

**ITEM 6**  
**TEST CLAIM**  
**FINAL STAFF ANALYSIS**  
**AND**  
**PROPOSED STATEMENT OF DECISION**

Los Angeles Regional Water Quality Control Board  
Resolution No. R4-2008-012, adopted December 11, 2008,  
approved by United States Environmental Protection Agency  
April 6, 2010.

*Upper Santa Clara River Chloride Requirements*

10-TC-09

Santa Clarita Valley Sanitation District of Los Angeles County, Claimant

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Attached is the proposed statement of decision for this matter. This proposed statement of decision also functions as the final staff analysis, as required by section 1183.07 of the Commission's regulations.

**EXECUTIVE SUMMARY**

**Overview**

This test claim alleges a reimbursable state mandate resulting from Resolution R4-2008-012, adopted December 11, 2008 by the California Regional Water Quality Control Board, Los Angeles Region (Regional Board). To assist the reader, there is a glossary of frequently used water quality related terms and acronyms at the end of this document.

The Resolution pled in this test claim amends the prior Basin Plan for the Santa Clara River, which imposed a maximum pollutant concentration for chloride, or "total maximum daily load" (TMDL) of 100 mg/L, and pollutant discharge limitations for chloride, or "waste load allocations" (WLAs), of 100 mg/L for the Santa Clarita Valley Sanitation District's (District) two Water Reclamation Plants (WRPs) that discharge into the river. The test claim Resolution includes a revised, less stringent TMDL and WLAs, providing greater flexibility to the District with respect to its chloride discharges into the river. The Plan, as amended by the test claim Resolution, also significantly reduced the costs for the District to comply with the TMDL and WLAs, as compared to the prior TMDL. The TMDL, as revised by the test claim Resolution, calls for the implementation of an Alternative Water Resources Management program (AWRM), in order to meet conditional "site-specific objectives" (SSOs) for water quality in Reaches 4B, 5, and 6 of the Santa Clara River, and conditional WLAs of 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B for the District's two WRPs.

The District alleges that meeting the SSOs and WLAs contained in the Resolution will require significant advanced treatment and other technological upgrades, and a number of other water supply control measures to control chloride concentrations in the Santa Clara River, especially

during periods of higher concentration in the water supply and groundwater (i.e., during periods of lower precipitation). The District alleges that these upgrades and control measures result in new costs of approximately \$250.7 million.

The test claim Resolution R4-2008-012 also includes a number of Implementation Tasks, consisting primarily of requirements to perform technical and scientific studies of the surface and groundwater, and evaluation of appropriate chloride thresholds, which the District alleges impose costs of approximately \$6.6 million.

Staff recommends the Commission deny this test claim on the following grounds: (1) several of the Implementation Tasks included in the TMDL are not new; (2) accelerating the implementation of final waste load allocations (discharge limitations) by one year is not a new program or higher level of service, and no increased costs are alleged; (3) the Alternative Water Resources Management program does not impose a new program or higher level of service, but provides for a lower level of service, and reduced costs with respect to prior law; and (4) even if the Alternative Water Resources Management program did impose a new program or higher level of service, there are no costs mandated by the state, because the claimant has sufficient fee authority to cover the costs of any required activities.

### Background

The federal Clean Water Act (CWA) states that it is the policy of Congress “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...” The CWA employs two primary mechanisms for the control and prevention of water pollution: identification and standard-setting for bodies of water, and identification and regulation of dischargers of pollutants. Section 1313 of the CWA provides for standard-setting for both intra- and inter-state bodies of water, “such as to protect the public health or welfare, enhance the quality of water,” and take into consideration the waters’ “use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.” Section 1313(d) provides that each state shall identify those waters for which the applicable water quality standards are not being met, and establish “the total maximum daily load [TMDL]...at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” A TMDL is defined as the sum of the amount of a pollutant allocated to all point sources (*i.e.*, the sum of all WLAs relative to the water body), plus the amount of the pollutant allocated for nonpoint sources and natural background; a TMDL should be set for each pollutant identified by the [EPA] Administrator, and constitutes, essentially, a plan or objective setting the amount of a pollutant that will attain the water quality standard necessary for the protection of beneficial uses.<sup>1</sup> The CWA also expressly provides that effluent limitations for a point source discharger may not be renewed or revised to contain limitations less stringent than the previous discharge permit.

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<sup>1</sup> Code of Federal Regulations, title 40, section 130.2.

## Regulatory History

The Santa Clara River is the largest river system in southern California that remains in a relatively natural state. The River originates in the San Gabriel Mountains in Los Angeles County, runs through Ventura County, and flows into the Pacific Ocean between the cities of San Buenaventura (Ventura) and Oxnard. Reaches 5 and 6 of the Santa Clara River are located upstream of the Blue Cut gauging station near the Los Angeles/Ventura County line, between the cities of Fillmore (in Ventura County) and Santa Clarita in Los Angeles County; Reach 4B is in Ventura County.

The Regional Board first established water quality objectives for chloride in the Santa Clara River in 1975, and in 1978 the Board set the water quality objectives for chloride at 100 mg/L for both reaches 5 and 6. In 1998 the Santa Clara River was listed for the first time as an impaired water body under section 1313(d) of the federal Clean Water Act: Reaches 5 and 6 of the Upper Santa Clara River did not meet the 100 mg/L water quality objective, and “[b]eneficial uses of the Upper Santa Clara River, including agricultural supply water and groundwater recharge were listed as impaired.” The Valencia and Saugus Water Reclamation Plants, which are owned and operated by claimant, Santa Clarita Valley Sanitation District, are responsible for approximately 70 percent of the chloride loading to the River. The Valencia and Saugus WRPs were not designed to remove chloride from waste water, and in fact have been contributing to elevated chloride concentrations due to the use of chlorine disinfection.

