans contain conventional pollutant objectives such as dissolved oxygen. None of the Basin Plans contains a comprehensive list of priority toxic pollutant criteria to satisfy CWA section 303(c)(2)(B). The nine RWQCBs and the SWRCB had intended that the priority toxic pollutant criteria contained in the three SWRCB statewide plans, the Inland Surface Waters Plan (ISWP), the Enclosed Bays and Estuaries Plan (EBEP), and the Ocean Plan, apply to all basins and satisfy CWA section 303(c)(2)(B).

On April 11, 1991, the SWRCB adopted two statewide water quality control plans, the ISWP and the EBEP. These statewide plans contained narrative and numeric water quality criteria for toxic pollutants, in part to satisfy CWA section 303(c)(2)(B). The water quality criteria contained in the SWRCB statewide plans, together with the designated uses in each of the Basin Plans, created a set of water quality standards for waters within the State of California.

Specifically, the two plans established water quality criteria or objectives for all fresh waters, bays and estuaries in the State. The plans contained water quality criteria for some priority toxic pollutants, provisions relating to whole effluent toxicity, implementation procedures for point and nonpoint sources, and authorizing compliance schedule provisions. The plans also included special provisions affecting waters dominated by reclaimed water (labeled as Category (a) waters), and waters dominated by agricultural drainage and constructed agricultural drains (labeled as Category (b) and (c) waters, respectively).

2. EPA's Review of California Water Quality Standards for Priority Toxic Pollutants in the ISWP and EBEP, and the National Toxics Rule

The EPA Administrator has delegated the responsibility and authority for review and approval or disapproval of all new or revised State water quality standards to the EPA Regional Administrators (see 40 CFR 131.21). Thus, State actions under CWA section 303(c)(2)(B) are submitted to the appropriate EPA Regional Administrator for review and approval.

In mid-April 1991, the SWRCB submitted to EPA for review and approval the two statewide water quality control plans, the ISWP and the EBEP. On November 6, 1991, EPA Region 9 formally concluded its review of the SWRCB's plans. EPA approved the narrative water quality criterion and the toxicity criterion in each of the plans. EPA also approved the numeric water quality criteria contained in both plans, finding them to be consistent with the requirements of section 303(c)(2)(B) of the CWA and with EPA's national criteria guidance published pursuant to section 304(a) of the CWA.

EPA noted the lack of criteria for some pollutants, and found that, because of the omissions, the plans did not fully satisfy CWA section 303(c)(2)(B). The plans did not contain criteria for all listed pollutants for which EPA had published national criteria guidance. The ISWP contained human health criteria for only 65 pollutants, and the EBEP contained human health criteria for only 61 pollutants for which EPA had issued section 304(a) guidance criteria. Both the ISWP and EBEP contained aquatic life criteria for all pollutants except cyanide and chromium III (freshwater only) for which EPA has CWA section

304(a) criteria guidance. The SWRCB's administrative record stated that all priority pollutants with EPA criteria guidance were likely to be present in California waters. However, the SWRCB's record contained insufficient information to support a finding that the excluded pollutants were not reasonably expected to interfere with designated uses of the waters of the State.

Although EPA approved the statewide selenium objective in the ISWP and EBEP, EPA disapproved the objective for the San Francisco Bay and Delta, because there was clear evidence that the objective would not protect the designated fish and wildlife uses (the California Department of Health Services had issued waterfowl consumption advisories due to selenium concentrations, and scientific studies had documented selenium toxicity to fish and wildlife). EPA restated its commitment to object to National Pollutant Discharge Elimination System (NPDES) permits issued for San Francisco Bay that contained effluent limits based on an objective greater than 5 parts per billion (ppb) (four day average) and 20 ppb (1 hour average), the freshwater criteria. EPA reaffirmed its disapproval of Californias' site-specific selenium objective for portions of the San Joaquin River, Salt Slough, and Mud Slough. EPA also disapproved of the categorical deferrals and exemptions. These disapprovals included the disapproval of the State's deferral of water quality objectives to effluent dominated streams (Category a) and to streams dominated by agricultural drainage (Category b), and the disapproval of the exemption of water quality objectives to constructed agricultural drains (Category c). EPA found the definitions of the categories imprecise and overly broad which could have led to an incorrect interpretation.

Since EPA had disapproved portions of each of the California statewide plans which were necessary to satisfy CWA section 303(c)(2)(B), certain disapproved aspects of California's water quality standards were included in EPA's promulgation of the National Toxics Rule (NTR) (40 CFR 131.36, 57 FR 60848). EPA promulgated specific criteria for certain water bodies in California.

The NTR was amended, effective April 14, 1995, to stay certain metals criteria which had been promulgated as total recoverable. Effective April 15, 1995, EPA promulgated interim final metals criteria as dissolved concentrations for those metals which had been stayed (Administrative Stay of Federal Water Quality Criteria for Metals and Interim Final Rule, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance—Revision of Metals Criteria; 60 FR 22228, 22229, May 4, 1995 [the NTR, as amended]). The stay was in response to a lawsuit against EPA challenging, among other issues, metals criteria expressed as total recoverable concentrations. A partial Settlement Agreement required EPA to stay specific metals criteria in the NTR. EPA then promulgated certain metals criteria in the dissolved form through the use of conversion factors. These factors are listed in the NTR, as amended. A scientific discussion of these criteria is found in a subsequent section of this preamble.

Since certain criteria have already been promulgated for specific water bodies in the State of California in the NTR, as amended, they are not within the scope of today's final rule. However, for clarity in reading a comprehensive rule for the State of California, these criteria are incorporated into 40 CFR 131.38(d)(2). Footnotes to the Table in 40 CFR 131.38(b)(1) and 40 CFR 131.38(d)(3) clarify which criteria (and for which specific water bodies) were promulgated by the NTR, as amended, and are therefore excluded from this final rule. The appropriate (freshwater or saltwater) aquatic life criteria which were promulgated in the NTR, as amended, for all inland surface waters and enclosed bays and estuaries include: chromium III and cyanide. The appropriate (water and organism or organism only) human health criteria which were promulgated in the NTR, as amended, for all inland surface waters and enclosed bays and estuaries include:

antimony
thallium
asbestos
acrolein
acrylonitrile
carbon tetrachloride
chlorobenzene
1,2-dichloroethane
1,1-dichloroethylene
1,3-dichloropropylene
ethylbenzene
1,1,2,2-tetrachloroethane
tetrachloroethylene
1,1,2-trichloroethane
trichloroethylene
vinyl chloride
2,4-dichlorophenol
2-methyl-4,6-dinitrophenol
2,4-dinitrophenol
benzidine
bis(2-chloroethyl)ether
bis(2-ethylhexyl)phthalate
3,3-dichlorobenzidine
diethyl phthalate
dimethyl phthalate
di-n-butyl phthalate
2,4-dinitrotoluene
1,2-diphenylhydrazine
hexachlorobutadiene
hexachlorocyclopentadiene
hexachloroethane
isophorone
nitrobenzene
n-nitrosodimethylamine
n-nitrosodiphenylamine

Other pollutant criteria were promulgated in the NTR, as amended, for specific water bodies, but not all inland surface waters and enclosed bays and estuaries.

3. Status of Implementation of CWA Section 303(c)(2)(B)

Shortly after the SWRCB adopted the ISWP and EBEP, several dischargers filed suit against the State alleging that it had not adopted the two plans in compliance with State law. The plaintiffs in a consolidated case included: the County of Sacramento, Sacramento County Water Agency; Sacramento Regional County Sanitation District; the City of Sacramento; the City of Sunnyvale; the City of San Jose; the City of Stockton; and Simpson Paper Company.

The dischargers alleged that the State had not adopted the ISWP and EBEP in compliance with the California Administrative Procedures Act (Gov Code. Section 11340, *et seq.*), the California Environmental Quality Act (Pub. Re Code, Section 21000, *et seq.*), and the Porter-Cologne Act (Wat. Code, Section 13200, *et seq.*). The allegation that the State did not sufficiently consider economics when adopting water quality objectives, as allegedly required by Section 13241 of the Porter Cologne Act, was an important issue in the litigation.

In October of 1993, the Superior Court of California, County of Sacramento, issued a tentative decision in favor of the dischargers. In March of 1994, the Court issued a substantively similar final decision in favor of the dischargers. Final judgments from the Court in July of 1994 ordered the SWRCB to rescind the ISWP and EBEP. On September 22, 1994, the SWRCB formally rescinded the two statewide water quality control plans. The State is currently in the process of readopting water quality control plans for inland surface waters, enclosed bays and estuaries.

CWA section 303(c)(2)(B) was fully implemented in the State of California from December of 1992, when the NTR was promulgated, until September of 1994, when the SWRCB was required to rescind the ISWP and EBEP. The provisions for California in EPA's NTR together with the approved portions of

California's ISWP and EBEP implemented the requirements of CWA section 303(c)(2)(B). However, since September of 1994, when the SWRCB rescinded the ISWP and EBEP, the requirements of section 303(c)(2)(B) have not been fully implemented in California.

The scope of today's rule is to re-establish criteria for the remaining priority toxic pollutants to meet the requirements of section 303(c)(2)(B) of the CWA. Pursuant to section 303(c)(4), the Administrator has determined that it is necessary to include in today's action criteria for priority toxic pollutants, which are not covered by the NTR, as amended, or by the State through EPA-approved site-specific criteria, for waters of the United States in the State of California.

4. State-Adopted, Site-Specific Criteria for Priority Toxic Pollutants

The State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over-or under-protective of designated uses. Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law.

These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted under the State's process and has become State law.

a. State-Adopted Site-Specific Criteria Under EPA Review

The State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of the Basin Plans have completed the State review and adoption process and have been submitted to EPA for review and approval. Some of the Basin Plans contain site-specific criteria. In these cases, the State-adopted site-specific criteria are used for water quality programs.

EPA has not yet concluded consultation under the Endangered Species Act with the U.S. Department of Interior, Fish and Wildlife Service, and the U.S. Department of Commerce, National Marine Fisheries Service, on EPA's tentative approval/disapproval actions on the RWQCB Basin Plans. In this situation, the more stringent of the two criteria (the State-adopted site-specific criteria in the RWQCB Basin Plans, or the Federal criteria in this final rule), would be used for water quality programs including the calculation of water quality-based effluent criteria in National Pollutant Discharge Elimination System (NPDES) permits.

b. State-Adopted Site-Specific Criteria With EPA Approval

In several cases, the EPA Regional Administrator has already reviewed and approved State-adopted site-specific criteria within the State of California. Several of these cases are discussed in this section. All of the EPA approval letters referenced in today's preamble are contained in the administrative record for today's rule.

Sacramento River: EPA has approved site-specific acute criteria for copper, cadmium and zinc in the Sacramento River, upstream of Hamilton City, in the Central Valley Region (RWQCB for the Central Valley Region) of the State of California. EPA approved these site-specific criteria by letter dated August 7, 1985. Specifically, EPA approved for the Sacramento River (and tributaries) above Hamilton City, a copper criterion of 5.6 µg/l (maximum), a zinc criterion of 16 µg/l (maximum) and a cadmium criterion of 0.22 µg/l (maximum), all in the dissolved form using a hardness of 40 mg/l as CaCO3. (These criteria were actually adopted by the State and approved by EPA as equations which vary with hardness.) These "maximum" criteria correspond to acute criteria in today's final rule. Therefore, Federal acute criteria for copper, cadmium, and zinc for the Sacramento River (and tributaries) above Hamilton City are not necessary to protect the designated uses and are not included in the final rule. However, the EPA Administrator is making a finding that it is necessary to include chronic criteria for copper, cadmium and zinc for the Sacramento River (and tributaries) above Hamilton City, as part of the statewide criteria promulgated in today's final rule.

San Joaquin River: The selenium criteria in this rule are not applicable to portions of the San Joaquin River, in the Central Valley Region, because selenium criteria have been either previously approved by EPA or previously promulgated by EPA as part of the NTR. EPA approved and disapproved State-adopted site-specific selenium criteria in portions of the San Joaquin River, in the Central Valley Region of the State of California (RWQCB for the Central Valley Region). EPA's determination on these site-specific criteria is contained in a letter dated April 13, 1990.

Specifically, EPA approved for the San Joaquin River, mouth of Merced River to Vernalis, an aquatic life selenium criterion of 12 µg/l (maximum with the understanding that the instantaneous maximum concentration may not exceed the objective more than once every three years). Today's final rule does not affect this Federally-approved, State-adopted site-specific acute criterion, and it remains in effect for the San Joaquin River, mouth of Merced River to Vernalis. Therefore, an acute criterion for selenium in the San Joaquin River, mouth of Merced River to Vernalis is not necessary to protect the designated use and thus is not included in this final rule.

By letter dated April 13, 1990, EPA also approved for the San Joaquin River, mouth of Merced River to Vernalis, a State-adopted site-specific aquatic life selenium criterion of 5 µg/l (monthly mean); however, EPA disapproved a State-adopted site-specific selenium criterion of 8 µg/l (monthly mean—critical year only) for these waters. Subsequently, EPA promulgated a chronic selenium criterion of 5 µg/l (4 day average) for waters of the San Joaquin River from the mouth of the Merced River to Vernalis in the NTR. This chronic criterion applies to all water quality programs concerning the San Joaquin River, mouth of Merced River to Vernalis. Today's final rule does not affect the Federally-promulgated chronic selenium criterion of 5 µg/l (4 day average) set forth in the NTR. This previously Federally-promulgated criterion remains in effect for the San Joaquin River, mouth of Merced River to Vernalis.

Grassland Water District, San Luis National Wildlife Refuge, and Los Banos State Wildlife Refuge: EPA approved for the Grassland Water District, San Luis National Wildlife Refuge, and Los Banos State Wildlife Refuge, a State-adopted site-specific aquatic life selenium criterion of 2 µg/l (monthly mean) by letter dated April 13, 1990. This Federally-approved, State-adopted site-specific chronic criterion remains in effect for the Grassland Water District, San Luis National Wildlife Refuge and Los Banos State Wildlife Refuge. Therefore it is not necessary to include in today's final rule, a chronic criterion for selenium for the Grassland Water District, San Luis National Wildlife Refuge and Los Banos State Wildlife Refuge, and thus, it is not included in this final rule.

San Francisco Regional Board Basin Plan of 1986: EPA approved several priority toxic pollutant objectives (CWA criteria) that were contained in the1986 San Francisco Regional Board Basin Plan, as amended by SWRCB Resolution Numbers 87–49, 87–82 and 87–92, by letters dated September 2, 1987 and December 24, 1987. This Basin Plan, the SWRCB Resolutions, and the EPA approval letters are contained in the administrative record for this rulemaking. It is not necessary to include these criteria for priority toxic pollutants that are contained in the San Francisco Regional Board's 1986 Basin Plan as amended, and approved by EPA. Priority pollutants in this situation are footnoted in the matrix at 131.38(b)(1) with footnote "b." Where gaps exist in the State adoption and EPA approval of priority toxic pollutant objectives, the criteria in today's rule apply.

EPA is assigning "human health, water and organism consumption" criteria to waters with the States' municipal or "MUN" beneficial use designation in the Basin Plan. Also, some pollutants regulated through the Basin Plan have different averaging periods, *e.g.*, one hour as compared with the rule's "short-term." However, where classes of chemicals, such as polynuclear aromatic hydrocarbons, or PAHs, and phenols, are regulated through the Basin Plan, but not specific chemicals within the category, specific chemicals within the category are regulated by today's rule.

E. Rationale and Approach for Developing the Final Rule

This section explains EPA's legal basis for today's final rule, and discusses EPA's general approach for developing the specific requirements for the State of California.

1. Legal Basis

CWA section 303(c) specifies that adoption of water quality standards is primarily the responsibility of the States. However, CWA section 303(c) also describes a role for the Federal government to oversee State actions to ensure compliance with CWA requirements. If EPA's review of the States' standards finds flaws or omissions, then the CWA authorizes EPA to correct the deficiencies (see CWA section 303(c)(4)). This water quality standards promulgation authority has been used by EPA to issue final rules on several separate occasions, including the NTR, as amended, which promulgated criteria similar to those included here for a number of States. These actions have addressed both insufficiently protective State criteria and/or designated uses and failure to adopt needed criteria. Thus, today's action is not unique.

The CWA in section 303(c)(4) provides two bases for promulgation of Federal water quality standards. The first basis, in paragraph (A), applies when a State submits new or revised standards that EPA determines are not consistent with the applicable requirements of the CWA. If, after EPA's disapproval, the State does not amend its rules so as to be consistent with the CWA, EPA is to promptly propose appropriate Federal water quality standards for that State. The second basis for an EPA action is in paragraph (B), which provides that EPA shall promptly initiate promulgation "* * * in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act." EPA is using section 303(c)(4)(B) as the legal basis for today's final rule.

As discussed in the preamble to the NTR, the Administrator's determination under CWA section 303(c)(4) that criteria are necessary to meet the requirements of the Act could be supported in several ways. Consistent with EPA's approach in the NTR, EPA interprets section 303(c)(2)(B) of the CWA to allow EPA to act where the State has not succeeded in establishing numeric water quality standards for toxic pollutants. This inaction can be the basis for the Administrator's determination under section 303(c)(4) that new or revised criteria are necessary to ensure designated uses are protected.

EPA does not believe that it is necessary to support the criteria in today's rule on a pollutant-specific, water body-by-water-body basis. For EPA to undertake an effort to conduct research and studies of each stream segment or water body across the State of California to demonstrate that for each toxic pollutant for which EPA has issued CWA section 304(a) criteria guidance there is a "discharge or presence" of that pollutant which could reasonably "be expected to interfere with" the designated use would impose an enormous administrative burden and would be contrary to the statutory directive for swift action manifested by the 1987 addition of section 303(c)(2)(B) to the CWA. Moreover, because these criteria are ambient criteria that define attainment of the designated uses, their application to all water bodies will result in additional controls on dischargers only where necessary to protect the designated uses.

EPA's interpretation of section 303(c)(2)(B) is supported by the language of the provision, the statutory framework and purpose of section 303, and the legislative history. In adding section 303(c)(2)(B) to the CWA, Congress understood the existing requirements in section 303(c)(1) for States to conduct triennial reviews of their water quality standards and submit the results of those reviews to EPA and in section 303(c)(4)(B) for promulgation. CWA section 303(c) includes numerous deadlines and section 303(c)(4) directs the Administrator to act "promptly" where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. Congress, by linking section 303(c)(2)(B) to the section 303(c)(1) three-year review period, gave States a last chance to correct this deficiency on their own. The legislative history of the provision demonstrates that chief Senate sponsors, including Senators Stafford, Chaffee and others wanted the provision to eliminate State and EPA delays and force quick action. Thus, to interpret CWA section 303(c)(2)(B) and (c)(4) to require such a cumbersome pollutant specific effort on each stream segment would essentially render section 303(c)(2)(B) meaningless. The provision and its legislative background indicate that the Administrator's determination to invoke section 303(c)(4)(B) authority can be met by the Administrator making a generic finding of inaction by the State without the need to develop pollutant specific data for individual stream segments. Finally, the reference in section 303(c)(2)(B) to section 304(a) criteria suggests that section 304(a) criteria serve as default criteria; that once EPA has issued them, States were to adopt numeric criteria for those pollutants based on the 304(a) criteria, unless they had other scientifically defensible criteria. EPA also notes that this rule follows the approach EPA took nationally in promulgating the NTR for States that failed to comply with CWA section 303(c)(2)(B). 57 FR 60848, December 22, 1992. EPA incorporates the discussion in the NTR preamble as part of this rulemaking record.

This determination is supported by information in the rulemaking record showing the discharge or presence of priority toxic pollutants throughout the State. While this data is not necessarily complete, it constitutes a strong record supporting the need for numeric criteria for priority toxic pollutants with section 304(a) criteria guidance where the State does not have numeric criteria.

Today's final rule would not impose any undue or inappropriate burden on the State of California or its dischargers. It merely puts in place numeric criteria

for toxic pollutants that are already used in other States in implementing CWA programs. Under this rulemaking, the State of California retains the ability to adopt alternative water quality criteria simply by completing its criteria adoption process. Upon EPA approval of those criteria, EPA will initiate action to stay the Federally-promulgated criteria and subsequently withdraw them.

2. Approach for Developing This Rule

In summary, EPA developed the criteria promulgated in today's final rule as follows. Where EPA promulgated criteria for California in the NTR, EPA has not acted to amend the criteria in the NTR. Where criteria for California were not included in the NTR, EPA used section 304(a) National criteria guidance documents as a starting point for the criteria promulgated in this rule. EPA then determined whether new information since the development of the national criteria guidance documents warranted any changes. New information came primarily from two sources. For human health criteria, new or revised risk reference doses and cancer potency factors on EPA's Integrated Risk Information System (IRIS) as of October 1996 form the basis for criteria values (see also 63 FR 68354). For aquatic life criteria, updated data sets resulting in revised criteria maximum concentrations (CMCs) and criteria continuous concentrations (CCCs) formed the basis for differences from the national criteria guidance documents. Both of these types of changes are discussed in more detail in the following sections. This revised information was used to develop the water quality criteria promulgated here for the State of California.

F. Derivation of Criteria

1. Section 304(a) Criteria Guidance Process

Under CWA section 304(a), EPA has developed methodologies and specific criteria guidance to protect aquatic life and human health. These methodologies are intended to provide protection for all surface waters on a national basis. The methodologies have been subject to public review, as have the individual criteria guidance documents. Additionally, the methodologies have been reviewed by EPA's Science Advisory Board (SAB) of external experts.

EPA has included in the record of this rule the aquatic life methodology as described in "Appendix B—Guidelines for Deriving Water Quality Criteria for the Protection of Aquatic Life and Its Uses" to the "Water Quality Criteria Documents; Availability" (45 FR 79341, November 28, 1980) as amended by the "Summary of Revisions to Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" (50 FR 30792, July 29, 1985). (Note: Throughout the remainder of this preamble, this reference is described as the 1985 Guidelines. Any page number references are to the actual guidance document, not the notice of availability in the Federal Register. A copy of the 1985 Guidelines is available through the National Technical Information Service (PB85–227049), is in the administrative record for this rule, and is abstracted in Appendix A of *Quality Criteria for Water*, 1986.) EPA has also included in the administrative record of this rule the human health methodology as described in "Appendix C—Guidelines and Methodology Used in the Preparation of Health Effects Assessment Chapters of the Consent Decree Water Criteria Documents" (45 FR 79347, November 28, 1980). (Note: Throughout the remainder of this preamble, this reference is described as the Human Health Guidelines or the 1980 Guidelines.) EPA also recommends that the following be reviewed: "Appendix D—Response to Comments on Guidelines for Deriving Water Quality Criteria for the Protection of Aquatic Life and Its Uses," (45 FR 79357, November 28, 1980); "Appendix E—Responses to Public Comments on the Human Health Effects Methodology for Deriving Ambient Water Quality Criteria" (45 FR 79368, November 28, 1980); and "Appendix B—Response to Comments on Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" (50 FR 30793, July 29, 1985). EPA placed into the administrative record for this rulemaking the most current individual criteria guidance for the priority toxic pollutants included in today's rule. (Note: All references to appendices are to the associated Federal Register publication.)

EPA received many comments related to the issue of what criteria should apply in the CTR if the CWA section 304(a) criteria guidance is undergoing re-evaluation, or if new data are developed that may affect a recommended criterion. As science is always evolving, EPA is faced with the challenge of promulgating criteria that reflect the best science and sound science. EPA addressed this challenge in some detail in its Federal Register notice that contained the Agency's current section 304(a) criteria guidance (63 FR 68335, December 10, 1998). There, EPA articulated its policy, reiterated here, that the existing criteria guidance represent the Agency's best assessment until such time as EPA's re-evaluation of a criteria guidance value for a particular chemical is complete. The reason for this is that both EPA's human health criteria guidance and aquatic life criteria guidance are developed taking into account numerous variables. For example, for human health criteria guidance, EPA evaluates many diverse toxicity studies, whose results feed into a reference dose or cancer potency estimate that, along with a number of exposure factors and determination of risk level, results in a guidance criterion. For aquatic life, EPA evaluates many diverse aquatic toxicity studies to determine chronic and acute toxicity taking into account how other factors (such as pH, temperature or hardness) affect toxicity. EPA also, to the extent possible, addresses bioaccumulation or bioconcentration. EPA then uses this toxicity information along with exposure information to determine the guidance criterion. Importantly, EPA subjects such evaluation to peer review and/or public comment.

For these reasons, EPA generally does not make a change to the 304(a) criteria guidance based on a partial picture of the evolving science. This makes sense, because to address one piece of new data without looking at all relevant data is less efficient and results in regulatory impacts that may go back and forth, when in the end, the criteria guidance value does not change that much. Certain new changes, however, do warrant change in criteria guidance, such as a change in a value in EPA's Integrated Risk Information System (IRIS) because it represents the Agency consensus about human health impacts. These changes are sufficiently examined across the Agency such that EPA believes they can be incorporated into EPA's water quality criteria guidance. EPA has followed this approach in the CTR. Included in the administrative record for today's rule is a document entitled "Status of Clean Water Act Section 304(a) Criteria" which further explains EPA's policy on managing change to criteria guidance.

2. Aquatic Life Criteria

Aquatic life criteria may be expressed in numeric or narrative form. EPA's 1985 Guidelines describe an objective, internally consistent and appropriate way of deriving chemical-specific, numeric water quality criteria for the protection of the presence of, as well as

the uses of, both fresh and salt water aquatic organisms.

An aquatic life criterion derived using EPA's CWA section 304(a) method "might be thought of as an estimate of the highest concentration of a substance in water which does not present a significant risk to the aquatic organisms in the water and their uses." (45 FR 79341.) EPA's guidelines are designed to derive criteria that protect aquatic communities. EPA's 1985 Guidelines attempt to provide a reasonable and adequate amount of protection with only a small possibility of substantial overprotection or underprotection. As discussed in detail below, there are several individual factors which may make the criteria somewhat overprotective or underprotective. The approach EPA is using is believed to be as well balanced as possible, given the state of the science.

Numerical aquatic life criteria derived using EPA's 1985 Guidelines are expressed as short-term and long-term averages, rather than one number, in order that the criterion more accurately reflect toxicological and practical realities. The combination of a criterion maximum concentration (CMC), a short-term concentration limit, and a criterion continuous concentration (CCC), a four-day average concentration limit, are designed to provide protection of aquatic life and its uses from acute and chronic toxicity to animals and plants, without being as restrictive as a one-number criterion would have to be (1985 Guidelines, pages 4 & 5). The terms CMC and CCC are the formal names for the two (acute and chronic) values of a criterion for a pollutant; however, this document will also use the informal synonyms acute criterion and chronic criterion.

The two-number criteria are intended to identify average pollutant concentrations which will produce water quality generally suited to maintenance of aquatic life and designated uses while restricting the duration of excursions over the average so that total exposures will not cause unacceptable adverse effects. Merely specifying an average value over a time period may be insufficient unless the time period is short, because excursions higher than the average may kill or cause substantial damage in short periods.

A minimum data set of eight specified families is recommended for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. EPA's application of its guidelines to develop the criteria matrix in this rule is judged by the Agency to be appropriate for all waters of the United States (U.S.), and to all ecosystems (1985 Guidelines, page 4) including those waters of the U.S. and ecosystems in the State of California.

Fresh water and salt water (including both estuarine and marine waters) have different chemical compositions, and freshwater and saltwater species often do not inhabit the same water. To provide additional accuracy, criteria are developed for fresh water and for salt water.

For this rule, EPA updated freshwater aquatic life criteria contained in CWA section 304(a) criteria guidance first published in the early 1980's and later modified in the NTR, as amended, for the following ten pollutants: arsenic, cadmium, chromium (VI), copper, dieldrin, endrin, lindane (gamma BHC), nickel, pentachlorophenol, and zinc. The updates used as the basis for this rule are explained in a technical support document entitled, *1995 Updates: Water Quality Criteria Documents for the Protection of Aquatic Life in Ambient Water* (U.S. EPA–820–B–96–001, September 1996), available in the administrative record to this rulemaking; this document presents the derivation of each of the final CMCs and CCCs and the toxicity studies from which the updated freshwater criteria for the ten pollutants were derived.

The polychlorinated biphenyls (PCB) criteria in the criteria matrix for this rule differs from that in the NTR, as amended; for this rule, the criteria are expressed as the sum of seven aroclors, while for the NTR, as amended, the criteria are expressed for each of seven aroclors. The aquatic life criteria for PCBs in the CTR are based on the criteria contained in the 1980 criteria guidance document for PCBs which is included in the administrative record for this rule. This criteria document explains the derivation of aquatic life criteria based on total PCBs. For more information see the Response to Comments document for this rule. Today's chronic aquatic life criteria for PCBs are based on a final residue value (FRV). In EPA's guidelines for deriving aquatic life criteria, an FRV-based criterion is intended to prevent concentrations of pollutants in commercially or recreationally important aquatic species from affecting the marketability of those species or affecting the wildlife that consume aquatic life.

The proposed CTR included an updated freshwater and saltwater aquatic life criteria for mercury. In today's final rule, EPA has reserved the mercury criteria for freshwater and saltwater aquatic life, but is promulgating human health criteria for mercury for all surface waters in California. In some instances, the human health mercury criteria included in today's final rule may not protect some aquatic species or threatened or endangered species. In such instances, more stringent mercury limits may be determined and implemented through use of the State's narrative criterion. The reasons for reserving the mercury aquatic life numbers are explained in further detail in Section L, Endangered Species Act.

a. Freshwater Acute Selenium Criterion

EPA proposed a different freshwater acute aquatic life criterion for selenium for this rule than was promulgated in the NTR, as amended. EPA's proposed action was consistent with EPA's proposed selenium criterion maximum concentration for the Water Quality Guidance for the Great Lakes System (61 FR 58444, November 14, 1996). This proposal took into account data showing that selenium's two most prevalent oxidation states, selenite and selenate, present differing potentials for aquatic toxicity, as well as new data which indicated that various forms of selenium are additive. Additivity increases the toxicity of mixtures of different forms of the pollutant. The proposed approach produces a different selenium acute criterion concentration, or CMC, depending upon the relative proportions of selenite, selenate, and other forms of selenium that are present.

The preamble to the August 5, 1997, proposed rule provided a lengthy discussion of this proposed criterion for the State of California. See 62 FR 42160–42208. EPA incorporates that discussion here as part of this rulemaking record. In 1996, a similar discussion was included in the proposed rule for the Great Lakes System. Commenters questioned several aspects of the Great Lakes proposal. EPA is continuing to respond to those comments, and to follow up with additional literature review and toxicity testing. In addition, the U.S. FWS and U.S. NMFS (collectively, the Services) are concerned that EPA's proposed criterion may not be sufficiently protective of certain threatened and endangered species in California. Because the Services believe there is a lack of data to show for certain that the proposed criterion would not affect threatened and endangered species, the Services prefer that EPA further investigate the protectiveness of the

criterion before finalizing the proposed criterion. Therefore, EPA is not promulgating a final acute freshwater selenium criterion at this time.

b. Dissolved Metals Criteria

In December of 1992, in the NTR, EPA promulgated water quality criteria for several States that had failed to meet the requirements of CWA section 303(c)(2)(B). Included among the water quality criteria promulgated were numeric criteria for the protection of aquatic life for 11 metals: arsenic, cadmium, chromium (III), chromium (VI), copper, lead, mercury, nickel, selenium, silver and zinc. Criteria for two metals applied to the State of California: chromium III and selenium.

The Agency received extensive public comment during the development of the NTR regarding the most appropriate approach for expressing the aquatic life metals criteria. The principal issue was the correlation between metals that are measured and metals that are bioavailable and toxic to aquatic life. It is now the Agency's policy that the use of dissolved metal to set and measure compliance with aquatic life water quality standards is the recommended approach, because dissolved metal more closely approximates the bioavailable fraction of the metal in the water column than does total recoverable metal.

Since EPA's previous aquatic life criteria guidance had been expressed as total recoverable metal, to express the criteria as dissolved, conversion factors were developed to account for the possible presence of particulate metal in the laboratory toxicity tests used to develop the total recoverable criteria. EPA included a set of recommended freshwater conversion factors with its Metals Policy (see Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria, Martha G. Prothro, Acting Assistant Administrator for Water, October 1, 1993). Based on additional laboratory evaluations that simulated the original toxicity tests, EPA refined the procedures used to develop freshwater conversion factors for aquatic life criteria. These new conversion factors were made available for public review and comment in the amendments to the NTR on May 4, 1995, at 60 FR 22229. They are also contained in today's rule at 40 CFR 131.38(b)(2).

The preamble to the August 5, 1997, proposed rule provided a more detailed discussion of EPA's metals policy concerning the aquatic life water quality criteria for the State of California. See 62 FR 42160–42208. EPA incorporates that discussion here as part of this rulemaking record. Many commenters strongly supported the Agency's policy on dissolved metals aquatic life criteria. A few commenters expressed an opinion that the metals policy may not provide criteria that are adequately protective of aquatic or other species. Responses to those comments are contained in a memo to the CTR record entitled "Discussion of the Use of Dissolved Metals in the CTR" (February 1, 2000, Jeanette Wiltse) and EPA's response to comments document which are both contained in the administrative record for the final rule.

Calculation of Aquatic Life Dissolved Metals Criteria: Metals criteria values for aquatic life in today's rule in the matrix at 131.38(b)(1) are shown as dissolved metal. These criteria have been calculated in one of two ways. For freshwater metals criteria that are hardness-dependent, the metals criteria value is calculated separately for each hardness using the table at 40 CFR 131.38(b)(2). (The hardness-dependent freshwater values presented in the matrix at 40 CFR 131.38(b)(1) have been calculated using a hardness of 100 mg/l as CaCO3 for illustrative purposes only.) The hardness-dependent criteria are then multiplied by the appropriate conversion factors in the table at 40 CFR 131.38(b)(2). Saltwater and freshwater metals criteria that are not hardness-dependent are calculated by taking the total recoverable criteria values (from EPA's national section 304(a) criteria guidance, as updated and described in section F.2.a.) before rounding, and multiplying them by the appropriate conversion factors. The final dissolved metals criteria values, as they appear in the matrix at 40 CFR 131.38(b)(1), are rounded to two significant figures.

Translators for Dissolved to Total Recoverable Metals Limits: EPA's National Pollutant Discharge Elimination System (NPDES) regulations require that limits for metals in permits be stated as total recoverable in most cases (see 40 CFR 122.45(c)) except when an effluent guideline specifies the limitation in another form of the metal, the approved analytical methods measure only dissolved metal, or the permit writer expresses a metal's limit in another form (*e.g.*, dissolved, specific valence, or total) when required to carry out provisions of the CWA. This is because the chemical conditions in ambient waters frequently differ substantially from those in the effluent and these differences result in changes in the partitioning between dissolved and absorbed forms of the metal. This means that if effluent limits were expressed in the dissolved form, additional particulate metal could dissolve in the receiving water causing the criteria to be exceeded. Expressing criteria as dissolved metal requires translation between different metal forms in the calculation of the permit limit so that a total recoverable permit limit can be established that will achieve water quality standards. Thus, it is important that permitting authorities and other authorities have the ability to translate between dissolved metal in ambient waters and total recoverable metal in effluent.

EPA has completed guidance on the use of translators to convert from dissolved metals criteria to total recoverable permit limits. The document, *The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From a Dissolved Criterion* (EPA 823–B–96–007, June 1996), is included in the administrative record for today's rule. This technical guidance examines how to develop a metals translator which is defined as the fraction of total recoverable metal in the downstream water that is dissolved, *i.e.*, the dissolved metal concentration divided by the total recoverable metal concentration. A translator may take one of three forms: (1) It may be assumed to be equivalent to the criteria guidance conversion factors; (2) it may be developed directly as the ratio of dissolved to total recoverable metal; and (3) it may be developed through the use of a partition coefficient that is functionally related to the number of metal binding sites on the adsorbent in the water column (*e.g.*, concentrations of total suspended solids or TSS). This guidance document discusses these three forms of translators, as well as field study designs, data generation and analysis, and site-specific study plans to generate site-specific translators.

California Regional Water Quality Control Boards may use any of these methods in developing water quality-based permit limits to meet water quality standards based on dissolved metals criteria. EPA encourages the State to adopt a statewide policy on the use of translators so that the most appropriate method or methods are used consistently within California.

c. Application of Metals Criteria

In selecting an approach for implementing the metals criteria, the principal issue is the correlation between metals that are measured and metals that are biologically available and toxic. In order to assure that the metals criteria are appropriate for the chemical conditions under which they are applied, EPA is providing for the

adjustment of the criteria through application of the "water-effect ratio" procedure. EPA notes that performing the testing to use a site-specific water-effect ratio is optional on the part of the State.

In the NTR, as amended, EPA identified the water-effect ratio (WER) procedure as a method for optional site-specific criteria development for certain metals. The WER approach compares bioavailability and toxicity of a specific pollutant in receiving waters and in laboratory waters. A WER is an appropriate measure of the toxicity of a material obtained in a site water divided by the same measure of the toxicity of the same material obtained simultaneously in a laboratory dilution water.

On February 22, 1994, EPA issued *Interim Guidance on the Determination and Use of the Water-Effect Ratios for Metals* (EPA 823-B–94–001) now incorporated into the updated Second Edition of the Water Quality Standards Handbook, Appendix L. A copy of the Handbook is contained in the administrative record for today's rule. In accordance with the WER guidance and where application of the WER is deemed appropriate, EPA strongly encourages the application of the WER on a watershed or water body basis as part of a water quality criteria in California as opposed to the application on a discharger-by-discharger basis through individual NPDES permits. This approach is technically sound and an efficient use of resources. However, discharger specific WERs for individual NPDES permit limits are possible and potentially efficient where the NPDES discharger is the only point source discharger to a specific water body.

The rule requires a default WER value of 1.0 which will be assumed, if no site-specific WER is determined. To use a WER other than the default of 1.0, the rule requires that the WER must be determined as set forth in EPA's WER guidance or by another scientifically defensible method that has been adopted by the State as part of its water quality standards program and approved by EPA.

The WER is a more comprehensive mechanism for addressing bioavailability issues than simply expressing the criteria in terms of dissolved metal. Consequently, expressing the criteria in terms of dissolved metal, as done in today's rule for California, does not completely eliminate the utility of the WER. This is particularly true for copper, a metal that forms reduced-toxicity complexes with dissolved organic matter.