In October of 2002, the Regional Board adopted a TMDL for chloride in the Santa Clara River, as required under section 1313(d) of the CWA for any impaired waters, which included WLAs of 100 mg/L chloride for the two WRPs that discharge into the River. The TMDL was to be fully implemented within two and one half years. The District appealed the decision to the State Water Resources Control Board (SWRCB), which remanded the TMDL to the Regional Board in 2003, for reconsideration of various items including: (1) an extension of the interim effluent limits for chloride, and (2) re-evaluation of the water quality objectives, including whether an alternate water supply to agricultural users would be appropriate, the beneficial uses to be protected, the quality of the imported water supply, and the impacts of drought periods. In response, the Regional Board adopted Resolution No. 03-008 which included interim WLAs and an implementation plan for the chloride TMDL, extending the time for full implementation of the limits to thirteen years and calling for various studies.<sup>2</sup>

The TMDL was amended again by Resolution No. 04-004, approved by the EPA on April 28, 2005, which added a number of special studies and analyses “to characterize the sources, fate, transport, and specific impacts of chloride in the Upper Santa Clara River, including impacts to downstream reaches and underlying groundwater basins.”<sup>3</sup> The TMDL was amended again by Resolution 2006-016, approved by EPA June 12, 2008, which shortened by two years the time for completing the special studies and implementing the control measures required by the TMDL. In 2008, the Regional Board adopted the test claim Resolution, which shortened the time for full implementation by an additional year, and relaxed the chloride requirements as described in the next paragraph.

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<sup>2</sup> See Exhibit B, LA Regional Board Comments, at p. 523-524 [Attachment 58].

<sup>3</sup> Exhibit B, LA Regional Board Comments, at p. 13.

## Alleged Executive Order, Resolution No. R4-2008-012

Between 2005 and 2008 several special studies were conducted, as required under the TMDL adopted in Resolution No. 04-004. “The completion of these TMDL special studies...has led to the development of an alternative TMDL implementation plan that addresses chloride impairment of surface waters and degradation of groundwater.”<sup>4</sup> The alternative plan, which was adopted by the Regional Board in a basin plan amendment effected by Resolution No. R4-2008-012 (the alleged executive order in this test claim), is known as the Alternative Water Resources Management program (AWRM); the AWRM includes:

...the development of site-specific objectives [SSOs] for chloride while protecting beneficial uses; chloride source reduction actions through the removal of self-regenerating water softeners; a switch from chlorine-based disinfection to ultraviolet disinfection at both WRPs; chloride load reduction actions through advanced treatment (like reverse osmosis and microfiltration) of a portion of the Valencia WRP’s effluent; supplemental water to enhance assimilative capacity of local groundwater or surface water; alternative water supply to protect salt-sensitive agricultural beneficial uses during drought conditions; construction of extraction wells and pipelines; and expansion of recycled water uses with[in] the Santa Clarita Valley.<sup>5</sup>

The new SSOs adopted for chloride concentration are 150 mg/L in Reaches 5 and 6, and 117 mg/L for Reach 4B, which is adjusted to 130 mg/L when the supply water has chloride levels above 80 mg/L. The new conditional WLAs for the Valencia and Saugus facilities are also 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B. Resolution No. R4-2008-012 provides for the construction and implementation of advanced treatment (reverse osmosis desalination) at the Valencia facility, as well as a number of water supply control measures designed to attain the site specific objectives as a condition of the relaxed TMDL and WLAs. The newly relaxed requirements are conditioned upon “the Claimant’s full and ongoing implementation of the AWRM program.”<sup>6</sup> If claimant fails to implement or chooses not to implement AWRM program, the TMDL reverts to the prior TMDL and WLAs of 100 mg/L. Resolution No. R4-2008-012 was approved by SWRCB, the Office of Administrative Law (OAL), and finally the U.S. EPA on April 6, 2010.

### **Procedural History**

This test claim was filed by the District on March 30, 2011. On July 29, 2011, the Regional Board filed comments on the test claim. The Department of Finance (Finance) filed comments on the test claim, dated July 29, 2013. On September 28, 2011, the District filed rebuttal comments.

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<sup>4</sup> Exhibit B, LA Regional Board Comments, Attachment 63, at p. 591 [Resolution R4-2008-012, at paragraph 15].

<sup>5</sup> Exhibit B, LA Regional Board Comments, at p. 15. See also, Exhibit A, Test Claim, at p. 12.

<sup>6</sup> Exhibit B, LA Regional Board Comments, at p. 17. See also, Exhibit A, Test Claim, at p. 11 [“If the AWRM program is not timely implemented, the water quality objectives for chloride will revert back from the conditional SSOs to the current levels of 100 mg/L.”].

On September 20, 2013, Commission staff issued a draft staff analysis and proposed statement of decision. On October 7, 2013, Finance submitted written comments on the draft staff analysis. Also on October 7, 2013, the District requested an extension of time to file comments, which was granted for good cause. On October 9, 2013, the Regional Board submitted a request for extension of time and postponement of the hearing, which was granted for good cause. Also on October 9, 2013, public comments were received from Ms. Lynda Cook of Santa Clarita. On October 18, 2013, the City of Santa Clarita submitted written comments on the draft staff analysis. On November 1, 2013, both the Regional Board and the District submitted written comments on the draft staff analysis.

**Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

**Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

<b>Subject</b>	<b>Description</b>	<b>Staff Recommendation</b>
Implementation Tasks 4, 5, 6, 7, 8, 9, 10a-d,17a (Resolution R4-2008-012, Attachment B), and the default waste load allocations of 100 mg/L for both water reclamation plants operated by the District.	The District is required to conduct a literature review to evaluate an appropriate chloride threshold; develop a groundwater/surface water interaction model to evaluate impacts of the chloride TMDL; evaluate the appropriate chloride threshold for the protection of sensitive agricultural supply water and endangered species protection; develop site-specific objectives for chloride for sensitive agriculture; develop an anti-degradation analysis for revision of the chloride	<i>Deny</i> – The required activities do not impose a new program or higher level of service. Implementation Tasks 4, 5, 6, 7, 8, and 9, 10a-d, and 17a-e and the default TMDL and WLAs were required by prior law. The 100 mg/L TMDL, including 100 mg/L WLAs, have been in effect since Resolution 02-018, which was adopted by the Regional Board October 24, 2002, remanded and revised and adopted again by the Regional Board on May 6, 2004, including tasks 4-10, and approved by U.S.

	<p>objectives; develop pre-planning report on compliance to meet different hypothetical final waste load allocations; evaluate alternative water supplies; analyze feasible compliance measures; complete an environmental impact report, engineering design, permits, construction, and begin operation of advanced treatment facilities to comply with final effluent permit limits for chloride.</p> <p>If the AWRM is not fully and continually implemented, the prior TMDL is triggered, including the default WLAs of 100 mg/L chloride.</p>	<p>EPA April 28, 2005. Task 17a was added by Resolution R4-2006-016, approved by EPA June 12, 2008. In addition, these implementation tasks were either completed or underway at the time the 2008 Resolution was adopted. And, the EIR, design, construction, and operation of advanced treatment facilities is a lower level of service than that required under prior law, according to the District's assertions in the record. Therefore these activities are not new, and by definition cannot impose a reimbursable <i>new</i> program or higher level of service.</p>
<p>Implementation Task 20 (Resolution R4-2008-012, Attachment B).</p>	<p>Implementation task 20 accelerates the implementation period for final WLAs by one year. The prior TMDL provided for interim WLAs to apply for no more than 11 years, Resolution R4-2008-012 provides for interim WLAs to apply for no more than 10 years.</p>	<p><i>Deny</i> – Implementing the underlying final WLAs one year sooner is not a new program or higher level of service; the final WLAs are not made more stringent or more costly by this resolution, and a mere increase in costs is not tantamount to a higher level of service in any event. Furthermore, the claimant has not alleged increased costs due to implementing final WLAs one year sooner.</p>
<p>Conditional site-specific objectives and waste load allocations of 117 mg/L for Reach 4B, and 150 mg/L for Reaches 5 and 6.</p>	<p>Attachment B to Resolution R4-2008-012 provides for conditional SSOs and WLAs for the two WRPs of 117 mg/L for Reach 4B, and the water discharged by the WRPs into Reach 4B; and 150 mg/L for Reaches 5 and 6 and the water discharged into Reaches 5 and 6. The SSOs and WLAs contemplate facilities upgrades and advanced treatment</p>	<p><i>Deny</i> –The Conditional SSOs and WLAs, including all facilities upgrades contemplated to achieve the standards, are a lower level of service than was required under the prior TMDL, and result in reduced costs to claimant.</p>

	technologies at the two WRPs, and outline certain water management activities to reach and maintain the SSOs and WLAs, including during periods of higher chloride concentrations in the supply water.	
Costs incurred as a result of the Implementation Tasks and AWRM steps to comply with the SSOs and WLAs, totaling approximately \$257 million.	The facilities upgrades and other technological controls and water management activities are estimated to result in approximately \$250 million in increased costs. The Implementation Tasks are alleged to result in approximately \$7 million in increased costs.	<i>Deny</i> – Even if the test claim executive order, Resolution R4-2008-012, imposed a new program or higher level of service resulting in state-mandated increased costs, such costs would not be reimbursable because the District has sufficient fee authority to cover the costs of any additional activities, unconstrained by the voter approval requirements of Proposition 218.

**Analysis**

Staff finds that this test claim should be denied on the following grounds: (1) several of the Implementation Tasks included in the TMDL are not new; (2) accelerating the implementation of final waste load allocations (discharge limitations) by one year is not a new program or higher level of service, and no increased costs are alleged; (3) the Alternative Water Resources Management program does not impose a new program or higher level of service, but a lower level of service, and reduced costs with respect to prior law; and (4) even if the Alternative Water Resources Management program did impose a new program or higher level of service, there are no costs mandated by the state, because the claimant has sufficient fee authority to cover the costs of any required activities.

**A. Threshold Issues: the Santa Clarita Valley Sanitation District is an Eligible Claimant Before the Commission; Resolution R4-2008-012 is an Executive Order within the Meaning of Article XIII B, Section 6; and the Test Claim is Timely Filed.**

1. The Santa Clarita Valley Sanitation District is an eligible claimant before the Commission.

Staff finds that SCVSD receives *at least some amount* of its funding from local taxes, and is subject to an appropriations limit for at least a portion of its revenues, and is therefore an eligible claimant. The State Controller’s Special Districts Annual Report for 2010-2011 indicates that SCVSD was subject to an appropriations limit for approximately one-third of its total revenue (nearly \$11 million), and made total appropriations subject to the appropriations limit in the amount of \$5,778,450. While a substantial amount of the District’s revenue comes from user

fees and other sources not considered “proceeds of taxes,” it cannot be said categorically that the District’s revenue is not subject to the limitations of articles XIII A and XIII B.

Based on the foregoing, the staff finds that the Santa Clarita Valley Sanitation District is an eligible claimant before the Commission.

2. The Regional Water Board’s order is an executive order within the meaning of Article XIII B, section 6.

Article XIII B, section 6 provides 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 programs or increased level of service...” Government Code section 17514 provides that costs mandated by the state includes “any increased costs which a local agency or school district is required to incur...as a result of...any executive order implementing any statute...which mandates a new program or higher level of service of an existing program...” Government Code section 17516 defines an “executive order” as “any order, plan, requirement, rule, or regulation issued by...[a]ny agency, department, board, or commission of state government.” Because Resolution No. R4-2008-012 is an order of a state board, it is an executive order for purposes of Government Code 17516 and may result in a reimbursable state-mandated program under article XIII B, section 6 if all required mandates elements are established.

3. The test claim was timely filed.

Section 17551 provides that “[l]ocal agency and school district 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.” Section 1183 of the Commission’s regulations states that “within 12 months,” for purposes of test claim filing, “means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the claimant.”

Finance has raised the statute of limitations found in section 17551, arguing that the test claim was filed on March 30, 2011, while the Resolution had an effective date of December 11, 2008. Finance further argues that “all claimed costs for that fiscal year would have had to be incurred after March 30, 2010 to not be time barred.”