The *Interim Guidance on Determination and Use of Water-Effect Ratios for Metals* explains the relationship between WERs for dissolved criteria and WERs for total recoverable criteria. Dissolved measurements are to be used in the site-specific toxicity testing underlying the WERs for dissolved criteria. Because WERs for dissolved criteria generally are little affected by elevated particulate concentrations, EPA expects those WERs to be somewhat less than WERs for total recoverable criteria in such situations. Nevertheless, after the site-specific ratio of dissolved to total metal has been taken into account, EPA expects a permit limit derived using a WER for a dissolved criterion to be similar to the permit limit that would be derived from the WER for the corresponding total recoverable criterion.

d. Saltwater Copper Criteria

The saltwater copper criteria for aquatic life in today's rule are 4.8 µg/l (CMC) and 3.1 µg/l (CCC) in the dissolved form. These criteria reflect new data including data collected from studies for the New York/New Jersey Harbor and the San Francisco Bay indicating a need to revise the former copper 304(a) criteria guidance document to reflect a change in the saltwater CMC and CCC aquatic life values. These data also reflect a comprehensive literature search resulting in added toxicity test data for seven new species to the database for the saltwater copper criteria. EPA believes these new data have national implications and the national criteria guidance now contains a CMC of 4.8 µg/l dissolved and a CCC of 3.1 µg/l dissolved. In the amendments to the NTR, EPA noticed the availability of data to support these changes to the NTR, and solicited comments. The data can be found in the draft document entitled, *Ambient Water Quality Criteria—Copper, Addendum 1995*. This document is available from the Office of Water Resource Center and is available for review in the administrative record for today's rule.

e. Chronic Averaging Period

In establishing water quality criteria, EPA generally recommends an "averaging period" which reflects the duration of exposure required to elicit effects in individual organisms (TSD, Appendix D–2). The criteria continuous concentration, or CCC, is intended to be the highest concentration that could be maintained indefinitely in a water body without causing an unacceptable effect on the aquatic community or its uses (TSD, Appendix D–1). As aquatic organisms do not generally experience steady exposure, but rather fluctuating exposures to pollutants, and because aquatic organisms can generally tolerate higher concentrations of pollutants over a shorter periods of time, EPA expects that the concentration of a pollutant can exceed the CCC without causing an unacceptable effect if (a) the magnitude and duration of exceedences are appropriately limited and (b) there are compensating periods of time during which the concentration is below the CCC. This is done by specifying a duration of an "averaging period" over which the average concentration should not exceed the CCC more often than specified by the frequency (TSD, Appendix D–1).

EPA is promulgating a 4-day averaging period for chronic criteria, which means that measured or predicted ambient pollutant concentrations should be averaged over a 4-day period to determine attainment of chronic criteria. The State may apply to EPA for approval of an alternative averaging period. To do so, the State must submit to EPA the basis for such alternative averaging period.

The most important consideration for setting an appropriate averaging period is the length of time that sensitive organisms can tolerate exposure to a pollutant at levels exceeding a criterion without showing adverse effects on survival, growth, or reproduction. EPA believes that the chronic averaging period must be shorter than the duration of the chronic tests on which the CCC is based, since, in some cases, effects are elicited before exposure of the entire duration. Most of the toxicity tests used to establish the chronic criteria are conducted using steady exposure to toxicants for a least 28 days (TSD, page 35). Some chronic tests, however, are much shorter than this (TSD, Appendix D–2). EPA selected the 4-day averaging period based on the shortest duration in which chronic test effects are sometimes observed for certain species and toxicants. In addition, EPA believes that the results of some chronic tests are due to an acute effect on a sensitive life stage that occurs some time during the test, rather than being caused by long-term stress or long-term accumulation of the test material in the organisms.

Additional discussion of the rationale for the 4-day averaging period is contained in Appendix D of the TSD. Balancing all of the above factors and data, EPA believes that the 4-day averaging period falls within the scientifically reasonable range of values for choice of the averaging period, and is an appropriate length of time of

pollutant exposure to ensure protection of sensitive organisms.

EPA established a 4-day averaging period in the NTR. In settlement of litigation on the NTR, EPA stated that it was "in the midst of conducting, sponsoring, or planning research related to the basis for and application of" water quality criteria and mentioned the issue of averaging period. See Partial Settlement Agreement in *American Forest and Paper Ass'n, Inc. et al.* v. *U.S. EPA* (Consolidated Case No. 93–0694 (RMU), D.D.C.). EPA is re-evaluating issues raised about averaging periods and will, if appropriate, revise the 1985 Guidelines.

EPA received public comment relevant to the averaging period during the comment period for the 1995 Amendments to the NTR (60 FR 22228, May 4, 1995), although these public comments did not address the chronic averaging period separately from the allowable excursion frequency and the design flow. Comments recommended that EPA use the 30Q5 design flow for chronic criteria.

While EPA is undertaking analysis of the chronic design conditions as part of the revisions to the 1985 Guidelines, EPA has not yet completed this work. Until this work is complete, for the reasons set forth in the TSD, EPA continues to believe that the 4-day chronic averaging period represents a reasonable, defensible value for this parameter.

EPA added language to the final rule which will enable the State to adopt alternative averaging periods and frequencies and associated design flows where appropriate. The State may apply to EPA for approval of alternative averaging periods and frequencies and related design flows; the State must submit the bases for any changes. Before approving any change, EPA will publish for public comment, a notice proposing the changes.

f. Hardness

Freshwater aquatic life criteria for certain metals are expressed as a function of hardness because hardness and/or water quality characteristics that are usually correlated with hardness can reduce or increase the toxicities of some metals. Hardness is used as a surrogate for a number of water quality characteristics which affect the toxicity of metals in a variety of ways. Increasing hardness has the effect of decreasing the toxicity of metals. Water quality criteria to protect aquatic life may be calculated at different concentrations of hardnesses measured in milligrams per liter (mg/l) as calcium carbonate ($CaCO_3$).

Section 131.38(b)(2) of the final rule presents the hardness-dependent equations for freshwater metals criteria. For example, using the equation for zinc, the total recoverable CMCs at a hardness of 10, 50, 100 or 200 mg/l as $CaCO_3$ are 17, 67, 120 and 220 micrograms per liter (µg/l), respectively. Thus, the specific value in the table in the regulatory text is for illustrative purposes only. Most of the data used to develop these hardness equations for deriving aquatic life criteria for metals were in the range of 25 mg/l to 400 mg/l as $CaCO_3$, and the formulas are therefore most accurate in this range. The majority of surface waters nationwide and in California have a hardness of less than 400 mg/l as $CaCO_3$.

In the past, EPA generally recommended that 25 mg/l as $CaCO_3$ be used as a default hardness value in deriving freshwater aquatic life criteria for metals when the ambient (or actual) hardness value is below 25 mg/l as $CaCO_3$. However, use of the approach results in criteria that may not be fully protective. Therefore, for waters with a hardness of less than 25 mg/l as $CaCO_3$, criteria should be calculated using the actual ambient hardness of the surface water.

In the past, EPA generally recommended that if the hardness was over 400 mg/l, two options were available: (1) Calculate the criterion using a default WER of 1.0 and using a hardness of 400 mg/l in the hardness equation; or (2) calculate the criterion using a WER and the actual ambient hardness of the surface water in the equation. Use of the second option is expected to result in the level of protection intended in the 1985 Guidelines whereas use of the first option is thought to result in an even more protective aquatic life criterion. At high hardness there is an indication that hardness and related inorganic water quality characteristics do not have as much of an effect on toxicity of metals as they do at lower hardnesses. Related water quality characteristics do not correlate as well at higher hardnesses as they do at lower hardnesses. Therefore, if hardness is over 400 mg/l as $CaCO_3$, a hardness of 400 mg/l as $CaCO_3$ should be used with a default WER of 1.0; alternatively, the WER and actual hardness of the surface water may be used.

EPA requested comments in the NTR amendments on the use of actual ambient hardness for calculating criteria when the hardness is below 25 mg/l as $CaCO_3$, and when hardness is greater than 400 mg/l as $CaCO_3$. Most of the comments received were in favor of using the actual hardness with the use of the water-effect ratio (1.0 unless otherwise specified by the permitting authority) when the hardness is greater than 400 mg/l as $CaCO_3$. A few commenters did not want the water-effect ratio to be mandatory in calculating hardness, and other commenters had concerns about being responsible for deriving an appropriate water-effect ratio. Overall, the commenters were in favor of using the actual hardness when calculating hardness-dependent freshwater metals criteria for hardness between 0–400 mg/l as $CaCO_3$. EPA took those comments into account in promulgating today's rule.

A hardness equation is most accurate when the relationships between hardness and the other important inorganic constituents, notably alkalinity and pH, are nearly identical in all of the dilution waters used in the toxicity tests and in the surface waters to which the equation is to be applied. If an effluent raises hardness but not alkalinity and/or pH, using the hardness of the downstream water might provide a lower level of protection than intended by the 1985 guidelines. If it appears that an effluent causes hardness to be inconsistent with alkalinity and/or pH, the intended level of protection will usually be maintained or exceeded if either (1) data are available to demonstrate that alkalinity and/or pH do not affect the toxicity of the metal, or (2) the hardness used in the hardness equation is the hardness of upstream water that does not contain the effluent. The level of protection intended by the 1985 guidelines can also be provided by using the WER procedure.

In some cases, capping hardness at 400 mg/l might result in a level of protection that is higher than that intended by the 1985 guidelines, but any such increase in the level of protection can be overcome by use of the WER procedure. For metals whose criteria are expressed as hardness equations, use of the WER procedure will generally be intended to account for effects of such water quality characteristics as total organic carbon on the toxicities of metals. The WER procedure is equally useful for accounting for any deviation from a hardness equation in a site water.

3. Human Health Criteria

EPA's CWA section 304(a) human health criteria guidance provides criteria recommendations to minimize adverse human effects due to substances in ambient water. EPA's CWA section 304(a) criteria guidance for human health are based on two types of

toxicological endpoints: (1) carcinogenicity and (2) systemic toxicity (i.e., all other adverse effects other than cancer). Thus, there are two procedures for assessing these health effects: one for carcinogens and one for non-carcinogens.

If there are no data on how a chemical agent causes cancer, EPA's existing human health guidelines assume that carcinogenicity is a "non-threshold phenomenon," that is, there are no "safe" or "no-effect levels" because even extremely small doses are assumed to cause a finite increase in the incidence of the effect (i.e., cancer). Therefore, EPA's water quality criteria guidance for carcinogens are presented as pollutant concentrations corresponding to increases in the risk of developing cancer. See Human Health Guidelines at 45 FR 79347.

With existing criteria, pollutants that do not manifest any apparent carcinogenic effect in animal studies (i.e., systemic toxicants), EPA assumes that the pollutant has a threshold below which no effect will be observed. This assumption is based on the premise that a physiological mechanism exists within living organisms to avoid or overcome the adverse effect of the pollutant below the threshold concentration.

Note: Recent changes in the Agency's cancer guidelines addressing these assumptions are described in the Draft Water Quality Criteria Methodology: Human Health, 63 FR 43756, August 14, 1998.

The human health risks of a substance cannot be determined with any degree of confidence unless dose-response relationships are quantified. Therefore, a dose-response assessment is required before a criterion can be calculated. The dose-response assessment determines the quantitative relationships between the amount of exposure to a substance and the onset of toxic injury or disease. Data for determining dose-response relationships are typically derived from animal studies, or less frequently, from epidemiological studies in exposed populations.

The dose-response information needed for carcinogens is an estimate of the carcinogenic potency of the compound. Carcinogenic potency is defined here as a general term for a chemical's human cancer-causing potential. This term is often used loosely to refer to the more specific carcinogenic or cancer slope factor which is defined as an estimate of carcinogenic potency derived from animal studies or epidemiological data of human exposure. It is based on extrapolation from test exposures of high doses over relatively short periods of time to more realistic low doses over a lifetime exposure period by use of linear extrapolation models. The cancer slope factor, q1*, is EPA's estimate of carcinogenic potency and is intended to be a conservative upper bound estimate (e.g. 95% upper bound confidence limit).

For non-carcinogens, EPA uses the reference dose (RfD) as the dose-response parameter in calculating the criteria. For non-carcinogens, oral RfD assessments (hereinafter simply "RfDs") are developed based on pollutant concentrations that cause threshold effects. The RfD is an estimate (with uncertainty spanning perhaps an order of magnitude) of a daily exposure to the human population (including sensitive subgroups) that is likely to be without appreciable risk of deleterious effects during a lifetime. See Human Health Guidelines. The RfD was formerly referred to as an "Acceptable Daily Intake" or ADI. The RfD is useful as a reference point for gauging the potential effect of other doses. Doses that are less than the RfD are not likely to be associated with any health risks, and are therefore less likely to be of regulatory concern. As the frequency of exposures exceeding the RfD increases and as the size of the excess increases, the probability increases that adverse effect may be observed in a human population. Nonetheless, a clear conclusion cannot be categorically drawn that all doses below the RfD are "acceptable" and that all doses in excess of the RfD are "unacceptable." In extrapolating non-carcinogen animal test data to humans to derive an RfD, EPA divides either a No Observed-Adverse Effect Level (NOAEL), Lowest Observed Adverse Effect Level (LOAEL), or other benchmark dose observed in animal studies by an "uncertainty factor" which is based on professional judgment of toxicologists and typically ranges from 10 to 10,000.

For CWA section 304(a) human health criteria development, EPA typically considers only exposures to a pollutant that occur through the ingestion of water and contaminated fish and shellfish. Thus, the criteria are based on an assessment of risks related to the surface water exposure route only where designated uses are drinking water and fish and shellfish consumption.

The assumed exposure pathways in calculating the criteria are the consumption of 2 liters per day of water at the criteria concentration and the consumption of 6.5 grams per day of fish and shellfish contaminated at a level equal to the criteria concentration but multiplied by a "bioconcentration factor." The use of fish and shellfish consumption as an exposure factor requires the quantification of pollutant residues in the edible portions of the ingested species.

Bioconcentration factors (BCFs) are used to relate pollutant residues in aquatic organisms to the pollutant concentration in ambient waters. BCFs are quantified by various procedures depending on the lipid solubility of the pollutant. For lipid soluble pollutants, the average BCF is calculated from the weighted average percent lipids in the edible portions of fish and shellfish, which is about 3%; or it is calculated from theoretical considerations using the octanol/water partition coefficient. For non-lipid soluble compounds, the BCF is determined empirically. The assumed water consumption is taken from the National Academy of Sciences publication *Drinking Water and Health* (1977). (Referenced in the Human Health Guidelines.) This value is appropriate as it includes a margin of safety so that the general population is protected. See also EPA's discussion of the 2.0 liters/day assumption at 61 FR 65183 (Dec. 11, 1996). The 6.5 grams per day contaminated fish and shellfish consumption value was equivalent to the average per-capita consumption rate of all (contaminated and non-contaminated) freshwater and estuarine fish and shellfish for the U.S. population. See Human Health Guidelines.

EPA assumes in calculating water quality criteria that the exposed individual is an average adult with body weight of 70 kilograms. EPA assumes 6.5 grams per day of contaminated fish and shellfish consumption and 2.0 liters per day of contaminated drinking water consumption for a 70 kilogram person in calculating the criteria. Regarding issues concerning criteria development and differences in dose per kilogram of body weight, RfDs are always derived based on the most sensitive health effect endpoint. Therefore, when that basis is due to a chronic or lifetime health effect, the exposure parameters assume the exposed individual to be the average adult, as indicated above.

In the absence of this final rule, there may be particular risks to children. EPA believes that children are protected by the human health criteria contained in this final rule. Children are protected against other less sensitive adverse health endpoints due to the conservative way that the RfDs are derived. An RfD is a public health protective endpoint. It is an amount of a chemical that can be consumed on a daily basis for a lifetime without expecting an adverse effect. RfDs are based on sensitive health endpoints and

are calculated to be protective for sensitive human sub-populations including children. If the basis of the RfD was due to an acute or shorter-term developmental effect, EPA uses exposure parameters other than those indicated above. Specifically, EPA uses parameters most representative of the population of concern (*e.g.*, the health criteria for nitrates based on infant exposure parameters). For carcinogens, the risk assessments are upper bound one in a million (10^{-6}) lifetime risk numbers. The risk to children is not likely to exceed these upper bounds estimates and may be zero at low doses. The exposure assumptions for drinking water and fish protect children because they are conservative for infants and children. EPA assumes 2 liters of untreated surface water and 6.5 grams of freshwater and estuarine fish are consumed each day. EPA believes the adult fish consumption assumption is conservative for children because children generally consume marine fish not freshwater and estuarine.

EPA has a process to develop a scientific consensus on oral reference dose assessments and carcinogenicity assessments (hereinafter simply cancer slope factors or slope factors or q1*s). Through this process, EPA develops a consensus of Agency opinion which is then used throughout EPA in risk management decision-making. EPA maintains an electronic data base which contains the official Agency consensus for oral RfD assessments and carcinogenicity assessments which is known as the Integrated Risk Information System (IRIS). It is available for use by the public on the National Institutes of Health's National Library of Medicine's TOXNET system, and through diskettes from the National Technical Information Service (NTIS). (NTIS access number is PB 90–591330.)

Section 304(a)(1) of the CWA requires EPA to periodically revise its criteria guidance to reflect the latest scientific knowledge: "(A) On the kind and extent of all identifiable effects on health and welfare * * *; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on the biological community diversity, productivity, and stability, including information on the factors affecting eutrophication rates of organic and inorganic sedimentation for varying types of receiving waters." In developing up-to-date water quality criteria for the protection of human health, EPA uses the most recent IRIS values (RfDs and q1*s) as the toxicological basis in the criterion calculation. IRIS reflects EPA's most current consensus on the toxicological assessment for a chemical. In developing the criteria in today's rule, the IRIS values as of October 1996 were used together with currently accepted exposure parameters for bioconcentration, fish and shellfish and water consumption, and body weight. The IRIS cover sheet for each pollutant criteria included in today's rule is contained in the administrative record.

For the human health criteria included in today's rule, EPA used the Human Health Guidelines on which criteria recommendations from the appropriate CWA section 304(a) criteria guidance document were based. (These documents are also placed in the administrative record for today's rule.) Where EPA has changed any parameters in IRIS used in criteria derivation since issuance of the criteria guidance document, EPA recalculated the criteria recommendation with the latest IRIS information. Thus, there are differences between the original 1980 criteria guidance document recommendations, and those in this rule, but this rule presents EPA's most current CWA section 304(a) criteria recommendation. The basis (q1* or RfD) and BCF for each pollutant criterion in today's rule is contained in the rule's Administrative Record Matrix which is included in the administrative record for the rule. In addition, all recalculated human health numbers are denoted by an "a" in the criteria matrix in 40 CFR 131.38(b)(1) of the rule. The pollutants for which a revised human health criterion has been calculated since the December 1992 NTR include:

mercury
dichlorobromomethane
1,2-dichloropropane
1,2-trans-dichloroethylene
2,4-dimethylphenol
acenaphthene
benzo(a)anthracene
benzo(a)pyrene
benzo(b)flouranthene
benzo(k)flouranthene
2-chloronaphthalene
chrysene
dibenzo(a,h)anthracene
indeno(1,2,3-cd)pyrene
N-nitrosodi-n-propylamine
alpha-endosulfan
beta-endosulfan
endosulfan sulfate
2-chlorophenol
butylbenzyl phthalate
polychlorinated biphenyls.

In November of 1991, the proposed NTR presented criteria for several pollutants in parentheses. These were pollutants for which, in 1980, insufficient information existed to develop human health water quality criteria, but for which, in 1991, sufficient information existed. Since these criteria did not undergo the public review and comment in a manner similar to the other water quality criteria presented in the NTR (for which sufficient information was available in 1980 to develop a criterion, as presented in the 1980 criteria guidance documents), they were not proposed for adoption into the water quality criteria, but were presented to serve as notice for inclusion in future State triennial reviews. Today's rule promulgates criteria for these nine pollutants:

copper
1, 2-dichloropropane
1,2-trans-dichloroethylene
2,4-dimethylphenol
acenaphthene
2-chloronaphthalene
N-nitrosodi-n-propylamine
2-chlorophenol
butylbenzene phthalate

All the criteria are based on IRIS values—either an RfD or q1*—which were listed on IRIS as of November 1991, the date of the proposed NTR. These values have not changed since the final NTR was published in December of 1992. The rule's Administrative Record Matrix in the administrative record of today's rule contains the specific RfDs, q1*s, and BCFs used in calculating these criteria.

Proposed Changes to the Human Health Criteria Methodology: EPA recently proposed revisions to the 1980 ambient water quality criteria derivation guidelines (the Human Health Guidelines). See *Draft Water Quality Criteria Methodology: Human Health*, 63 FR 43756, August 14, 1998; see also *Draft Water Quality Criteria Methodology: Human Health*, U.S. EPA Office of Water, EPA 822–Z–98–001. The EPA revisions consist of five documents: *Draft Water Quality Criteria Methodology: Human Health*, EPA 822–Z–98–001; *Ambient Water Quality Criteria Derivation Methodology Human Health, Technical Support Document, Final Draft*, EPA–822–B–98–005; and three Ambient Water Quality Criteria for the Protection of Human Health, Drafts—one each for Acrylonitrile, 1,3-Dichloropropene (1,3-DCP), and Hexachlorobutadiene (HCBD), respectively, EPA–822–R–98–006, –005, and –004. All five documents are contained in the administrative record for today's rule.

The proposed methodology revisions reflect significant scientific advances that have occurred during the past nineteen years in such key areas as cancer and noncancer risk assessments, exposure assessments and bioaccumulation. For specific details on

these proposed changes and others, please refer to the Federal Register notice or the EPA document.

It should be noted that some of the proposed changes may result in significant numeric changes in the ambient water quality criteria. However, EPA will continue to rely on existing criteria as the basis for regulatory and non-regulatory decisions, until EPA revises and reissues a 304(a) criteria guidance using the revised final human health criteria methodology. The existing criteria are still viewed as scientifically acceptable by EPA. The intention of the proposed methodology revisions is to present the latest scientific advancements in the areas of risk and exposure assessment in order to incrementally improve the already sound toxicological and exposure bases for these criteria. As EPA's current human health criteria are the product of many years worth of development and peer review, it is reasonable to assume that revisiting all existing criteria, and incorporating peer review into such review, could require comparable amounts of time and resources. Given these circumstances, EPA proposed a process for revisiting these criteria as part of the overall revisions to the methodology for deriving human health criteria. This process is discussed in the Implementation Section of the Notice of *Draft Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (see 63 FR 43771–43776, August 14, 1998).

The State of California in its Ocean Plan, adopted in 1990 and approved by EPA in 1991, established numeric water quality criteria using an average fish and shellfish consumption rate of 23 grams per day. This value is based on an earlier California Department of Health Services estimate. The State is currently in the process of readopting its water quality control plans for inland surface waters, enclosed bays, and estuaries. The State intends to consider information on fish and shellfish consumption rates evaluated and summarized in a report prepared by the State's Pesticide and Environmental Toxicology Section of the Office of Environmental Health Hazard Assessment of the California Environmental Protection Agency. The report, entitled, *Chemicals in Fish Report No. 1: Consumption of Fish and Shellfish in California and the United States*, was published in final draft form in July of 1997, and released to the public on September 16, 1997. The report is currently undergoing final evaluation, and is expected to published in final form in the near future. This final draft report is contained in the administrative record for today's rule. Although EPA has not used this fish consumption value here because this information has not yet been finalized, the State may use any appropriate higher state-specific fish and shellfish consumption rates in its readoption of criteria in its statewide plans.

a. 2,3,7,8-TCDD (Dioxin) Criteria

In today's action, EPA is promulgating human health water quality criteria for 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin") at the same levels as promulgated in the NTR, as amended. These criteria are derived from EPA's 1984 CWA section 304(a) criteria guidance document for dioxin.

For National Pollutant Discharge Elimination System (NPDES) purposes, EPA supports the regulation of other dioxin and dioxin-like compounds through the use of toxicity equivalencies or TEQs in NPDES permits (see discussion below). For California waters, if the discharge of dioxin or dioxin-like compounds has reasonable potential to cause or contribute to a violation of a narrative criterion, numeric water quality-based effluent limits for dioxin or dioxin-like compounds should be included in NPDES permits and should be expressed using a TEQ scheme.

EPA has been evaluating the health threat posed by dioxin nearly continuously for over two decades. Following issuance of the 1984 criteria guidance document, evaluating the health effects of dioxin and recommending human health criteria for dioxin, EPA prepared draft reassessments reviewing new scientific information relating to dioxin in 1985 and 1988. EPA's Science Advisory Board (SAB), reviewing the 1988 draft reassessment, concluded that while the risk assessment approach used in 1984 criteria guidance document had inadequacies, a better alternative was unavailable (see SAB's *Dioxin Panel Review of Documents from the Office or Research and Development relating to the Risk and Exposure Assessment of 2,3,7,8-TCDD* (EPA–SAB–EC–90–003, November 28, 1989) included in the administrative record for today's rule). Between 1988 and 1990, EPA issued numerous reports and guidances relating to the control of dioxin discharges from pulp and paper mills. See e.g., EPA Memorandum, "Strategy for the Regulation of Discharges of PHDDs & PHDFs from Pulp and Paper Mills to the Waters of the United States," from Assistant Administrator for Water to Regional Water Management Division Directors and NPDES State Directors, dated May 21, 1990 (AR NL–16); EPA Memorandum, "State Policies, Water Quality Standards, and Permit Limitations Related to 2,3,7,8-TCDD in Surface Water," from the Assistant Administrator for Water to Regional Water Management Division Directors, dated January 5, 1990 (AR VA–66). These documents are available in the administrative record for today's rule.

In 1991, EPA's Administrator announced another scientific reassessment of the risks of exposure to dioxin (see Memorandum from Administrator William K. Reilly to Erich W. Bretthauer, Assistant Administrator for Research and Development and E. Donald Elliott, General Counsel, entitled *Dioxin: Follow-Up to Briefing on Scientific Developments*, April 8, 1991, included in the administrative record for today's rule). At that time, the Administrator made clear that while the reassessment was underway, EPA would continue to regulate dioxin in accordance with existing Agency policy. Thereafter, the Agency proceeded to regulate dioxin in a number of environmental programs, including standards under the Safe Drinking Water Act and the CWA.

The Administrator's promulgation of the dioxin human health criteria in the 1992 NTR affirmed the Agency's decision that the ongoing reassessment should not defer or delay regulating this potent contaminant, and further, that the risk assessment in the 1984 criteria guidance document for dioxin continued to be scientifically defensible. Until the reassessment process was completed, the Agency could not "say with any certainty what the degree or directions of any changes in the risk estimates might be" (57 FR 60863–64).

The basis for the dioxin criteria as well as the decision to include the dioxin criteria in the 1992 NTR pending the results of the reassessment were challenged. See *American Forest and Paper Ass'n, Inc. et al.* v. *U.S. EPA* (Consolidated Case No. 93–0694 (RMU) D.D.C.). By order dated September 4, 1996, the Court upheld EPA's decision. EPA's brief and the Court's decision are included in the administrative record for today's rule.

EPA has undertaken significant effort toward completion of the dioxin reassessment. On September 13, 1994, EPA released for public review and comment a draft reassessment of toxicity and exposure to dioxin. See *Health Assessment Document for 2,3,7,8-Tetrachlorobenzo-p-Dioxin (TCDD) and Related Compounds*, U.S. EPA, 1994. EPA is currently addressing comments made by the public and the SAB and anticipates that the final

revised reassessment will go to the SAB in the near future. With today's rule, the Agency reaffirms that, notwithstanding the on-going risk reassessment, EPA intends to continue to regulate dioxin to avoid further harm to public health, and the basis for the dioxin criteria, both in terms of the cancer potency and the exposure estimates, remains scientifically defensible. The fact that EPA is reassessing the risk of dioxin, virtually a continuous process to evaluate new scientific information, does not mean that the current risk assessment is "wrong". It continues to be EPA's position that until the risk assessment for dioxin is revised, EPA supports and will continue to use the existing risk assessment for the regulation of dioxin in the environment. Accordingly, EPA today promulgates dioxin criteria based on the 1984 criteria guidance document for dioxin and promulgated in the NTR in 1992.

Toxicity Equivalency: The State of California, in its 1991 water quality control plans, adopted human health criteria for dioxin and dioxin-like compounds based on the concept of toxicity equivalency (TEQ) using toxicity equivalency factors (TEFs). EPA Region 9 reviewed and approved the State's use of the TEQ concept and TEFs in setting the State's human health water quality criteria for dioxin and dioxin-like compounds.

In 1987, EPA formally embraced the TEQ concept as an interim procedure to estimate the risks associated with exposures to 210 chlorinated dibenzo-p-dioxin and chlorinated dibenzofuran (CDD/CDF) congeners, including 2,3,7,8-TCDD. This procedure uses a set of derived TEFs to convert the concentration of any CDD/CDF congener into an equivalent concentration of 2,3,7,8-TCDD. In 1989, EPA updated its TEFs based on an examination of relevant scientific evidence and a recognition of the value of international consistency. This updated information can be found in EPA's 1989 *Update to the Interim Procedures for Estimating Risks Associated with Exposures to Mixtures of Chlorinated Dibenzo-p-dioxins and -dibenzofurans (CDDs and CDFs)* (EPA/625/3–89/016, March 1989). EPA had been active in an international effort aimed at adopting a common set of TEFs (International TEFs/89 or I–TEFs/89), to facilitate information exchange on environmental contamination of CDD/CDF. This document reflects EPA's support of an internationally consistent set of TEFs, the I–TEFs/89. EPA uses I–TEFs/89 in many of its regulatory programs.

In 1994, the World Health Organization (WHO) revised the TEF scheme for dioxins and furans to include toxicity from dioxin-like compounds (Ahlborg et al., 1994). However, no changes were made to the TEFs for dioxins and furans. In 1998, the WHO re-evaluated and revised the previously established TEFs for dioxins (Ds), furans (Fs) and dioxin-like compounds (Vanden Bers, 1998). The nomenclature for this TEF scheme is TEQDFP–WHO98, where TEQ represents the 2,3,7,8-TCDD Toxic Equivalence of the mixture, and the subscript DFP indicates that dioxins (Ds) furans (Fs) and dioxin-like compounds (P) are included in the TEF scheme. The subscript 98 following WHO displays the year changes were made to the TEF scheme.

EPA intends to use the 1998 WHO TEF scheme in the near future. At this point however, EPA will support the use of either the 1989 interim procedures or the 1998 WHO TEF scheme but encourages the use of the 1998 WHO TEF scheme in State programs. EPA expects California to use a TEF scheme in implementing the 2,3,7,8-TCDD water quality criteria contained in today's rule. The TEQ and TEF approach provide a methodology for setting NPDES water quality-based permit limits that are protective of human health for dioxin and dioxin-like compounds.

Several commenters requested EPA to promulgate criteria for other forms of dioxin, in addition to 2,3,7,8-TCDD. EPA's draft reassessment for dioxin examines toxicity based on the TEQ concept and I–TEFs/89. When EPA completes the dioxin reassessment, the Agency intends to adopt revised 304(a) water quality criteria guidance based on the reassessment for dioxin. If necessary, EPA will then act to amend the NTR and CTR to reflect the revised 304(a) water quality criteria guidance.

b. Arsenic Criteria

EPA is not promulgating human health criteria for arsenic in today's rule. EPA recognizes that it promulgated human health water quality criteria for arsenic for a number of States in 1992, in the NTR, based on EPA's 1980 section 304(a) criteria guidance for arsenic established, in part, from IRIS values current at that time. However, a number of issues and uncertainties existed at the time of the CTR proposal concerning the health effects of arsenic. These issues and uncertainties were summarized in "Issues Related to Health Risk of Arsenic" which is contained in the administrative record for today's rule. During the period of this rulemaking action, EPA commissioned a study of arsenic health effects by the National Research Council (NRC) arm of the National Academy of Sciences. EPA received the NRC report in March of 1999. EPA scientists reviewed the report, which recommended that EPA lower the Safe Drinking Water Act arsenic maximum contaminant level (MCL) as soon as possible (The arsenic MCL is currently 50 µg/l.) The bladder cancer analysis in the NRC report will provide part of the basis for the risk assessment of a proposed revised arsenic MCL in the near future. After promulgating a revised MCL for drinking water, the Agency plans to revise the CWA 304(a) human health criteria for arsenic in order to harmonize the two standards. Today's rule defers promulgating arsenic criteria based on the Agency's previous risk assessment of skin cancer. In the meantime, permitting authorities in California should rely on existing narrative water quality criteria to establish effluent limitations as necessary for arsenic. California has previously expressed its science and policy position by establishing a criterion level of 5 µg/l for arsenic. Permitting authorities may, among other considerations, consider that value when evaluating and interpreting narrative water quality criteria.

c. Mercury Criteria

The human health criteria promulgated here use the latest RfD in EPA's Integrated Risk Information System (IRIS) and the weighted average practical bioconcentration factor (PBCF) from the 1980 section 304(a) criteria guidance document for mercury. EPA considered the approach used in the Great Lakes Water Quality Guidance ("Guidance") incorporating Bioaccumulation Factors (BAFs), but rejected this approach for reasons outlined below. The equation used here to derive an ambient water quality criterion for mercury from exposure to organisms and water is:

$$HHC = \frac{RfD \times BW}{WC + (FC \times PBCF)}$$

Where:
RfD = Reference Dose
BW = Body Weight
WC = Water Consumption
FC = Total Fish and Shellfish Consumption per Day
PBCF = Practical Bioconcentration Factor (weighted average)

For mercury, the most current RfD from IRIS is 1×10^{-4} mg/kg/day. The RfD used a benchmark dose as an estimate of a No Observed Adverse Effect Level (NOAEL). The benchmark dose was calculated by applying a Weibel model

for extra risk to all neurological effects observed in 81 Iraqi children exposed in utero as reported in Marsh, et. al. (1987). Maternal hair mercury was the measure of exposure. Extra risk refers to an adjustment for background incidence of a given health effect. Specifically, the extra risk is the added incidence of observing an effect above the background rate relative to the proportion of the population of interest that is not expected to exhibit such as effect. The resulting estimate was the lower 95% statistical bound on the 10% extra risk; this was 11 ppm mercury in maternal hair. This dose in hair was converted to an equivalent ingested amount by applying a model based on data from human studies; the resulting benchmark dose was 1×10^{-3} mg/kg body weight /day. The RfD was calculated by dividing the benchmark dose by a composite uncertainty factor of 10. The uncertainty factor was used to account for variability in the human population, in particular the wide variation in biological half-life of methylmercury and the variation that is observed in the ration of hair mercury to mercury in the blood. In addition the uncertainty factor accounts for lack of a two-generation reproductive study and the lack of data on long term effects of childhood mercury exposures. The RfD thus calculated is 1×10^{-4} mg/kg body weight/day or 0.1 µg/kg/day. The body weight used in the equation for the mercury criteria, as discussed in the Human Health Guidelines, is a mean adult human body weight of 70 kg. The drinking water consumption rate, as discussed in the Human Health Guidelines, is 2.0 liters per day.

The bioconcentration factor or BCF is defined as the ratio of chemical concentration in the organism to that in surrounding water. Bioconcentration occurs through uptake and retention of a substance from water only, through gill membranes or other external body surfaces. In the context of setting exposure criteria it is generally understood that the terms "BCF" and "steady-state BCF" are synonymous. A steady-state condition occurs when the organism is exposed for a sufficient length of time that the ratio does not change substantially.

The BCFs that were used herein are the "Practical Bioconcentration Factors (PBCFs)" that were derived in 1980: 5500 for fresh water, 3765 for estuarine coastal waters, and 9000 for open oceans. See pages C–100–1 of Ambient Water Quality Criteria for Mercury (EPA 440/5–80–058) for a complete discussion on the PBCF. Because of the way they were derived, these PBCFs take into account uptake from food as well as uptake from water. A weighted average PBCF was calculated to take into account the average consumption from the three waters using the following equation:

$$\text{Weighted Average Practical BCF} = \frac{\sum(\text{FC} \times \text{PBCF})}{\sum(\text{FC})} = \frac{(0.00172)(5500) + (0.00478)(3765) + (0.0122)(9000)}{0.00172 + 0.00478 + 0.0122} = \frac{137.3}{0.0187} = 7342.6$$

Given the large value for the weighted average PBCF, the contribution of drinking water to total daily intake is negligible so that assumptions concerning the chemical form of mercury in drinking water become less important. The human health mercury criteria promulgated for this rule are based on the latest RfD as listed in IRIS and a weighted PBCF from the 1980 § 304(a) criteria guidance document for mercury.

On March 23, 1995 (60 FR 15366), EPA promulgated the Great Lakes Water Quality Guidance ("Guidance"). The Guidance incorporated bioaccumulation factors (BAFs) in the derivation of criteria to protect human health because it is believed that BAFs are a better predictor than BCFs of the concentration of a chemical within fish tissue since BAFs include consideration of the uptake of contaminants from all routes of exposure. A bioaccumulation factor is defined as the ratio (in L/kg) of a substance's concentration in tissue to the concentration in the ambient water, in situations where both the organism and its food are exposed and the ratio does not change substantially over time. The final Great Lakes Guidance establishes a hierarchy of four methods for deriving BAFs for non-polar organic chemicals: (1) Field-measured BAFs; (2) predicted BAFs derived using a field-measured biota-sediment accumulation factor; (3) predicted BAFs derived by multiplying a laboratory-measured BCF by a food chain multiplier; and (4) predicted BAFs derived by multiplying a BCF calculated from the log Kow by a food-chain multiplier. The final Great Lakes Guidance developed BAFs for trophic levels three and four fish of the Great Lakes Basin. Respectively, the BAFs for mercury for trophic level 3 and 4 fish were: 27,900 and 140,000.

The BAF promulgated in the GLI was developed specifically for the Great Lakes System. It is uncertain whether the BAFs of 27,900 and 140,000 are appropriate for use in California at this time; therefore, today's final rule does not use the GLI BAF in establishing human health criteria for mercury in California. The magnitude of the BAF for mercury in a given system depends on how much of the total mercury is present in the methylated form. Methylation rates vary widely from one water body to another for reasons that are not fully understood. Lacking the data, it is difficult to determine if the BAF used in the GLI represents the true potential for mercury to bioaccumulate in California surface waters. The true, average BAF for California could be higher or lower. For more information see EPA's Response to Comments document in the administrative record for this rule (specifically comments CTR–002–007(b) and CTR–016–007).

EPA is developing a national BAF for mercury as part of revisions to its 304(a) criteria for human health; however, the BAF methodology that will be used is currently under evaluation as part of EPA's revisions to its National Human Health Methodology (see section F.3 above). EPA applied a similar methodology in its Mercury Study Report to Congress (MSRC) to derive a BAF for methylmercury. The MSRC is available through NTIS (EPA–452/R–97–003). Although a BAF was derived in the MSRC, EPA does not intend to use this BAF for National application. EPA is engaged in a separate effort to incorporate additional mercury bioaccumulation data that was not considered in the MSRC, and to assess uncertainties with using a National BAF approach for mercury. Once the proposed revised human health methodology, including the BAF component, is finalized, EPA will revise its 304(a) criteria for mercury to reflect changes in the underlying methodology, recommendations contained in the MSRC, and recommendations in a National Academy of Science report on human health assessment of methylmercury. When EPA changes its 304(a) criteria recommendation for mercury, States and Tribes will be expected to review their water quality standards for mercury and make any revisions necessary to ensure their standards are scientifically defensible.

New information may become available regarding the bioaccumulation

of mercury in certain water bodies in California. EPA supports the use of this information to develop site-specific criteria for mercury. Further, if a California water body is impaired due to mercury fish tissue or sediment contamination, loadings of mercury could contribute to or exacerbate the impairment. Therefore, one option regulatory authorities should consider is to include water quality-based effluent limits (WQBELs) in permits based on mass for discharges to the impaired water body. Such WQBELs must be derived from and comply with applicable State water quality standards (including both numeric and narrative criteria) and assure that the discharge does not cause or contribute to a violation of water quality standards.

d. Polychlorinated Biphenyls (PCBs) Criteria

The NTR, as amended, calculated human health criteria for PCBs using a cancer potency factor of 7.7 per mg/kg-day from the Agency's IRIS. This cancer potency factor was derived from the Norback and Weltman (1985) study which looked at rats that were fed Aroclor 1260. The study used the linearized multistage model with a default cross-species scaling factor (body weight ratio to the ⅔ power). Although it is known that PCB mixtures vary greatly as to their potency in producing biological effects, for purposes of its carcinogenicity assessment, EPA considered Aroclor 1260 to be representative of all PCB mixtures. The Agency did not pool data from all available congener studies or generate a geometric mean from these studies, since the Norback and Weltman study was judged by EPA as acceptable, and not of marginal quality, in design or conduct as compared with other studies. Thereafter, the Institute for Evaluating Health Risks (IEHR, 1991) reviewed the pathological slides from the Norback and Weltman study, and concluded that some of the malignant liver tumors should have been interpreted as nonmalignant lesions, and that the cancer potency factor should be 5.1 per mg/kg-day as compared with EPA's 7.7 per mg/kg-day.

The Agency's peer-reviewed reassessment of the cancer potency of PCBs published in a final report, *PCBs: Cancer Dose-Response Assessment and Applications to Environmental Mixtures* (EPA/600/P–96/001F), adopts a different approach that distinguishes among PCB mixtures by using information on environmental processes. (The report is included in the administrative record of today's rule.) The report considers all cancer studies (which used commercial mixtures only) to develop a range of cancer potency factors, then uses information on environmental processes to provide guidance on choosing an appropriate potency factor for representative classes of environmental mixtures and different pathways. The reassessment provides that, depending on the specific application, either central estimates or upper bounds can be appropriate. Central estimates describe a typical individual's risk, while upper bounds provide assurance (*i.e.*, 95% confidence) that this risk is not likely to be underestimated if the underlying model is correct. Central estimates are used for comparing or ranking environmental hazards, while upper bounds provide information about the precision of the comparison or ranking. In the reassessment, the use of the upper bound values were found to increase cancer potency estimates by two or three-fold over those using central tendency. Upper bounds are useful for estimating risks or setting exposure-related standards to protect public health, and are used by EPA in quantitative cancer risk assessment. Thus, the cancer potency of PCB mixtures is determined using a tiered approach based on environmental exposure routes with upper-bound potency factors (using a body weight ratio to the ¾ power) ranging from 0.07 (lowest risk and persistence) to 2 (high risk and persistence) per mg/kg-day for average lifetime exposures to PCBs. It is noteworthy that bioaccumulated PCBs appear to be more toxic than commercial PCBs and appear to be more persistent in the body. For exposure through the food chain, risks can be higher than other exposures.

EPA issued the final reassessment report on September 27, 1996, and updated IRIS to include the reassessment on October 1, 1996. EPA updated the human health criteria for PCBs in the National Toxics Rule on September 27, 1999. For today's rule, EPA derived the human health criteria for PCBs using a cancer potency factor of 2 per mg/kg-day, an upper bound potency factor reflecting high risk and persistence. This decision is based on recent multimedia studies indicating that the major pathway of exposure to persistent toxic substances such as PCBs is via dietary exposure (*i.e.*, contaminated fish and shellfish consumption).

Following is the calculation of the human health criterion (HHC) for organism and water consumption:

$$HHC = \frac{RF \times BW \times (1{,}000\ \mu g/mg)}{q1^* \times [WC + (FC \times BCF)]}$$

Where:

RF = Risk Factor = 1×10^{-6}
BW = Body Weight = 70 kg
q1* = Cancer slope factor = 2 per mg/kg-day
WC = Water Consumption = 2 l/day
FC = Fish and Shellfish Consumption = 0.0065 kg/day
BCF = Bioconcentration Factor = 31,200
the HHC (µg/l) = 0.00017 µg/l (rounded to two significant digits).

Following is the calculation of the human health criterion for organism only consumption:

$$HHC = \frac{RF \times BW \times (1{,}000\ \mu g/mg)}{q1^* \times FC \times BCF}$$

Where:

RF = Risk Factor = 1×10^{-6}
BW = Body Weight = 70 kg
q1* = Cancer slope factor = 2 per mg/kg-day
FC = Total Fish and Shellfish Consumption per Day = 0.0065 kg/day
BCF = Bioconcentration Factor = 31,200
the HHC (µg/l) = 0.00017 µg/l (rounded to two significant digits).

The criteria are both equal to 0.00017 µg/l and apply to total PCBs. *See PCBs: Cancer Dose Response Assessment and Application to Environmental Mixtures* (EPA/600/9–96–001F). For a discussion of the body weight, water consumption, and fish and shellfish consumption factors, see the Human Health Guidelines. For a discussion of the BCF, see the 304(a) criteria guidance document for PCBs (included in the administrative record for today's rule).

e. Excluded Section 304(a) Human Health Criteria

As is the case in the NTR, as amended, today's rule does not promulgate criteria for certain priority pollutants for which CWA section 304(a) criteria guidance exists because those criteria were not based on toxicity to humans or aquatic organisms. The basis for those particular criteria is organoleptic effects (*e.g.*, taste and odor) which would make water and edible aquatic life unpalatable but not toxic. Because the basis for this rule is to protect the public health and aquatic life from toxicity consistent with the language and intent in CWA section 303(c)(2)(B), EPA is promulgating criteria only for those priority toxic pollutants whose criteria recommendations are based on toxicity. The CWA section 304(a) human health criteria based on organoleptic effects for zinc and 3-methyl-4-chlorophenol are excluded for this reason. See the 1992 NTR discussion at 57 FR 60864.

f. Cancer Risk Level

EPA's CWA section 304(a) criteria guidance documents for priority toxic pollutants that are based on carcinogenicity present concentrations for upper bound risk levels of 1 excess cancer case per 100,000 people (10^{-5}), per 1,000,000 people (10^{-6}), and per 10,000,000 people (10^{-7}). However, the criteria documents do not recommend a particular risk level as EPA policy.

As part of the proposed rule, EPA requested and received comment on the adoption of a 10^{-5} risk level for carcinogenic pollutants. The effect of a 10^{-5} risk level would have been to increase (*i.e.*, make less stringent) carcinogenic pollutant criteria values (noted in the matrix by footnote c) that are not already promulgated in the NTR, by one order of magnitude. For example, the organism-only criterion for gamma BHC (pollutant number 105 in the matrix) is 0.013 µg/l; the criterion based on a 10^{-5} risk level would have been 0.13 µg/l. EPA received several comments that indicated a preference for a higher (10^{-4} and 10^{-5}) risk level for effluent dependent waters or other types of special circumstances.

In today's rule, EPA is promulgating criteria that protect the general population at an incremental cancer risk level of one in a million (10^{-6}) for all priority toxic pollutants regulated as carcinogens, consistent with the criteria promulgated in the NTR for the State of California. Standards adopted by the State contained in the Enclosed Bays and Estuaries Plan (EBEP), and the Inland Surface Waters Plan (ISWP), partially approved by EPA on November 6, 1991, and the Ocean Plan approved by EPA on June 28, 1990, contained a risk level of 10^{-6} for most carcinogens. The State has historically protected at a 10^{-6} risk level for carcinogenic pollutants.

EPA, in its recent human health methodology revisions, proposed acceptable lifetime cancer risk for the general population in the range of 10^{-5} to 10^{-6}. EPA also proposed that States and Tribes ensure the most highly exposed populations do not exceed a 10^{-4} risk level. However, EPA's draft methodology revisions also stated that it will derive 304(a) criteria at a 10^{-6} risk level, which the Agency believes reflects the appropriate risk for the general population and which applies a risk management policy which ensures protection for all exposed population groups. (Draft Water Quality Criteria Methodology: Human Health, EPA 822–Z–98–001, August 1998, Appendix II, page 72).

Subpopulations within a State may exist, such as recreational and subsistence anglers, who as a result of greater exposure to a contaminant are at greater risk than the standard 70 kilogram person eating 6.5 grams per day of fish and shellfish and drinking 2.0 liters per day of drinking water with pollutant levels meeting the water quality criteria. EPA acknowledges that at any given risk level for the general population, those segments of the population that are more highly exposed face a higher relative risk. For example, if fish are contaminated at a level permitted by criteria derived on the basis of a risk level of 10^{-6}, individuals consuming up to 10 times the assumed fish consumption rate would still be protected at a 10^{-5} risk level. Similarly, individuals consuming 100 times the general population rate would be protected at a 10^{-4} risk level. EPA, therefore, believes that derivation of criteria at the 10^{-6} risk level is a reasonable risk management decision protective of designated uses under the CWA. While outside the scope of this rule, EPA notes that States and Tribes, however, have the discretion to adopt water quality criteria that result in a higher risk level (*e.g.*, 10^{-5}). EPA expects to approve such criteria if the State or Tribe has identified the most highly exposed subpopulation within the State or Tribe, demonstrates the chosen risk level is adequately protective of the most highly exposed subpopulation, and has completed all necessary public participation.

This demonstration has not happened in California. Further, the information that is available on highly exposed subpopulations in California supports the need to protect the general population at the 10^{-6} level. California has cited the Santa Monica Bay Seafood Consumption Study as providing the best available data set for estimating consumption of sport fish and shellfish in California for both marine or freshwater sources (Chemicals in Fish Report No. 1: Consumption of Fish and Shellfish in California and the United States, Final Draft Report, July 1997). Consumption rates of sport fish and shellfish of 21g/day, 50 g/day, 107 g/day, and 161 g/day for the median, mean, 90th, and 95th percentile rates, respectively, were determined from this study. Additional consumption of commercial species in the range of approximately 8 to 42 g/day would further increase these values. Clearly the consumption rates for the most highly exposed subpopulation within the State exceeds 10 times the 6.5 g/day rates used in the CTR. Therefore, use of a risk level of 10^{-5} for the general population would not be sufficient to protect the most highly exposed population in California at a 10^{-4} risk level. On the other hand, even the most highly exposed subpopulations cited in the California study do not have consumption rates approaching 100 times the 6.5 g/day rates used in the CTR. The use of the 10^{-6} risk level to protect average level consumers does not subject these subpopulations to risk levels as high as 10^{-4}.

EPA believes its decision to establish a 10^{-6} risk level for the CTR is also consistent with EPA's policy in the NTR to select the risk level that reflect the policies or preferences of CWA programs in the affected States. California adopted standards for priority toxic pollutants for its ocean waters in 1990 using a 10^{-6} risk level to protect human health (California Ocean Plan, 1990). In April 1991, and again in November 1992, California adopted standards for its inland surface waters and enclosed bays and estuaries in its Inland Surface Waters Plan (ISWP) and its Enclosed Bays and Estuaries Plan (EBEP) using a 10^{-6} risk level. To be consistent with the State's water quality standards, EPA used a 10^{-6} risk level for California in the NTR at 57 FR 60867. The State has continued using a 10^{-6} risk level to protect human health for its standards that were not withdrawn with the ISWP and EBEP. The most recent expression of risk level preference is contained in the Draft Functional Equivalent Document, Amendment of the Water Quality Control Plan for Ocean Waters of California, October 1998, where the State recommended maintaining a consistent risk level of 10^{-6} for the human health standards that it was proposing to revise.

EPA received several comments requesting a 10^{-5} risk level based on the risk level chosen for the Great Lakes Water Quality Guidance (the Guidance). There are several differences between the guidelines for the derivation of human health criteria contained in the Guidance and the California Toxics Rule (CTR) that make a 10^{-5} risk factor appropriate for the Guidance, but not for the CTR. These differences result in criteria developed using the 10^{-5} risk factor in the Guidance being at least as stringent as criteria derived under the CTR using a 10^{-6} risk factor. The relevant aspects of the Guidance include:

- Use of fish consumption rates that are considerably higher than fish consumption rates for the CTR.
- Use of bioaccumulation factors rather than bioconcentration factors in

estimating exposure, considerably increasing the dose of carcinogens to sensitive subgroups.

- Consideration of additivity of effects of mixtures for both carcinogenic and noncarcinogenic pollutants.

This combination of factors increase the calculated carcinogenic risk substantially under the Guidance (the combination would generally be more than one order of magnitude), making a lower overall risk factor acceptable. The Guidance risk factor provides, in fact, criteria with at least the same level of protection against carcinogens as criteria derived with a higher risk factor using the CTR. A lower risk factor for the CTR would not be appropriate absent concomitant changes in the derivation procedures that provide equivalent risk protection.

G. Description of Final Rule

1. Scope

Paragraph (a) in 40 CFR 131.38, entitled "Scope," states that this rule is a promulgation of criteria for priority toxic pollutants in the State of California for inland surface waters, enclosed bays, and estuaries. Paragraph (a) in 40 CFR 131.38 also states that this rule contains an authorizing compliance schedule provision.

2. EPA Criteria for Priority Toxic Pollutants

EPA's criteria for California are presented in tabular form at 40 CFR 131.38. For ease of presentation, the table that appears combines water quality criteria promulgated in the NTR, as amended, that are outside the scope of this rulemaking, with the criteria that are within the scope of today's rule. This is intended to help readers determine applicable water quality criteria for the State of California. The table contains footnotes for clarification.

Paragraph (b) in 40 CFR 131.38 presents a matrix of the applicable EPA aquatic life and/or human health criteria for priority toxic pollutants in California. Section 303(c)(2)(B) of the CWA addresses only pollutants listed as "toxic" pursuant to section 307(a) of the CWA for which EPA has developed section 304(a) criteria guidance. As discussed earlier in this preamble, the section 307(a) list of toxics contains 65 compounds and families of compounds, which potentially include thousands of specific compounds. Of these, the Agency identified a list of 126 "priority toxic pollutants" to implement the CWA (see 40 CFR 131.36(b)). Reference in this rule to priority toxic pollutants, toxic pollutants, or toxics refers to the 126 priority toxic pollutants.

EPA has not developed both aquatic life and human health CWA section 304(a) criterion guidance for all of the priority toxic pollutants. The matrix in 40 CFR 131.38(b) contains human health criteria in Column D for 92 priority toxic pollutants which are divided into Column 1: criteria for water consumption (i.e., 2.0 liters per day) and aquatic organism consumption (i.e., 6.5 grams per day of aquatic organisms); and Column 2: criteria for aquatic organism consumption only. The term aquatic organism includes fish and shellfish such as shrimp, clams, oysters and mussels. One reason the total number of priority toxic pollutants with criteria today differs from the total number of priority toxic pollutants contained in earlier published CWA section 304(a) criteria guidance is because EPA has developed and is promulgating chromium criteria for two valence states with respect to aquatic life criteria. Thus, although chromium is a single priority toxic pollutant, there are two criteria for chromium for aquatic life protection. See pollutant 5 in today's rule at 40 CFR 131.38(b). Another reason is that EPA is promulgating human health criteria for nine priority pollutants for which health-based national criteria have been calculated based on information obtained from EPA's IRIS database (EPA provided notice of these nine criteria in the NTR for inclusion in future State triennial reviews. See 57 FR 60848, 60890).

The matrix contains aquatic life criteria for 23 priority pollutants. These are divided into freshwater criteria (Column B) and saltwater criteria (Column C). These columns are further divided into acute and chronic criteria. The aquatic life criteria are considered by EPA to be protective when applied under the conditions described in the section 304(a) criteria documents and in the TSD. For example, water body uses should be protected if the criteria are not exceeded, on average, once every three year period. It should be noted that the criteria maximum concentrations (the acute criteria) are short-term concentrations and that the criteria continuous concentrations (the chronic criteria) are four-day averages. It should also be noted that for certain metals, the actual criteria are equations which are included as footnotes to the matrix. The toxicity of these metals is water hardness dependent and may be adjusted. The values shown in the table are illustrative only, based on a hardness expressed as calcium carbonate of 100 mg/l. Finally, the criterion for pentachlorophenol is pH dependent. The equation is the actual criterion and is included as a footnote. The value shown in the matrix is for a pH of 7.8. Several of the freshwater aquatic life criteria are incorporated into the matrix in the format used in the 1980 criteria methodology which uses a final acute value instead of a continuous maximum concentration. This distinction is noted in footnote g of the table.

The final rule at 40 CFR 131.38(c) establishes the applicability of the criteria to the State of California. 40 CFR 131.38(d) is described later in Section F, of this preamble. EPA has included in this rule provisions necessary to implement numeric criteria in a way that maintains the level of protection intended. These provisions are included in 40 CFR 131.38(c) of today's rule. For example, in order to do steady state waste load allocation analyses, most States have low flow values for streams and rivers which establish flow rates for various purposes. These low flow values become design flows for sizing treatment plants and developing water quality-based effluent limits and/or TMDLs. Historically, these design flows were selected for the purposes of waste load allocation analyses which focused on instream dissolved oxygen concentrations and protection of aquatic life. With the publication of the 1985 TSD, EPA introduced hydrologically and biologically based analyses for the protection of aquatic life and human health. (These concepts have been expanded subsequently in EPA's *Technical Guidance Manual for Performing Wasteload Allocations, Book 6, Design Conditions,* U.S. EPA, 1986. These analyses are included in Appendix D of the revised TSD. The discussion here is greatly simplified and is provided to support EPA's decision to promulgate design flows for instream flows and thereby maintain the adequacy of the criteria for priority toxic pollutants.) EPA recommended either of two methods for calculating acceptable low flows, the traditional hydrologic method developed by the U.S. Geological Survey or a biological based method developed by EPA. Other methods for evaluating the instream flow record may be available; use of these methods may result in TMDLs and/or water quality-based effluent limitations which adequately protect human health and/or aquatic life. The results of either of these two methods, or an equally protective alternative method, may be used.

The State of California may adopt specific design flows for streams and rivers to protect designated uses against the effects of toxics. EPA believes it is

important to specify design flows in today's rule so that, in the absence of state design flows, the criteria promulgated today would be implemented appropriately. The TSD also recommends the use of three dynamic models to perform wasteload allocations. Dynamic wasteload models do not generally use specific steady state design flows but accomplish the same effect by factoring in the probability of occurrence of stream flows based on the historical flow record.

The low flows specified in the rule explicitly contain duration and frequency of occurrence which represent certain probabilities of occurrence. Likewise, the criteria for priority toxic pollutants are defined with duration and frequency components. Dynamic modeling techniques explicitly predict the effects of variability in receiving water, effluent flow, and pollution variation. Dynamic modeling techniques, as described in the TSD, allow for calculating wasteload allocations that meet the criteria for priority toxic pollutants without using a single, worst-case concentration based on a critical condition. Either dynamic modeling or steady state modeling can be used to implement the criteria promulgated today. For simplicity, only steady state conditions are discussed here. Clearly, if the criteria were implemented using design flows that are too high, the resulting toxic controls would not be adequate, because the resulting ambient concentrations would exceed EPA's criteria.

In the case of aquatic life, assuming exceedences occur more frequently than once in three years on the average, exceedences would result in diminished vitality of stream ecosystems characterized by the loss of desired species. Numeric water quality criteria should apply at all flows that are equal to or greater than flows specified below. The low flow values are:

Type of criteria	Design flow
Acute Aquatic Life (CMC).	1 Q 10 or 1 B 3
Chronic Aquatic Life (CCC).	7 Q 10 or 4 B 3
Human Health	harmonic mean flow

Where:

1 Q 10 is the lowest one day flow with an average recurrence frequency of once in 10 years determined hydrologically;

1 B 3 is biologically based and indicates an allowable exceedence of once every 3 years. It is determined by EPA's computerized method (DFLOW model);

7 Q 10 is the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically;

4 B 3 is biologically based and indicates an allowable exceedences for 4 consecutive days once every 3 years. It is determined by EPA's computerized method (DFLOW model);

EPA is requiring that the harmonic mean flow be applied with human health criteria. The harmonic mean is a standard calculated statistical value. EPA's model for human health effects assumes that such effects occur because of a long-term exposure to low concentration of a toxic pollutant, for example, two liters of water per day for seventy years. To estimate the concentrations of the toxic pollutant in those two liters per day by withdrawal from streams with a high daily variation in flow, EPA believes the harmonic mean flow is the correct statistic to use in computing such design flows rather than other averaging techniques. (For a description of harmonic means see "Design Stream Flows Based on Harmonic Means," Lewis A. Rossman, Jr. of Hydraulics Engineering, Vol. 116, No. 7, July, 1990.)

All waters (including lakes, estuaries, and marine waters), whether or not suitable for such hydrologic calculations, are subject to the criteria promulgated today. Such criteria will need to be attained at the end of the discharge pipe, unless the State authorizes a mixing zone. Where the State plans to authorize a mixing zone, the criteria would apply at the locations allowed by the mixing zone. For example, the chronic criteria (CCC) would apply at the defined boundary of the chronic mixing zone. Discussion of and guidance on these factors are included in the revised TSD in Chapter 4.

EPA is aware that the criteria promulgated today for some of the priority toxic pollutants are at concentrations less than EPA's current analytical detection limits. Analytical detection limits have never been an acceptable basis for setting water quality criteria since they are not related to actual environmental impacts. The environmental impact of a pollutant is based on a scientific determination, not a measuring technique which is subject to change. Setting the criteria at levels that reflect adequate protection tends to be a forcing mechanism to improve analytical detection methods. See 1985 Guidelines, page 21. As the methods improve, limits based on the actual criteria necessary to protect aquatic life and human health become measurable. The Agency does not believe it is appropriate to promulgate criteria that are not sufficiently protective. EPA discusses this issue further in its Response to Comment Document for today's final rule.

EPA does believe, however, that the use of analytical detection limits are appropriate for assessing *compliance* with National Pollutant Discharge Elimination System (NPDES) permit limits. This view of the role of detection limits was first articulated in guidance for translating dioxin criteria into NPDES permit limits. See "Strategy for the Regulation of Discharges of PHDDs and PHDFs from Pulp and Paper Mills to Waters of the U.S." Memorandum from the Assistant Administrator for Water to the Regional Water Management Division Directors, May 21, 1990. This guidance presented a model for addressing toxic pollutants which have criteria less than current detection limits. EPA, in more recent guidance, recommends the use of the "minimum level" or ML for reporting sample results to assess compliance with WQBELs (TSD page 111). The ML, also called the "quantification level," is the level at which the entire analytical system gives recognizable mass spectra and acceptable calibration points, i.e., the point at which the method can reliably quantify the amount of pollutant in the sample. States can use their own procedures to average and otherwise account for monitoring data, *e.g.*, quantifying results below the ML. These results can then be used to assess compliance with WQBELs. (See 40 CFR part 132, Appendix F, Procedure 8.B.) This approach is applicable to priority toxic pollutants with criteria less than current detection limits. EPA's guidance explains that standard analytical methods may be used for purposes of assessing compliance with permit limits, but not for purposes of establishing water quality criteria or permit limits. Under the CWA, analytical methods are appropriately used in connection with NPDES permit limit compliance assessments. Because of the function of water quality criteria, EPA has not considered the sensitivity of analytical methods in deriving the criteria promulgated today.

EPA has promulgated 40 CFR 131.38(c)(3) to determine when freshwater or saltwater aquatic life criteria apply. This provision incorporates a time parameter to better define the critical condition. The structure of the paragraph is to establish

applicable rules and to allow for site-specific exceptions where the rules are not consistent with actual field conditions. Because a distinct separation generally does not exist between freshwater and saltwater aquatic communities, EPA is establishing the following: (1) The freshwater criteria apply at salinities of 1 part per thousand and below at locations where this occurs 95% or more of the time; (2) saltwater criteria apply at salinities of 10 parts per thousand and above at locations where this occurs 95% more of the time; and (3) at salinities between 1 and 10 parts per thousand the more stringent of the two apply unless EPA approves the application of the freshwater or saltwater criteria based on an appropriate biological assessment. The percentiles included here were selected to minimize the chance of overlap, that is, one site meeting both criteria. Determination of these percentiles can be done by any reasonable means such as interpolation between points with measured data or by the application of calibrated and verified mathematical models (or hydraulic models). It is not EPA's intent to require actual data collection at particular locations.

In the brackish water transition zones of estuaries with varying salinities, there generally will be a mix of freshwater and saltwater species. Generally, therefore, it is reasonable for the more stringent of the freshwater or saltwater criteria to apply. In evaluating appropriate data supporting the alternative set of criteria, EPA will focus on the species composition as its preferred method. This assignment of criteria for fresh, brackish and salt waters was developed in consultation with EPA's research laboratories at Duluth, Minnesota and Narragansett, Rhode Island. The Agency believes such an approach is consistent with field experience.

Paragraph (d) in 40 CFR 131.38 lists the designated water and use classifications for which the criteria apply. The criteria are applied to the beneficial use designations adopted by the State of California; EPA has not promulgated any new use classifications in this rule.

Exceedences Frequency: In a water quality criterion for aquatic life, EPA recommends an allowable frequency for excursions of the criteria. See 1985 Guidelines, pages 11–13. This allowable frequency provides an appropriate period of time during which the aquatic community can recover from the effect of an excursion and then function normally for a period of time before the next excursion. An excursion is defined as an occurrence of when the average concentration over the duration of the averaging period is above the CCC or the CMC. As ecological communities are naturally subjected to a series of stresses, the allowable frequency of pollutant stress may be set at a value that does not significantly increase the frequency or severity of all stresses combined. See also TSD, Appendix D. In addition, providing an allowable frequency for exceeding the criterion recognizes that it is not generally possible to assure that criteria are never exceeded. (TSD, page 36.)

Based on the available data, today's rule requires that the acute criterion for a pollutant be exceeded no more than once in three years on the average. EPA is also requiring that the chronic criterion for a pollutant be exceeded no more than once in three years on the average. EPA acknowledges that States may develop allowable frequencies that differ from these allowable frequencies, so long as they are scientifically supportable, but believes that these allowable frequencies are protective of the designated uses where EPA is promulgating criteria.

The use of aquatic life criteria for developing water quality-based effluent limits in permits requires the permitting official to use an appropriate wasteload allocation model. (TSD, Appendix D–6.) As discussed above, there are generally two methods for determining design flows, the hydrologically-based method and the biologically-based method.

The biologically-based method directly uses the averaging periods and frequencies specified in the aquatic life criteria for determining design flows. (TSD, Appendix. D–8.) Because the biologically-based method calculates the design flow directly from the duration and allowable frequency, it most accurately provides the allowed number of excursions. The hydrologically based method applies the CMC at a design flow equal to or equivalent to the 1Q10 design flow (i.e., the lowest one-day flow with an average recurrence frequency of once in ten years), and applies the CCC at the 7Q10 design flow (i.e., the lowest average seven consecutive day flow with a recurrence frequency of once in ten years).

EPA established a three year allowable frequency in the NTR. In settlement of the litigation on the NTR, EPA stated that it was in the midst of conducting, sponsoring, or planning research aimed at addressing scientific issues related to the basis for and application of water quality criteria and mentioned the issue of allowable frequency. See Partial Settlement Agreement in *American Forest and Paper Ass'n, Inc. et al.* v. *U.S. EPA* (Consolidated Case No. 93–0694 (RMU) D.D.C. To that end, EPA is reevaluating issues raised about allowable frequency as part of its work in revising the 1985 Guidelines.

EPA recognizes that additional data concerning (a) the probable frequency of lethal events for an assemblage of taxa covering a range of sensitivities to pollutants, (b) the probable frequency of sublethal effects for such taxa, (c) the differing effects of lethal and sublethal events in reducing populations of such taxa, and (d) the time needed to replace organisms lost as a result of toxicity, may lead to further refinement of the allowable frequency value. EPA has not yet completed this work. Until this work is complete, EPA believes that where EPA promulgates criteria, the three year allowable frequency represents a value in the reasonable range for this parameter.

3. Implementation

Once the applicable designated uses and water quality criteria for a water body are determined, under the National Pollutant Discharge Elimination System (NPDES) program discharges to the water body must be characterized and the permitting authority must determine the need for permit limits. If a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the permitting authority must develop permit limits as necessary to meet water quality standards. These permit limits are water quality-based effluent limitations or WQBELs. The terms "cause," "reasonable potential to cause," and "contribute to" are the terms in the NPDES regulations for conditions under which water quality-based permit limits are required. See 40 CFR 122.44(d)(1).

Since the publication of the proposed CTR, the State of California adopted procedures which detail how water quality criteria will be implemented through NPDES permits, waste discharge requirements, and other regulatory approaches. These procedures entitled, *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* were adopted on March 2, 2000. Once these procedures are submitted for review under CWA section 303(c), EPA will review them as they relate to water quality standards, and approve or disapprove them.

Several commenters understood the language in the preamble to the proposed rule regarding implementation

to mean that site-specific criteria, variances, and other actions would be prohibited or severely limited by the CTR. Site-specific criteria, variances and other actions modifying criteria are neither prohibited nor limited by the CTR. The State, if it so chooses, still can make these changes to its water quality standards, subject to EPA approval. However, with this Federal rule in effect, the State cannot implement any modifications that are less stringent than the CTR without an amendment to the CTR to reflect these modifications. EPA will make every effort to expeditiously accommodate Federal rulemaking of appropriate modifications to California's water quality standards. In the preamble to the proposed CTR, and here today, EPA is emphasizing that these efforts to amend the CTR on a case-by-case basis will generally increase the time before a modification can be implemented.

4. Wet Weather Flows

EPA has for a longtime maintained that CWA section 301(b)(1)(C) applies to NPDES permits for discharges from municipal separate storm sewer systems. Recently, the U.S. Court of Appeals for the Ninth Circuit upheld NPDES permits issued by EPA for five Arizona municipal separate storm sewer systems and addressed this issue specifically. *Defenders of Wildlife, et al.* v. *Browner,* No. 98–71080 (9th Cir., October 1999). The Court held that the CWA does not require "strict compliance" with State water quality standards for municipal storm sewer permits under section 301(b)(1)(C), but that at the same time, the CWA does give EPA discretion to incorporate appropriate water quality-based effluent limitations under another provision, CWA section 402(p)(3)(B)(iii).

The Court based its decision on the structure of section 402(p)(3), which contains distinct language for discharges of industrial storm water and municipal storm water. In section 402(p)(3)(A), Congress requires that "dischargers associated with industrial activity shall meet all applicable provisions of [section 402] and section [301]." 33 U.S.C. section 1342(p)(3)(A). The Court noted, therefore, that by incorporation, industrial storm water discharges need to achieve "any more stringent limitation, including those necessary to meet water quality standards * * *" The Court explained that industrial storm water discharges "must comply strictly with State water quality standards" but that Congress chose not to include a similar provision for municipal storm sewer discharges, including instead a requirement for controls to reduce pollutants to the maximum extent practicable or MEP standard in section 402(p)(3)(B). Reading the two related sections together, the Court concluded that section 402(p)(3)(B)(iii) does not require "strict compliance" by municipal storm sewer discharges according to section 301(b)(1)(C). At the same time, however, the Court found that the language in CWA section 402(p)(3)(B)(iii) which states that permits for discharges from municipal storm sewers shall require "such other provisions as the Administrator of the state determines appropriate for the control of such pollutants" provides EPA with discretion to incorporate provisions lending to ultimate compliance with water quality standards.

EPA believes that compliance with water quality standards through the use of Best Management Practices (BMPs) is appropriate. EPA articulated its position on the use of BMPs in storm water permits in the policy memorandum entitled, "Interim Permitting Approach for Water Quality-Based Effluent Limitations In Storm Water Permits" which was signed by the Assistant Administrator for Water, Robert Perciasepe on August 1, 1996 (61 FR 43761, August 9, 1996). A copy of this memorandum is contained in the administrative record for today's rule. The policy affirms the use of BMPs as a means to attain water quality standards in municipal storm water permits, and embraces BMPs as an interim permitting approach.

The interim permitting approach uses BMPs in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate.

This interim permitting approach, however, only applies to EPA. EPA encourages the State to adopt a similar policy for municipal storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. More information on this issue is included in the response to comment document in response to specific storm water issues raised by commenters.

5. Schedules of Compliance

A compliance schedule refers to an enforceable sequence of interim requirements in a permit leading to ultimate compliance with water quality-based effluent limitations or WQBELs in accordance with the CWA. The authorizing compliance schedule provision authorizes, but does not require, the permit issuing authority in the State of California to include such compliance schedules in permits under appropriate circumstances. The State of California is authorized to administer the National Pollutant Discharge Elimination System (NPDES) program and may exercise its discretion when deciding if a compliance schedule is justified because of the technical or financial (or other) infeasibility of immediate compliance. An authorizing compliance schedule provision is included in today's rule because of the potential for existing dischargers to have new or more stringent effluent limitations for which immediate compliance would not be possible or practicable.

New and Existing Dischargers: The provision allows compliance schedules only for an "existing discharger" which is defined as any discharger which is not a "new California discharger." A "new California discharger" includes "any building, structure, facility, or installation from which there is, or may be, a 'discharge of pollutants', the construction of which commences after the effective date of this regulation." These definitions are modeled after the existing 40 CFR 122.2 definitions for parallel terms, but with a cut-off date modified to reflect this rule. Only "new California dischargers" are required to comply immediately upon commencement of discharge with effluent limitations derived from the criteria in this rule. For "existing dischargers" whose permits are reissued or modified to contain new or more stringent limitations based upon certain water quality requirements, the permit could allow up to five years, or up to the length of a permit, to comply with such limitations. The provision applies to new or more stringent effluent limitations based on the criteria in this EPA rule.

EPA has included "increasing dischargers" within the category of "existing dischargers" since "increasing dischargers" are existing facilities with a change—an increase—in their discharge. Such facilities may include those with seasonal variations. "Increasing dischargers" will already have treatment systems in place for their current discharge, thus, they have less

opportunity than a new discharger does to design and build a new treatment system which will meet new water quality-based requirements for their changed discharge. Allowing existing facilities with an increasing discharge a compliance schedule will avoid placing the discharger at a competitive disadvantage vis-a-vis other existing dischargers who are eligible for compliance schedules.

Today's rule does not prohibit the use of a short-term "shake down period" for new California dischargers as is provided for new sources or new dischargers in 40 CFR 122.29(d)(4). These regulations require that the owner or operator of (1) a new source; (2) a new discharger (as defined in 40 CFR 122.2) which commenced discharge after August 13, 1979; or (3) a recommencing discharger shall install and implement all pollution control equipment to meet the conditions of the permit before discharging. The facility must also meet all permit conditions in the shortest feasible time (not to exceed 90 days). This shake-down period is not a compliance schedule. This approach may be used to address violations which may occur during a new facility's start-up, especially where permit limits are water quality-based and biological treatment is involved.

The burden of proof to show the necessity of a compliance schedule is on the discharger, and the discharger must request approval from the permit issuing authority for a schedule of compliance. The discharger should submit a description of the minimum required actions or evaluations that must be undertaken in order to comply with the new or more restrictive discharge limits. Dates of completion for the required actions or evaluations should be included, and the proposed schedule should reflect the shortest practicable time to complete all minimum required actions.

Duration of Compliance Schedules: Today's rule provides that compliance schedules may provide for up to five years to meet new or more stringent effluent limitations in those limited circumstances where the permittee can demonstrate to the permit authority that an extended schedule is warranted. EPA's regulations at 122.47 require compliance with standards as soon as possible. This means that permit authorities should not allow compliance schedules where the permittee fails to demonstrate their necessity. This provision should not be considered a default compliance schedule duration for existing facilities.

In instances where dischargers wish to conduct toxicological studies, analyze results, and adopt and implement new or revised water quality-based effluent limitations, EPA believes that five years is sufficient time within which to complete this process. See the preamble to the proposed rule.

Under this rule, where a schedule of compliance exceeds one year, interim requirements are to be specified and interim progress reports are to be submitted at least annually to the permit issuing authority, in at least one-year time intervals.

The rule allows all compliance schedules to extend up to a maximum duration of five years, which is the maximum term of any NPDES permit. See 40 CFR 122.46. The discharger's opportunity to obtain a compliance schedule occurs when the existing permit for that discharge is issued, reissued or modified to contain more stringent limits based on the water quality criteria in today's rule. Such compliance schedules, however, cannot be extended to any indefinite point of time in the future because the compliance schedule provision in this rule will sunset on May 18, 2005. The sunset applies to the authorizing provision in today's rule (40 CFR 131.38(e)), not to individual schedules of compliance included in specific NPDES permits. Delays in reissuing expired permits (including those which continue in effect under applicable NPDES regulations) cannot indefinitely extend the period of time during which a compliance schedule is in effect. This would occur where the permit authority includes the single maximum five-year compliance schedule in a permit that is reissued just before the compliance schedule provision sunsets (having been previously issued without WQBELS using the rule's criteria on the eve of the effective date of this rule). Instead, the effect of the sunset provision is to limit the longest time period for compliance to ten years after the effective date of this rule.

EPA recognizes that where a permit is modified during the permit term, and the permittee needs the full five years to comply, the five-year schedule may extend beyond the term of the modified permit. In such cases, the rule allows for the modified permit to contain a compliance schedule with an interim limit by the end of the permit term. When the permit is reissued, the permit authority may extend the compliance schedule in the next permit, provided that, taking into account the amount of time allowed under the previous permit, the entire compliance schedule contained in the permit shall not exceed five years. Final permit limits and compliance dates will be included in the record for the permit. Final compliance dates must occur within five years from the date of permit issuance, reissuance, or modification, unless additional or less time is provided for by law.