Finance’s first point, that the effective date of the Resolution would place this test claim beyond the time bar, has some merit. An effective date of December 11, 2008 would require that a valid test claim be filed by June 30, 2010. However, because TMDLs and waste load allocations must be approved by the SWRCB, OAL, and the Administrator of U.S.EPA,<sup>7</sup> there is an open question, for purposes of applying section 17551, whether the Resolution at issue is “effective” on the date it was approved by the Regional Board or on the date that it is approved by the Administrator (here, April 6, 2010).

The cover page of the test claim indicates that the Resolution was effective December 11, 2008, as Finance asserts. However, the Regional Board’s comments on the test claim state that the Resolution was effective April 6, 2010, the date of EPA approval. In addition, a later settlement

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<sup>7</sup> Exhibit B, LA Regional Board Comments, at p. 8 [citing 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c)]. See also, Exhibit A, Test Claim, at p. 6.



agreement between the District and the Regional Board is in accord, stating that the Resolution became effective April 6, 2010.<sup>8</sup> An effective date of April 6, 2010, would require that a timely filed test claim be submitted on or before June 30, 2011. This test claim was filed March 30, 2011, and therefore was filed before the expiration of the statute of limitations, based on the effective date agreed upon by the parties. Based on the foregoing, staff finds that this test claim was timely filed.

**B. The Regional Water Board's Resolution and Order does not Impose a New Program or Higher Level of Service within the Meaning of Article XIII B, Section 6.**

The District states that "Regional Board Resolution No. R4-2008-012, the revised TMDL, requires: (1) compliance with specific waste load allocations that will also be incorporated into the Saugus and Valencia WRPs' NPDES permits; and (2) specific 'implementation tasks' necessary for compliance." The Implementation Tasks, along with the final waste load allocations, "are the subject of this test claim."<sup>9</sup> Attachment B to Resolution R4-2008-012 outlines the conditional SSOs for Reaches 4B, 5, and 6, and conditional WLAs for the water discharged from the Valencia and Saugus WRPs to Reaches 4B, 5, and 6. The WLAs for the District's WRP facilities are based on, and numerically identical to, the SSOs for the respective reaches (117 mg/L for Reach 4B, and the discharge into Reach 4B; 150 mg/L for Reaches 5 and 6, and for the discharge into Reaches 5 and 6). All other point sources are assigned WLAs equal to 100 mg/L. Attachment B also outlines the operation of reverse osmosis treatment at the Valencia WRP, the provision of supplemental water to Reach 4B when chloride concentrations exceed 117 mg/L, and the design and construction of advanced treatment facilities. In addition, Attachment B outlines a number of implementation tasks, primarily consisting of technical studies to assess the appropriate threshold for chloride to protect agricultural uses and to determine how best to reach that threshold, including preparation of an Environmental Impact Report (EIR) for the advanced treatment facilities and other upgrades necessary to meet the SSOs and WLAs.

The District has alleged the required activities resulting from Resolution R4-2008-012 impose costs of approximately \$257 million. Though claimant alleges that this \$257 million constitutes *increased costs*, claimant does acknowledge that the costs would be nearly double, approximately \$500 million, if it operated under the prior TMDL. The analysis below concludes that none of the Implementation Tasks, or the AWRM program elements, of Resolution R4-2008-012 constitutes a new program or higher level of service, because the alleged activities and costs either are not new or they provide for a lower level of service and reduced costs when compared to prior law. In addition, the claimant has fee authority sufficient to cover the costs of any required activities and, thus, pursuant to Government Code section 17556(d), there can be no costs mandated by the state.

1. Some of the Implementation Tasks described in the Resolution are not new.

Implementation Tasks 4, 5, 6, 7, 8, 9, and 10a-d of Resolution R4-2008-012 are found also, in nearly identical language, in Resolution 04-004, and again in Resolution R4-2006-016. These prior TMDLs were approved by EPA on April 28, 2005, and June 12, 2008, respectively. Additionally, Implementation Tasks 4-9 are listed in the revised TMDL as having completion

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<sup>8</sup> Exhibit X, Settlement Agreement, at p. 4.

<sup>9</sup> Exhibit A, Test Claim, at p. 13.

dates *prior to* the adoption and approval of the 2008 Resolution. Moreover, these tasks had in fact *been completed* prior to the adoption of the revised TMDL incorporating the AWRM: the Resolution states that “[t]he Santa Clarita Valley Sanitation District (SCVSD) has completed all of the necessary special studies required by the Chloride TMDL (TMDL Task Nos 3, 4, 5, 6, 7, 8, 9, 10b, and 10c).” Therefore none of these implementation tasks, or the costs alleged, are reimbursable, both because they are not new, and because the costs incurred are outside the period of eligibility for this test claim (prior to July 1, 2009).

Implementation Task 17a, “Implementation of Compliance Measures, Complete Environmental Impact Report...” was required by identical language in Resolution R4-2006-016. Resolution R4 2006-016 is stated as having an effective date (presumably meaning the date approved by the U.S. EPA) of June 12, 2008. It is unknown, from the test claim exhibits, or any other information in the record, exactly when costs might first have been incurred to complete the Environmental Impact Report; but the direction to implement compliance measures and to complete an EIR is not *new*, with respect to prior law.<sup>10</sup> In fact, claimant was required to prepare the draft EIR by May 4, 2010 under prior law and was fined “for the failure to complete Wastewater Facilities Plans and Programmatic Environmental Impact Reports by the required due date in 2011.”<sup>11</sup> Resolution R4-2006-016, which first required this activity, was not pled in this test claim.

Finally, the default TMDL, including WLAs of 100 mg/L for the Saugus and Valencia WRPs, which takes effect “if the District cannot comply with the AWRM program,” is not a new requirement. The Regional Board adopted a TMDL for Reaches 5 and 6 of the Santa Clara River in 2002, “which became effective May 4, 2005,” and includes WLAs of 100 mg/L for Valencia WRP and 100 mg/L for Saugus WRP.”