EPA would prefer that the State adopt an authorizing compliance schedule provision but recognizes that the State may not be able to complete this action for some time after promulgation of the CTR. Thus, EPA has chosen to promulgate the rule with a sunset provision which states that the authorizing compliance schedule provision will cease or sunset on May 18, 2005. However, if the State Board adopts, and EPA approves, a statewide authorizing compliance schedule provision significantly prior to May 18, 2005, EPA will act to stay the authorizing compliance schedule provision in today's rule. Additionally, if a Regional Board adopts, and the State Board adopts and EPA approves, a Regional Board authorizing compliance schedule provision, EPA will act to stay today's provision for the appropriate or corresponding geographic region in California. At that time, the State Board's or Regional Board's authorizing compliance schedule provision will govern the ability of the State regulatory entity to allow a discharger to include a compliance schedule in a discharger's NPDES permit.

Antibacksliding: EPA wishes to address the potential concern over antibacksliding where revised permit limits based on new information are the result of the completion of additional studies. The Agency's interpretation of the CWA is that the antibacksliding requirements of section 402(o) of the CWA do not apply to revisions to effluent limitations made before the scheduled date of compliance for those limitations.

State Compliance Schedule Provisions: EPA supports the State in adopting a statewide provision independent of or as part of the effort to readopt statewide water quality control plans, or in adopting individual basin-wide compliance schedule provisions through its nine Regional Water Quality Control Boards (RWQCBs). The State and RWQCBs have broad discretion to adopt a provision, including discretion on reasonable lengths of time for final compliance with WQBELs. EPA recognizes that practical time frames within which to set interim goals may be necessary to achieve meaningful, long-term improvements in water quality in California.

At this time, two RWQCBs have adopted an authorizing compliance schedule provision as an amendment to

their respective Basin Plans during the Boards' last triennial review process. The Basin Plans have been adopted by the State and have come to EPA for approval. Thus, the Basin Plans' provisions are effective for the respective Basins. If and when EPA approves of either Regional Basin Plan, EPA will expeditiously act to amend the CTR, staying its compliance schedule provision, for the appropriate geographic region.

6. Changes From Proposed Rule

A few changes were made in the final rule from the proposal both as a result of the Agency's consideration of issues raised in public comments and Endangered Species Act consultation with the U.S. Fish and Wildlife Service (FWS) and U.S. National Marine Fisheries Service (NMFS). The important changes include: reserving the mercury aquatic life criteria; reserving the selenium freshwater acute aquatic life criterion; reserving the chloroform human health criteria; and adding a sunset provision to the authorizing compliance schedule provision. EPA also clarified that the CTR will not replace priority toxic pollutant criteria which were adopted by the San Francisco Regional Water Quality Control Board in its 1986 Basin Plan, adopted by the State Board, and approved by EPA; specifying the harmonic mean for human health criteria for non-carcinogens and adding a provision which explicitly allows the State to adopt and implement an alternative averaging period, frequency, and design flow for a criterion after opportunity for public comment.

The first two changes, the reservation of mercury criteria and selenium criterion, are discussed in more detail below in Section L., The Endangered Species Act (ESA). The selenium criterion is also discussed in more detail above in Section E., Derivation of Criteria, in subsection 2.b., Freshwater Acute Selenium Criterion. EPA has also decided to reserve a decision on numeric criteria for chloroform and therefore not promulgate chloroform criteria in the final rule. As part of a large-scale regulation promulgated in December 1998 under the Safe Drinking Water Act, EPA published a health-based goal for chloroform (the maximum contaminant level goal or MCLG) of zero, see 63 FR 69390, Dec. 16, 1998. EPA provided new data and analyses concerning chloroform for public review and comment, including a different, mode of action approach for estimating the cancer risk, 63 FR 15674, March 31, 1998, but did not reach a conclusion on how to use that new information in establishing the final MCLG, pending further review by the Science Advisory Board. EPA has now concluded that any further actions on water quality criteria should take into account the new data and analysis as reviewed by the SAB. This decision is consistent with a recent federal court decision vacating the MCLG for chloroform (*Chlorine Chemistry Council v. EPA*, No. 98–1627 (DC Cir., Mar. 31,2000)). EPA intends to reassess the human health 304(a) criteria recommendation for chloroform. For these reasons, EPA has decided to reserve a decision on numeric criteria for chloroform in the CTR and not promulgate water quality criteria as proposed. Permitting authorities in California should continue to rely on existing narrative criteria to establish effluent limitations as necessary for chloroform.

The sunset provision for the authorizing compliance schedule provision has been added to ease the transition from a Federal provision to the State's provision that was adopted in March 2000 as part of its' new statewide implementation plan. The sunset provision is discussed in more detail in Section G.5 of today's preamble. The CTR matrix at 40 CFR 131.38(b)(1) makes it explicit that the rule does not supplant priority toxic pollutant criteria which were adopted by the San Francisco Regional Water Quality Control Board in its 1986 Basin Plan, adopted by the State Board, and approved by EPA. This change is discussed more fully in Section D.4. of today's preamble. EPA modified the design flow for implementing human health criteria for non-carcinogens from a 30Q5 to a harmonic mean. Human health criteria for non-carcinogens are based on an RfD, which is an acceptable daily exposure over a lifetime. EPA matched the criteria for protection over a human lifetime with the longest stream flow averaging period, i.e., the harmonic mean. Lastly, the CTR now contains language which is intended to make it easier for the State to adopt and implement an alternative averaging period, frequency and related design flow, for situations where the default parameters are inappropriate. This language is found at 40 CFR 131.38(c)(2)(iv).

H. Economic Analysis

This final rule establishes ambient water quality criteria which, by themselves, do not directly impose economic impacts (see section K). These criteria combined with the State-adopted designated uses for inland surface waters, enclosed bays and estuaries, and implementation policies, will establish water quality standards. Until the State implements these water quality standards, there will be no effect of this rule on any entity. The State will implement these criteria by ensuring that NPDES permits result in discharges that will meet these criteria. In so doing, the State will have considerable discretion.

EPA has analyzed the indirect potential costs and benefits of this rule. In order to estimate the indirect costs and benefits of the rule, an appropriate baseline must be established. The baseline is the starting point for measuring incremental costs and benefits of a regulation. The baseline is established by assessing what would occur in the absence of the regulation. At present, State Basin Plans contain a narrative water quality criterion stating that all waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life. EPA's regulation at 40 CFR 122.44(d)(1)(vi) requires that where a discharge causes or has the reasonable potential to cause an excursion above a narrative criterion within a State water quality standard, the permitting authority must establish effluent limits but may determine limits using a number of options. These options include establishing "effluent limits on a case-by-case basis, using EPA's water quality criteria published under section 304(a) of the CWA, supplemented where necessary by other relevant information" (40 CFR 122.44(d)(1)(vi)(B)). Thus, to the extent that the State is implementing its narrative criteria by applying the CWA section 304(a) criteria, this rule does not impose any incremental costs because the criteria in this rule are identical to the CWA section 304(a) criteria. Alternatively, to the extent that the State is implementing its narrative criteria on a "case-by-case basis" using "other relevant information" in its permits this rule may impose incremental indirect costs because the criteria in these permits may not be based on CWA 304(a) criteria. Both of these approaches to establishing effluent limits are in full compliance with the CWA.

Because a specific basis for effluent limits in all existing permits in California is not known, it is not possible to determine a precise estimate of the indirect costs of this rule. The incremental costs of the rule may be as low as zero, or as high as $61 million. The high estimate of costs is based on the possibility that most of the effluent limits now in effect are not based on 304(a) criteria. EPA evaluated these

indirect costs using two different approaches. The first approach uses existing discharge data and makes assumptions about future State NPDES permit limits. Actual discharge levels are usually lower than the level set by current NPDES permit limits. This approach, representing the low-end scenario, also assumes that some of the discretionary mechanisms that would enhance flexibility (*e.g.*, site specific criteria, mixing zones) would be granted by the State. The second approach uses a sample of existing permit limits and assumes that dischargers are actually discharging at the levels contained in their permits and makes assumptions about limits statewide that would be required under the rule. This approach, representing the high-end scenario, also assumes that none of the discretionary mechanisms that would enhance flexibility (*e.g.*, site specific criteria, mixing zones) would be granted by the State. These two approaches recognize that the State has significant flexibility and discretion in how it chooses to implement standards within the NPDES permit program, the EA by necessity includes many assumptions about how the State will implement the water quality standards. These assumptions are based on a combination of EPA guidance and current permit conditions for the facilities examined in this analysis. To account for the uncertainty of EPA's implementation assumptions, this analysis estimates a wide range of costs and benefits. By completing the EA, EPA intends to inform the public about how entities might be potentially affected by State implementation of water quality standards in the NPDES permit program. The costs and benefits sections that follow summarize the methodology and results of the analysis.

1. Costs

EPA assessed the potential compliance costs that facilities may incur to meet permit limits based on the criteria in today's rule. The analysis focused on direct compliance costs such as capital costs and operation and maintenance costs (O&M) for end-of-pipe pollution control, indirect source controls, pollution prevention, monitoring, and costs of pursuing alternative methods of compliance.

The population of facilities with NPDES permits that discharge into California's enclosed bays, estuaries and inland surface waters includes 184 major dischargers and 1,057 minor dischargers. Of the 184 major facilities, 128 are publicly owned treatment works (POTWs) and 56 are industrial facilities. Approximately 2,144 indirect dischargers designated as significant industrial users discharge wastewater to those POTWs. In the EA for the proposed CTR, EPA used a three-phased process to select a sample of facilities to represent California dischargers potentially affected by the State's implementation of permit limits based on the criteria contained in this rule.

The first phase consisted of choosing three case study areas for which data was thought to exist. The three case studies with a total of 5 facilities included: the South San Francisco Bay (the San Jose/Santa Clara Water Pollution Control Plant and Sunnyvale Water Pollution Control Plant); the Sacramento River (the Sacramento Regional Wastewater Treatment Plant); and the Santa Ana River (the City of Riverside Water Quality Control Plant and the City of Colton Municipal Wastewater Treatment Facility). The second phase consisted of selecting five additional major industrial dischargers to complement the case-study POTWs.

The third phase involved selecting 10 additional facilities to improve the basis for extrapolating the costs of the selected sample facilities to the entire population of potentially affected dischargers. The additional 10 facilities were selected such that the group examined: (1) Was divided between major POTWs and major industrial discharger categories in proportion to the numbers of facilities in the State; (2) gave greater proportionate representation to major facilities than minor facilities based on a presumption that the majority of compliance costs would be incurred by major facilities; (3) gave a proportionate representation to each of four principal conventional treatment processes typically used by facilities in specified industries in California; and (4) was representative of the proportionate facilities located within the different California Regional Water Quality Control Boards. Within these constraints, facilities were selected at random to complete the sample.

In the EA for today's final rule, EPA primarily used the same sample as the EA for the proposed rule with some modifications. EPA increased the number of minor POTWs and minor industrial facilities in the sample. EPA randomly selected four new minor POTW facilities and five new minor industrial facilities to add to the sample. The number of sample facilities selected in each area under the jurisdiction of a Regional Water Quality Control Board was roughly proportional to the universe of facilities in each area.

For those facilities that were projected to exceed permit limits based on the criteria, EPA estimated the incremental costs of compliance. Using a decision matrix or flow chart, costs were developed for two different scenarios—a "low-end" cost scenario and a "high-end" cost scenario—to account for a range of regulatory flexibility available to the State when implementing permit limits based on the water quality criteria. The assumptions for baseline loadings also vary over the two scenarios. The low-end scenario generally assumed that facilities were discharging at the maximum effluent concentrations taken from actual monitoring data, while the high-end scenario generally assumed that facilities were discharging at their current effluent limits. The decision matrix specified assumptions used for selection of control options, such as optimization of existing treatment processes and operations, in-plant pollutant minimization and prevention, and end-of-pipe treatment.

The annualized potential costs that direct and indirect dischargers may incur as a result of State implementation of permit limits based on water quality standards using today's criteria are estimated to be between $33.5 million and $61 million. EPA believes that the costs incurred as a result of State implementation of these permit limits will approach the low-end of the cost range. Costs are unlikely to reach the high-end of the range because State authorities are likely to choose implementation options that provide some degree of flexibility or relief to point source dischargers. Furthermore, cost estimates for both scenarios, but especially for the high-end scenario, may be overstated because the analysis tended to use conservative assumptions in calculating these permit limits and in establishing baseline loadings. The baseline loadings for the high-end were based on current effluent limits rather than actual pollutant discharge data. Most facilities discharge pollutants in concentrations well below current effluent limits. In addition, both the high-end and low-end cost estimates in the EA may be slightly overstated since potential costs incurred to reduce chloroform discharges were included in these estimates. EPA made a decision to reserve the chloroform human health criteria after the EA was completed.

Under the low-end cost scenario, major industrial facilities and POTWs would incur about 27 percent of the potential costs, indirect dischargers would incur about 70 percent of the potential costs, while minor dischargers would incur about 3 percent. Of the major direct dischargers, POTWs would incur the largest share of projected costs (87 percent). However, distributed

among 128 major POTWs in the State, the average cost per plant would be $61,000 per year. Chemical and petroleum industries would incur the highest cost of the industrial categories (5.6 percent of the annual costs, with an annual average of $25,200 per plant). About 57 percent of the low-end costs would be associated with pollution prevention activities, while nearly 38 percent would be associated with pursuing alternative methods of compliance under the regulations.

Under the high-end cost scenario, major industrial facilities and POTWs would incur about 94 percent of the potential costs, indirect dischargers would incur about 17 percent of the potential costs, while minor dischargers would incur about 5 percent. Among the major, direct dischargers, two categories would incur the majority of potential costs—major POTWs (82 percent), Chemical/Petroleum Products (9 percent). The average annual per plant cost for different industry categories would ranges from zero to $324,000. The two highest average cost categories would be major POTWs ($324,000 per year) and Chemical/Petroleum Products ($221,264 per year). The shift in proportion of potential costs between direct and indirect dischargers is due to the assumption that more direct dischargers would use end-of-pipe treatment under the high-end scenario. Thus, a smaller proportion of indirect dischargers would be impacted under the high-end scenario, since some municipalities are projected to add end-of-pipe treatment which would reduce the need for controls from indirect discharges. Over 91 percent of the annual costs are for waste minimization and treatment optimization costs. Waste minimization would represent nearly 84% of the total annual costs. Capital and operation and maintenance costs would make up less than 9 percent of annual costs.

Cost-Effectiveness: Cost-effectiveness is estimated in terms of the cost of reducing the loadings of toxic pollutants from point sources. The cost-effectiveness is derived by dividing the projected annual costs of implementing permit limits based on water quality standards using today's criteria by the toxicity-weighted pounds (pound-equivalents) of pollutants removed. Pound-equivalents are calculated by multiplying pounds of each pollutant removed by the toxic weight (based on the toxicity of copper) for that pollutant.

Based on this analysis, State implementation of permit limits based on today's criteria would be responsible for the reduction of about 1.1 million to 2.7 million toxic pound-equivalents per year, or 15 to 50 percent of the toxic-weighted baseline loadings for the high- and low-end scenarios, respectively. The cost-effectiveness of the scenarios would range from $22 (high-end scenario) to $31 (low-end scenario) per pound-equivalent.

2. Benefits

The benefits analysis is intended to provide insight into both the types and potential magnitude of the economic benefits expected as a result of implementation of water quality standards based on today's criteria. To the extent feasible, empirical estimates of the potential magnitude of the benefits were developed and then compared to the estimated costs of implementing water quality standards based on today's criteria.

To perform a benefits analysis, the types or categories of benefits that apply need to be defined. EPA relied on a set of benefits categories that typically apply to changes in the water resource environment. Benefits were categorized as either use benefits or passive (nonuse) benefits depending on whether or not they involve direct use of, or contact with, the resource. The most prominent use benefit categories are those related to recreational fishing, boating, and swimming. Another use benefit category of significance is human health risk reduction. Human health risk reductions can be realized through actions that reduce human exposure to contaminants such as exposure through the consumption of fish containing elevated levels of pollutants. Passive use benefits are those improvements in environmental quality that are valued by individuals apart from any use of the resource in question.

Benefits estimates were derived in this study using an approach in which benefits of discrete large-scale changes in water quality beyond present day conditions were estimated wherever feasible. A share of those benefits was then apportioned to implementation of water quality standards based on today's criteria. The apportionment estimate was based on a three-stage process:

First, EPA assessed current total loadings from all sources that are contributing to the toxics-related water quality problems observed in the State. This defines the overall magnitude of loadings. Second, the share of total loadings that are attributable to sources that would be controlled through implementation of water quality standards based on today's criteria was estimated. Since this analysis was designed to focus only on those controls imposed on point sources, this stage of the process entailed estimating the portion of total loadings originating from point sources. Third, the percentage reduction in loadings expected due to implementation of today's criteria was estimated and then multiplied by the share of point source loadings to calculate the portion of benefits that could be attributed to implementation of water quality standards based on today's criteria.

Total monetized annual benefits were estimated in the range of $6.9 to $74.7 million. By category, annual benefits would be $1.3 to $4.6 million for avoided cancer risk, $2.2 to $15.2 million for recreational angling, and $3.4 to $54.9 million for passive use benefits.

There are numerous categories of potential or likely benefits that have been omitted from the quantified and monetized benefit estimates. In terms of potential magnitudes of benefit, the following are likely to be significant contributors to the underestimation of the monetized values presented above:

- Improvements in water-related (in-stream and near stream) recreation apart from fishing. The omission of potential motorized and nonmotorized boating, swimming, picnicking, and related in-stream and stream-side recreational activities from the benefits estimates could contribute to an appreciable underestimation of total benefits. Such recreational activities have been shown in empirical research to be highly valued, and even modest changes in participation and or user values could lead to sizable benefits statewide. Some of these activities can be closely associated with water quality attributes (notably, swimming). Other recreational activities may be less directly related to the water quality improvements, but might nonetheless increase due to their association with fishing, swimming, or other activities in which the participants might engage.
- Improvements in consumptive and nonconsumptive land-based recreation, such as hunting and wildlife observation. Improvements in aquatic habitats may lead (via food chain and related ecologic benefit mechanisms) to healthier, larger, and more diverse populations of avian and terrestrial species, such as waterfowl, eagles, and otters. Improvements in the populations for these species could manifest as improved hunting and wildlife viewing opportunities, which might in turn increase participation and user day values for such activities. Although the scope of the benefits analysis has not allowed a quantitative assessment of these values at either pre- or post-rule

conditions, it is conceivable that these benefits could be appreciable.

• Improvements in human health resulting from reduction of non-cancer risk. EPA estimated that implementation of water quality standards based on the criteria would result in a reduction of mercury concentrations in fish tissue and, thus, a reduction in the hazard from consumption of mercury contaminated fish. However, EPA was unable to monetize benefits due to reduced non-cancer health effects.

• Human health benefits for saltwater anglers outside of San Francisco Bay were not estimated. The number of saltwater anglers outside of San Francisco Bay is estimated to be 673,000 (based on Huppert, 1989, and U.S. FWS, 1993). The omission of other saltwater anglers may cause human health benefits to be underestimated. In addition, benefit estimates in the EA may be slightly overstated since potential benefits from reductions in chloroform discharges were included in these estimates. EPA made a decision to reserve the chloroform human health criteria after the EA was completed.

EPA received a number of comments which requested the Agency use the cost-benefit analysis in the EA as a factor in setting water quality criteria. EPA does not use the EA as a basis in determining protective water quality criteria. EPA's current regulations at 40 CFR 131.11 state that the criteria must be based on sound scientific rationale and must protect the designated use. From the outset of the water quality standards program, EPA has explained that while economic factors may be considered in designating uses, they may not be used to justify criteria that are not protective of those uses. 44 FR 25223–226, April 30, 1979. See e.g. *Mississippi Commission on Natural Resources* v. *Costle*, 625 F. 2d 1269, 1277 (5th Cir. 1980). EPA reiterated this interpretation of the CWA and its implementing regulations in discussing section 304(a) recommended criteria guidance stating that "they are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects and do not reflect consideration of economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water." 63 FR 36742 and 36762, July 7, 1998.

I. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

J. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating any regulation for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an Agency to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government Agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of the affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and EPA informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act (UMRA)) for State, local, or tribal governments or the private sector. Today's rule imposes no enforceable duty on any State, local or Tribal governments or the private sector; rather, the CTR promulgates ambient water quality criteria which, when combined with State-adopted uses, will create water quality standards for those water bodies with adopted uses. The State will then use these resulting water quality standards in implementing its existing water quality control programs. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This rule establishes ambient water quality criteria which, by themselves do not directly impact any entity. The State will implement these criteria by ensuring that NPDES permits result in discharges that will meet these criteria. In so doing, the State will have considerable discretion. Until the State implements these water quality standards, there will be no effect of this rule on any entity. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

K. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact of a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business according to RFA default definitions for small businesses (based on SBA size

standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities.

Under the CWA water quality standards program, States must adopt water quality standards for their waters that must be submitted to EPA for approval. If the Agency disapproves a State standard and the State does not adopt appropriate revisions to address EPA's disapproval, EPA must promulgate standards consistent with the statutory requirements. EPA has authority to promulgate criteria or standards in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. These State standards (or EPA-promulgated standards) are implemented through various water quality control programs including the National Pollutant Discharge Elimination System (NPDES) program that limits discharges to navigable waters except in compliance with an EPA permit or permit issued under an approved State NPDES program. The CWA requires that all NPDES permits must include any limits on discharges that are necessary to meet State water quality standards.

Thus, under the CWA, EPA's promulgation of water quality criteria or standards establishes standards that the State, in turn, implements through the NPDES permit process. The State has considerable discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. In circumstances where there is more than one discharger to a water body that is subject to water quality standards or criteria, a State also has discretion in deciding on the appropriate limits for the different dischargers. While the State's implementation of federally-promulgated water quality criteria or standards may result indirectly in new or revised discharge limits for small entities, the criteria or standards themselves do not apply to any discharger, including small entities.

Today's rule, as explained above, does not itself establish any requirements that are applicable to small entities. As a result of EPA's action here, the State of California will need to ensure that permits it issues include limits as necessary to meet the water quality standards established by the criteria in today's rule. In so doing, the State will have a number of discretionary choices associated with permit writing. While California's implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.

The RFA requires analysis of the economic impact of a rule only on the small entities subject to the rule's requirements. Courts have consistently held that the RFA imposes no obligation on an Agency to prepare a small entity analysis of the effect of a rule on entities not regulated by the rule. *Motor & Equip. Mrfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 467 & n.18 (D.C. Cir. 1998)(quoting *United States Distribution Companies* v. *FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); see also *American Trucking Association, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999). This final rule will have a direct effect only on the State of California which is not a small entity under the RFA. Thus, individual dischargers, including small entities, are not directly subject to the requirements of the rule. Moreover, because of California's discretion in implementing these standards, EPA cannot assess the extent to which the promulgation of this rule may subsequently affect any dischargers, including small entities. Consequently, certification under section 605(b) is appropriate. *State of Michigan, et al.* v. *U.S. Environmental Protection Agency*, No. 98–1497 (D.C. Cir. Mar. 3, 2000), slip op. at 41–42.

L. Paperwork Reduction Act

This action requires no new or additional information collection, reporting, or record keeping subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

M. Endangered Species Act

Pursuant to section 7(a) of the Endangered Species Act (ESA), EPA has consulted with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (collectively, the Services) concerning EPA's rulemaking action for the State of California. EPA initiated informal consultation in early 1994, and completed formal consultation in April 2000. As a result of the consultation, EPA modified some of the provisions in the final rule.

As part of the consultation process, EPA submitted to the Services a Biological Evaluation for their review in October of 1997. This evaluation found that the proposed CTR was not likely to jeopardize the continued existence of any Federally listed species or result in the destruction or adverse modification of designated critical habitat. In April of 1998, the Services sent EPA a draft Biological Opinion which tentatively found that EPA's proposed rule would jeopardize the continued existence of several Federally listed species and result in the destruction or have adverse effect on designated critical habitat. After lengthy discussions with the Services, EPA agreed to several changes in the final rule and the Services in turn issued a final Biological Opinion finding that EPA's action would not likely jeopardize the continued existence of any Federally listed species or result in the destruction or adverse modification of designated critical habitat. EPA's Biological Evaluation and the Services' final Biological Opinion are contained in the administrative record for today's rule.

In order to ensure the continued protection of Federally listed threatened and endangered species and to protect their critical habitat, EPA agreed to reserve the aquatic life criteria for mercury and the acute freshwater aquatic life criterion for selenium. The Services believe that EPA's proposed criteria are not sufficiently protective of Federally listed species and should not be promulgated. EPA agreed that it would reevaluate these criteria in light of the Services concerns before promulgating them for the State of California. Other commitments made by EPA are described in a letter to the Services dated December 16, 1999; this letter is contained in the administrative record for today's rule.

N. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a major rule as defined

by 5 U.S.C. 804(2). This rule will be effective May 18, 2000.

O. Executive Order 13084, Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments nor does it impose substantial direct compliance cots on them. Today's rule will only address priority toxic pollutant water quality criteria for the State of California and does not apply to waters in Indian country. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

P. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

Q. Executive Order 13132 on Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule does not affect the nature of the relationship between EPA and States generally, for the rule only applies to water bodies in California. Further, the rule will not substantially affect the relationship of EPA and the State of California, or the distribution of power or responsibilities between EPA and the State. The rule does not alter the State's authority to issue NPDES permits or the State's considerable discretion in implementing these criteria. The rule simply implements Clean Water Act section 303(c)(2)(B) requiring numeric ambient water quality criteria for which EPA has issued section 304(a) recommended criteria in a manner that is consistent with previous regulatory guidance that the Agency has issued to implement CWA section 303(c)(2)(B). Further, this rule does not preclude the State from adopting water quality standards that meet the requirements of the CWA. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State and local government representatives in developing this rule. EPA and the State reached an agreement that to best utilize its respective resources, EPA would promulgate water quality criteria and the State would concurrently work on a plan to implement the criteria. Since the proposal of this rule, EPA has kept State officials fully informed of changes to the proposal. EPA has continued to invite comment from the State on these changes. EPA believes that the final CTR incorporates comments from State officials and staff.

R. Executive Order 13045 on Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

While this final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, we nonetheless have reason to believe that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. As a matter of EPA policy, we therefore have assessed the environmental health or safety effects of ambient water quality criteria on children. The results of this assessment are contained in section F.3., Human Health Criteria.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: April 27, 2000.

Carol Browner,

Administrator.

For the reasons set out in the preamble, part 131 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—[Amended]

2. Section 131.38 is added to subpart D to read as follows:

§ 131.38 Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California.

(a) *Scope.* This section promulgates criteria for priority toxic pollutants in the State of California for inland surface waters and enclosed bays and estuaries. This section also contains a compliance schedule provision.

(b)(1) Criteria for Priority Toxic Pollutants in the State of California as described in the following table:

BILLING CODE 6560–50–P

A		B Freshwater		C Saltwater		D Human Health (10^{-6} risk for carcinogens) For consumption of:	
# Compound	CAS Number	Criterion Maximum Conc. [d] B1	Criterion Continuous Conc. [d] B2	Criterion Maximum Conc. [d] C1	Criterion Continuous Conc. [d] C2	Water & Organisms (µg/L) D1	Organisms Only (µg/L) D2
1. Antimony	7440360					14 a,s	4300 a,t
2. Arsenic [b]	7440382	340 i,m,w	150 i,m,w	69 i,m	36 i,m		
3. Beryllium	7440417					n	n
4. Cadmium [b]	7440439	4.3 e,i,m,w,x	2.2 e,i,m,w	42 i,m	9.3 i,m	n	n
5a. Chromium (III)	16065831	550 e,i,m,o	180 e,i,m,o			n	n
5b. Chromium (VI) [b]	18540299	16 i,m,w	11 i,m,w	1100 i,m	50 i,m	n	n
6. Copper [b]	7440508	13 e,i,m,w,x	9.0 e,i,m,w	4.8 i,m	3.1 i,m	1300	
7. Lead [b]	7439921	65 e,i,m	2.5 e,i,m	210 i,m	8.1 i,m	n	n
8. Mercury [b]	7439976	[Reserved]	[Reserved]	[Reserved]	[Reserved]	0.050 a	0.051 a
9. Nickel [b]	7440020	470 e,i,m,w	52 e,i,m,w	74 i,m	8.2 i,m	610 a	4600 a
10. Selenium [b]	7782492	[Reserved] p	5.0 q	290 i,m	71 i,m	n	n
11. Silver [b]	7440224	3.4 e,i,m		1.9 i,m			
12. Thallium	7440280					1.7 a,s	6.3 a,t
13. Zinc [b]	7440666	120 e,i,m,w,x	120 e,i,m,w	90 i,m	81 i,m		
14. Cyanide [b]	57125	22 o	5.2 o	1 r	1 r	700 a	220,000 a,j
15. Asbestos	1332214					7,000,000 fibers/L k,s	
16. 2,3,7,8-TCDD (Dioxin)	1746016					0.000000013 c	0.000000014 c
17. Acrolein	107028					320 s	780 t
18. Acrylonitrile	107131					0.059 a,c,s	0.66 a,c,t
19. Benzene	71432					1.2 a,c	71 a,c
20. Bromoform	75252					4.3 a,c	360 a,c
21. Carbon Tetrachloride	56235					0.25 a,c,s	4.4 a,c,t
22. Chlorobenzene	108907					680 a,s	21,000 a,j,t
23. Chlorodibromomethane	124481					0.401 a,c	34 a,c
24. Chloroethane	75003						
25. 2-Chloroethylvinyl Ether	110758						

26. Chloroform	67663					[Reserved]	[Reserved]
27. Dichlorobromomethane	75274					0.56 a,c	46 a,c
28. 1,1-Dichloroethane	75343						
29. 1,2-Dichloroethane	107062					0.38 a,c,s	99 a,c,t
30. 1,1-Dichloroethylene	75354					0.057 a,c,s	3.2 a,c,t
31. 1,2-Dichloropropane	78875					0.52 a	39 a
32. 1,3-Dichloropropylene	542756					10 a,s	1,700 a,t
33. Ethylbenzene	100414					3,100 a,s	29,000 a,t
34. Methyl Bromide	74839					48 a	4,000 a
35. Methyl Chloride	74873					n	n
36. Methylene Chloride	75092					4.7 a,c	1,600 a,c
37. 1,1,2,2-Tetrachloroethane	79345					0.17 a,c,s	11 a,c,t
38. Tetrachloroethylene	127184					0.8 c,s	8.85 c,t
39. Toluene	108883					6,800 a	200,000 a
40. 1,2-Trans-Dichloroethylene	156605					700 a	140,000 a
41. 1,1,1-Trichloroethane	71556					n	n
42. 1,1,2-Trichloroethane	79005					0.60 a,c,s	42 a,c,t
43. Trichloroethylene	79016					2.7 c,s	81 c,t
44. Vinyl Chloride	75014					2 c,s	525 c,t
45. 2-Chlorophenol	95578					120 a	400 a
46. 2,4-Dichlorophenol	120832					93 a,s	790 a,t
47. 2,4-Dimethylphenol	105679					540 a	2,300 a
48. 2-Methyl-4,6-Dinitrophenol	534521					13.4 s	765 t
49. 2,4-Dinitrophenol	51285					70 a,s	14,000 a,t
50. 2-Nitrophenol	88755						
51. 4-Nitrophenol	100027						
52. 3-Methyl-4-Chlorophenol	59507						
53. Pentachlorophenol	87865	19 f,w	15 f,w	13	7.9	0.28 a,c	8.2 a,c,j
54. Phenol	108952					21,000 a	4,600,000 a,j,t
55. 2,4,6-Trichlorophenol	88062					2.1 a,c	6.5 a,c
56. Acenaphthene	83329					1,200 a	2,700 a
57. Acenaphthylene	208968						
58. Anthracene	120127					9,600 a	110,000 a

59. Benzidine	92875					0.00012 a,c,s	0.00054 a,c,t
60. Benzo(a)Anthracene	56553					0.0044 a,c	0.049 a,c
61. Benzo(a)Pyrene	50328					0.0044 a,c	0.049 a,c
62. Benzo(b)Fluoranthene	205992					0.0044 a,c	0.049 a,c
63. Benzo(ghi)Perylene	191242						
64. Benzo(k)Fluoranthene	207089					0.0044 a,c	0.049 a,c
65. Bis(2-Chloroethoxy)Methane	111911						
66. Bis(2-Chloroethyl)Ether	111444					0.031 a,c,s	1.4 a,c,t
67. Bis(2-Chloroisopropyl)Ether	39638329					1,400 a	170,000 a,t
68. Bis(2-Ethylhexyl)Phthalate	117817					1.8 a,c,s	5.9 a,c,t
69. 4-Bromophenyl Phenyl Ether	101553						
70. Butylbenzyl Phthalate	85687					3,000 a	5,200 a
71. 2-Chloronaphthalene	91587					1,700 a	4,300 a
72. 4-Chlorophenyl Phenyl Ether	7005723						
73. Chrysene	218019					0.0044 a,c	0.049 a,c
74. Dibenzo(a,h)Anthracene	53703					0.0044 a,c	0.049 a,c
75. 1,2 Dichlorobenzene	95501					2,700 a	17,000 a
76. 1,3 Dichlorobenzene	541731					400	2,600
77. 1,4 Dichlorobenzene	106467					400	2,600
78. 3,3'-Dichlorobenzidine	91941					0.04 a,c,s	0.077 a,c,t
79. Diethyl Phthalate	84662					23,000 a,s	120,000 a,t
80. Dimethyl Phthalate	131113					313,000 s	2,900,000 t
81. Di-n-Butyl Phthalate	84742					2,700 a,s	12,000 a,t
82. 2,4-Dinitrotoluene	121142					0.11 c,s	9.1 c,t
83. 2,6-Dinitrotoluene	606202						
84 Di-n-Octyl Phthalate	117840						
85. 1,2-Diphenylhydrazine	122667					0.040 a,c,s	0.54 a,c,t
86. Fluoranthene	206440					300 a	370 a
87. Fluorene	86737					1,300 a	14,000 a
88. Hexachlorobenzene	118741					0.00075 a,c	0.00077 a,c
89. Hexachlorobutadiene	87683					0.44 a,c,s	50 a,c,t
90. Hexachlorocyclopentadiene	77474					240 a,s	17,000 a,j,t
91. Hexachloroethane	67721					1.9 a,c,s	8.9 a,c,t

92. Indeno(1,2,3-cd) Pyrene	193395					0.0044 a,c	0.049 a,c
93. Isophorone	78591					8.4 c,s	600 c,t
94. Naphthalene	91203						
95. Nitrobenzene	98953					17 a,s	1,900 a,j,t
96. N-Nitrosodimethylamine	62759					0.00069 a,c,s	8.1 a,c,t
97. N-Nitrosodi-n-Propylamine	621647					0.005 a	1.4 a
98. N-Nitrosodiphenylamine	86306					5.0 a,c,s	16 a,c,t
99. Phenanthrene	85018						
100. Pyrene	129000					960 a	11,000 a
101. 1,2,4-Trichlorobenzene	120821						
102. Aldrin	309002	3 g		1.3 g		0.00013 a,c	0.00014 a,c
103. alpha-BHC	319846					0.0039 a,c	0.013 a,c
104. beta-BHC	319857					0.014 a,c	0.046 a,c
105. gamma-BHC	58899	0.95 w		0.16 g		0.019 c	0.063 c
106. delta-BHC	319868						
107. Chlordane	57749	2.4 g	0.0043 g	0.09 g	0.004 g	0.00057 a,c	0.00059 a,c
108. 4,4'-DDT	50293	1.1 g	0.001 g	0.13 g	0.001 g	0.00059 a,c	0.00059 a,c
109. 4,4'-DDE	72559					0.00059 a,c	0.00059 a,c
110. 4,4'-DDD	72548					0.00083 a,c	0.00084 a,c
111. Dieldrin	60571	0.24 w	0.056 w	0.71 g	0.0019 g	0.00014 a,c	0.00014 a,c
112. alpha-Endosulfan	959988	0.22 g	0.056 g	0.034 g	0.0087 g	110 a	240 a
113. beta-Endosulfan	33213659	0.22 g	0.056 g	0.034 g	0.0087 g	110 a	240 a
114. Endosulfan Sulfate	1031078					110 a	240 a
115. Endrin	72208	0.086 w	0.036 w	0.037 g	0.0023 g	0.76 a	0.81 a,j
116. Endrin Aldehyde	7421934					0.76 a	0.81 a,j
117. Heptachlor	76448	0.52 g	0.0038 g	0.053 g	0.0036 g	0.00021 a,c	0.00021 a,c
118. Heptachlor Epoxide	1024573	0.52 g	0.0038 g	0.053 g	0.0036 g	0.00010 a,c	0.00011 a,c
119-125. Polychlorinated biphenyls (PCBs)			0.014 u		0.03 u	0.00017 c,v	0.00017 c,v
126. Toxaphene	8001352	0.73	0.0002	0.21	0.0002	0.00073 a,c	0.00075 a,c
Total Number of Criteria [h]		22	21	22	20	92	90

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Footnotes to Table in Parargraph (b)(1):

a. Criteria revised to reflect the Agency q1* or RfD, as contained in the Integrated Risk Information System (IRIS) as of October 1, 1996. The fish tissue bioconcentration factor (BCF) from the 1980 documents was retained in each case.

b. Criteria apply to California waters except for those waters subject to objectives in Tables III–2A and III–2B of the San Francisco Regional Water Quality Control Board's (SFRWQCB) 1986 Basin Plan, that were adopted by the SFRWQCB and the State Water Resources Control Board, approved by EPA, and which continue to apply.

c. Criteria are based on carcinogenicity of 10 (-6) risk.

d. Criteria Maximum Concentration (CMC) equals the highest concentration of a pollutant to which aquatic life can be exposed for a short period of time without deleterious effects. Criteria Continuous Concentration (CCC) equals the highest concentration of a pollutant to which aquatic life can be exposed for an extended period of time (4 days) without deleterious effects. ug/L equals micrograms per liter.

e. Freshwater aquatic life criteria for metals are expressed as a function of total hardness (mg/L) in the water body. The equations are provided in matrix at paragraph (b)(2) of this section. Values displayed above in the matrix correspond to a total hardness of 100 mg/l.

f. Freshwater aquatic life criteria for pentachlorophenol are expressed as a function of pH, and are calculated as follows: Values displayed above in the matrix correspond to a pH of 7.8. CMC = exp(1.005(pH) − 4.869). CCC = exp(1.005(pH) − 5.134).

g. This criterion is based on 304(a) aquatic life criterion issued in 1980, and was issued in one of the following documents: Aldrin/Dieldrin (EPA 440/5–80–019), Chlordane (EPA 440/5–80–027), DDT (EPA 440/5–80–038), Endosulfan (EPA 440/5–80–046), Endrin (EPA 440/5–80–047), Heptachlor (440/5–80–052), Hexachlorocyclohexane (EPA 440/5–80–054), Silver (EPA 440/5–80–071). The Minimum Data Requirements and derivation procedures were different in the 1980 Guidelines than in the 1985 Guidelines. For example, a "CMC" derived using the 1980 Guidelines was derived to be used as an instantaneous maximum. If assessment is to be done using an averaging period, the values given should be divided by 2 to obtain a value that is more comparable to a CMC derived using the 1985 Guidelines.

h. These totals simply sum the criteria in each column. For aquatic life, there are 23 priority toxic pollutants with some type of freshwater or saltwater, acute or chronic criteria. For human health, there are 92 priority toxic pollutants with either "water + organism" or "organism only" criteria. Note that these totals count chromium as one pollutant even though EPA has developed criteria based on two valence states. In the matrix, EPA has assigned numbers 5a and 5b to the criteria for chromium to reflect the fact that the list of 126 priority pollutants includes only a single listing for chromium.

i. Criteria for these metals are expressed as a function of the water-effect ratio, WER, as defined in paragraph (c) of this section. CMC = column B1 or C1 value x WER; CCC = column B2 or C2 value x WER.

j. No criterion for protection of human health from consumption of aquatic organisms (excluding water) was presented in the 1980 criteria document or in the 1986 Quality Criteria for Water. Nevertheless, sufficient information was presented in the 1980 document to allow a calculation of a criterion, even though the results of such a calculation were not shown in the document.

k. The CWA 304(a) criterion for asbestos is the MCL.

l. [Reserved]

m. These freshwater and saltwater criteria for metals are expressed in terms of the dissolved fraction of the metal in the water column. Criterion values were calculated by using EPA's Clean Water Act 304(a) guidance values (described in the total recoverable fraction) and then applying the conversion factors in § 131.36(b)(1) and (2).

n. EPA is not promulgating human health criteria for these contaminants. However, permit authorities should address these contaminants in NPDES permit actions using the State's existing narrative criteria for toxics.

o. These criteria were promulgated for specific waters in California in the National Toxics Rule ("NTR"), at § 131.36. The specific waters to which the NTR criteria apply include: Waters of the State defined as bays or estuaries and waters of the State defined as inland, i.e., all surface waters of the State not ocean waters. These waters specifically include the San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta. This section does not apply instead of the NTR for this criterion.

p. A criterion of 20 ug/l was promulgated for specific waters in California in the NTR and was promulgated in the total recoverable form. The specific waters to which the NTR criterion applies include: Waters of the San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta; and waters of Salt Slough, Mud Slough (north) and the San Joaquin River, Sack Dam to the mouth of the Merced River. This section does not apply instead of the NTR for this criterion. The State of California adopted and EPA approved a site specific criterion for the San Joaquin River, mouth of Merced to Vernalis; therefore, this section does not apply to these waters.

q. This criterion is expressed in the total recoverable form. This criterion was promulgated for specific waters in California in the NTR and was promulgated in the total recoverable form. The specific waters to which the NTR criterion applies include: Waters of the San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta; and waters of Salt Slough, Mud Slough (north) and the San Joaquin River, Sack Dam to Vernalis. This criterion does not apply instead of the NTR for these waters. This criterion applies to additional waters of the United States in the State of California pursuant to 40 CFR 131.38(c). The State of California adopted and EPA approved a site-specific criterion for the Grassland Water District, San Luis National Wildlife Refuge, and the Los Banos State Wildlife Refuge; therefore, this criterion does not apply to these waters.

r. These criteria were promulgated for specific waters in California in the NTR. The specific waters to which the NTR criteria apply include: Waters of the State defined as bays or estuaries including the San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta. This section does not apply instead of the NTR for these criteria.

s. These criteria were promulgated for specific waters in California in the NTR. The specific waters to which the NTR criteria apply include: Waters of the Sacramento-San Joaquin Delta and waters of the State defined as inland (*i.e.*, all surface waters of the State not bays or estuaries or ocean) that include a MUN use designation. This section does not apply instead of the NTR for these criteria.

t. These criteria were promulgated for specific waters in California in the NTR. The specific waters to which the NTR criteria apply include: Waters of the State defined as bays and estuaries including San Francisco Bay upstream to and including Suisun Bay and the Sacramento-San Joaquin Delta; and waters of the State defined as inland (i.e., all surface waters of the State not bays or estuaries or ocean) without a MUN use designation. This section does not apply instead of the NTR for these criteria.

u. PCBs are a class of chemicals which include aroclors 1242, 1254, 1221, 1232, 1248, 1260, and 1016, CAS numbers 53469219, 11097691, 11104282, 11141165, 12672296, 11096825, and 12674112, respectively. The aquatic life criteria apply to the sum of this set of seven aroclors.

v. This criterion applies to total PCBs, e.g., the sum of all congener or isomer or homolog or aroclor analyses.

w. This criterion has been recalculated pursuant to the 1995 Updates: Water Quality Criteria Documents for the Protection of Aquatic Life in Ambient Water, Office of Water, EPA–820–B–96–001, September 1996. See also Great Lakes Water Quality Initiative Criteria Documents for the Protection of Aquatic Life in Ambient Water, Office of Water, EPA–80–B–95–004, March 1995.

x. The State of California has adopted and EPA has approved site specific criteria for the Sacramento River (and tributaries) above Hamilton City; therefore, these criteria do not apply to these waters.