In comments submitted on the draft staff analysis, the District argues that the test claim Resolution is the result of a years-long administrative appeal and negotiation process, and that the prior TMDLs are “part and parcel of the 2008 TMDL.” The District argues that “[t]he proper measure of whether the TMDL is a new or higher level of service is to compare the TMDL’s requirements with the existing or pre-TMDL requirements.” The District’s reasoning does not comport with existing mandates law, and does not change the above analysis. The prior TMDLs, including the implementation tasks and the effluent limitations, were approved by the State Water Resources Control Board and the U.S. EPA, and are therefore analyzed as “prior law,” for purposes of determining whether the test claim Resolution imposes a new program or higher level of service.<sup>12</sup>

Based on the foregoing, staff finds that Implementation Tasks 4, 5, 6, 7, 8, 9, 10a-d, and 17a, and the waste load allocations, are not new, but rather were required by prior law. Therefore none of these provisions imposes a state-mandated new program or higher level of service.

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<sup>10</sup> Resolution R4-2006-016.

<sup>11</sup> LA Regional Board, Enforcement News, November 26, 2012.

<sup>12</sup> *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

2. Implementation Task 20 only accelerates the schedule of implementation of final waste load allocations and is not a new program or higher level of service resulting in increased costs mandated by the state.

Implementation Task 20 shortens the applicable period of the interim WLAs for the Saugus and Valencia WRPs from 11 years to 10 years, commencing with the effective date of the 2002 TMDL. The interim WLAs are designed to accommodate the time needed for the WRPs to implement desalination and other chloride reduction improvements to meet the final WLAs. For the Saugus WRP, the interim WLA is described as “the sum of State Water Project treated water supply concentration plus 114 mg/L, as a twelve month rolling average,” but not to exceed 230 mg/L. For the Valencia WRP, the interim WLA is described as “the sum of State Water Project treated water supply concentration plus 134 mg/L, as a twelve month rolling average,” but not to exceed 230 mg/L. There is no new program inherent in shortening the time frame for the interim WLAs. The requirements of the interim WLAs remain the same, but are shortened, and the final WLAs attach one year sooner. It may be argued that it costs more to implement the final WLAs one year sooner, but this change does not of itself constitute a new program or higher level of service.

The court of appeal in *Long Beach Unified School District* declared that “[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.*” The Supreme Court has also spoken on the requirement of a new program, in terms often repeated in later decisions: “We recognize that, as its made indisputably clear from 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.*” Finally, not only is an increase in costs not tantamount to a higher level of service, but there is no evidence in the record of the incremental cost increase which might be alleged based on accelerating the implementation of the final WLAs by one year.

In comments on the draft staff analysis, the District argues that “[j]ust as accelerating a car is a higher level of speed, accelerating a compliance schedule is a higher level of service.” The District argues that “reliance on case law for the proposition that an accelerated compliance schedule’s increased costs are ‘not tantamount to a higher level of service’ is misplaced.” The District argues that the cases are distinguishable. Indeed, the cases are distinguishable; in both *Long Beach Unified* and *County of Los Angeles* the courts found a reimbursable state mandate. Here, staff finds none; the activities required to implement the final WLAs are not changed. The District merely experiences costs to complete the activities one year sooner.

Based on the foregoing, Implementation Task 20 does not impose any new state mandated activities and does not result in a new program or higher level of service.

3. The Alternative Water Resources Management program is not a new program or higher level of service.

The California Supreme Court, in *County of Los Angeles I*, articulated a multi-faceted test for “new program or higher level of service:” reimbursement requires (1) a new task or activity; (2) which constitutes an increase in service as compared to prior law; (3) and which either provides a service to the public, or imposes requirements uniquely upon government, rather than upon all persons and entities equally.

The Regional Board argues that the test claim executive order, Resolution R4-2008-012, cannot impose a new program or higher level of service because it “amended the Basin Plan to, among other things, adopt site-specific objectives for chloride in the Santa Clara River that are *less stringent* than the generally applicable water quality objectives that apply to other major dischargers to the Santa Clara River...” The Regional Board argues: “thus, if anything, the 2008 Resolution imposes a *lower level of service* in order to make it less expensive for the Claimant to implement” the TMDL. In 2002, the 100 mg/L objective was incorporated into a TMDL, pursuant to the impairment listing of certain reaches of the Santa Clara River, and the threat to salt-sensitive agriculture uses both within Reaches 5 and 6 and downstream. Both the District and the Regional Board agree that the AWRM contains “relaxed” requirements, as compared with the current water quality objectives.

In addition, both the District and the Regional Board recognize that under the prior TMDL “implementation actions to attain this level would require advanced treatment – that is, reverse osmosis – of the full effluent from the Saugus *and* Valencia plants with discharge into the ocean through a 43-mile brine line.” The District estimated the costs of the facilities upgrades and other compliance tasks at approximately \$500 million. Under the AWRM, reverse osmosis desalination is only required at the Valencia WRP, and the waste is permitted to be disposed of through deep well injection. The District estimates that implementing the advanced treatment upgrades at only one of the two facilities, along with other tasks, will cost just over half of the amount of compliance with the prior TMDL, or approximately \$250 million.

Staff finds that there is nothing in the AWRM that imposes a higher level of service on this claimant. Resolution R4-2008-012 calls for the implementation of less-stringent requirements than under prior law, which the District has acknowledged will be less expensive to implement. In comments on the draft staff analysis, the District continues to stress that the proper test should be to compare the pre-TMDL requirements with the requirements of the Resolution; in that view the requirements of the Resolution are “far more stringent than the pre-TMDL standard.” There is no support in mandates law for this reasoning, and staff’s conclusion is unchanged.

Based on the foregoing, staff finds that Resolution R4-2008-012, which includes the AWRM, does not impose a new program or higher level of service, and the costs and activities thereunder should be denied.

**C. Even if Resolution R4-2008-012 Did Constitute a State Mandated New Program or Higher Level of Service, it Would Not Impose Costs Mandated by the State Under Section 17556(d) Because the Claimant has Sufficient Fee Authority to Fully Fund the Costs of the Required Activities.**

Government Code section 17556(d) provides that the Commission “shall not find costs mandated by the state, as defined in Section 17514...if...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.”