General Notes to Table in Paragraph (b)(1)

1. The table in this paragraph (b)(1) lists all of EPA's priority toxic pollutants whether or not criteria guidance are available. Blank spaces indicate the absence of national section 304(a) criteria guidance. Because of variations in chemical nomenclature systems, this listing of toxic pollutants does not duplicate the listing in Appendix A to 40 CFR Part 423–126 Priority Pollutants. EPA has added the Chemical Abstracts Service (CAS) registry numbers, which provide a unique identification for each chemical.

2. The following chemicals have organoleptic-based criteria recommendations that are not included on this chart: zinc, 3-methyl-4-chlorophenol.

3. Freshwater and saltwater aquatic life criteria apply as specified in paragraph (c)(3) of this section.

(2) Factors for Calculating Metals Criteria. Final CMC and CCC values should be rounded to two significant figures.

(i) $CMC = WER \times (Acute\ Conversion\ Factor) \times (\exp\{m_A[\ln(hardness)]+b_A\})$

(ii) $CCC = WER \times (Acute\ Conversion\ Factor) \times (\exp\{m_C[\ln(hardness)]+b_C\})$

(iii) Table 1 to paragraph (b)(2) of this section:

Metal	m_A	b_A	m_C	b_C
Cadmium	1.128	−3.6867	0.7852	−2.715
Copper	0.9422	−1.700	0.8545	−1.702
Chromium (III)	0.8190	3.688	0.8190	1.561
Lead	1.273	−1.460	1.273	−4.705
Nickel	0.8460	2.255	0.8460	0.0584
Silver	1.72	−6.52		
Zinc	0.8473	0.884	0.8473	0.884

Note to Table 1: The term "exp" represents the base e exponential function.

(iv) Table 2 to paragraph (b)(2) of this section:

Metal	Conversion factor (CF) for freshwater acute criteria	CF for freshwater chronic criteria	CF for saltwater acute criteria	CF [a] for saltwater chronic criteria
Antimony	[d]	[d]	[d]	[d]
Arsenic	1.000	1.000	1.000	1.000
Beryllium	[d]	[d]	[d]	[d]
Cadmium	[b] 0.944	[b] 0.909	0.994	0.994
Chromium (III)	0.316	0.860	[d]	[d]
Chromium (VI)	0.982	0.962	0.993	0.993
Copper	0.960	0.960	0.83	0.83
Lead	[b] 0.791	[b] 0.791	0.951	0.951
Mercury	.....	.....	.....	.....
Nickel	0.998	0.997	0.990	0.990
Selenium	.....	[c]	0.998	0.998
Silver	0.85	[d]	0.85	[d]
Thallium	[d]	[d]	[d]	[d]
Zinc	0.978	0.986	0.946	0.946

Footnotes to Table 2 of Paragraph (b)(2):

[a] Conversion Factors for chronic marine criteria are not currently available. Conversion Factors for acute marine criteria have been used for both acute and chronic marine criteria.

[b] Conversion Factors for these pollutants in freshwater are hardness dependent. CFs are based on a hardness of 100 mg/l as calcium carbonate ($CaCO_3$). Other hardness can be used; CFs should be recalculated using the equations in table 3 to paragraph (b)(2) of this section.

[c] Bioaccumulative compound and inappropriate to adjust to percent dissolved.

[d] EPA has not published an aquatic life criterion value.

Note to Table 2 of Paragraph (b)(2): The term "Conversion Factor" represents the recommended conversion factor for converting a metal criterion expressed as the total recoverable fraction in the water column to a criterion expressed as the dissolved fraction in the water column. See "Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria", October 1, 1993, by Martha G. Prothro, Acting Assistant Administrator for Water available from Water Resource Center, USEPA, Mailcode RC4100, M Street SW, Washington, DC, 20460 and the note to § 131.36(b)(1).

(v) Table 3 to paragraph (b)(2) of this section:

	Acute	Chronic
Cadmium	CF=1.136672—[(ln {hardness}) (0.041838)]	CF = 1.101672—[(ln {hardness})(0.041838)]
Lead	CF=1.46203—[(ln {hardness})(0.145712)]	CF = 1.46203—[(ln {hardness})(0.145712)]

(c) *Applicability.* (1) The criteria in paragraph (b) of this section apply to the State's designated uses cited in paragraph (d) of this section and apply concurrently with any criteria adopted by the State, except when State regulations contain criteria which are more stringent for a particular parameter and use, or except as provided in footnotes p, q, and x to the table in paragraph (b)(1) of this section.

(2) The criteria established in this section are subject to the State's general rules of applicability in the same way and to the same extent as are other Federally-adopted and State-adopted numeric toxics criteria when applied to the same use classifications including mixing zones, and low flow values below which numeric standards can be exceeded in flowing fresh waters.

(i) For all waters with mixing zone regulations or implementation procedures, the criteria apply at the appropriate locations within or at the boundary of the mixing zones; otherwise the criteria apply throughout the water body including at the point of discharge into the water body.

(ii) The State shall not use a low flow value below which numeric standards can be exceeded that is less stringent than the flows in Table 4 to paragraph (c)(2) of this section for streams and rivers.

(iii) Table 4 to paragraph (c)(2) of this section:

Criteria	Design flow
Aquatic Life Acute Criteria (CMC).	1 Q 10 or 1 B 3
Aquatic Life Chronic Criteria (CCC).	7 Q 10 or 4 B 3
Human Health Criteria.	Harmonic Mean Flow

Note to Table 4 of Paragraph (c)(2): 1. CMC (Criteria Maximum Concentration) is the water quality criteria to protect against acute effects in aquatic life and is the highest instream concentration of a priority toxic pollutant consisting of a short-term average not to be exceeded more than once every three years on the average.

2. CCC (Continuous Criteria Concentration) is the water quality criteria to protect against chronic effects in aquatic life and is the highest in stream concentration of a priority toxic pollutant consisting of a 4-day average not to be exceeded more than once every three years on the average.

3. 1 Q 10 is the lowest one day flow with an average recurrence frequency of once in 10 years determined hydrologically.

4. 1 B 3 is biologically based and indicates an allowable exceedence of once every 3 years. It is determined by EPA's computerized method (DFLOW model).

5. 7 Q 10 is the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically.

6. 4 B 3 is biologically based and indicates an allowable exceedence for 4 consecutive days once every 3 years. It is determined by EPA's computerized method (DFLOW model).

(iv) If the State does not have such a low flow value below which numeric standards do not apply, then the criteria included in paragraph (d) of this section apply at all flows.

(v) If the CMC short-term averaging period, the CCC four-day averaging period, or once in three-year frequency is inappropriate for a criterion or the site to which a criterion applies, the State may apply to EPA for approval of an alternative averaging period, frequency, and related design flow. The State must submit to EPA the bases for any alternative averaging period, frequency, and related design flow. Before approving any change, EPA will publish for public comment, a document proposing the change.

(3) The freshwater and saltwater aquatic life criteria in the matrix in paragraph (b)(1) of this section apply as follows:

(i) For waters in which the salinity is equal to or less than 1 part per thousand 95% or more of the time, the applicable criteria are the freshwater criteria in Column B;

(ii) For waters in which the salinity is equal to or greater than 10 parts per thousand 95% or more of the time, the applicable criteria are the saltwater criteria in Column C except for selenium in the San Francisco Bay estuary where the applicable criteria are the freshwater criteria in Column B (refer to footnotes p and q to the table in paragraph (b)(1) of this section); and

(iii) For waters in which the salinity is between 1 and 10 parts per thousand as defined in paragraphs (c)(3)(i) and (ii) of this section, the applicable criteria are the more stringent of the freshwater or saltwater criteria. However, the Regional Administrator may approve the use of the alternative freshwater or saltwater criteria if scientifically defensible information and data demonstrate that on a site-specific basis the biology of the water body is dominated by freshwater aquatic life and that freshwater criteria are more appropriate; or conversely, the biology of the water body is dominated by saltwater aquatic life and that saltwater criteria are more appropriate. Before approving any change, EPA will publish for public comment a document proposing the change.

(4) *Application of metals criteria.* (i) For purposes of calculating freshwater aquatic life criteria for metals from the equations in paragraph (b)(2) of this section, for waters with a hardness of 400 mg/l or less as calcium carbonate, the actual ambient hardness of the surface water shall be used in those equations. For waters with a hardness of over 400 mg/l as calcium carbonate, a hardness of 400 mg/l as calcium carbonate shall be used with a default Water-Effect Ratio (WER) of 1, or the actual hardness of the ambient surface water shall be used with a WER. The same provisions apply for calculating the metals criteria for the comparisons provided for in paragraph (c)(3)(iii) of this section.

(ii) The hardness values used shall be consistent with the design discharge conditions established in paragraph (c)(2) of this section for design flows and mixing zones.

(iii) The criteria for metals (compounds #1—#13 in the table in paragraph (b)(1) of this section) are expressed as dissolved except where otherwise noted. For purposes of calculating aquatic life criteria for metals from the equations in footnote i to the table in paragraph (b)(1) of this section and the equations in paragraph (b)(2) of this section, the water effect ratio is generally computed as a specific pollutant's acute or chronic toxicity value measured in water from the site covered by the standard, divided by the respective acute or chronic toxicity value in laboratory dilution water. To use a water effect ratio other than the default of 1, the WER must be determined as set forth in Interim Guidance on Determination and Use of Water Effect Ratios, U.S. EPA Office of Water, EPA–823–B–94–001, February 1994, or alternatively, other scientifically defensible methods adopted by the State as part of its water quality standards program and approved by EPA. For calculation of criteria using site-specific values for both the hardness and the water effect ratio, the hardness used in the equations in paragraph (b)(2) of this section must be determined as required in paragraph (c)(4)(ii) of this section. Water hardness must be calculated from the measured calcium and magnesium ions present, and the ratio of calcium to magnesium should be approximately the same in standard laboratory toxicity testing water as in the site water.

(d)(1) Except as specified in paragraph (d)(3) of this section, all waters assigned any aquatic life or human health use classifications in the Water Quality Control Plans for the various Basins of the State ("Basin Plans") adopted by the California State Water Resources Control Board ("SWRCB"), except for ocean waters covered by the Water Quality Control Plan for Ocean Waters of California ("Ocean Plan") adopted by the SWRCB with resolution Number 90–27 on March 22, 1990, are subject to the criteria in paragraph (d)(2) of this section, without exception. These criteria apply to waters identified in the Basin Plans. More particularly, these criteria apply to waters identified in the Basin Plan chapters designating beneficial uses for waters within the region. Although the State has adopted several use designations for each of these waters, for purposes of this action, the specific standards to be applied in paragraph (d)(2) of this section are based on the presence in all waters of some aquatic life designation and the presence or absence of the MUN use designation (municipal and domestic supply). (See Basin Plans for more detailed use definitions.)

(2) The criteria from the table in paragraph (b)(1) of this section apply to the water and use classifications defined in paragraph (d)(1) of this section as follows:

Water and use classification	Applicable criteria
(i) All inland waters of the United States or enclosed bays and estuaries that are waters of the United States that include a MUN use designation.	(A) Columns B1 and B2—all pollutants (B) Columns C1 and C2—all pollutants (C) Column D1—all pollutants
(ii) All inland waters of the United States or enclosed bays and estuaries that are waters of the United States that do not include a MUN use designation.	(A) Columns B1 and B2—all pollutants (B) Columns C1 and C2—all pollutants (C) Column D2—all pollutants

(3) Nothing in this section is intended to apply instead of specific criteria, including specific criteria for the San Francisco Bay estuary, promulgated for California in the National Toxics Rule at § 131.36.

(4) The human health criteria shall be applied at the State-adopted 10 (−6) risk level.

(5) Nothing in this section applies to waters located in Indian Country.

(e)*Schedules of compliance.* (1) It is presumed that new and existing point source dischargers will promptly comply with any new or more restrictive water quality-based effluent limitations ("WQBELs") based on the water quality criteria set forth in this section.

(2) When a permit issued on or after May 18, 2000 to a new discharger contains a WQBEL based on water quality criteria set forth in paragraph (b) of this section, the permittee shall comply with such WQBEL upon the commencement of the discharge. A new discharger is defined as any building, structure, facility, or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the State of California's inland surface waters or enclosed bays and estuaries, the construction of which commences after May 18, 2000.

(3) Where an existing discharger reasonably believes that it will be infeasible to promptly comply with a new or more restrictive WQBEL based on the water quality criteria set forth in this section, the discharger may request approval from the permit issuing authority for a schedule of compliance.

(4) A compliance schedule shall require compliance with WQBELs based on water quality criteria set forth in paragraph (b) of this section as soon as possible, taking into account the dischargers' technical ability to achieve compliance with such WQBEL.

(5) If the schedule of compliance exceeds one year from the date of permit issuance, reissuance or modification, the schedule shall set forth interim requirements and dates for their achievement. The dates of completion between each requirement may not exceed one year. If the time necessary for completion of any requirement is more than one year and is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of interim requirements.

(6) In no event shall the permit issuing authority approve a schedule of compliance for a point source discharge which exceeds five years from the date of permit issuance, reissuance, or modification, whichever is sooner. Where shorter schedules of compliance are prescribed or schedules of compliance are prohibited by law, those provisions shall govern.

(7) If a schedule of compliance exceeds the term of a permit, interim permit limits effective during the permit shall be included in the permit and addressed in the permit's fact sheet or statement of basis. The administrative record for the permit shall reflect final permit limits and final compliance dates. Final compliance dates for final permit limits, which do not occur during the term of the permit, must occur within five years from the date of issuance, reissuance or modification of the permit which initiates the compliance schedule. Where shorter schedules of compliance are prescribed or schedules of compliance are prohibited by law, those provisions shall govern.

(8) The provisions in this paragraph (e), Schedules of compliance, shall expire on May 18, 2005.

[FR Doc. 00–11106 Filed 5–17–00; 8:45 am]
BILLING CODE 6560–50–P

TAB “39”

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LEXSTAT CA. CONST ART 13B § 6

DEERING'S CALIFORNIA CODES ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH 2009-2010 EXTRAORDINARY SESSIONS 1-5, ***
7, AND 8, AND URGENCY LEGISLATION THROUGH CH 27 OF THE 2010 REGULAR SESSION

CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII B. GOVERNMENT SPENDING LIMITATION

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII B § 6 (2009)

§ 6. Reimbursement for new programs and services

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975. (b)

(1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section. (c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

HISTORY:

Adopted November 6, 1979. Amendment approved by voters, Prop. 1A, effective November 3, 2004.

NOTES:

Amendments:

2004 Amendment:

(1) Designated the former section to be subd (a); (2) generally eliminated "such" in the introductory clause of subd (a); (3) redesignated former subds (a)-(c) to be subds (a)(1)-(a)(3); (4) substituted the period for the semicolon at the end of subd (a)(1); (5) substituted the period for "; or" at the end of subd (a)(2); and (6) added subds (b) and (c).

Note

Stats 2004 ch 216 provides:

SEC. 34. Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision in 97-TC-23, relating to the Standardized Testing and Reporting (STAR) program mandate, and its parameters and guidelines for calculating the state reimbursement for that mandate pursuant to *Section 6 of Article XIII B of the California Constitution* for each of the following statutes in light of federal statutes enacted and state court decisions rendered since these statutes were enacted:

(a) Chapter 975 of the Statutes of 1995.

(b) Chapter 828 of the Statutes of 1997.

(c) Chapter 576 of the Statutes of 2000.

(d) Chapter 722 of the Statutes of 2001.

Stats 2004 ch 316 provides:

SEC. 2. The Legislature hereby finds and declares that, notwithstanding a prior determination by the Board of Control, acting as the predecessor agency for the Commission on State Mandates, and pursuant to subdivision (d) of *Section 17556 of the Government Code*, the state-mandated local program imposed by Chapter 1131 of the Statutes of 1975 no longer constitutes a reimbursable mandate under *Section 6 of Article XIIIB of the California Constitution* because subdivision (e) of *Section 2207 of the Public Resources Code*, as added by Chapter 1097 of the Statutes of 1990, confers on local agencies subject to that mandate authority to levy fees sufficient to pay for the mandated program.

SEC. 3. Notwithstanding any other provision of law, by January 1, 2006, the Commission on State Mandates shall reconsider whether each of the following statutes constitutes a reimbursable mandate under *Section 6 of Article XIII B of the California Constitution* in light of federal statutes enacted and federal and state court decisions rendered since these statutes were enacted:

(a) Sex offenders: disclosure by law enforcement officers (97-TC-15; and Chapters 908 and 909 of the Statutes of 1996, Chapters 17, 80, 817, 818, 819, 820, 821, and 822 of the Statutes of 1997, and Chapters 485, 550, 927, 928, 929, and 930 of the Statutes of 1998).

(b) Extended commitment, Youth Authority (98-TC-13; and Chapter 267 of the Statutes of 1998).

(c) Brown Act Reforms (CSM-4469; and Chapters 1136, 1137, and 1138 of the Statutes of 1993, and Chapter 32 of the Statutes of 1994).

(d) Photographic Record of Evidence (No. 98-TC-07; and Chapter 875 of the Statutes of 1985, Chapter 734 of the Statutes of 1986, and Chapter 382 of the Statutes of 1990).

SEC. 4. The Legislature hereby finds and declares that the following statutes no longer constitute a reimbursable mandate under *Section 6 of Article XIIIB of the California Constitution* because provisions containing the reimbursable mandate have been repealed:

(a) Democratic Party presidential delegates (CSM-4131; and Chapter 1603 of the Statutes of 1982 and Chapter 8 of the Statutes of 1988, which enacted statutes that were repealed by Chapter 920 of the Statutes of 1994).

(b) Short-Doyle case management, Short-Doyle audits, and residential care services (CSM-4238; and Chapter 815 of the Statutes of 1979, Chapter 1327 of the Statutes of 1984, and Chapter 1352 of the Statutes of 1985, which enacted statutes that were repealed by Chapter 89 of the Statutes of 1991).

Cross References:

Appropriation and payment of amount due to cities, counties and special districts for which reimbursement is required under *Cal Const Art. XIII B § 6* as of June 30, 1995: *Gov C § 17617.*

Subvention of funds to reimburse local governments: *Gov C §§ 17500* et seq.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 466 "Public Entities And Officers: Taxpayers' Actions".

7 Witkin Summary (10th ed) Constitutional Law § 148.

9 Witkin Summary (10th ed) Taxation §§ 118, 119, 120, 121, 122.

Law Review Articles:

Educational financing mandates in California: reallocating the cost of educating immigrants between state and local governmental entities. *35 Santa Clara LR 367.*

Attorney General's Opinions:

Judicial arbitration is mandated by the Legislature for municipal courts within the meaning of *Cal Const., art. XIIIB, § 6* as to arbitration based upon stipulation or plaintiff election. It is also mandated within the meaning of Article XIIIB, § 6 as to "court ordered" arbitration resulting from a local court rule adopted after July 1, 1980, the effective date of Article XIIIB. *Cal. Const., Art. XIIIB, § 6* contemplates that the state should provide a subvention of funds to reimburse counties for the costs of the judicial arbitration in municipal courts. Reimbursement, however, is still subject to appropriation of funds by the Legislature. *64 Ops. Cal. Atty. Gen. 261.*

Commission on State Mandates does have authority to reconsider prior final decision relating to existence or nonexistence of state mandated costs, where prior decision was contrary to law. *72 Ops. Cal. Atty. Gen. 173.*

Hierarchy Notes:

Art. XIII B Note

NOTES OF DECISIONS 1. In General 2. Purpose 3. Definitions 4. Jurisdictional Issues 5. New Program Mandated 6. New Program Not Mandated 7. Other Issues

1. In General

An enactment may have an "operative" date different from its "effective" date, and does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. It should not be given a retroactive application unless it is clear that the Legislature so intended. Thus, the construction of *Cal. Const., art. XIII B, § 6*, as requiring that local governments be reimbursed for costs incurred as a result of mandates enacted between January 1, 1975 and July 1, 1980, but that reimbursement did have to begin until the latter date, which was the effective date of the statute, did not constitute an impermissible retroactive operation. The provision would operate prospectively after its effective date, albeit with respect to mandates both after that date and those in effect between January 1, 1975, and that date. *City of Sacramento v. State of California (1984, Cal App 3d Dist) 156 Cal App 3d 182, 203 Cal Rptr 258, 1984 Cal App LEXIS 2079,* overruled *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

Generally, principles of construction applicable to statutes are also applicable to constitutional provisions. Thus, in construing *Cal. Const., art. XIII B, § 6*, which was effective on July 1, 1980, and provided that reimbursement of local governments was required for any "new program or higher level of service" mandated by the state, but also provided that reimbursement was permissive for legislative mandates enacted prior to January 1, 1975, the proper construction was that, for legislative mandates enacted between January 1, 1975, and July 1, 1980, the "window period" of the statute, reimbursement was required but did not have to begin until the statute's effective date. This construction accorded with the rule of *expressio unius est exclusio alterius*--where the electorate had specified an exception to the general rule of mandatory reimbursement (prior to January 1, 1975), other exceptions were not to be implied or presumed. A construction that reimbursement was permissive for the window period would have rendered the exception for pre-1975 mandates meaningless. *City of Sacramento v. State of California (1984, Cal App 3d Dist) 156 Cal App 3d 182, 203 Cal Rptr 258, 1984 Cal App LEXIS 2079,* overruled *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

Cal. Const., art. XIII B, § 6, requiring the Legislature to reimburse local governments for expenses incurred as a result of state law, does not authorize courts to act if the Legislature fails to appropriate funds for this purpose. Although such a legislative failure might frustrate the constitutional intent, the question of whether to appropriate funds is still exclusively a matter of legislative discretion, unless the electorate directly appropriates such funds by its own vote. *City of Sacramento v. California State Legislature (1986, Cal App 3d Dist) 187 Cal App 3d 393, 231 Cal Rptr 686, 1986 Cal App LEXIS 2261.*

The subvention provisions of *Cal. Const., art. XIII B, § 6*, operate so as to require the state to reimburse counties for state-mandated costs incurred between January 1, 1975, and June 30, 1980. The amendment, which became effective on July 1, 1980, provided that the Legislature "may, but need not," provide reimbursement for mandates enacted before January 1, 1975. Nevertheless, the Legislature must reimburse mandates passed after that date, even though the state did not have to begin reimbursement until the effective date of the amendment. *Carmel Valley Fire Protection Dist. v. State of California (1987, Cal App 2d Dist) 190 Cal App 3d 521, 234 Cal Rptr 795, 1987 Cal App LEXIS 1266.*

The concepts of reimbursable state-mandated costs in Cal. Const., art. XIII B, requiring that the state reimburse local governments for the costs of state-mandated new programs or higher levels of service, and former Rev. & Tax. Code, §§ 2207, 2231, are identical. *City of Sacramento v. State of California (1990) 50 Cal 3d 51, 266 Cal Rptr 139, 785 P2d 522, 1990 Cal LEXIS 148.*

State reimbursement statute, *Gov C § 17556(d)* was facially constitutional because it did not create a new exception to reimbursement as required by *Cal Const Art XIII B § 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.*

Gov C § 17500-17630 was enacted to implement *Cal Const Art XIII B § 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.*

As a matter of law, no provision mandates the reimbursement of costs incurred under California Occupational Safety and Health Administration (Cal/OSHA), and thus a school district, seeking reimbursement for its expenditures complying with Cal/OSHA, had no right to reimbursement. Cal/OSHA was enacted in 1973. By its terms, *Cal. Const., art. XIII B, § 6* (reimbursement to local governments for new programs and services), enacted in 1975, allows but does not require reimbursements for funds expended complying with prior legislation. Also, the Legislature enacted reimbursement provisions in 1980 (*Gov. Code, § 17500* et seq.), and later repealed *Rev. & Tax. Code, §§ 2207.5, 2231*, also dealing with reimbursement. These legislative acts effectively preclude reimbursement for compliance with legislation enacted before 1975. *Los Angeles Unified School Dist. v. State of California (1991, Cal App 2d Dist) 229 Cal App 3d 552, 280 Cal Rptr 237, 1991 Cal App LEXIS 372.*

Since Cal. Const., art. XIII B, requiring subvention for state mandates enacted after Jan. 1, 1975, had an effective date of July 1, 1980, a local agency may seek subvention for costs imposed by legislation after Jan. 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law. *Hayes v. Commission on State Mandates (1992, Cal App 3d Dist) 11 Cal App 4th 1564, 15 Cal Rptr 2d 547, 1992 Cal App LEXIS 1498.*

Since the statutory scheme (*Gov. Code, § 17500* et seq.) for resolution of state mandate claims arising under *Cal. Const., art. XIII B, § 6*, contemplates that the Legislature will appropriate funds in a claims bill to reimburse an affected entity for state-mandated expenditures made prior to its enactment, the date the Legislature deletes such funds is also the point at which a nonstatutory cause of action logically accrues for the reimbursement of expenditures that are not recoverable under the statutory procedure. *Berkeley Unified School Dist. v. State of California (1995, Cal App 3d Dist) 33 Cal App 4th 350, 39 Cal Rptr 2d 326, 1995 Cal App LEXIS 264,* review denied (1995, Cal) *1995 Cal LEXIS 4298.*

In enacting *Gov. Code, § 17500* et seq., the Legislature established the Commission on State Mandates as a quasi-judicial body to carry out a comprehensive administrative procedure for resolving claims for reimbursement of state-mandated local costs arising out of *Cal. Const., art. XIII B, § 6*. The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of *Cal. Const., art. XIII B, § 6*, lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establish procedures that exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce *Cal. Const., art. XIII B, § 6*. Thus, the statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. *Redevelopment Agency v. California Comm'n on State Mandates (1996, Cal App 4th Dist) 43 Cal App 4th 1188, 51 Cal Rptr 2d 100, 1996 Cal App LEXIS 267.*

Rules of constitutional interpretation require that constitutional limitations and restrictions on legislative power are to be construed strictly and are not to be extended to include matters not covered by the language used. Policymaking authority is vested in the Legislature, and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation. Under these principles, there is no basis for applying *Cal. Const., art. XIII B, § 6*, which imposes limits on the state's authority to mandate new programs or increased services on local governmental entities, as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities. *City of San Jose v. State of California (1996, Cal App 6th Dist) 45 Cal App 4th 1802, 53 Cal Rptr 2d 521, 1996 Cal App LEXIS 520,* review denied (1996, Cal) *1996 Cal LEXIS 5314.*

A claimant that elects to discontinue participation in a state optional funded program does not face certain and severe penalties such as double taxation or other "draconian" consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations, and such circumstances do not constitute a reimbursable state mandate for purposes of *Cal. Const. art. XIII B, § 6. Department of Finance v. Commission on State Mandates (2003) 30 Cal 4th 727, 134 Cal Rptr 2d 237, 68 P3d 1203, 2003 Cal LEXIS 3353.*

Simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting "service to the public" under *Cal Const Art XIII B, § 6* and *Gov C § 17514. San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.*

2. Purpose

When the voters adopted *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

The goals of *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for

governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of art. XIII B, § 6, did not effect a pro tanto repeal of *Cal. Const., art. XIV, § 4*, which gives the Legislature plenary power over workers' compensation. *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

The intent of *Cal. Const., art. XIII B, § 6*, was to preclude the state from shifting to local agencies the financial responsibility for providing public services, in view of restrictions imposed on the taxing and spending power of local entities by *Cal. Const., arts. XIII A, XIII B. Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal 3d 830, 244 Cal Rptr 677, 750 P2d 318, 1988 Cal LEXIS 55.*

In *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated costs or increased levels of service), "mandates" means "orders" or "commands," concepts broad enough to include executive orders as well as statutes. The concern that prompted the inclusion of § 6 in art. XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services that the state believed should be extended to the public. It is clear that the primary concern of the voters was the increased financial burdens being shifted to local government, not the form in which those burdens appeared. *Long Beach Unified Sch. Dist. v. State of California (1990, Cal App 2d Dist) 225 Cal App 3d 155, 275 Cal Rptr 449, 1990 Cal App LEXIS 1198,* review denied (1991, Cal) *1991 Cal LEXIS 832.*

Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), 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 Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, *Cal. Const., art. XIII B, § 6*, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

The goal of Cal. Const., arts. XIII A and XIII B, is to protect California residents from excessive taxation and government spending. A central purpose of *Cal. Const., art. XIII B, § 6* (reimbursement to local government of state-mandated costs), is to prevent the state's transfer of the cost of government from itself to the local level. *Redevelopment Agency v. Commission on State Mandates (1997, Cal App 4th Dist) 55 Cal App 4th 976, 64 Cal Rptr 2d 270, 1997 Cal App LEXIS 474,* review denied (1997, Cal) *1997 Cal LEXIS 5622.*

The intent underlying Const Art XIII B § 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state-mandate. Local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. *City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546,* review denied (1998, Cal) *1998 Cal LEXIS 5509.*

Intent underlying *Cal Const Art XIII B § 6*, was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. *San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.*

3. Definitions

When a word or phrase has been given a particular meaning in one part of a law, it is to be given the same meaning in other parts of the law. Thus, in the government spending limitation provisions of Cal. Const., art. XIII B, the definition of "mandate" in § 9, subd. (b), as being an enactment that directs compliance without discretion, governed with respect to § 6, which required state reimbursement of local governments for costs of state mandated programs. *City of Sacramento v. State of California (1984, Cal App 3d Dist) 156 Cal App 3d 182, 203 Cal Rptr 258, 1984 Cal App LEXIS 2079,* overruled *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

The word "program," as used in *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. *County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

A "new program," for purposes of determining whether the program is subject to the constitutional imperative of subvention under *Cal. Const., art. XIII B, § 6*, is one which carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. *Carmel Valley Fire Protection Dist. v. State of California (1987, Cal App 2d Dist) 190 Cal App 3d 521, 234 Cal Rptr 795, 1987 Cal App LEXIS 1266.*

In *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated costs or increased levels of service), "mandates" means "orders" or "commands," concepts broad enough to include executive orders as well as statutes. The concern that prompted the inclusion of § 6 in art. XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services that the state believed should be extended to the public. It is clear that the primary concern of the voters was the increased financial burdens being shifted to local government, not the form in which those burdens appeared. *Long Beach Unified Sch. Dist. v. State of California (1990, Cal App 2d Dist) 225 Cal App 3d 155, 275 Cal Rptr 449, 1990 Cal App LEXIS 1198,* review denied (1991, Cal) *1991 Cal LEXIS 832.*

A "new program" within the meaning of *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for new programs mandated by state), is a program that carries out the governmental function of providing services to the public, or a law that, to implement state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. But no state mandate exists if the requirements or provisions of a state statute are, nevertheless, required by federal law. When the federal government imposes costs on local agencies, those costs are not mandated by the state and thus do not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This is true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate, so long as the state had no true choice in the manner of implementation of the federal mandate. *County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161,* review denied (1995, Cal) *1995 Cal LEXIS 3339.*

The state was not obligated to reimburse local governments by virtue of its reduction of property taxes previously allocated to local governments and its simultaneous placement of an equal amount of property tax revenues into Educational Revenue Augmentation Funds (ERAF) (former Rev & Tax C § 97.03) for distribution to school districts, since the reallocation of revenue did not result in reimbursable "costs" and the ERAF legislation did not amount to the imposition of a "new program or higher level of service" within the meaning of *Cal Const art XIII B § 6.* Section 6 subvention was intended for increases in actual costs, not lost revenue, and the state had not imposed responsibility for any program that local governments had not always had a substantial share in supporting. Nor did Proposition 98 (*Cal Const art XVI § 8*), providing a minimum level of funding for schools, confer a right of subvention on counties. Proposition 98 merely provides the formulas for determining the minimum to be appropriated every budget year. *County of Sonoma v. Commission on State Mandates (2000, Cal App 1st Dist) 84 Cal App 4th 1264, 101 Cal Rptr 2d 784, 2000 Cal App LEXIS 889,* review denied (2001, Cal) *2001 Cal LEXIS 1445.*

4. Jurisdictional Issues

The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commis-

sion rejected the other county's claim. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

5. New Program Mandated

In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with state executive orders to provide protective clothing and equipment to county fire fighters, the trial court properly determined that the executive orders constituted the type of "new program" that was subject to the constitutional imperative of subvention under *Cal. Const., art. XIII B, § 6.* Fire protection is a peculiarly governmental function. Also, the executive orders manifest a state policy to provide updated equipment to all fire fighters, impose unique requirements on local governments, and do not apply generally to all residents and entities in the state, but only to those involved in fire fighting. *Carmel Valley Fire Protection Dist. v. State of California (1987, Cal App 2d Dist) 190 Cal App 3d 521, 234 Cal Rptr 795, 1987 Cal App LEXIS 1266.*

Ed. Code, § 59300 (requiring school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped), imposes on school districts a "new program or higher level of service" within the meaning of *Cal. Const., art. XIII B, § 6* (providing reimbursement to local agencies for state-mandated new programs or higher levels of service). Thus, in a test case brought by school districts, the Commission on State Mandates erred in finding to the contrary; however, remand to the commission was necessary to determine whether § 59300 was a state mandate. *Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal 3d 830, 244 Cal Rptr 677, 750 P2d 318, 1988 Cal LEXIS 55.*