The California Supreme Court held, in *County of Fresno v. State of California*, that “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.*” Accordingly, in *Connell v. Superior Court of Sacramento County*, the Santa Margarita Water District, among others, was denied reimbursement on the basis of its authority to impose fees on water users. The Districts argued

that they did not have “sufficient” authority to levy such fees, because the cost of reclaimed water would make it impractical to market to the users if the Districts were forced to raise fees. The court concluded that the “Districts do not demonstrate that anything in Water Code section 35470 limits the authority of the Districts to levy fees ‘sufficient’ to cover their costs,” and that “[t]hus, the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry.” Similarly, in *Clovis Unified School District v. Chiang*, the court found that the Controller’s office was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts’ authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court stated: “[t]o the extent a local agency or school district ‘has the authority’ to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.” The court endorsed the Controller’s view that “‘Claimants can choose not to require these fees, but not at the state’s expense.’”

Here, the Regional Board argues that the District “is authorized to impose and increase fees and charges for wastewater management services under Health and Safety Code section 5471.” The District argues that it is constrained by the “the Proposition 218 process...[and] fierce public opposition.” The District further argues that *Connell*, discussed above, “ignored the then-recent passage of Proposition 218.”

Health and Safety Code section 5471 provides “authority,” within the meaning of section 17556(d), “to prescribe, revise and collect, fees tolls, rates, rentals, or territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.”

Proposition 218, adopted by the voters in 1996, added articles XIII C and XIII D to the Constitution; the plain language of article XIII D, section 6 provides that an agency seeking to impose or increase fees must identify the parcels and the amount proposed, and must provide written notice by mail to the record owners of the identified parcels, including notice of a public hearing, at which the agency is required to “consider all protests.” Section 6 further provides that if written protests are submitted by more than half of the owners of parcels affected, a fee or assessment may not be raised. In addition, new or increased fees are required to “not exceed the funds required to provide the property related service;” “not be used for any purpose other than that for which the fee or charge was imposed;” “not exceed the proportional cost of the service attributable to the parcel;” and be “actually used by, or immediately available to, the owner of the property in question.” Finally, voter approval is required “[e]xcept for fees or charges for sewer, water, and refuse collection services.”

The District asserts that the case law related to fee authority is no longer on point “because the most significant cases predate the passage of [Proposition 218].” The District asserts that it “attempted to implement the Proposition 218 process, but the elected public officials could not support the proposed rate increase in the face of fierce public opposition.” The District claims that the “political realities...limit the ability of local government to raise fees in a way that makes it impossible for a local agency to raise sufficient funding for state mandate projects.”

Here, the fee authority is that of a sanitation district, and relates to the fees charged to users of the sewerage system; based on the plain language of article XIII D, section 6, voter approval is not required for increases to water and sewer rates. However, the other requirements of XIII D do apply, requiring the District to ensure that any fee increase is noticed to the affected property

owners, that the increase is directly related to and proportional to the service provided, and that at a public hearing the District considers all protests. In addition, the voters have the power, either by referendum, or by written protests of a majority of owners of the affected parcels, to defeat a fee increase. Only the “written protests” provision is raised by the parties’ comments. The Regional Board argues that there are nearly 69,000 parcels connected to the District’s sewerage system, and therefore “at least 34,449 written protests” would be a majority required under XIII D to defeat a rate increase. At the May 26, 2009 and July 27, 2010 hearings the District received “203 written protests and 7,732 written protests, respectively.”

The District does not dispute the number of written protests needed to defeat a fee increase, or the number received (the Regional Board’s argument assumes, without evidence, that all 69,000 parcels represent a single voting property owner); rather the District argues that the District’s Board “quite reasonably believed that this large rate increase would be rejected if challenged by initiative.”<sup>13</sup> The District implies that because an initiative to overturn the fee increase would qualify for the ballot with approximately 6,500 votes, the 7,732 written protests “exceeded the number of signatures needed to qualify an initiative that would overturn the rate increase.”<sup>14</sup>

But written protests are not tantamount to an initiative petition, and an initiative petition is not a successful referendum. The District’s board “declined to adopt the proposed rate increases based on the expectation that any substantive rate increase would be overturned by way of referendum.” Nothing in the California Constitution requires a local legislative body to bend to political pressure. As the Regional Board concluded, “[t]he Claimant cannot rely on mere speculation as to what could happen as a defense to the fee increase exception” of section 17556(d).

It is true, as the District argues, that *Connell* did not discuss Proposition 218, because the water districts did not allege that their authority to raise fees was impacted by Proposition 218. The water districts in *Connell* instead urged an interpretation of “authority” under section 17556(d) that required a “practical ability in light of surrounding economic circumstances,” and the court rejected that interpretation. Here, as in *Connell*, “the plain language of the statute defeats the Districts’ position.” The District here would have the Commission recognize political undesirability as an element of the District’s “authority” under Health and Safety Code section 5471 to raise fees. In the same way that the court in *Connell* declined to find that economic considerations undermine the “sufficiency” of the water districts’ authority to raise fees, staff recommends that the Commission here decline to make a finding that *political opposition* undermines the authority of a sanitation district to raise fees.

In comments submitted on the draft staff analysis, the District continues to stress its concern that the District will be unable, in the face of Proposition 218 “protests and referenda on the rates necessary to support the TMDL facilities,” to raise revenue sufficient to cover the costs of the mandate. However, there is still no credible argument that, as a matter of law, the District’s fee authority is insufficient. Staff’s analysis is unchanged.

Based on the foregoing, staff finds that the District has not incurred increased costs mandated by the state, pursuant to section 17556(d).

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<sup>13</sup> Exhibit D, Claimant Rebuttal Comments, at p. 11.

<sup>14</sup> *Ibid.*

**Conclusion**

Based on the foregoing discussion and analysis, staff concludes that Resolution No. R4-2008-012, adopted December 11, 2008, by the Los Angeles Regional Water Quality Control Board, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

**Staff Recommendation**

Staff recommends that the Commission adopt the proposed statement of decision to deny this test claim.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Los Angeles Regional Water Quality Control Board Resolution No. R4-2008-012, adopted December 11, 2008; approved by United States Environmental Protection Agency April 6, 2010

Filed on March 30, 2011

By Santa Clarita Valley Sanitation District of Los Angeles County, Claimant.