Stats. 1978, ch. 2, extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restricting local taxation, and thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. In enacting Stats. 1978, ch. 2, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses; the alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. (Disapproving, insofar as it is inconsistent with this analysis, the decision in *City of Sacramento v. State of California (1984) 156 Cal.App.3d 182, 203 Cal.Rptr. 258, 1984 Cal App LEXIS 2079.) City of Sacramento v. State of California (1990) 50 Cal 3d 51, 266 Cal Rptr 139, 785 P2d 522, 1990 Cal LEXIS 148.*

A school district was entitled to reimbursement pursuant to *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since an executive order (in the form of regulations issued by the state Department of Education) required a higher level of service and constituted a state mandate. The requirements of the order went beyond constitutional and case law requirements in that they required specific actions to alleviate segregation. Although under *Cal. Const., art. XIII B, § 6*, subd. (c), the state has discretion whether to reimburse pre-1975 mandates that are either statutes or executive orders implementing statutes, it cannot be inferred from this exception that reimbursability is otherwise dependent on the form of the mandate. Further, the district's claim was not defeated by *Gov. Code, § 17561, 17514*, limiting reimbursement to certain costs incurred after July 1, 1980, the effective date of Cal. Const., art. XIII B, since the limitations contained in those sections are confined to the exception contained in *Cal. Const., art. XIII B, § 6*, subd. (c). *Long Beach Unified Sch. Dist. v. State of California (1990, Cal App 2d Dist) 225 Cal App 3d 155, 275 Cal Rptr 449, 1990 Cal App LEXIS 1198,* review denied (1991, Cal) *1991 Cal LEXIS 832.*

The 1975 amendments to the federal Education of the Handicapped Act *(20 USCS § 1401* et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention under *Cal. Const., art. XIII B, § 6.* Thus, on remand of a proceeding by school districts to the Commission on State Mandates for consideration of whether special education programs constituted new programs or higher levels of service mandated by the state entitling the districts to reimbursement, the commission was required to focus on the costs incurred by local school districts and whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program. *Hayes v. Commission on State Mandates (1992, Cal App 3d Dist) 11 Cal App 4th 1564, 15 Cal Rptr 2d 547, 1992 Cal App LEXIS 1498.*

In a county's action against the state to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was *Welf. & Inst. Code, § 17000*, enacted in 1965, rather than the 1982 legislation, and since *Cal. Const., art. XIII B, § 6*, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, *Welf. & Inst. Code, § 17000*, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules (*Welf. & Inst. Code, § 14000.2*), and Medi-Cal was administered by state departments and agencies. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

In a county's action against the state to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While *Welf. & Inst. Code, § 17001*, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of *Welf. & Inst. Code, § 17000* (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although *Welf. & Inst. Code, § 17000*, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under *Welf. & Inst. Code, § 17000*. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

In a county's action against the state to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. *Welf. & Inst. Code, § 17000*, mandates that medical care be provided to indigents, and *Welf. & Inst. Code, § 10000*, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing *Welf. & Inst. Code, § 17000*, have held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, *Health & Saf. Code, § 1442.5*, former subd. (c), also spoke to the level of services that counties had to provide under *Welf. & Inst. Code, § 17000*, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

Ed C § 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under *Cal Const Art XIII B, § 6*, and imposes a reimbursable state mandate for all resulting hearing costs, even those costs attributable to procedures required by federal law. *San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.*

6. New Program Not Mandated

The provisions of *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated

programs or higher levels of service within the meaning of art. XIII B, § 6. Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (*Disapproving City of Sacramento v. State of California (1984) 156 Cal.App.3d 182, 203 Cal.Rptr. 258, 1984 Cal App LEXIS 2079,* to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees be covered by unemployment insurance.)*County of Los Angeles v. State of California (1987) 43 Cal 3d 46, 233 Cal Rptr 38, 729 P2d 202, 1987 Cal LEXIS 273.*

In an administrative mandamus proceeding brought by a city to compel the State Board of Control to grant the city's claim to reimbursement for increased employer contribution rates to the Public Employees' Retirement System (PERS), attributable to transfers of reserve funds to a special temporary benefits fund pursuant to an act of the Legislature, the trial court properly denied the writ on the ground that such an increase was not reimbursable under *Cal. Const., art. XIII B, § 6*, as a state-mandated local expense. Bearing the costs of employment is not a "service" that the city is required by state law to provide in its governmental function, and where such costs as pension contributions, workers' compensation insurance, and other expenses of public employment increase incidentally to legislatively imposed changes in the operation of a state agency like PERS, reimbursement of local government employers is not compelled by the legislative purposes of § 6 (control of excessive taxation and spending, prevention of shift of financial burdens of programs from state to local governments). *City of Anaheim v. State of California (1987, Cal App 2d Dist) 189 Cal App 3d 1478, 235 Cal Rptr 101, 1987 Cal App LEXIS 1462.*

In a class action by a city on behalf of all local governments in the state against the state, in which it was alleged that Stats. 1978, ch. 2, extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations, mandated a new program or higher level of service on local agencies for which reimbursement by the state was required under Cal. Const., art. XIII B, the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing such coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (former Rev. & Tax. Code, §§ 2207, 2231, subd. (a); *Gov. Code, §§ 17514, 17561*, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. The phrase, "To force programs on local governments," in the voters' pamphlet relating to *Cal. Const., art. XIII B, § 6*, confirmed that the intent underlying that section was to require reimbursement to local agencies for the cost involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that applied generally to all state residents and entities. *City of Sacramento v. State of California (1990) 50 Cal 3d 51, 266 Cal Rptr 139, 785 P2d 522, 1990 Cal LEXIS 148.*

The constitutional subvention provision (*Cal. Const., art. XIII B, § 6*) and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. When 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. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate, so long as the state had no "true choice" in the manner of implementation of the federal mandate. *Hayes v. Commission on State Mandates (1992, Cal App 3d Dist) 11 Cal App 4th 1564, 15 Cal Rptr 2d 547, 1992 Cal App LEXIS 1498.*

The trial court properly denied a writ of mandate sought by a county to compel the Commission on State Mandates to vacate its determination that *Pen. Code, § 987.9* (funding by court for preparation of defense for indigent defendants in capital cases), did not constitute a state mandate, for which the state was obligated to reimburse the county pursuant to *Cal. Const., art. XIII B, § 6*. The requirements of *Pen. Code, § 987.9*, are not state mandated. Pursuant to the federal Constitution's guaranty of the right to counsel and its due process clause (U.S. Const., 6th and 14th Amends.), the right to counsel of an indigent defendant includes the right to the use of experts to assist counsel in preparing a defense. Thus, even in the absence of *Pen. Code, § 987.9*, counties would be responsible for providing ancillary services under those federal constitutional guaranties. And, even assuming that the provisions of the statute constitute a new program, it does not necessarily mean that the program is a state mandate under *Cal. Const., art. XIII B, § 6*. If a local entity has alternatives under the statute other than the mandated contribution, that contribution does not constitute a state mandate. In fact, the requirements under *Pen. Code, § 987.9*, are not mandated by the state, but rather by principles of constitutional

law and a superior court's finding of reasonableness and necessity under the statute. *County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161,* review denied (1995, Cal) *1995 Cal LEXIS 3339.*

Gov. Code, § 29550, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, does not establish a new program or higher level of service under *Cal. Const., art. XIII B, § 6*, which imposes limits on the state's authority to mandate new programs or increased services on local governmental entities, since the shift in funding is not from the State to the local entity but from county to city. At the time *Gov. Code, § 29550*, was enacted, and long before, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county (*Gov. Code, § 29602*). In this respect, counties are not considered agents of the state. Moreover, Cal. Const., art. XIII B, treats cities and counties alike as "local government." Thus, for purposes of subvention analysis, it is clear that counties and cities were intended to be treated alike as part of "local government"; both are considered local agencies or political subdivisions of the state. Nothing in Cal. Const., art. XIII B prohibits the shifting of costs between local governmental entities. *City of San Jose v. State of California (1996, Cal App 6th Dist) 45 Cal App 4th 1802, 53 Cal Rptr 2d 521, 1996 Cal App LEXIS 520,* review denied (1996, Cal) *1996 Cal LEXIS 5314.*

Gov. Code, § 29550, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities and other entities, does not shift costs so as to constitute a state "mandate" within the meaning of *Cal. Const., art. XIII B, § 6*, which imposes limits on the State's authority to mandate new programs or increased services on local governmental entities. The pertinent words of the statute state that "a county may impose a fee on a city." Thus, it does not require that counties impose fees on other local entities, but only authorizes them to do so. Although as a practical result of the authorization under *Gov. Code, § 29550*, a city is required to bear costs it did not formerly bear, a mandate cannot be read into language that is plainly discretionary. *Cal. Const., art. XIII B, § 6*, was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the *State. City of San Jose v. State of California (1996, Cal App 6th Dist) 45 Cal App 4th 1802, 53 Cal Rptr 2d 521, 1996 Cal App LEXIS 520,* review denied (1996, Cal) *1996 Cal LEXIS 5314.*

The California Commission on State Mandates properly denied a test claim brought by a city's redevelopment agency seeking a determination that the state should reimburse the agency for moneys transferred into its low- and moderate-income housing fund pursuant to *Health & Saf. Code, §§ 33334.2* and *33334.3*, which require a 20 percent deposit of the particular form of financing received by the agency, i.e., tax increment financing generated from its project areas. Under *Health & Saf. Code, § 33678*, which provides that tax increment financing is not deemed to be the "proceeds of taxes," the source of funds used by the agency was exempt from the scope of *Cal. Const., art. XIII B, § 6* (subvention). Although *Cal. Const., art. XIII B, § 6*, does not expressly discuss the source of funds used by an agency to fund a program, the historical and contextual context of this provision demonstrates that it applies only to costs recovered solely from tax revenues. Because of the nature of the financing they receive (i.e., tax increment financing), redevelopment agencies are not subject to appropriations limitations or spending caps, they do not expend any proceeds of taxes, and they do not raise general revenues for the local entity. Also, the state is not transferring any program for which it was formerly responsible. Therefore, the purposes of state subvention laws are not furthered by requiring reimbursement when redevelopment agencies are required to allocate their tax increment financing in a particular manner, as in the operation of *Health & Saf. Code, §§ 33334.2* and *33334.3. Redevelopment Agency v. Commission on State Mandates (1997, Cal App 4th Dist) 55 Cal App 4th 976, 64 Cal Rptr 2d 270, 1997 Cal App LEXIS 474,* review denied (1997, Cal) *1997 Cal LEXIS 5622.*

An amendment to *Lab C § 4707*, which eliminated local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS, so that the survivors of a local safety member of PERS who is killed in the line of duty receives both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter, did not mandate a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under Const Art XIII B § 6. The amendment addressed death benefits, not the equipment used by local safety members. Increasing the cost of providing services could not be equated with requiring an increased level of service under Const Art XIII B § 6. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public. Further, the amendment simply put local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit. That the amendment affected only local government did not compel the conclusion that it imposed a unique requirement

on local government. *City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546,* review denied (1998, Cal) *1998 Cal LEXIS 5509.*

Legislation requiring local redevelopment agencies to contribute to a local Educational Revenue Augmentation Fund (ERAF) did not constitute a reimbursable state mandate under *Cal Const art XIIIB § 6.* The ERAF legislation was, in part, an exercise of the Legislature's authority to apportion property tax revenues; the shift of a portion of redevelopment agency funds to local schools was merely the most recent adjustment in the historical fluidity of the fiscal relationship between local governments and schools. In addition, subvention is required only when the costs in question can be recovered solely from tax revenues and here the Legislature provided that a redevelopment agency's obligations for the local ERAF fund could be paid from any legally available source. *City of El Monte v. Commission on State Mandates (2000, Cal App 3d Dist) 83 Cal App 4th 266, 99 Cal Rptr 2d 333, 2000 Cal App LEXIS 672,* review denied (2000, Cal) *2000 Cal LEXIS 8639.*

The state was not obligated to reimburse local governments by virtue of its reduction of property taxes previously allocated to local governments and its simultaneous placement of an equal amount of property tax revenues into Educational Revenue Augmentation Funds (ERAF) (former Rev & Tax C § 97.03) for distribution to school districts, since the reallocation of revenue did not result in reimbursable "costs" and the ERAF legislation did not amount to the imposition of a "new program or higher level of service" within the meaning of *Cal Const art XIII B § 6.* Section 6 subvention was intended for increases in actual costs, not lost revenue, and the state had not imposed responsibility for any program that local governments had not always had a substantial share in supporting. Nor did Proposition 98 (*Cal Const art XVI § 8*), providing a minimum level of funding for schools, confer a right of subvention on counties. Proposition 98 merely provides the formulas for determining the minimum to be appropriated every budget year. *County of Sonoma v. Commission on State Mandates (2000, Cal App 1st Dist) 84 Cal App 4th 1264, 101 Cal Rptr 2d 784, 2000 Cal App LEXIS 889,* review denied (2001, Cal) *2001 Cal LEXIS 1445.*

Domestic violence training requirement for local police officers, pursuant to *Cal. Penal Code § 13519(e)*, was not an unfunded mandate entitling a county to reimbursement from the state; police officers already had continuing education requirements, so any new costs were minimal. *County of Los Angeles v. Commission on State Mandates (2003, Cal App 2d Dist) 110 Cal App 4th 1176, 2 Cal Rptr 3d 419, 2003 Cal App LEXIS 1137.*

No hearing costs incurred in carrying out those expulsions that are discretionary under *Ed C § 48915*, including costs related to hearing procedures claimed to exceed the requirements of federal law, are reimbursable; to the extent § 48915 makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. *San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.*

Even if the hearing procedures set forth in *Ed C § 48918* constitute a new program or higher level of service, this statute does not trigger any right to reimbursement because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis; all hearing procedures set forth in § 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence all such hearing costs are nonreimbursable under *Cal Const Art XIII B § 6*, and *Gov C § 17557(c). San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.*

California Public Safety Officers Procedural Bill of Rights Act, *Gov C § 3300* et seq., is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. *Department of Finance v. Commission on State Mandates (2009, 3d Dist) 2009 Cal App LEXIS 152.*

Trial court erred in upholding the California Commission on State Mandates' determination that, as to school districts not compelled by statute to employ peace officers, the California Public Safety Officers Procedural Bill of Rights Act, *Gov C § 3300* et seq., requirements were a reimbursable state mandate where its judgment rested on the insupportable legal conclusion that the districts, identified in *Gov C § 3301*, were as a practical matter compelled to exercise their authority to hire peace officers; districts in issue were authorized, but not required, to provide their own peace officers and did not have provision of police protection as an essential and basic function. *Department of Finance v. Commission on State Mandates (2009, 3d Dist) 2009 Cal App LEXIS 152.*

To the extent that *Gov. Code, § 17556*, subd. (f), as amended, provides that the state need not reimburse local governments for imposing duties that are expressly included in or necessary to implement a ballot measure, the statute is

consistent with *Cal. Const., art. XIII B, § 6*. However, any duty not expressly included in or necessary to implement the ballot measure gives rise to a reimbursable state mandate, even if the duty is reasonably within the scope of the ballot measure. *California School Boards Assn. v. State of California (2009, 3d Dist) 2009 Cal App LEXIS 302.*

"Necessary to implement" language of *Gov. Code, § 17556*, subd. (f), is consistent with *Cal. Const., art. XIII B, § 6*, because it denies reimbursement only to the extent that costs imposed by a statute are necessary to implement a ballot measure; therefore, the "necessary to implement" language of the statute does not violate *Cal. Const., art. XIII B, § 6. California School Boards Assn. v. State of California (2009, 3d Dist) 2009 Cal App LEXIS 302.*

To the extent that *Gov. Code, § 17556*, subd. (f), as amended, allows the legislature to impose on local governments nonreimbursable costs resulting from duties that are necessary to implement or expressly included in a ballot measure, it does not violate *Cal. Const., art. XIII B, § 6*; however, additional language declaring that no reimbursement is necessary for duties that are reasonably within the scope of a ballot measure is impermissibly broad because it allows for denial of reimbursement when reimbursement is required by *Cal. Const., art. XIII B, § 6. California School Boards Assn. v. State of California (2009, 3d Dist) 2009 Cal App LEXIS 302.*

7. Other Issues

Because *Gov C § 17516(c)* was unconstitutional to the extent that it exempted regional water quality control boards from the constitutional state mandate subvention requirement, a trial court properly issued a writ of mandate directing the California Commission on State Mandates to resolve, on the merits and without reference to § 17516(c), test claims presented by a county and several cities seeking reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal stormwater and urban runoff discharges that was issued by a regional water quality control board. *County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.*

Gov C § 17516c is unconstitutional to the extent that it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to *Cal Const Art XIII B, § 6* because the exemption contravenes the clear, unequivocal intent of *Cal Const Art XIII B, § 6* that subvention of funds was required whenever any state agency mandated a new program or higher level of service on any local government, and whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under *Cal Const Art XIII B, § 6* is an issue that must in the first instance be resolved by the California Commission on State Mandates. Moreover, a contrary conclusion is not compelled by virtue of the fact that Gov C § 17516c essentially mirrors the language of *Rev & Tax C § 2209(c)* because a statute cannot trump the constitution. *County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.*

Under *Rev. & Tax. Code, § 2231*, subd. (a), requiring the state to reimburse local agencies for all costs mandated by the state, as defined in *Rev. & Tax. Code, § 2207*, subd. (a), defining such costs as any increased costs a local agency is required to incur as a result of any law enacted after January 1, 1973, the Legislature had a statutory duty to reimburse two counties for all state-mandated costs incurred after the 1974-75 fiscal year pursuant to Stats. 1974, ch. 1392 (*Gov. Code, § 23300* et seq.) in connection with the defeat of four proposed new counties. Although *Cal. Const., art. XIII B, § 6*, subd. (c), approved in 1980, provided the Legislature may, but need not, reimburse local governments for costs of legislative mandates enacted prior to January 1, 1975, the Legislature in 1980 amended *Rev. & Tax. Code, § 2207*, thereby reaffirming its statutory obligation to reimburse local agencies for the costs defined in § 2207, subd. (a), which constituted the exercise of legislative discretion authorized by *Cal. Const., art. XIII B, § 6*, subd. (c). The mandatory provisions of *Rev. & Tax. Code, § 2231*, do not restrict legislative power, and the Legislature is free to amend or repeal it as it applies to pre-1975 legislative mandates. *County of Los Angeles v. State of California (1984, Cal App 2d Dist) 153 Cal App 3d 568, 200 Cal Rptr 394, 1984 Cal App LEXIS 1807.*

The Legislature's initial appropriation to reimburse counties for the costs of *Pen. Code, § 987.9* (funding by court for preparation of defense for indigent defendants in capital cases), was not a final and unchallengeable determination that the statute constitutes a state mandate, nor did the Commission on State Mandates err in finding that the statute is not a state mandate, despite the Legislature's finding to the contrary in a later appropriations bill. The commission was not bound by the Legislature's determination, and it had discretion to determine whether a state mandate existed. The comprehensive administrative procedures for resolution of claims arising out of *Cal. Const., art. XIII B, § 6* (*Gov. Code, § 17500* et seq.), are the exclusive procedures by which to implement and enforce the constitutional provision. Thus, the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists.

Any legislative findings are irrelevant to the issue of whether a state mandate exists, and the commission properly determined that no such mandate existed. In any event, the Legislature itself ceased to regard the provisions of *Pen. Code, § 987.9*, as a state mandate in 1983. *County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161,* review denied (1995, Cal) *1995 Cal LEXIS 3339.*

School districts, which sought reimbursement pursuant to *Cal. Const., art. XIII B, § 6*, for the costs of a state mandated desegregation program, waived their nonstatutory remedy for such costs incurred after the Legislature deleted funds in a claims bill to pay for the costs, since their statutory cause of action under *Gov. Code, § 17612*, accrued on that date and they could have avoided the imposition of state mandated costs at any time after that cause of action accrued by timely use of the statutory remedy. *Gov. Code, § 17612*, provides, as to future state mandated expenditures, an efficacious procedure for the implementation of local agency rights under *Cal. Const., art. XIII B, § 6*. Thus, as to such expenditures, the exercise of the constitutional right to avoid involuntary expenditures is not unduly restricted. There is no statutory remedy of reimbursement of state mandated expenditures that could have been prevented after funding has been deleted from the local government claims bill. The courts accordingly must limit the remedy for future expenditures to the procedures established by the Legislature in *Gov. Code, § 17612*. It follows that any claim to reimbursement of subsequent costs is waived by the failure to seek the relief provided by that statute. *Berkeley Unified School Dist. v. State of California (1995, Cal App 3d Dist) 33 Cal App 4th 350, 39 Cal Rptr 2d 326, 1995 Cal App LEXIS 264,* review denied (1995, Cal) *1995 Cal LEXIS 4298.*

The judicially created remedy to enforce the right of local entities arising under *Cal. Const., art. XIII B, § 6*, to reimbursement for the costs of state-mandated programs is subject to the four-year limitations period provided in *Code Civ. Proc., § 343* (action for relief for which no period of limitations previously provided). *Berkeley Unified School Dist. v. State of California (1995, Cal App 3d Dist) 33 Cal App 4th 350, 39 Cal Rptr 2d 326, 1995 Cal App LEXIS 264,* review denied (1995, Cal) *1995 Cal LEXIS 4298.*

A cause of action by school districts for reimbursement pursuant to *Cal. Const., art. XIII B, § 6*, for the costs of a state-mandated desegregation program accrued, pursuant to *Gov. Code, § 17612*, on the date the Legislature deleted funds in a claims bill to pay for the costs, and accrual was not postponed until the statute of limitations had run on the state's right to judicial review of an administrative determination in a test claim that there was a state mandate or until final judgment in any litigation brought by the test claimant or the state. Although the administrative decision in the test claim was not yet free of direct attack, under the doctrine of exhaustion of administrative remedies, judicial interference is withheld only until the administrative process has run its course, and that had occurred when, in the test claim case, the administrative agency had approved the claim that the desegregation regulations imposed a state mandate and issued guidelines for reimbursement for the claimed expenditures from the Legislature. *Gov. Code, § 17612*, implies that judicial interference must be withheld until the narrowly prescribed legislative process has also run its course. It does not imply that the judicial forum is unavailable thereafter. *Berkeley Unified School Dist. v. State of California (1995, Cal App 3d Dist) 33 Cal App 4th 350, 39 Cal Rptr 2d 326, 1995 Cal App LEXIS 264,* review denied (1995, Cal) *1995 Cal LEXIS 4298.*

In administrative mandamus proceedings by a city's redevelopment agency against the Commission on State Mandates to challenge the commission's ruling that the agency was not entitled to reimbursement for housing costs the agency incurred (*Cal. Const., art. XIII B, § 6*; *Gov. Code, § 17550* et seq.; *Health & Saf. Code, §§ 33334.2, 33334.3*), the trial court erred in denying the Department of Finance's motion to intervene. The department and the commission are not merely two agents of the state representing the same interests. Separate statutory schemes create and govern the department and the commission, and since the department is authorized to sue the commission (*Gov. Code, §§ 13070, 17559*), it is more like an adversary party than it is an equivalent to the commission itself. Moreover, the commission is a quasi-judicial body that hears both sides of the dispute. In light of the department's right to notice and participation in the administrative hearings before the commission, and in light of its duty to supervise the financial policies of the state (*Gov. Code, § 13070*), the relief requested by the agency, subvention of state funds, would have affected the interests of the department. Thus, the department was a real party in interest, and should have been named in the agency's writ petition. It was an indispensable party under *Code Civ. Proc., § 389*, subd. (a), and it had an interest against the success of the agency on its subvention claim (*Code Civ. Proc., § 387*, subd. (a)). Also, a ruling in the department's absence could have impaired its ability to protect its interests in the subject matter of the action (*Code Civ. Proc., § 387*, subd. (b)). *Redevelopment Agency v. California Comm'n on State Mandates (1996, Cal App 4th Dist) 43 Cal App 4th 1188, 51 Cal Rptr 2d 100, 1996 Cal App LEXIS 267.*

The Legislative Counsel's determination that *Gov. Code, § 29550*, which authorizes counties to charge cities and other local entities for the costs of booking into county jails persons who had been arrested by employees of the cities

and other entities, imposed a state mandated local program was not determinative of the ultimate issue whether the enactment constituted a state mandate under *Cal. Const., art. XIII B, § 6*. The legislative scheme contained in *Gov. Code, § 17500* et seq., makes clear that this issue is to be decided by the State Commission on Mandates. The statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists. *City of San Jose v. State of California (1996, Cal App 6th Dist) 45 Cal App 4th 1802, 53 Cal Rptr 2d 521, 1996 Cal App LEXIS 520,* review denied (1996, Cal) *1996 Cal LEXIS 5314.*

In a county's action against the state to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under *Code Civ. Proc., § 1085*, was not an improper vehicle for challenging the commission's position. Mandamus under *Code Civ. Proc., § 1094.5*, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under *Code Civ. Proc., § 1085*, as one brought under *Code Civ. Proc., § 1094.5*, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under *Cal. Const., art. XIII B, § 6*, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate. *County of San Diego v. State of California (1997) 15 Cal 4th 68, 61 Cal Rptr 2d 134, 931 P2d 312, 1997 Cal LEXIS 630.*

TAB “40”

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1 of 3 DOCUMENTS

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII C § 1 (2011)

§ 1. Definitions

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article **XIII** D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

HISTORY:

Adopted by voters, Prop. 218 § 3, effective November 6, 1996. Amendment approved by voters, Prop. 26 § 3, effective November 3, 2010.

NOTES:

Amendments:

2010 Amendment:

Added subd (e).

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 540 "Taxes And Assessments".

9 Witkin Summary (10th ed) Taxation §§ 133, 136, 137, 139, 141.

Law Review Articles:

The Proposition 218 odyssey: new challenges for real property development (Cal Const, art XIIIC and **D).** 20 CEB Real Prop L Rep 70.

Comment: Is Nothing Certain But Death? The Uncertainty Created by California's Proposition 218. *35 USF LR 385.*

Attorney General's Opinions:

The method by which the Vallejo Sanitation and Flood Control District calculates the monthly user fees charged for the operation and maintenance of its storm drainage system does not meet constitutional requirements. The Vallejo Sanitation and Flood Control District is required to obtain prior voter approval when revising the methodology by which it calculates its storm drainage system monthly user fees, resulting in an increased amount being charged certain persons (Cal Const art **XIIIC, XIIID).** *81 Ops. Cal. Atty. Gen. 104.*

Hierarchy Notes:

Art. XIII C Note

NOTES OF DECISIONS

Two definitional sections of Proposition 218, Const Art 13C, § 1 and Const Art. 13D, § 2 are not in conflict but are meant to be interpreted together; therefore, for the restrictions of Proposition 218 to apply, the circumstances have to involve either a general or a special tax or a property-related assessment, fee, or charge. That was not the situation where an initiative petition sought to reduce water rates; the initiative was properly found to be facially invalid. ***Bighorn-Desert View Water Agency v. Beringson (2004, Cal App 4th Dist) 114 Cal App 4th 1213, 8 Cal Rptr 3d 485, 2004 Cal App LEXIS 32.***

Groundwater augmentation fee charged to operators of wells did not constitute a tax, property assessment, or charge incidental to property ownership within the meaning of Cal. Const. arts. XIII C, XIII D because it was a charge on the activity of extracting groundwater, not on the owners of land. ***Pajaro Valley Water Management Agency v. Amrhen (2006, Cal App 6th Dist) 141 Cal App 4th 928, 46 Cal Rptr 3d 476, 2006 Cal App LEXIS 1152,*** rehearing granted, depublished (2006, Cal App 6th Dist) ***2006 Cal App LEXIS 1331,*** abrogated as stated ***Meeker v. Belridge Water Storage Dist. (2006, ED Cal) 2006 US Dist LEXIS 91775.***

Groundwater augmentation fee to be charged to operators of wells within a water management agency's jurisdiction was a fee or charge imposed as an incident of property ownership and was subject to the restrictions imposed on such charges by Cal Const Art XIII D because the augmentation charge was not a charge upon real property, but one upon an activity, the extraction of groundwater, and that activity in some ways was more intimately connected with property ownership than was the mere receipt of delivered water. The agency was not granted a lien, or the power to impose a lien, but was relegated to the remedies available to any other creditor, which no more made the charge incidental to property ownership than was a credit card debt, and because the agency made no attempt to comply with the constitutional pre-conditions for the imposition of the charge, its ordinance increasing the groundwater augmentation fee was invalid. ***Pajaro Valley Water Management Agency v. Amrhein (2007, Cal App 6th Dist) 150 Cal App 4th 1364, 59 Cal Rptr 3d 484, 2007 Cal App LEXIS 785,*** rehearing denied ***Pajaro Valley Mgmt. Agency v. Ray Amrhein (2007, Cal App 6th Dist) 2007 Cal App LEXIS 1086,*** review denied (2007, Cal) ***2007 Cal LEXIS 9718.***

Trial court properly found that fee imposed by city on telephone lines to fund its 911 emergency communication system was a special tax and thus subject to ***Cal Const Art XIII C § 2'*** s requirement of approval by two-thirds of the voters in the city, where the parties essentially conceded that the 911 charge did not fit into the category of a special assessment, a development fee, or a regulatory fee, and where those who paid the fee received no benefit not received by those who did not pay (and thus by the general public), thereby negating the distinguishing feature of a user fee; although the city had chosen to provide enhanced services rather than a basic system, the fee effectively did what the state surcharge authorized by California's Emergency Telephone Users Surcharge Act, ***Rev & Tax C § 41001*** et seq., did, which is providing revenues to fund a governmental service available to all. ***Bay Area Cellular Telephone Co. v. City of Union City (2008, 1st Dist) 162 Cal App 4th 686, 75 Cal Rptr 3d 839, 2008 Cal App LEXIS 634,*** review denied ***Bay Area Cellular Telephone Company v. City of Union City (2008, Cal.) 2008 Cal. LEXIS 9937.***

No principled distinction is seen between an imposition charged simply for access to a governmental service that is equally available to the public as a whole and a special tax. ***Bay Area Cellular Telephone Co. v. City of Union City (2008, 1st Dist) 162 Cal App 4th 686, 75 Cal Rptr 3d 839, 2008 Cal App LEXIS 634,*** review denied ***Bay Area Cellular Telephone Company v. City of Union City (2008, Cal.) 2008 Cal. LEXIS 9937.***

Levy imposed by a city to recover the cost of collecting and administering a general business tax imposed on landlords was not a fee within the ***Gov C § 50076,*** exception to the special tax limitation in Cal Const Art XIII-A, § 4, because it was not intended to fund regulatory activity or provide municipal services; nor was it a fee or charge under Cal Const Art XIII-D-, § 2, for a property related service. Rather, it was a general tax as defined in Cal Const Art XIII-C, § 1, subd. (a), and was thus void under Cal Const Art XIII-C, § 2, subd. (b), because it was imposed without a vote of the electorate. ***Weisblat v. City of San Diego (2009, 4th Dist) 2009 Cal App LEXIS 1360.***

Although plaintiff contended that a city's hotel tax as interpreted by the hotel tax guidelines was invalid because it was not submitted to the electorate for approval as required by Articles XIIIC and XIIID of the California Constitution, this contention was not made below, and the appellate court declined to consider it. Even if the issue had been preserved for appeal, plaintiff would not have prevailed. ***Batt v. City And County of San Francisco (2010, 1st Dist) 2010 Cal App LEXIS 588.***

CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII C § 2 (2010)

§ 2. Local government tax limitation

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

HISTORY:

Adopted by voters, Prop. 218 § 3, effective November 6, 1996.

NOTES:

Cross References:

Tax limitation initiative: Const Art XIII A §§ 1 et seq.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 302 "Initiative, Referendum, And Recall".

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 540 "Taxes and Assessments."

8 Witkin Summary (10th ed) Constitutional Law § 993.

9 Witkin Summary (10th ed) Taxation §§ 132, 133, 136, 137, 139.

Reader alert: effects of Proposition 218 on maintenance assessments (re: Cal Const, arts. XIIIC and **D).** 15 Cal Real Prop J No. 2, p. 42.

Hierarchy Notes:

Art. XIII C Note

NOTES OF DECISIONS

Under Prop. 218 (Cal. Const., arts. XIII C & XIII D), which requires, in part, majority voter approval as a precondition to the imposition, extension, or increase of any local general tax, and also specifies that any local general tax imposed, extended, or increased without voter approval between Jan. 1, 1995, and Nov. 5, 1996 (the window period), would be subject to voter approval at an election to be held within two years of the effective date of the initiative, i.e., by Nov. 5, 1998, a city's continued collection of a utility tax (imposed in 1991 without voter approval) during the window period did not constitute an "imposition" or "extension" thereof. However, Prop. 218 did not implicitly protect the utility tax from the voter approval requirement of Prop. 62 *(Gov. Code, § 53720* et seq.), enacted in 1986, prohibiting local governments from imposing any general tax unless and until the tax has been submitted to, and approved by a majority of, the local electorate. *McBrearty v. City of Brawley (1997, Cal App 4th Dist) 59 Cal App 4th 1441, 69 Cal Rptr 2d 862, 1997 Cal App LEXIS 1037,* overruled in part *Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal 4th 809, 107 Cal Rptr 2d 369, 23 P3d 601, 2001 Cal LEXIS 3253.*

In an action by an airport authority challenging a city's transient parking tax (TPT), the airport authority was not entitled to a refund for **TPT** paid during the period after the TPT was first imposed and before it was approved by the city voters. The city's charter required its tax ordinances to conform "as nearly as may be" to the tax system established by the state's general laws. Until Const Art XIII C was added to the Constitution by Proposition 218, however, that system did not require the city to obtain voter approval for new general taxes *(Gov C § 53723).* Accordingly, the **TPT** was valid on its effective date. *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank (1998, Cal App 2d Dist) 64 Cal App 4th 1217, 76 Cal Rptr 2d 297, 1998 Cal App LEXIS 545,* review denied (1998, Cal) *1998 Cal LEXIS 6115.*

Plaintiff businesses brought an action against a city alleging business improvement district assessments were governed by Proposition 218, Const arts XIII C and XIII D. Proposition 218 contains a specific definition of the term "assessment" as part of art XIII D. The definition is unambiguous and applies only to levies upon real property. The assessment here was not imposed upon real property, but upon businesses. Although plaintiffs also argued that the assessment amounted to a special tax prohibited by Prop 218, California law recognizes a distinction between a special tax and a special assessment. The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. Unlike a special assessment, a tax can be levied without reference to peculiar benefits to particular individuals or property. *Howard Jarvis Taxpayers Assn. v. City of San Diego (1999, Cal App 4th Dist) 72 Cal App 4th 230, 84 Cal Rptr 2d 804, 1999 Cal App LEXIS 491,* review denied (1999, Cal) *1999 Cal LEXIS 5631.*

Taxpayer's challenge to a resolution that imposed an assessment, filed more than 30 days after approval of the resolution, was untimely under *CCP § 329.5;* the limitations period of § 329.5 was not abrogated by Cal. Const. arts. **XIII-C, XIII-D** and their implementing legislation, *Gov C § 53753,* and the taxpayer could not rely on a continuous accrual theory because *CCP § 329.5* contained express language as to the accrual of a cause of action, identifying the date the assessment was levied, which meant that any other date of accrual was precluded in accordance with *CCP § 312. Barratt American, Inc. v. City of San Diego (2004, Cal App 4th Dist) 117 Cal App 4th 809, 12 Cal Rptr 3d 132, 2004 Cal App LEXIS 488,* review denied *Barratt American Inc. v. City of San Diego (2004, Cal) 2004 Cal LEXIS 6430.*

City's increased cell tax violated the requirement in Cal. Proposition 218 that a proposed tax increase be submitted to the voters for approval because the city had revised the methodology by which it calculated the cell tax when it decided to implement the Mobile Telecommunications Sourcing Act (MTSA), Pub. L. No. 106-252, *114 Stat. 626,* and unilaterally expand the cell tax to cover all airtime. A taxing methodology must be frozen in time until the electorate approves higher taxes, and a local government's methodology cannot evolve--even if it is due to external factors such as the MTSA--and avoid submitting it to voter approval. *AB Cellular LA, LLC v. City of Los Angeles (2007, Cal App 2d Dist) 150 Cal App 4th 747, 59 Cal Rptr 3d 295, 2007 Cal App LEXIS 699.*

Groundwater augmentation fee to be charged to operators of wells within a water management agency's jurisdiction was a fee or charge imposed as an incident of property ownership and was subject to the restrictions imposed on such charges by Cal Const Art XIII D because the augmentation charge was not a charge upon real property, but one upon an activity, the extraction of groundwater, and that activity in some ways was more intimately connected with property ownership than was the mere receipt of delivered water. The agency was not granted a lien, or the power to impose a lien, but was relegated to the remedies available to any other creditor, which no more made the charge incidental to property ownership than was a credit card debt, and because the agency made no attempt to comply with the constitutional preconditions for the imposition of the charge, its ordinance increasing the groundwater augmentation fee was invalid. *Pajaro Valley Water Management Agency v. Amrhein (2007, Cal App 6th Dist) 150 Cal App 4th 1364, 59 Cal Rptr 3d 484, 2007 Cal App LEXIS 785,* rehearing denied *Pajaro Valley Mgmt. Agency v. Ray Amrhein (2007, Cal App 6th Dist) 2007 Cal App LEXIS 1086,* review denied (2007, Cal) *2007 Cal LEXIS 9718.*

Trial court properly found that fee imposed by city on telephone lines to fund its 911 emergency communication system was a special tax and thus subject to *Cal Const Art XIII C § 2'* s requirement of approval by two-thirds of the voters in the city, where the parties essentially conceded that the 911 charge did not fit into the category of a special assessment, a development fee, or a regulatory fee, and where those who paid the fee received no benefit not received by those who did not pay (and thus by the general public), thereby negating the distinguishing feature of a user fee; although the city had chosen to provide enhanced services rather than a basic system, the fee effectively did what the state surcharge authorized by California's Emergency Telephone Users Surcharge Act, *Rev & Tax C § 41001* et seq., did, which is providing revenues to fund a governmental service available to all. *Bay Area Cellular Telephone Co. v. City of Union City (2008, 1st Dist) 162 Cal App 4th 686, 75 Cal Rptr 3d 839, 2008 Cal App LEXIS 634,* review denied *Bay Area Cellular Telephone Company v. City of Union City (2008, Cal.) 2008 Cal. LEXIS 9937.*

Levy imposed by a city to recover the cost of collecting and administering a general business tax imposed on landlords was not a fee within the *Gov C § 50076,* exception to the special tax limitation in Cal Const Art XIII-A, § 4, because it was not intended to fund regulatory activity or provide municipal services; nor was it a fee or charge under Cal Const Art XIII-D, § 2, for a property related service. Rather, it was a general tax as defined in Cal Const Art XIII-C, § 1, subd. (a), and was thus void under Cal Const Art XIII-C, § 2, subd. (b), because it was imposed without a vote of the electorate. *Weisblat v. City of San Diego (2009, 4th Dist) 2009 Cal App LEXIS 1360.*

3 of 3 DOCUMENTS

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GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII C § 3 (2010)

§ 3. Initiative power

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

HISTORY:

Adopted by voters, Prop. 218 § 3, effective November 6, 1996.

NOTES:

Cross References:

Tax limitation initiative: Const Art XIII A §§ 1 et seq.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 302 "Initiative, Referendum, & Recall."

7 Witkin Summary (10th ed) Constitutional Law § 159.

9 Witkin Summary (10th ed) Taxation § 132.

Attorney General's Opinions:

If a local agency formation commission conditions approval of a change of organization or reorganization upon a requirement that the subject agency levy or fix and collect a previously established and collected tax, benefit assessment,

or property-related fee or charge on parcels being annexed to the agency, the voter and landowner approval requirements of the Constitution relating to taxes, assessments, fees, and charges do not apply (Const art XIIIC § 3, art XIIID § 4). *82 Ops. Cal. Atty. Gen. 180.*

Hierarchy Notes:

Art. XIII C Note

NOTES OF DECISIONS

Under Prop. 218 (Cal. Const., arts. XIII C & XIII D), which requires, in part, majority voter approval as a precondition to the imposition, extension, or increase of any local general tax, and also specifies that any local general tax imposed, extended, or increased without voter approval between Jan. 1, 1995, and Nov. 5, 1996 (the window period), would be subject to voter approval at an election to be held within two years of the effective date of the initiative, i.e., by Nov. 5, 1998, a city's continued collection of a utility tax (imposed in 1991 without voter approval) during the window period did not constitute an "imposition" or "extension" thereof. However, Prop. 218 did not implicitly protect the utility tax from the voter approval requirement of Prop. 62 *(Gov. Code, § 53720* et seq.), enacted in 1986, prohibiting local governments from imposing any general tax unless and until the tax has been submitted to, and approved by a majority of, the local electorate. *McBrearty v. City of Brawley (1997, Cal App 4th Dist) 59 Cal App 4th 1441, 69 Cal Rptr 2d 862, 1997 Cal App LEXIS 1037,* overruled in part *Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal 4th 809, 107 Cal Rptr 2d 369, 23 P3d 601, 2001 Cal LEXIS 3253.*

Initiative petition seeking to reduce water rates was invalid because electorate lacked power to reduce water rates. Usage-based water rates were not incidents of property ownership. *Bighorn-Desert View Water Agency v. Beringson (2004, Cal App 4th Dist) 114 Cal App 4th 1213, 8 Cal Rptr 3d 485, 2004 Cal App LEXIS 32.*

Groundwater augmentation fee to be charged to operators of wells within a water management agency's jurisdiction was a fee or charge imposed as an incident of property ownership and was subject to the restrictions imposed on such charges by Cal Const Art XIII D because the augmentation charge was not a charge upon real property, but one upon an activity, the extraction of groundwater, and that activity in some ways was more intimately connected with property ownership than was the mere receipt of delivered water. The agency was not granted a lien, or the power to impose a lien, but was relegated to the remedies available to any other creditor, which no more made the charge incidental to property ownership than was a credit card debt, and because the agency made no attempt to comply with the constitutional preconditions for the imposition of the charge, its ordinance increasing the groundwater augmentation fee was invalid. *Pajaro Valley Water Management Agency v. Amrhein (2007, Cal App 6th Dist) 150 Cal App 4th 1364, 59 Cal Rptr 3d 484, 2007 Cal App LEXIS 785,* rehearing denied *Pajaro Valley Mgmt. Agency v. Ray Amrhein (2007, Cal App 6th Dist) 2007 Cal App LEXIS 1086,* review denied (2007, Cal) *2007 Cal LEXIS 9718.*

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TAB “41”

1 of 1 DOCUMENT

* THIS DOCUMENT IS CURRENT THROUGH REGISTER 2011, NO. 19, MAY 13, 2011 *

TITLE 2. ADMINISTRATION
DIVISION 2. FINANCIAL OPERATIONS
CHAPTER 2.5. COMMISSION ON STATE MANDATES
ARTICLE 3. TEST CLAIMS

2 *CCR 1183.07* (2011)

§ 1183.07. Review of Completed Test Claim and Preparation of Staff Analysis

(a) Before the hearing on the test claim, commission staff shall prepare a final written analysis of the test claim, which shall include but not be limited to a review of the written responses, opposition, recommendations, and comments filed by other state agencies, interested parties, and the claimant. The final staff analysis shall describe and analyze the test claim to assist the commission in determining whether the alleged statutes or executive orders contain a reimbursable state-mandated program under Article XIII B, section 6 of the California Constitution.

(b) At least eight (8) weeks before the hearing, or at such other time as required by the executive director or stipulated to by the parties, commission, staff shall prepare a draft staff analysis and distribute it to the parties, interested parties, and any person who requests a copy, and shall post it on the commission's web site.

(c) Any party or interested party may file written comments concerning the draft staff analysis with commission staff. Written comments shall be filed and served as described in section 1181.2 of these regulations, by the date determined and publicized by the executive director. A three (3) week period for comments shall be given, subject to the executive director's authority to expedite all matters pursuant to *Government Code section 17530.* All written comments timely filed shall be reviewed by commission staff and may be incorporated into the final written analysis of the test claim.

AUTHORITY:

Note: Authority cited: *Sections 17527(g) and 17553, Government Code.* Reference: *Sections 17514, 17530, 17551 and 17553, Government Code.*

HISTORY:

1. New section filed 7-23-96; operative 7-23-96. Submitted to OAL for printing only (Register 96, No. 30).

2. Amendment of subsections (b)-(c) filed 9-13-99; operative 9-13-99. Submitted to OAL for printing only pursuant to *Government Code section 17527* (Register 99, No. 38).

3. Amendment filed 9-6-2005; operative 9-6-2005. Exempt from OAL review and submitted to OAL for printing only pursuant to *Government Code section 17527(g)* (Register 2005, No. 36).

4. Amendment filed 10-27-2010; operative 1-1-2011. Submitted to OAL for filing and printing only pursuant to *Government Code section 11343.8* (Register 2010, No. 44).

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EVIDENCE CODE
Division 2. Words and Phrases Defined

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Evid Code § 115 (2011)

§ 115. "Burden of proof"

"Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

HISTORY:

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:

Law Revision Commission Comments:

1965

See the Comment to Section 110.

After stating the general definition of "burden of proof," the first paragraph of Section 115 gives examples of specific burdens that may be imposed by statutory or decisional law. The list of examples is not exclusive, and in some cases the law may prescribe some other burden of proof. For example, under ***Penal Code Section 872***, the prosecution's burden of proof at a preliminary hearing is to establish "sufficient cause" a "strong suspicion" --of the accused's guilt. ***Garabedian v. Superior Court, 59 Cal 2d 124, 28 Cal Rptr 318, 378 P2d 590 (1963); Rogers v. Superior Court, 46 Cal 2d 3, 291 P2d 929 (1955).***

The second paragraph of Section 115 makes it clear that "burden of proof' refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law. See the definition of "law" in ***Evidence Code § 160.*** (As amended in the Legislature.)

Cross References:

"Evidence": *Ev C § 140.*

"Proof": *Ev C § 190.*

"Trier of fact": *Ev C § 235.*

Foundational and preliminary facts: *Ev C §§ 403-405.*

Assignment of burden of proof: *Ev C §§ 500* et seq.

Presumptions affecting burden of proof: *Ev C §§ 605-607, 660* et seq.

Burden of establishing fact under Uniform Commercial Code: *UCC § 1201.*

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 5 "Abuse Of Minors And Elderly".

Cal. Points & Authorities (Matthew Bender(R)) ch 50 "Contracts," § 50.523.

Cal. Points & Authorities (Matthew Bender(R)) ch 105 "Fraud And Deceit," § 105.60.

Cal. Points & Authorities (Matthew Bender(R)) ch 170 "Partnerships," § 170.20.

Cal. Fam. Law Practice & Procedure 2d (Matthew Bender(R)), ch 34, Establishing Guardianship § 34.35.

Cal. Torts (Matthew Bender(R)), § 3.01.

Cal. Torts (Matthew Bender(R)), § 3.02.

Cotchett, California Courtroom Evidence, § 2.04 (Matthew Bender).

Matthew Bender (R) Practice Guide: *Cal. Trial and Post Trial Civil Procedure §§ 9.04, 9.05[1],* [4], 9.09, 9.16, 9.17, 9.18[1], 11.83[4], 14.03, 14.07[1], 15.12.

Witkin & Epstein, Criminal Law (3d ed), Illegally Obtained Evidence §§ 35, 36, 37, 38, 39.

Witkin & Epstein, Criminal Law (3d ed), Punishment § 378.

5 Witkin Summary (10th ed) Torts § 769.

9 Witkin Summary (10th ed) Partnership § 10.

10 Witkin Summary (10th ed) Parent and Child §§ 345, 741.

11 Witkin Summary (10th ed) Community Property § 11.

14 Witkin Summary (10th ed) Wills and Probate § 996.

1 Witkin Cal. Evidence (4th ed) Burden of Proof and Presumptions §§ 34, 35, 38.

1 Witkin Cal. Evidence (4th ed) Introduction §§ 17, 63.

Cal. Juvenile Courts Practice and Procedure (Matthew Bender(R)), Confidentiality of Juvenile Records Limits on Disclosure, § 1.34

Cal. Juvenile Courts Practice and Procedure (Matthew Bender(R)), Deciding to Order or Deny Services, § 2.129

Cal. Juvenile Courts Practice and Procedure (Matthew Bender(R)), Procedures for Conduct of Hearing, § 2.141

Cal. Juvenile Courts Practice and Procedure (Matthew Bender(R)), Relative Guardianship Content, § 2.171

Judicial Council of California Civil Jury Instructions, *CACI Nos. 200, 201* (Matthew Bender).

Jefferson's California Evidence Benchbook, 3rd Edition (CEB, 2003) §§ 45.1-45.9.

Miller & Starr, Cal Real Estate 3d § 1:98.

Matthew Bender(R) Practice Guide: *Cal. Trust Lit., ch 8, Filing or Opposing Petition Regarding Internal Affairs of Trust Under Prob Code Section, § 8.11.*

Matthew Bender(R) Practice Guide: *California E-Discovery and Evidence, 15.12.*

Matthew Bender(R) Practice Guide: *California E-Discovery and Evidence, 15.14.*

Matthew Bender(R) Practice Guide: *California E-Discovery and Evidence, 15.18.*

Matthew Bender(R) Practice Guide: *California E-Discovery and Evidence, 15.19.*

Law Review Articles:

Effect of application of res ipsa loquitur on burden of proof. *12 Cal LR 138.*

Nola M. v. U.S.C.: A serious threat to California negligence law. 23 Cal Trial Law Forum No. 9.

Burden of proof under California Evidence Code. *18 Hast LI 96.*

Presumptions and the two burdens under the Evidence Code. 2 Lincoln LR 110.

The California Supreme Court Speaks out on Summary Judgment in its Own "Trilogy" of Decisions: Has the Celotex Era Arrived? *42 Santa Clara LR 483.*

Burden of proof where goods destroyed while in possession of bailee. *23 SCLR 409.*

Requiring clear and convincing proof in tort claims involving recently recovered repressed memories. 25 South-western LR 173.

Standards of proof and preliminary questions of fact. *27 Stan LR 271.*

Burden of proof and presumptions. *2 UCLA LR 13.*

California Evidence Code--Federal Rules of Evidence: IX. General Provisions: Conforming the California Evidence Code. *44 USF LR 891.*

Hierarchy Notes:

Evid Code Note

Div. 2 Note

NOTES OF DECISIONS 1. In General 2. Construction 3. Presumption of Innocence 4. Preponderance of the Evidence 5. Administrative Hearings 6. Other Crimes Evidence 7. Language of Findings 8. Application to Other Law 9. Punitive Damages

1. In General

The phrase "burden of persuasion" means the burden of making the trier of fact believe the facts asserted. This burden is commonly referred to as the burden of proof by a preponderance of the evidence. *People v. Valverde (1966 Cal App 5th Dist) 246 Cal App 2d 318, 54 Cal Rptr 528, 1966 Cal App LEXIS 1029.*

The definition in *Ev C § 115,* of the burden of proof is for the use by the trial court to guide it in weighing the evidence and resolving the issues; its significance to an appellate court is limited. *Baron v. Baron (1970, Cal App 2d Dist) 9 Cal App 3d 933, 88 Cal Rptr 404, 1970 Cal App LEXIS 2006.*

The definition in *Ev C § 115,* of the "burden of proof" is for use by the trial court to guide it in weighing the evidence and resolving the issues; the significance of the definition is limited in the appellate court, which cannot reweigh the

evidence and, until the contrary is established, must assume the trial court followed the appropriate rule regarding burden of proof and resolving the issues. *Williams v. Williams (1970, Cal App 1st Dist) 12 Cal App 3d 172, 90 Cal Rptr 457, 1970 Cal App LEXIS 1617.*

A decision which is contrary to the weight of evidence is one which is contrary to the preponderance of the evidence, and the purpose for which a court normally weighs the evidence is to determine which way it preponderates on a given issue. Thus, an unexplained statement that a court reviewing an administrative decision shall weigh the evidence is a statement that it shall determine whether the evidence preponderates in favor of, or against, the administrative decision under review. Further, the standard of proof in the original administrative proceedings is wholly irrelevant to the standard of proof applicable to a review of such proceedings by a court, and the standard of proof on review is governed by the degree to which it is appropriate to presume correctness of the factual determinations of the administrative tribunal. *Chamberlain v. Ventura County Civil Service Com. (1977, Cal App 2d Dist) 69 Cal App 3d 362, 138 Cal Rptr 155, 1977 Cal App LEXIS 1427.*

The party offering the evidence has the burden of proving its admissibility; the weight of his burden is by a preponderance of the evidence. That is the general burden of proof except as otherwise provided by law. *People v. Ashmus (1991) 54 Cal 3d 932, 2 Cal Rptr 2d 112, 820 P2d 214, 1991 Cal LEXIS 5408,* rehearing denied (1992, Cal) *1992 Cal LEXIS 392,* cert den *(1992) 506 US 841, 113 S Ct 124, 121 L Ed 2d 79, 1992 US LEXIS 4959.*

Questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. *People v. Ashmus (1991) 54 Cal 3d 932, 2 Cal Rptr 2d 112, 820 P2d 214, 1991 Cal LEXIS 5408,* rehearing denied (1992, Cal) *1992 Cal LEXIS 392,* cert den *(1992) 506 US 841, 113 S Ct 124, 121 L Ed 2d 79, 1992 US LEXIS 4959.*

Ev C § 606, indicates that a presumption affecting the burden of proof imposes on the party against whom it operates the burden of proof as to the nonexistence of the presumed fact, while *Ev C § 115,* makes it clear that the obligation exists for that party to establish by evidence a requisite degree of belief concerning the fact in the mind of the trier of fact or the court. Hence, the presumption requires the party against whom it operates to prove its case to the trier of fact. *Haycock v. Hughes Aircraft Co. (1994, Cal App 2d Dist) 22 Cal App 4th 1473, 28 Cal Rptr 2d 248, 1994 Cal App LEXIS 182,* review denied (1994, Cal) *1994 Cal LEXIS 2309.*

In a civil case alleging that doctors presented fraudulent insurance claims, the burden of proving the acts was met by a preponderance of the evidence; the high degree of proof demanded in criminal cases was not required in civil cases even on the issue of a crime. *People ex rel. Allstate Insurance Co. v. Muhyeldin (2003, Cal App 2d Dist) 112 Cal App 4th 604, 5 Cal Rptr 3d 492, 2003 Cal App LEXIS 1523,* review denied *People ex rel. Allstate Ins. Co. v. Muhyeldin (2004, Cal) 2004 Cal LEXIS 57.*

2. Construction

The standard of proof applicable to proceedings under the Mentally Disordered Sex Offenders Law (W & I *C §§ 6300* et seq.), is controlled by *Ev C § 115,* which declares that except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. As used therein, the word "law" includes the law established by judicial decisions, as well as by constitutional and statutory provisions. *People v. Burnick (1975) 14 Cal 3d 306, 121 Cal Rptr 488, 535 P2d 352, 1975 Cal LEXIS 287.*

"Law," as used in the provision of *Ev C § 115,* that "except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence," includes law established by judicial decisions as well as by constitutional and statutory provisions *(Ev C § 160). People v. Jimenez (1978) 21 Cal 3d 595, 147 Cal Rptr 172, 580 P2d 672, 1978 Cal LEXIS 250,* overruled *People v. Cahill (1993) 5 Cal 4th 478, 20 Cal Rptr 2d 582, 853 P2d 1037, 1993 Cal LEXIS 3087,* superseded by statute as stated in *People v. Campos (1986, Cal App 3d Dist) 183 Cal App 3d 926, 228 Cal Rptr 470.*

The general rule in California is that issues of fact in civil cases are determined by a preponderance of testimony. Under *Ev C § 115,* providing that the burden of proof requires proof by a preponderance of the evidence, except as otherwise provided by law, "law" includes constitutional, statutory, and decisional law. Judicial expressions purporting to require clear and convincing or clear and satisfactory evidence must be read in light of the statutory provision for proof by a preponderance of the evidence. *Weiner v. Fleischman (1991) 54 Cal 3d 476, 286 Cal Rptr 40, 816 P2d 892, 1991 Cal LEXIS 4395.*

Law of states other than California and law of federal jurisdictions is not what is meant by "otherwise provided by law" in *Ev C § 115,* which, by definition and common sense, is referring to the "constitutional, statutory and decisional

law" of *Cal. State Bd. of Equalization v. Renovizor's Inc. (In re Renovizor's, Inc.) (2002, 9th Cir Cal) 282 F3d 1233, 2002 US App LEXIS 4131.*

Ev C § 115, does not purport to govern the standard of proof applicable in any particular proceeding. *Utility Consumers' Action Network v. Public Utilities Commission of the State of California (2010, 4th Dist) 2010 Cal App LEXIS 1443.*

3. Presumption of Innocence

In a prosecution on a charge of arson by an accessory, prosecution proof of a false alibi provided by defendant for the principal as the gravamen of a violation of *Pen C § 32,* relating to accessories, did not shift to defendant the burden of proving the alibi's truth and force him to take the stand in violation of his Fifth Amendment right to silence, where the trial court gave the standard instructions on presumption of innocence and proof beyond a reasonable doubt, where, as in every criminal case, the burden of proving guilt beyond a reasonable doubt remained on the prosecution throughout the entire case, where no presumption required defendant's trial jury to infer that his statement was false, or if it found falsity, to draw an inference of guilty intent, and where the fabrication of the false alibi permitted but did not require an inference of defendant's guilty state of mind *People v. Duty (1969, Cal App 3d Dist) 269 Cal App 2d 97, 74 Cal Rptr 606, 1969 Cal App LEXIS 1622.*

4. Preponderance of the Evidence

The burden of proof required in a fraud case is no more than a preponderance of the evidence, and the applicable pattern jury instruction was a proper instruction; thus, in an action for fraud arising out of the sale of a mobile home, the court did not err in refusing defendant's request for an instruction that fraud should be "clearly proved and satisfactorily established," where the court had properly instructed the jury that fraud must be proved by a preponderance of the evidence. *Sierra Nat. Bank v. Brown (1971, Cal App 1st Dist) 18 Cal App 3d 98, 95 Cal Rptr 742, 1971 Cal App LEXIS 1365.*

Where laches was pleaded by a school board as an affirmative defense in an action by a school teacher for reinstatement, the school board had the burden of proving such defense by a preponderance of the evidence *(Ev C §§ 500, 115),* which required proof of unreasonable delay on the part of the teacher in filing the action, plus either acquiescence in her dismissal or prejudice to the school board resulting from the delay. *Pennel v. Pond Union School Dist. (1973, Cal App 5th Dist) 29 Cal App 3d 832, 105 Cal Rptr 817, 1973 Cal App LEXIS 1236.*

The presumption that real property conveyed to a husband and wife by a joint tenancy deed is held in joint tenancy, may be overcome by a preponderance of the evidence pursuant to *Ev C § 115,* providing that in the proof of any issue, unless a different standard of proof is set forth by constitutional, statutory or decisional law, the burden of proof shall be proved by a preponderance of the evidence. *Hansford v. Lassar (1975, Cal App 2d Dist) 53 Cal App 3d 364, 125 Cal Rptr 804, 1975 Cal App LEXIS 1569.*

In a civil fraud action, the trial court properly deleted from an instruction requested by defendant, language requiring that plaintiff must prove the alleged fraud by "clear and convincing evidence," as such deletion was in accordance with *Ev C § 115,* providing that the burden of proof in civil actions requires proof by a preponderance of evidence, which standard is as applicable to fraud actions as any other. Furthermore, no valid distinction existed between the quantum of evidence required to support a finding of fraud, that it be a preponderance, and the "quality" of that evidence, that it be "clear and convincing," as there are no degrees of quality of evidence. No evidence is admissible except relevant evidence *(Ev C § 350),* and except as otherwise provided by statute "all relevant evidence is admissible." *(Ev C § 351).* (Disapproving language in *K King & G. Shuler Corp. v. King (1968, Cal App 2d Dist) 259 Cal App 2d 383, 66 Cal Rptr 330, 1968 Cal App LEXIS 1981,* implying that a preponderance of evidence is not adequate proof of fraud, and stating that *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal 2d 580, 25 Cal Rptr 545, 375 P2d 425, 1962 Cal LEXIS 291,* containing language that fraud must be proved by clear and convincing evidence, is no longer to be followed on the issue of the standard of proof of fraud in civil cases.) *Liodas v. Sahadi (1977) 19 Cal 3d 278, 137 Cal Rptr 635, 562 P2d 316, 1977 Cal LEXIS 132.*

The proper test to be applied by a trial court in deciding whether to grant a post-trial motion to add an alleged alter ego as an additional judgment debtor is the normal preponderance-of-the-evidence burden of proof that applies generally to fact-finding proceedings in a trial court. The issue is directly controlled by *Ev C § 115,* which identifies three possible burdens of proof applicable to fact-finding proceedings: preponderance of the evidence, clear and convincing proof, and proof beyond a reasonable doubt. Section 115 specifies that except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. The law does not otherwise provide, and preponderance of the evi-

dence is therefore the test which must be applied; the substantial evidence text has no application in this context. *Wollersheim v. Church of Scientology (1999, Cal App 2d Dist) 69 Cal App 4th 1012, 81 Cal Rptr 2d 896, 1999 Cal App LEXIS 90.*

Standard of proof required for a reasonable-services finding at an 18-month review hearing is a preponderance of the evidence. In making that finding, the court applied *Ev C § 115,* which provided that when a statute was silent on the standard of proof, the preponderance of the evidence standard ordinarily applied. *Katie V. v. Superior Court (2005, Cal App 4th Dist) 130 Cal App 4th 586, 30 Cal Rptr 3d 320, 2005 Cal App LEXIS 990.*

Superior court did not err in only requiring a manufacturer to establish by a preponderance of the evidence, under *Ev C § 115,* that exposure to a chemical presented no significant risk of cancer in humans. Although a chemical has to be "clearly shown" to cause cancer before it may be listed under *H & S C § 25249.8(b),* the warning exemption of *H & S C § 25249.10(c)* does not similarly require it to be clearly shown that exposure to the chemical poses no significant risk of causing cancer; this indicates the burden of proving the exemption is less than by clear and convincing evidence. *Baxter Healthcare Corp. v. Denton (2004, Cal App 3d Dist) 120 Cal App 4th 333, 15 Cal Rptr 3d 430, 2004 Cal App LEXIS 1054,* review denied *(2004) 2004 Cal. LEXIS 9470.*

Defendant's claim during his trial on charges of committing aggravated sexual assault on his daughter, a forcible lewd act on his daughter, and a lewd act on his son, that instructing the jury on preponderance of the evidence and clear and convincing evidence as the burdens of proof of extension of the statute of limitations and independent corroboration of the children's accusations, respectively, denied him his constitutional due process and jury guarantees of proof beyond a reasonable doubt lacked merit because none of the facts relevant to extension of the statute of limitations, former Pen C § 803(g), or independent corroboration of the children's accusations was a fact necessary to constitute the crimes with which defendant was charged. Furthermore, case law and statutory law designated preponderance of the evidence as the standard of proof of statute of limitations issues, and clear and convincing evidence as the standard of proof of independent corroboration of the children's accusations. *People v. Riskin (2006, Cal App 5th Dist) 143 Cal App 4th 234, 49 Cal Rptr 3d 287, 2006 Cal App LEXIS 1466,* review denied *People v. Riskin (Michael) (2007) 2007 Cal. LEXIS 68,* cert den *Riskin v. California (2008, U.S.) 128 S. Ct. 2942, 171 L. Ed. 2d 871, 2008 U.S. LEXIS 4939.*

In seeking termination of a domestic violence restraining order issued under *Fam C § 6345(a),* the applicant is seeking to dissolve an injunction, as defined in *CCP § 525;* thus, *CCP § 533,* sets forth the standards for the trial court to apply, and the burden is on the restrained party to show by a preponderance of the evidence pursuant to *Ev C §§ 115, 500,* that these standards have been met. *Loeffler v. Medina (2009, 4th Dist) 2009 Cal App LEXIS 974.*

5. Administrative Hearings

In an administrative proceeding involving a threatened suspension or revocation of a food processing license, the administrative hearing officer did not err in utilizing the preponderance of the evidence standard of proof, rather than the clear and convincing standard. *Ev C § 115,* provides that except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. The sharp distinction between professional licenses, to which the clear and convincing standard applies, and food processing and other nonprofessional licenses, supports the distinction in the standards of proof applicable in proceedings to revoke these two different types of licenses. There is no rational basis for treating a food processor's license in the same manner as a professional's license. Because no "law" requires that a standard of proof other than preponderance of the evidence be applied in administrative proceedings to suspend or revoke a food processor's license, § 115 governs the standard of proof in proceedings to revoke or suspend a food processor's license. *San Benito Foods v. Veneman (1996, Cal App 6th Dist) 50 Cal App 4th 1889, 58 Cal Rptr 2d 571, 1996 Cal App LEXIS 1089.*

Where a trial court is required to exercise "independent judgment" review of an agency determination, the trial court must, in exercising such review, afford a "strong presumption" that the administrative findings are correct, and the petitioner bears the burden of proving that these findings are incorrect. Long-established case law demonstrates that placing the burden on the petitioner is not inconsistent with independent judgment review as that term has been understood in this state. Further, the burden is one of proof *(Ev C § 115),* not merely a burden of production *(Ev C § 110). Fukuda v. City of Angels (1999) 20 Cal 4th 805, 85 Cal Rptr 2d 696, 977 P2d 693, 1999 Cal LEXIS 3899.*

A vehicle salesperson's license is a non-professional license. The license carries no educational, training, or testing prerequisites *(Veh C § 11802).* All of the application criteria concern historical evidence of the applicant's character, honesty, integrity, and reputation, and information regarding prior court judgments and disciplinary actions *(Veh C § 11802).* Because no law requires that a standard of proof other than preponderance of the evidence be applied in admin-

istrative proceedings to suspend or revoke a vehicle salesperson's license, *Ev C § 115* governs the standard of proof. *Mann v. Department of Motor Vehicles (1999, Cal App 6th Dist) 76 Cal App 4th 312, 90 Cal Rptr 2d 277, 1999 Cal App LEXIS 1005.*

Both the administrative law judge and the trial court correctly applied the preponderance of evidence standard in revoking a dental license after an unsuccessful period of probation. Because no law specified the standard of proof in such a proceeding, the applicable standard was preponderance of the evidence. *Sandarg v. Dental Bd. of California (2010, 2d Dist) 2010 Cal App LEXIS 747.*

County assessment appeals board erred when it did not accord a homeowner the presumption of correctness to which he was entitled under *Rev & Tax C § 167,* subd. (a), which places the burden of proof on the assessor and is thus a presumption affecting the burden of proof and implementing policy as set forth in *Ev C §§ 605, 606.* Because this presumption applied, the assessor was not entitled to the presumption of regularity in *Ev C § 664,* and had the burden to overcome the presumption favoring the taxpayer by a preponderance of the evidence pursuant to *Ev C § 115. Farr v. County of Nevada (2010, 3d Dist) 2010 Cal App LEXIS 1442.*

6. Other Crimes Evidence

In a capital murder prosecution, the trial court properly instructed the jury to consider crimes that were charged in another case but not in this case only if it found that defendant committed them by a preponderance of the evidence. The preponderance of the evidence standard adequately protects defendants. Once the other crimes evidence is admitted, no matter what improper prejudicial effect there may be is realized whatever standard is adopted. If the jury finds by a preponderance of the evidence that the defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered. The preponderance standard is also consistent with the rule stated in *Ev C § 115,* that, except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. Furthermore, the jury could not reasonably infer from the instructions that the prosecution need prove intent only by a preponderance of the evidence. The trial court gave the standard instructions on reasonable doubt in general and on the sufficiency of circumstantial evidence to prove the necessary specific intent or mental state. These instructions made clear that the reasonable doubt standard applied to intent as well as identity. *People v. Carpenter (1997) 15 Cal 4th 312, 63 Cal Rptr 2d 1, 935 P2d 708, 1997 Cal LEXIS 1948,* rehearing denied (1997, Cal.) *1997 Cal. LEXIS 3555,* cert den *Carpenter v. California (1998) 522 U.S. 1078, 118 S. Ct. 858, 139 L. Ed. 2d 757, 1998 U.S. LEXIS 521,* superseded by statute as stated in *Covarrubias v. Superior Court (1998, Cal App 6th Dist) 60 Cal App 4th 1168, 71 Cal Rptr 2d 91, 1998 Cal App LEXIS 34,* superseded by statute as stated in *Verdin v. Superior Court (2008, Cal) 2008 Cal LEXIS 6665.*

7. Language of Findings

In an action alleging, inter alia, an implied easement, nothing in the record indicated the trial court imposed a clear and convincing standard of proof, rather than proof by a preponderance of the evidence. Therefore, the appellate court assumed that the trial court applied the proper standard. Although the judge stated in her comments, "The law requires that, for an easement to be shown, it has to be shown clearly," and recurrently used the words "clear" and "clearly," it appeared more likely to be a habit of speech than an expression of a legal conclusion. Furthermore, the court held that if the use of "clear" and "clearly" do have some legal significance, it is obvious from the context of the usage that the trial judge was referring to the quality of the evidence she thought was necessary to prove intent, rather than to the quantity or weight of that evidence. *Tusher v. Gabrielsen (1998, Cal App 1st Dist) 68 Cal App 4th 131, 80 Cal Rptr 2d 126, 1998 Cal App LEXIS 992.*

8. Application to Other Law

There is no reason to believe that *Pen C § 190.3* was intended to incorporate *Ev C § 115.* Indeed, the final paragraph of § 190.3 makes clear the sui generis nature of the jury's penalty phase determination. Because *Pen C § 190.3* describes a process of sentencing determination that is basically incompatible with burden of proof quantification, it is most reasonable to infer that § 190.3 is either simply outside the scope of *Ev C § 115,* which was not intended to apply to such sentencing matters, or else fits within the latter statute's "otherwise provided by law" exception. The same would be the case with the relationship between § 190.3 and *Ev C § 500. People v. Welch (1999) 20 Cal 4th 701, 85 Cal Rptr 2d 203, 976 P2d 754, 1999 Cal LEXIS 2976,* rehearing denied (1999, Cal) *1999 Cal LEXIS 5545,* cert den *Welch v. California (2000) 528 US 1154, 120 S Ct 1160, 145 L Ed 2d 1071, 2000 US LEXIS 1034.*

In a hearing held pursuant to the Sexually Violent Predators Act, W & *I C §§ 6600* et seq., the burden of proof is probable cause. *Cooley v. Superior Court (2002) 29 Cal 4th 228, 127 Cal Rptr 2d 177, 57 P3d 654, 2002 Cal LEXIS 7958,* rehearing denied (2003, Cal) *2003 Cal LEXIS 227.*

Under *Pen C § 290,* the court may require a defendant convicted of any crime to register as a sex offender if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification; *Pen C § 290* does not demand that the court find that the predicate fact is proved beyond a reasonable doubt, and thus it is subject to proof by a preponderance of the evidence under the provisions of *Ev C § 115. People v. Marchand (2002, Cal App 3d Dist) 98 Cal App 4th 1056, 120 Cal Rptr 2d 687, 2002 Cal App LEXIS 4215,* review denied *(2002) 2002 Cal. LEXIS 5577.*

Clear and convincing evidence must be shown to establish civil tax fraud under *California law. Cal. State Bd. of Equalization v. Renovizor's Inc. (In re Renovizor's, Inc.) (2002, 9th Cir Cal) 282 F3d 1233, 2002 US App LEXIS 4131.*

Clear and convincing evidence standard, not preponderance of the evidence, applied to a foster son's claim to inherit the intestate estate of his foster father as an equitably adopted son. *Estate of Ford (2004) 32 Cal 4th 160, 8 Cal Rptr 3d 541, 82 P3d 747, 2004 Cal LEXIS 7,* rehearing denied *(2004) 2004 Cal. LEXIS 983,* 2004 D.A.R. 1335.

Under *Ev C §§ 115, 500,* claimants challenging a *Pen C § 186.11* proceeding bear the initial burden of proving by a preponderance of the evidence the nature and amount of their interest in the property subject to forfeiture; once the claimants meet this burden of proof, the burden of producing evidence shifts to the People under *Ev C § 662. People v. Semaan (2005, Cal App 4th Dist) 133 Cal App 4th 1445, 35 Cal Rptr 3d 582, 2005 Cal App LEXIS 1735,* rev'd (2007, Cal) *2007 Cal LEXIS 8633.*

Trial court correctly ruled that the preponderance of the evidence standard set forth in *Ev C § 115* applied to rebutting the community property presumption of *Fam C § 760* when it determined that certain parcels of real estate acquired by a husband during the marriage were the husband's separate property under *Fam C § 770(a)(2),* based on the husband's evidence that his father provided the funds to purchase the properties. *In re Marriage of Ettefagh (2007, 1st Dist) 150 Cal App 4th 1578, 59 Cal Rptr 3d 419, 2007 Cal App LEXIS 804,* review denied *Ettefagh (Semrin), Marriage of (2007, Cal.) 2007 Cal. LEXIS 8475.*

Community property presumption of *Fam C § 760* may be rebutted by a preponderance of the evidence, in accordance with *Ev C § 115. In re Marriage of Ettefagh (2007, 1st Dist) 150 Cal App 4th 1578, 59 Cal Rptr 3d 419, 2007 Cal App LEXIS 804,* review denied *Ettefagh (Semrin), Marriage of (2007, Cal.) 2007 Cal. LEXIS 8475.*

Because no evidentiary standard has been specified for issuance of a protective order under W & I C § 15657.03(c), a preponderance of the evidence suffices under *Ev C § 115. Bookout v. Nielsen (2007, 4th Dist) 154 Cal App 4th 1152, 65 Cal Rptr 3d 417, 2007 Cal App LEXIS 1445,* reprinted as modified (2007, Cal. App. 4th Dist.) *155 Cal. App. 4th 1131, 67 Cal. Rptr. 3d 2, 2007 Cal. App. LEXIS 1694,* modified, rehearing denied (2007, Cal. App. 4th Dist.) *2007 Cal. App. LEXIS 1682.*

9. Punitive Damages

Complex standard of proof applicable to claims for lost punitive damages militates against the recovery of such damages as compensatory in a legal malpractice suit. *Ev C § 115* provides that the burden of proof to recover compensatory damages requires proof by a preponderance of the evidence; whereas, *CC § 3294* provides that a plaintiff may recover punitive damages only where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal 4th 1037, 135 Cal Rptr 2d 46, 69 P3d 965, 2003 Cal LEXIS 3517, 9 ALR6th 749.*

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TAB “43”

Cal Gov Code § 17514 (2010)
§ 17514. "Costs mandated by the state"

"Costs mandated by the state" means any 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 XIIIB of the California Constitution.

Cal Gov Code § 17514

TAB “44”

1 of 13 DOCUMENTS

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 3. Commission on State Mandates

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17525 (2010)

§ 17525. Members; Term and per diem for specified members

(a) There is hereby created the Commission on State Mandates, which shall consist of seven members as follows:

(1) The Controller.

(2) The Treasurer.

(3) The Director of Finance.

(4) The Director of the Office of Planning and Research.

(5) A public member with experience in public finance, appointed by the Governor and approved by the Senate.

(6) Two members from the following three categories appointed by the Governor and approved by the Senate, provided that no more than one member shall come from the same category:

(A) A city council member.

(B) A member of a county or city and county board of supervisors.

(C) A governing board member of a school district as defined in Section 17519.

(b) Each member appointed pursuant to paragraph (5) or (6) of subdivision (a) shall be subject to both of the following:

(1) The member shall serve for a term of four years subject to renewal.

(2) The member shall receive per diem of one hundred dollars ($100) for each day actually spent in the discharge of official duties and shall be reimbursed for any actual and necessary expenses incurred in connection with the performance of duties as a member of the commission.

HISTORY:

Added Stats 1984 ch 1459 § 1. Amended Stats 1985 ch 179 § 4, effective July 8, 1985; Stats 1996 ch 154 § 1 (SB 805).

NOTES:

Amendments:

1985 Amendment:

Added the second sentence of the second paragraph.

1996 Amendment:

(1) Added subdivision designations (a) and (b); **(2)** amended subd (a) by **(a)** substituting "seven" for "five" in the introductory clause; and **(b)** adding subd (a)(6); and **(3)** amended subd (b) by **(a)** adding the introductory clause; and **(b)** substituting "(1) The" and "(2) The for The public".

Note

Stats 1985 ch 179 provides:

SEC. 14. The provisions of this act shall take effect retroactively to January 1, 1985.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability Of Judicial Review Of Agency Decisions".