Case No.: 10-TC-09

*Upper Santa Clara River Chloride Requirements*

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 January 24, 2014)

**PROPOSED STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. [Witness list will be included in the final statement of decision.]

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 sections 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

**Summary of the Findings**

This test claim alleges a reimbursable state mandate resulting from Resolution R4-2008-012, adopted December 11, 2008 by the Regional Water Quality Control Board for the Los Angeles region (Regional Board). To assist the reader, there is a glossary of frequently used water quality related terms and acronyms at the end of this document. The Resolution amended the prior Basin Plan, which imposed a maximum chloride concentration limit, or “total maximum daily load” (TMDL) of 100 mg/L for the Santa Clara River and chloride concentration discharge limits, or “waste load allocations” (WLAs) of 100 mg/L for the District’s two Water Reclamation Plants (WRPs), to include a revised, less stringent, TMDL and WLAs, providing greater flexibility to the District with regard to chloride discharges into the river and significantly reducing the costs for the District to comply with the TMDL and WLAs for the Upper Santa Clara River. The revised TMDL calls for the implementation of an Alternative Water Resources Management program (AWRM), in order to meet conditional site-specific objectives (SSOs) for



water quality in Reaches 4B, 5, and 6 of the river, and conditional WLAs of 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B for the District's two WRPs.

The District alleges that meeting the SSOs and WLAs will require significant advanced treatment and other technological upgrades, and a number of water supply control measures to control chloride concentrations in the Santa Clara River, especially during periods of higher concentration in the water supply and groundwater (*i.e.*, during periods of lower precipitation). The District alleges that these upgrades and control measures result in increased costs of approximately \$250.7 million. R4-2008-012 also includes a number of Implementation Tasks, primarily consisting of requirements to perform technical and scientific studies of the surface and groundwater and evaluation of appropriate chloride thresholds, which the District alleges impose increased costs of approximately \$6.6 million.

The Commission finds that Resolution R4-2008-012 does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 on the following grounds: (1) several of the Implementation Tasks included in the TMDL are not new and cannot impose a *new* program or higher level of service; (2) accelerating the implementation of final waste load allocations (discharge limitations) by one year is not a new program or higher level of service, and no increased costs are alleged; (3) the Alternative Water Resources Management program is not a new program or higher level of service, but a lower level of service, and reduced costs with respect to prior law; and (4) even if the Alternative Water Resources Management program did impose a new program or higher level of service, there are no costs mandated by the state, because the claimant has sufficient fee authority to cover the costs of any required activities.

Because this test claim is denied on the grounds stated above, the Commission declines to make findings on whether claimant is practically compelled to implement the Alternative Water Resources Management activities or whether the Alternative Water Resources Management activities, TMDLs or WLAs are mandated by federal law.

## COMMISSION FINDINGS

### I. Chronology

03/30/2011	Claimant, Santa Clarita Valley Sanitation District of Los Angeles County, filed the test claim, <i>Upper Santa Clara River Chloride Requirements</i> , 10-TC-09, with the Commission on State Mandates (Commission) <sup>15</sup>
04/14/2011	Commission staff issued a notice of complete filing and request for comments from state agencies.
05/02/2011	The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) filed a request for an extension of time to submit comments on the test claim.
05/04/2011	Commission staff granted the Regional Board's request for an extension of time to comment to July 15, 2011.

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<sup>15</sup> Exhibit A, Test Claim.

06/23/2011 The Regional Board filed a request for an extension of time to comment on the test claim, which was granted for good cause.

07/ 29/2011 The Regional Board filed comments on test claim.<sup>16</sup>

08/01/2011 The Department of Finance (Finance) filed comments on the test claim.<sup>17</sup>

08/19/2011 Claimant filed a request for an extension of time to submit rebuttal comments to September 28, 2011, which was granted for good cause.

09/28/2011 Claimant filed rebuttal comments.<sup>18</sup>

09/20/2013 Commission staff issued the draft staff analysis and proposed statement of decision.<sup>19</sup>

10/07/2013 Finance submitted comments on the draft staff analysis.<sup>20</sup>

10/07/2013 Claimant requested an extension of time to October 25, 2013 to file comments on the draft staff analysis, which was granted for good cause.

10/09/2013 Ms. Lynda Cook of Santa Clarita submitted comments on the draft staff analysis.<sup>21</sup>

10/09/2013 The Regional Board requested an extension of time to file comments to November 1, 2013 and postponement of hearing to January 24, 2014.

10/10/2013 Commission staff granted the Regional Board's request for extension and postponement.

10/18/2013 City of Santa Clarita filed comments on the draft staff analysis.<sup>22</sup>

11/01/2013 The Regional Board filed comments on the draft staff analysis.<sup>23</sup>

11/01/2013 Claimant submitted filed comments on the draft staff analysis.<sup>24</sup>

## **II. Introduction**

### **A. History and Framework of Federal Water Pollution Control**

Regulation of water pollution in the United States finds its beginnings in the Rivers and Harbors Appropriation Act of 1899, which made it unlawful to throw or discharge “any refuse matter of

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<sup>16</sup> Exhibit B, LA Regional Board Comments.

<sup>17</sup> Exhibit C, Department of Finance Comments.

<sup>18</sup> Exhibit D, Claimant's Rebuttal Comments.

<sup>19</sup> Exhibit E, Draft Staff Analysis.

<sup>20</sup> Exhibit F, Department of Finance Comments on Draft Staff Analysis.

<sup>21</sup> Exhibit G, Public Comments on Draft Staff Analysis.

<sup>22</sup> Exhibit H, City of Santa Clarita Comments on Draft Staff Analysis.

<sup>23</sup> Exhibit I, LA Regional Board Comments on Draft Staff Analysis.