Attorney General's Opinions:

Commission on State Mandates does have authority to reconsider prior final decision relating to existence or non-existence of state mandated costs, where prior decision was contrary to law. *72 Ops. Cal. Atty. Gen. 173.*

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

TAB “45”

2 of 13 DOCUMENTS

DEERING'S CALIFORNIA CODE ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17551 (2010)

§ 17551. Commission hearing and decision upon claims

(a) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by *Section 6 of Article XIIIB of the California Constitution.*

(b) Except as provided in Sections 17573 and 17574, commission review of claims may be had pursuant to subdivision (a) only if the test claim is filed within the time limits specified in this section.

(c) Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.

(d) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, that the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subdivision (d) of Section 17561.

HISTORY:

Added Stats 1984 ch 1459 § 1. Amended Stats 1985 ch 179 § 5, effective July 8, 1985; Stats 1986 ch 879 § 2; Stats 2002 ch 1124 § 30.2 (AB 3000), effective September 30, 2002; Stats 2004 ch 890 § 11 (AB 2856); Stats 2007 ch 329 § 3 (AB 1222), effective January 1, 2008.

NOTES:

Amendments:

1985 Amendment:

Added subd (c).

1986 Amendment:

(1) Deleted former subd (b) which read: "(b) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on and after January 1, 1985, that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state, as defined in *Section 2207 or 2207.5 of the Revenue and Taxation Code,* pursuant to a statute enacted, or an executive order implementing a statute enacted, before January 1, 1975."; **(2)** redesignated former subd (c) to be subd (b); and (3) substituted "Section 17561" for *"Section 2231 of the Revenue and Taxation Code"* at the end of subd (b).

2002 Amendment:

(1) Added subds (b) and (c); and **(2)** redesignated former subd (b) to be subd (d).

2004 Amendment:

Substituted "12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later" for "three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision" at the end of subd (c).

2007 Amendment:

Added "Except as provided in Sections 17573 and 17574," at the beginning of subd (b).

Note

Stats 1985 ch 179 provides:

SEC. 14. The provisions of this act shall take effect retroactively to January 1, 1985.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability Of Judicial Review Of Agency Decisions"

Commission on State Mandates (financial operations): *2 Cal Code Reg § 1181* et seq.

Attorney General's Opinions:

Commission on State Mandates does have authority to reconsider prior final decision relating to existence or non-existence of state mandated costs, where prior decision was contrary to law. *72 Ops. Cal. Atty. Gen. 173.*

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

NOTES OF DECISIONS 1. Generally 2. Constructions with Other Law

1. Generally

Gov C § 17516c is unconstitutional to the extent that it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to *Cal Const Art XIII B, §* 6 because the exemption contravenes the clear, unequivocal intent of *Cal Const Art XIII B, § 6* that subvention of funds was required whenever any state agency mandated a new program or higher level of service on any local government, and whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under *Cal Const Art XIII B, § 6* is an issue that must in the first instance be resolved by the California Commission on State Mandates. Moreover, a contrary conclusion is not compelled by virtue of the fact that Gov C § 17516c essentially mirrors the language of *Rev & Tax C § 2209(c)* because a statute cannot trump the constitution. *County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.*

2. Constructions with Other Law

Because *Gov C § 17516(c)* was unconstitutional to the extent that it exempted regional water quality control boards from the constitutional state mandate subvention requirement, a trial court properly issued a writ of mandate directing the California Commission on State Mandates to resolve, on the merits and without reference to § 17516(c), test claims presented by a county and several cities seeking reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal stormwater and urban runoff discharges that was issued by a regional water quality control board. *County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.*

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GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17552 (2010)

§ 17552. Exclusivity of procedure provided by chapter

This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by *Section 6 of Article XIIIB of the California Constitution.*

HISTORY:

Added Stats 1984 ch 1459 § 1. Amended Stats 1986 ch 879 § 3.

NOTES:

Amendments:

1986 Amendment:

Deleted "or for costs mandated by the state, as defined in *Section 2207 or 2207.5 of the Revenue and Taxation Code,* pursuant to a statute enacted, or an executive order implementing a statute enacted, before January 1, 1975" at the end of the section.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

Cal Gov Code § 17552

NOTES OF DECISIONS 1. Generally

1. Generally

County could not sua sponte declare itself relieved of the mental health services mandate where the legislature had not specifically identified the mandate as unfunded. There is no functional equivalent to the legislative actions specified in *Gov C § 17581(a)(2),* and *Gov C §§ 17552, 17612* established an exclusive remedy by which local governments could claim funding for mandated programs. *Tri-County Special Educ. Local Plan Area v. County of Tuolumne (2004, Cal App 5th Dist) 123 Cal App 4th 563, 19 Cal Rptr 3d 884, 2004 Cal App LEXIS 1794.*

TAB “47”

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17553 (2010)

§ 17553. Adoption of procedures for receiving claims and providing hearings; Postponement of hearings; Determining completeness of indirect reduction claim

(a) The commission shall adopt procedures for receiving claims filed pursuant to this article and Section 17574 and for providing a hearing on those claims. The procedures shall do all of the following:

(1) Provide for presentation of evidence by the claimant, the Department of Finance, and any other affected department or agency, and any other interested person.

(2) Ensure that a statewide cost estimate is adopted within 12 months after receipt of a test claim, when a determination is made by the commission that a mandate exists. This deadline may be extended for up to six months upon the request of either the claimant or the commission.

(3) Permit the hearing of a claim to be postponed at the request of the claimant, without prejudice, until the next scheduled hearing.

(b) All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents:

(1) A written narrative that identifies the specific sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate and shall include all of the following:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following:

(i) Dedicated state funds appropriated for this program.

(ii) Dedicated federal funds appropriated for this program.

(iii) Other nonlocal agency funds dedicated for this program.

(iv) The local agency's general purpose funds for this program.

(v) Fee authority to offset the costs of this program.

(G) Identification of prior mandate determinations made by the Commission on State Mandates or a predecessor agency that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Section 17573 that is on the same statute or executive order.

(2) The written narrative shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:

(A) Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

(B) Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

(C) Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program. Specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program.

(D) If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Section 17574.

(3)

(A) The written narrative shall be supported with copies of all of the following:

(i) The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate.

(ii) Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate.

(iii) Administrative decisions and court decisions cited in the narrative.

(B) State mandate determinations made by the Commission on State Mandates or a predecessor agency and published court decisions on state mandate determinations made by the Commission on State Mandates are exempt from this requirement.

(4) A test claim shall be signed at the end of the document, under penalty of perjury by the claimant or its authorized representative, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief. The date of signing, the declarant's title, address, telephone number, facsimile machine telephone number, and electronic mail address shall be included.

(c) If a completed test claim is not received by the commission within 30 calendar days from the date that an incomplete test claim was returned by the commission, the original test claim filing date may be disallowed, and a new test claim may be accepted on the same statute or executive order.

(d) In addition, the commission shall determine whether an incorrect reduction claim is complete within 10 days after the date that the incorrect reduction claim is filed. If the commission determines that an incorrect reduction claim is not complete, the commission shall notify the local agency and school district that filed the claim stating the reasons that the claim is not complete. The local agency or school district shall have 30 days to complete the claim. The commission shall

serve a copy of the complete incorrect reduction claim on the Controller. The Controller shall have no more than 90 days after the date the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the commission.

HISTORY:

Added Stats 1995 ch 945 § 5 (SB 11), operative July 1, 1996. Amended Stats 1998 ch 681 § 1 (AB 1963), effective September 22, 1998; Stats 1999 ch 643 § 3 (AB 1679); Stats 2004 ch 890 § 12 (AB 2856); Stats 2006 ch 538 § 278 (SB 1852), effective January 1, 2007; Stats 2007 ch 329 § 4 (AB 1222), effective January 1, 2008.

NOTES:

Former Sections:

Former § 17553, similar to the present section, was added Stats 1984 ch 1459 § 1, amended Stats 1995 ch 945 § 4, operative until July 1, 1996, and repealed, operative January 1, 1997, by its own terms.

Amendments:

1998 Amendment:

Amended subd (a) **(1)** substituting "12 months after receipt of a test claim" for "18 months or six months after an undisputed test claim, except for any extensions or postponements by the claimant, or if incomplete information is submitted by the claimant" in the third sentence; and **(2)** adding the fourth sentence.

1999 Amendment:

(1) Amended subd (b) by **(a)** adding subd (b)(1); **(b)** redesignated former subds (b)(1) and (b)(2) to be subds (b)(2) and (b)(3); (c) substituting "30 days" for "90 days"; and **(2)** substituted subd (d) for former subd (d) which read: "(d) This section shall become operative on July 1, 1996."

2004 Amendment:

(1) Amended subd (a) by **(a)** adding the introductory clause; **(b)** adding subdivision designations (a)(1)-(a)(3); (c) deleting "The hearing procedure shall" at the beginning of subd (a)(1); **(d)** deleting "The procedures shall" at the beginning of subd (a)(2); and **(e)** substituting "Permit the hearing of a claim to" for "Hearing of a claim may" at the beginning of subd (a)(3); and **(2)** substituted subd (b) for former subd (b) which read: "(b) The procedures adopted by the commission pursuant to subdivision (a) shall include the following:

"(1) Provisions for acceptance of more than one claim on the same statute or executive order relating to the same statute or executive order filed with the commission, and, absent agreement by the test claimants to the contrary, to designate the first to file as the lead test claimant.

"(2) Provisions for consolidating test claims relating to the same statute or executive order filed with the commission with time limits that do not exceed 90 days from the initial filing for consolidating the test claims and for claimants to designate a single contact for information regarding the test claim.

"(3) Provisions for claimants to designate a single claimant for a test claim relating to the same statute or executive order filed with the commission, with time limits that do not exceed 90 days from the initial filing for making that designation."

2006 Amendment:

(1) Added the comma after "Department of Finance" in subd (a)(1); (2) amended subd (b)(1)(G) by (a) adding "California Victim Compensation and Government Claims" after "made by the"; and (b) deleting of Control" after "Government Claims Board"; (3) added the comma after "personal knowledge, information" in subd (b)(2); (4) amended subd (b)(3)(B) by (a) adding "California Victim Compensation and Government Claims" after "made by the"; and (b) deleting of Control" after "Government Claims Board"; and (5) substituted "knowledge, information," for "knowledge or information" after the declarant's personal" in subd (b)(4).

2007 Amendment:

(1) Amended subd (a) by (a) adding "filed" after "receiving claims"; and (b) adding "Section 17574 and"; (2) added "and the effective date and register number of regulations" in subd (b)(1); (3) amended subd (b)(1)(G) by (a) deleting "California Victim Compensation and Government Claims Board or the" after "determinations made by the"; and (b) adding "a predecessor agency"; (4) added subd (b)(1)(H); (5) added subd (b)(2)(D); and (6) amended subd (b)(3)(B) by (a) deleting "California Victim Compensation and Government Claims Board or the after "determinations made by the"; and (b) adding "a predecessor agency".

Note

Stats 1995 ch 945 provides:

SECTION 1. This act shall be known and may be cited as the Ayala-Monteith-Johannessen Mandate Relief and Reform Act of 1995.

Stats 1999 ch 643 provides:

SECTION 1. This act shall be known, and may be cited, as the Local Government Omnibus Act of 1999.

Collateral References:

Commission on State Mandates (financial operations): *2 Cal Code Reg § 1181* et seq.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

TAB “48”

Cal Gov Code § 17556 (2010)
§ 17556. Criteria for not finding costs mandated by state

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

(a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district 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 or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision.

(b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

TAB “49”

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17557 (2011)

§ 17557. Determination of amount to be subvened for reimbursement; Parameters and guidelines

(a) If the commission determines there are costs mandated by the state pursuant to Section 17551, it shall determine the amount to be subvened to local agencies and school districts for reimbursement. In so doing it shall adopt parameters and guidelines for reimbursement of any claims relating to the statute or executive order. The successful test claimants shall submit proposed parameters and guidelines within 30 days of adoption of a statement of decision on a test claim. The proposed parameters and guidelines may include proposed reimbursable activities that are reasonably necessary for the performance of the state-mandated program. At the request of a successful test claimant, the commission may provide for one or more extensions of this 30-day period at any time prior to its adoption of the parameters and guidelines. If proposed parameters and guidelines are not submitted within the 30-day period and the commission has not granted an extension, then the commission shall notify the test claimant that the amount of reimbursement the test claimant is entitled to for the first 12 months of incurred costs will be reduced by 20 percent, unless the test claimant can demonstrate to the commission why an extension of the 30-day period is justified.

(b) In adopting parameters and guidelines, the commission may adopt a reasonable reimbursement methodology.

(c) The parameters and guidelines adopted by the commission shall specify the fiscal years for which local agencies and school districts shall be reimbursed for costs incurred. However, the commission may not specify in the parameters and guidelines any fiscal year for which payment could be provided in the annual Budget Act.

(d)

(1) A local agency, school district, or the state may file a written request with the commission to amend the parameters or guidelines. The commission may, after public notice and hearing, amend the parameters and guidelines. A parameters and guidelines amendment submitted within 90 days of the claiming deadline for initial claims, as specified in the claiming instructions pursuant to Section 17561, shall apply to all years eligible for reimbursement as defined in the original parameters and guidelines. A parameters and guidelines amendment filed more than 90 days after the claiming deadline for initial claims, as specified in the claiming instructions pursuant to Section 17561, and on or before the claiming deadline following a fiscal year, shall establish reimbursement eligibility for that fiscal year.

(2) For purposes of this subdivision, the request to amend parameters and guidelines may be filed to make any of the following changes to parameters and guidelines, consistent with the statement of decision:

(A) Delete any reimbursable activity that has been repealed by statute or executive order after the adoption of the original or last amended parameters and guidelines.

(B) Update offsetting revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of Section 17556.

(C) Include a reasonable reimbursement methodology for all or some of the reimbursable activities.

(D) Clarify what constitutes reimbursable activities.

(E) Add new reimbursable activities that are reasonably necessary for the performance of the state-mandated program.

(F) Define what activities are not reimbursable.

(G) Consolidate the parameters and guidelines for two or more programs.

(H) Amend the boilerplate language. For purposes of this section, "boilerplate language" means the language in the parameters and guidelines that is not unique to the state-mandated program that is the subject of the parameters and guidelines.

(e) A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. The claimant may thereafter amend the test claim at any time, but before the test claim is set for a hearing, without affecting the original filing date as long as the amendment substantially relates to the original test claim.

(f) In adopting parameters and guidelines, the commission shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that balances accuracy with simplicity.

HISTORY:

Added Stats 1995 ch 945 § 9 (SB 11), operative July 1, 1996. Amended Stats 1998 ch 681 § 2 (AB 1963), effective September 22, 1998; Stats 2004 ch 313 § 1 (AB 2224), ch 890 § 16 (AB 2856); Stats 2007 ch 179 § 14 (SB 86), effective August 24, 2007; Stats 2010 ch 719 § 32 (SB 856), effective October 19, 2010.

NOTES:

Former Sections:

Former § 17557, similar to the present section, was added Stats 1984 ch 1459 § 1, amended Stats 1985 ch 179 § 6, effective July 8, 1985, Stats 1988 ch 1123 § 1, ch 1179 § 2, effective September 21, 1988, § 2.5, effective September 21, 1988, operative January 1, 1989, Stats 1995 ch 945 § 8, operative until July 1, 1996, and repealed operative January 1, 1997, by its own terms.

Amendments:

1998 Amendment:

(1) Amended subd (c) by **(a)** substituting "June 30" for "December 31" in the second sentence; and **(b)** adding the third sentence; and **(2)** deleted former subd (d) which read: "(d) This section shall become operative on July 1, 1996."

2004 Amendment:

(1) Amended subd (a) by **(a)** substituting "Section 17551" for "Section 17555" in the first sentence; and **(b)** deleting the former last two sentences which read: "A local agency, school district, and the state may file a claim or request with the commission to amend, modify, or supplement the parameters or guidelines. The commission may, after public notice and hearing, amend, modify, or supplement the parameters and guidelines."; **(2)** substituted "a reasonable reimbursement methodology" for an allocation formula or uniform allowance which would provide for reimbursement of each local agency or school district of a specified amount each year" at the end of subd (b); **(3)** substituted subd (c) for former subd (c) which read: The parameters and guidelines adopted by the commission shall specify the fiscal years for which local agencies and school districts shall be reimbursed for costs incurred, provided, however, that the commission shall not specify therein any fiscal year for which payment could be provided in the annual Budget Act. A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. The claimant may thereafter amend the test claim at any time prior to a commission hearing on the claim, without affecting the original filing date as long as the amendment substantially relates to the original test claim."; and **(4)** added subds (d)-(f). (As amended Stats 2004 ch 890, compared to the section as it read prior to 2004. This section was also amended by an earlier chapter, ch 313. See *Gov C § 9605.)*

2007 Amendment:

Substituted "the claiming deadline" for "January 15" in subd (d).

2010 Amendment:

(1) Added the fourth sentence of subd (a); (2) added subdivision designation (d)(1); (3) deleted ", modify, or supplement" after "amend" in the first and second sentences of subd (d)(1); and (4) added subd (d)(2).

Note

Stats 1995 ch 945 provides:

SECTION 1. This act shall be known and may be cited as the Ayala--Monteith--Johannessen Mandate Relief and Reform Act of 1995.

Stats 2007 ch 179 provides:

SEC. 40. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Collateral References:

Commission on State Mandates (financial operations): *2 Cal Code Reg §§ 1181* et seq.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

Received
June 17, 2011
Commission on
State Mandates

TAB “50”

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17559 (2010)

§ 17559. Judicial review

(a) The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) A claimant or the state may commence a proceeding in accordance with the provisions of *Section 1094.5 of the Code of Civil Procedure* to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence. The court may order the commission to hold another hearing regarding the claim and may direct the commission on what basis the claim is to receive a rehearing.

HISTORY:

Added Stats 1984 ch 1459 § 1. Amended Stats 1999 ch 643 § 4 (AB 1679).

NOTES:

Amendments:

1999 Amendment:

(1) Added subd (a); and **(2)** designated the former section to be subd (b).

Note

Stats 1999 ch 643 provides:

SECTION 1. This act shall be known, and may be cited, as the Local Government Omnibus Act of 1999.

Collateral References:

*Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "*Availability Of Judicial Review Of Agency Decisions".

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

NOTES OF DECISIONS 1. Generally 2. Review: Scope 3. Review: Standards

1. Generally

While the legislative history of an amendment to ***Lab C § 4707*** may have evinced the understanding or belief of the Legislature that the amendment created a state mandate, such understanding or belief was irrelevant to the issue of whether a state mandate existed. The Legislature has entrusted that determination to the Commission on State Mandates, subject to judicial review ***(Gov C §§ 17500, 17559),*** and has provided that the initial determination by Legislative Counsel is not binding on the Commission. ***(Gov C § 17575.) City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546,*** review denied (1998, Cal) ***1998 Cal LEXIS 5509.***

2. Review: Scope

On appeal from the trial court's denial of a county's petition for a writ of mandate to compel the Commission on State Mandates to vacate its determination that ***Pen C § 987.9*** (funding by court for preparation of defense for indigent defendants in capital cases), did not constitute a state mandate, the appropriate standard of review was the substantial evidence test and not the independent judgment test. The independent judgment test applies when the order or decision substantially affects a fundamental vested right, and the county had no such right. Further, pursuant to ***Gov C § 17559,*** which governs the state mandates process, a claimant or the state may commence a mandamus proceeding under ***CCP § 1094.5,*** to set aside a decision of the commission on the ground that the decision is not supported by substantial evidence. Where the proper scope of review in the trial court was whether the administrative decision was supported by substantial evidence on the whole record, the function of the reviewing court on appeal from the judgment is the same as that of the trial court, that is, to review the administrative decision to determine whether it is supported by substantial evidence on the whole record. ***County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161,*** review denied (1995, Cal) ***1995 Cal LEXIS 3339.***

Under ***Gov C § 17559,*** a proceeding to set aside the Commission on State Mandates' decision on a claim may be commenced on the ground that the Commission's decision is not supported by substantial evidence. Where the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the review on appeal is generally the same. However, the appellate court independently reviews the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. The question of whether a statute is a state-mandated program or higher level of service under ***Cal. Const., Art. XIII B, § 6*** is a question of law to be reviewed ***de novo. City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546,*** review denied (1998, Cal) ***1998 Cal LEXIS 5509.***

3. Review: Standards

Cal Gov Code § 17559

Under *Gov C § 17559,* review by administrative mandamus is the exclusive method of challenging a decision of the California Commission on State Mandates to deny a subvention claim. The determination whether the statutes at issue established a mandate under *Cal Const Art XIII B, § 6,* is a question of law. On appellate review, the following standards apply: *Gov C § 17559,* governs the proceeding below and requires that the trial court review the decision of the commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, the appellate court is generally confined to inquiring whether substantial evidence supports the trial court's findings and judgment. However, the appellate court independently reviews the trial court's legal conclusions about the meaning and effect of constitutional and statutory provisions. *Redevelopment Agency v. Commission on State Mandates (1997, Cal App 4th Dist) 55 Cal App 4th 976, 64 Cal Rptr 2d 270, 1997 Cal App LEXIS 474,* review denied (1997, Cal) *1997 Cal LEXIS 5622.*

TAB “51”

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 5. Local Agencies
Division 2. Cities, Counties, and Other Agencies
Part 1. Powers and Duties Common to Cities, Counties, and Other Agencies
Chapter 9. Meetings

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 54950 (2011)

§ 54950. Declaration of public policy

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

HISTORY:

Added Stats 1953 ch 1588 § 1.

TAB “52”

GOVERNMENT CODE
Title 5. Local Agencies
Division 2. Cities, Counties, and Other Agencies
Part 1. Powers and Duties Common to Cities, Counties, and Other Agencies
Chapter 9. Meetings

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 54953 (2011)

§ 54953. Requirement that meetings be open and public; Teleconferencing; Teleconference meetings by health authority

(a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

(b)

(1) Notwithstanding any other provision of law, the legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding shall comply with all requirements of this chapter and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding.

(2) Teleconferencing, as authorized by this section, may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. All votes taken during a teleconferenced meeting shall be by rollcall.

(3) If the legislative body of a local agency elects to use teleconferencing, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction, except as provided in subdivision (d). The agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.

(4) For the purposes of this section, "teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both. Nothing in this section shall prohibit a local agency from providing the public with additional teleconference locations.

(c) No legislative body shall take action by secret ballot, whether preliminary or final.

(d) (Effective until January 1, 2009)

(1) Notwithstanding the provisions relating to a quorum in paragraph (3) of subdivision (b), when a health authority conducts a teleconference meeting, members who are outside the jurisdiction of the authority may be counted toward the establishment of a quorum when participating in the teleconference if at least 50 percent of the number of

members that would establish a quorum are present within the boundaries of the territory over which the authority exercises jurisdiction, and the health authority provides a teleconference number, and associated access codes, if any, that allows any person to call in to participate in the meeting and that number and access codes are identified in the notice and agenda of the meeting.

(2) Nothing in this subdivision shall be construed as discouraging health authority members from regularly meeting at a common physical site within the jurisdiction of the authority or from using teleconference locations within or near the jurisdiction of the authority. A teleconference meeting for which a quorum is established pursuant to this subdivision shall be subject to all other requirements of this section.

(3) For purposes of this subdivision, a health authority means any entity created pursuant to *Sections 14018.7, 14087.31, 14087.35, 14087.36, 14087.38, and 14087.9605 of the Welfare and Institutions Code*, any joint powers authority created pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 for the purpose of contracting pursuant to *Section 14087.3 of the Welfare and Institutions Code*, and any advisory committee to a county sponsored health plan licensed pursuant to Chapter 2.2 (commencing with *Section 1340) of Division 2 of the Health and Safety Code* if the advisory committee has 12 or more members.

(4) This subdivision shall remain in effect only until January 1, 2009.

HISTORY:

Added Stats 1953 ch 1588 § 1. Amended Stats 1988 ch 399 § 1, operative until January 1, 1994; Stats 1993 ch 1136 § 4 (AB 1426), operative April 1, 1994, ch 1137 § 4 (SB 36), operative April 1, 1994; Stats 1994 ch 32 § 4 (SB 752), effective March 30, 1994, operative April 1, 1994; Stats 1997 ch 253 § 2 (SB 138); Stats 1998 ch 260 § 1 (SB 139); Stats 2005 ch 540 § 1 (AB 1438), effective January 1, 2006.

TAB “53”

LEXSTAT CAL WAT CODE § 13050

*** THIS DOCUMENT IS CURRENT THROUGH 2009-2010 EXTRAORDINARY SESSIONS 1-5, ***
7, AND 8, AND URGENCY LEGISLATION THROUGH CH 27 OF THE 2010 REGULAR SESSION

WATER CODE
Division 7. Water Quality
Chapter 2. Definitions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13050 (2010)

§ 13050. Terms used in this division

As used in this division:

(a) "State board" means the State Water Resources Control Board.

(b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.

(c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.

(d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

(f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

(g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.

(h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.

(i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.

(j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:

(1) Beneficial uses to be protected.

(2) Water quality objectives.

(3) A program of implementation needed for achieving water quality objectives.

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l)

(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

(m) "Nuisance" means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(n) "Recycled water" means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.

(o) "Citizen or domiciliary" of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.

(p)

(1) "Hazardous substance" means either of the following:

(A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act *(33 U.S.C. Sec. 1251* et seq.).

(B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to *Section 25140 of the Health and Safety Code*, without regard to whether the substance is intended to be used, reused, or discarded, except that "hazardous substance" does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.

(2) "Hazardous substance" does not include any of the following:

(A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.

(B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by *Section 116180 of the Health and Safety Code*, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

(C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.

(D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to *Section 25140 of the Health and Safety Code.* No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

(1) "Mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in *Section 2732 of the Public Resources Code*, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.

(2) For the purposes of this subdivision, "cementitious material" means cement, cement kiln dust, clinker, and clinker dust.

(r) "Master recycling permit" means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

HISTORY:

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 2.5; Stats 1970 ch 202 § 1; Stats 1980 ch 877 § 1; Stats 1989 ch 642 § 2; Stats 1991 ch 187 § 1 (AB 673); Stats 1992 ch 211 § 1 (AB 3012); Stats 1995 ch 28 § 17 (AB 1247), ch 847 § 2 (SB 206); Stats 1996 ch 1023 § 429 (SB 1497), effective September 29, 1996.

TAB “54”

LexisNexis®

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 25 OF THE 2011 SESSION ***
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 5. Enforcement and Implementation
Article 2. Administrative Review by the State Board

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13320 (2011)

§ 13320. Review by state board; Evidence; Findings; Submission of disagreement between regional boards; Action on request for stay

(a) Within 30 days of any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), Chapter 5.5 (commencing with Section 13370), Chapter 5.9 (commencing with Section 13399.25), or Chapter 7 (commencing with Section 13500), an aggrieved person may petition the state board to review that action or failure to act. In case of a failure to act, the 30-day period shall commence upon the refusal of the regional board to act, or 60 days after request has been made to the regional board to act. The state board may, on its own motion, at any time, review the regional board's action or failure to act .

(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

(c) The state board may find that the action of the regional board, or the failure of the regional board to act, was appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to another state agency having jurisdiction, take the appropriate action itself, or take any combination of those actions. In taking any action, the state board is vested with all the powers of the regional boards under this division.

(d) If a waste discharge in one region affects the waters in another region and there is any disagreement between the regional boards involved as to the requirements that should be established, either regional board may submit the disagreement to the state board , which shall determine the applicable requirements.

(e) If a petition for state board review of a regional board action on waste discharge requirements includes a request for a stay of the waste discharge requirements, the state board shall act on the requested stay portion of the petition within 60 days of accepting the petition. The board may order any stay to be in effect from the effective date of the waste discharge requirements.

HISTORY:

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 4.5; Stats 1970 ch 902 § 1.5, ch 956 § 2; Stats 1971 ch 1288 § 12; Stats 1975 ch 888 § 1; Stats 1982 ch 90 § 7, effective March 2, 1982; Stats 1993 ch 656 § 58 (AB 1220), effective October 1, 1993; Stats 1998 ch 998 § 2.5 (AB 2019); Stats 2002 ch 324 § 1 (SB 1599); Stats 2010 ch 288 § 30 (SB 1169), effective January 1, 2011.

NOTES:

Amendments:

1970 Amendment:

Substituted subd (a) for former subd (a) which read: "Upon petition by any aggrieved person or upon its own motion, the state board may at any time review any action or failure to act by a regional board under subdivision (c) of Section 13225, Article 4 (commencing with Section 13260) of Chapter 4 of this division, Chapter 5 (commencing with Section 13300) of this division, or Chapter 7 (commencing with Section 13500) of this division.".

1971 Amendment:

Added and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4 of this division" at the end of subd (a).

1975 Amendment:

Added "Chapter 5.5 (commencing with Section 13370) of this division," in subd (a).

1982 Amendment:

(1) Amended subd (a) by **(a)** deleting "of this division" after "Chapter 4" wherever it appears, after "Section 13300" and after "Section 13370"; **(b)** adding "or" before "Chapter 7"; and (c) deleting "of this division, or Division 7.5 (commencing with Section 14000)" after "Section 13500"; **(2)** deleted subdivision designations (b)(i), (b)(ii) and (c)(1)-(c)(4); and **(3)** added "do" after "action itself, or" in the second sentence of subd (c).

1993 Amendment:

(1) Amended subd (a) by **(a)** substituting "that" for "such" after "board to review"; **(b)** adding "regional" after "refusal of the" and after "made to the; and (c) substituting "the regional board's" for "such" after "any time, review"; **(2)** amended subd (c) by substituting **(a)** "that the action of the regional board, or the failure of the regional board to act, was" for "the regional board action to inaction to be"; and **(b)** "take any combination of those actions" for "do any combination of the foregoing"; **(3)** substituted If for "In the event" at the beginning of subd (d); and **(4)** added subd (e).

1998 Amendment:

Added "Chapter 5.9 (commencing with Section 13399.25)," in subd (a).

2002 Amendment:

Amended subd (e) by **(1)** deleting "issued for a solid waste landfill" after "discharge requirements"; and **(2)** added the last sentence.

2010 Amendment:

(1) Amended subd (a) by (a) substituting "an aggrieved" for "any aggrieved" in the first sentence; and (b) deleting "and also any failure to act under Article 3 (commencing with Section 13240) of Chapter 4" at the end of the last sentence; (2) amended subd (c) by (a) substituting "another" for any other" in the second sentence; and (b) deleting "such" after "taking any in the last sentence; and (3) amended subd (d) by (a) substituting "that" for "which" after "the requirements"; and (b) adding the comma after "state board".

Historical Derivation:

(a) Former Wat C § 13025, as added Stats 1949 ch 1549 § 1, amended Stats 1955 ch 1947 § 1, Stats 1959 ch 1299 § 9, Stats 1965 ch 1656 § 2.

(b) Former Wat C § 13025.5, as added Stats 1965 ch 1656 § 3, amended Stats 1967 ch 284 § 146.3.

Cross References:

Legislative intent that Board not adopt enforcement orders against publicly owned dischargers mandating construction costs absent federal financing: *Rev & Tax C § 2209.*

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability Of Judicial Review Of Agency Decisions3".

Certification under *Section 169 of the Internal Revenue Code of 1954,* as amended *(26 USCS § 169):* 23 Cal Adm Code §§ 2360 et seq.

Review by state board of action or failure to act by regional board: 23 Cal Adm Code §§ 2050 et seq.

Law Review Articles:

Control of water quality and water pollution. *45 CLR 586.*

Municipal Storm Water Permitting in California. 40 San Diego LR 245.

Development of the California and Federal water pollution control programs; the California Porter-Cologne Act. *5 UCD LR 265.*

Attorney General's Opinions:

Authority and duty of state board to review action of regional board procedure to be followed in such review. *24 Ops. Cal. Atty. Gen. 266.*

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 5, Art. 2 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Legislative Intent 2. Due Process 3. Contamination Generally 4. Failure to Comply 5. Institution of Proceedings 6. City as Party 7. Exhaustion of Remedies 8. Standard of Review 9. Referral to Review

1. Legislative Intent

It was not legislative intent to place in state water pollution control board or any of its regional boards exclusive power to determine whether nuisance exists and to abate nuisance created by pollution of water. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

2. Due Process

A dairy's due process rights were not violated, even though it was not afforded a hearing before the issuance of a cleanup and abatement order, since a balancing of the relevant factors demonstrated that the dairy was provided due process. First, the order did not impose criminal or civil penalties, nor did it shut down the dairy or otherwise prevent its operation. Second, the hearing procedures provided by Wat Cal § 13320 minimized the risk of an erroneous deprivation of the dairy's interests. Although administrative review was discretionary, a denial of review entitled the party to challenge the order through a petition for mandate in the trial court. The dairy also had an informal opportunity to dispute the water quality control board's determination before the order issued. Finally, the need for immediate action to clean up or abate waste discharge was obvious, since unlawful discharges threatened public health and safety and posed significant risk to the environment. *Machado v. State Water Resources Control Bd. (2001, Cal App 3d Dist) 90 Cal App 4th 720, 109 Cal Rptr 2d 116, 2001 Cal App LEXIS 538.*

3. Contamination Generally

As to contamination of water, only power given to regional water pollution control board is to report fact of contamination to state board and appropriate local health officer, and only power given to state board is to direct any state agency having jurisdiction to take action. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

4. Failure to Comply

If person ordered to correct nuisance or pollution found by regional water pollution control board to exist by virtue of discharge of sewage fails to comply with board's order, only then is it duty of regional board to certify facts and district attorney of county in which discharge of sewage originates, and it is duty of district attorney to seek injunction against persons causing pollution or nuisance. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

5. Institution of Proceedings

Statute contains no provisions through which city or county may institute proceedings before state board. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

There is no provision requiring any county or municipality damaged by public nuisance, or health of whose inhabitants is endangered by such nuisance, to institute any proceedings before either regional water pollution control board or state board. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

Although the California Department of Forestry and Fire Protection had approved a lumber company's amended timber harvest plan, the Department of Forestry did not have exclusive jurisdiction; the California State Water Board was not estopped from exercising its own independent jurisdiction, and ordering the lumber company to monitor water quality in a river, even though the State Water Board did not appeal the Department of Forestry's decision. *Pacific Lumber Co. v. California State Water Resources Control Bd. (2004, Cal App 1st Dist) 116 Cal App 4th 1232, 11 Cal Rptr 3d 378, 2004 Cal App LEXIS 353,* affd *Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal 4th 921, 38 Cal Rptr 3d 220, 126 P3d 1040, 2006 Cal LEXIS 1894.*

6. City as Party

It is not required that city in which public nuisance exists by reason of pollution of waters within its boundaries be made party to proceedings instituted by board of its own motion. *People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145,* superseded by statute as stated in TrafficSchoolOnline, Inc. v. *Clarke (2003, Cal App 2d Dist) 112* Cal App 4th 736, *5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.*

7. Exhaustion of Remedies

The action of a California regional water quality control board in denying a developer's request for exemption from a water discharge prohibition adopted by the regional board, was subject to review by the California Water Resources Control Board pursuant to *Wat. Code, § 13320,* providing that any person aggrieved by the action of a regional board may within 30 days petition the state board for review, and thus the developer failed to exhaust its administrative remedies when it failed to seek state board review of the regional board's order denying it an exemption. *Hampson v. Superior Court (1977, Cal App 4th Dist) 67 Cal App 3d 472, 136 Cal Rptr 722, 1977 Cal App LEXIS 1242.*

Various water agencies exhausted their available administrative remedies prior to filing petitions for writs of mandate to challenge a determination of the regional water quality control board that authorized the continued disposal of municipal waste at a company's landfill site above a groundwater basin and that simultaneously declared the project exempt from the California Environmental Quality Act (CEQA) *(Pub. Resources Code, § 21000* et seq.). Although the water agencies failed to object to the regional board's determination prior to the close of the meeting at which the decision was made, that meeting was simply a regularly scheduled public meeting, not a public hearing, so that no objection was required of the water agencies *(Pub. Resources Code, § 21177,* subd. (a)). Furthermore, by petitioning the state board, the water agencies exhausted the administrative remedy provided by *Wat. Code, § 13320,* subd. (a). In any event, during a prior appeal, the Court of Appeal had already considered the issue of exhaustion involving the same parties, the same agencies, and the same landfill site. Hence the landfill company was collaterally estopped from relitigating the issue. Furthermore, the state board conceded that the water agencies exhausted their administrative remedies; given that the state board was the party protected by the exhaustion doctrine in this instance, that admission was dispositive. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster (1997, Cal App 2d Dist) 52 Cal App 4th 1165, 61 Cal Rptr 2d 447, 1997 Cal App LEXIS 111,* review denied *Azusa Land Reclamation Co. v. Main San Gabriel Basis Watermaster (1997, Cal) 1997 Cal LEXIS 2874.*

Phrases "for which the state board denies review" and "not later than 30 days from the date on which the state board denies review" in *Wat C § 13330(b)* plainly indicate the legislature's intent that the aggrieved party need only exhaust its State Water Resources Control Board administrative review remedy. That remedy is separately set forth in *Wat C § 13320(a),* which authorizes any person aggrieved by a regional water quality control board's action or failure to act under specified statutory provisions to petition the state board, within specified time limits, for review of that action or failure to act. *Schutte & Koerting, Inc. v. Regional Water Quality Control Bd., San Diego Region (2007, 4th Dist) 2007 Cal App LEXIS 2146.*

8. Standard of Review

Under *Wat. Code, § 13330,* providing the procedure to review decisions of the State Water Resources Board, the review of an action of a regional water quality control board is governed by *Wat. Code, § 13320,* providing procedures for

review by the State Water Resources Control Board, and must be based on the court's independent judgment of the evidence in the record, only under the enumerated provisions. Thus, the state board's review, on its own motion, of a regional board's failure to act in revising a basin plan was not subject to the independent judgment standard of review. *Marina County Water Dist. v. State Water Resources Control Bd. (1984, Cal App 1st Dist) 163 Cal App 3d 132, 209 Cal Rptr 212, 1984 Cal App LEXIS 2886.*

9. Referral to Review

Wat. Code, § 13320, authorizing a person aggrieved by an action of a Regional Water Quality Control Board to "petition the state board to review" the action, gives the state board discretion to decline to review regional board orders. Accordingly, when the state board denied a miner's petition for review of a regional board's orders to abate water pollution, those orders became final and the regional board was free to seek court enforcement of them. *People ex rel. Cal. Regional Wat. Quality Control Bd. v. Barry (1987, Cal App 3d Dist) 194 Cal App 3d 158, 239 Cal Rptr 349, 1987 Cal App LEXIS 2030.*