<sup>24</sup> Exhibit J, Claimant Comments on Draft Staff Analysis.

any kind or description...into any navigable water of the United States, or into any tributary of any navigable water.”<sup>25</sup> This provision survives in the current United States Code, qualified by more recent provisions that outline a regime of discharge permits issued by the U.S. EPA or by states on behalf of the EPA.<sup>26</sup>

In 1948, the Federal Water Pollution Control Act “adopted principles of state and federal cooperative program development, limited federal enforcement authority, and limited federal financial assistance.”<sup>27</sup> Pursuant to further amendments to the Act made in 1965, “States were directed to develop water quality standards establishing water quality goals for interstate waters.” However, “[d]ue to enforcement complexities and other problems, an approach based solely on water quality standards was deemed insufficiently effective.”<sup>28</sup> The Federal Water Pollution Control Act was therefore significantly expanded in 1972 to regulate individual point source dischargers. Later, major amendments to the Federal Water Pollution Control Act were enacted in the Clean Water Act of 1977, and the federal act is now commonly referred to as the Clean Water Act (CWA). The CWA 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 chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.<sup>29</sup>

The United States Supreme Court observes the cooperative nature of water quality regulation under the CWA as follows:

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 this end, the Act provides for two sets of water quality measures. “Effluent limitations” are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. (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

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<sup>25</sup> United States Code, title 33, section 407 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152).

<sup>26</sup> See United States Code, title 33, sections 401; 1311-1342.

<sup>27</sup> Exhibit X, Statutory History of Water Quality Standards: available at <http://water.epa.gov/scitech/swguidance/standards/history.cfm>. (Accessed November 26, 2013.)

<sup>28</sup> *Ibid.*

<sup>29</sup> United States Code, title 33, section 1251(b).

levels.” (*EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).)<sup>30</sup>

The CWA thus employs two primary mechanisms for controlling water pollution: identification and standard-setting for bodies of water, and identification and regulation of dischargers.

With respect to standard-setting for bodies of water, section 1313(a) provides that existing water quality standards can remain in effect unless the standards are not consistent with the CWA, and that the Administrator may “promptly prepare and publish” water quality standards for any waters for which a state fails to submit water quality standards, or for which the standards are not consistent with the CWA. In addition, states are required to hold public hearings “at least once each three year period” for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.<sup>31</sup>

And with respect to regulating dischargers, section 1311 requires that point source dischargers be identified and effluent limitations be set, “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.”<sup>32</sup> Section 1312 provides that effluent limitations must promote the attainment of water quality objectives, while section 131.10 of the applicable regulations requires also taking into consideration the water quality standards of downstream waters.<sup>33</sup>

Section 303(d) of the CWA, codified at section 1313(d) of title 33 of the United States Code, requires that each state “identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard applicable to such waters.” Waters for which the effluent limitations are not sufficient to meet water quality standards are called “impaired,” and the list of “impaired” waters is also known as the “303(d)

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<sup>30</sup> *Arkansas v. Oklahoma* (1992) 503 U.S. 91, at pp. 101-102.

<sup>31</sup> United States Code, title 33, section 1313(c)(2).

<sup>32</sup> United States Code, title 33, section 1311.

<sup>33</sup> United States Code, title 33, section 1312; Code of Federal Regulations, title 40, section 131.10(b) (57 FR 60910) [“In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.”].

List.” The state is required by the Act to “establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.”

After the waters are ranked, the state “shall establish for the waters identified...and in accordance with the priority ranking, the total maximum daily load [known as a TMDL], for those pollutants which the Administrator identifies...as suitable for such calculation.” The TMDL “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” A TMDL is defined as the sum of the amount of a pollutant allocated to *all point sources* (i.e., the sum of all waste load allocations, or WLAs), plus the amount of a pollutant allocated for nonpoint sources and natural background. A TMDL should be set for each pollutant identified by the Administrator, and is essentially a plan setting forth the amount of a pollutant allowable that will attain the water quality standard necessary for beneficial uses.<sup>34</sup> TMDLs are required to be submitted to the Administrator “from time to time,” and the Administrator “shall either approve or disapprove such identification and load not later than thirty days after the date of submission.” If the Administrator disapproves the 303(d) List or a TMDL, the Administrator “shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement [water quality standards].” Finally, the identification of waters and setting of standards and TMDLs is required as a part of a state’s “continuing planning process approved [by the Administrator] which is consistent with this chapter.”<sup>35</sup>

Section 1342 provides for the National Pollutant Discharge Elimination System (NPDES). NPDES is the final piece of the regulatory framework under which discharges of pollutants are regulated and permitted, and applies whether or not a TMDL has been established. Section 1342 states that “the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title.”<sup>36</sup> Section 1342 further provides that states may submit a plan to administer the NPDES permit program, and that upon review of the state’s submitted program “[t]he Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State.”<sup>37</sup> Whether issued by the Administrator or by a state permitting program, all NPDES permits must ensure compliance with the requirements of sections 1311, 1312, 1316, 1317, and 1343; must be for fixed terms not exceeding five years; can be terminated or modified for cause, including violation of any condition of the permit; and must control the disposal of pollutants into wells.<sup>38</sup> In addition, NPDES permits are generally prohibited, with some exceptions, from containing effluent limitations that are “less stringent than the comparable effluent limitations in the previous

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<sup>34</sup> Code of Federal Regulations, title 40, section 130.2.

<sup>35</sup> United States Code, title 33, section 1313(d-e).

<sup>36</sup> United States Code, title 33, section 1342(a)(1)

<sup>37</sup> United States Code, title 33, section 1342(a)(5); (b).

<sup>38</sup> United States Code, title 33, section 1342(b)(1).

permit.”<sup>39</sup> An NPDES permit for a point source discharging into an impaired water body must be consistent with the waste load allocations made in a TMDL, if a TMDL is approved and is applicable to the water body.<sup>40</sup>

## **B. State Water Pollution Control Program**

### Porter-Cologne Water Quality Control Act

California’s water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).<sup>41</sup> Beginning with section 13000, Porter-Cologne provides:

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated 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.

The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state...and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.<sup>42</sup>

The state water pollution control program was again modified, beginning in 1972, so that the code would substantially comply with the federal Act, and “on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program.”<sup>43</sup>

Section 13160 provides that the state water resources control board (SWRCB or State Board) “is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act...[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto.”<sup>44</sup>

Section 13001 describes the state and regional boards as being “the principal state agencies with primary responsibility for the coordination and control of water quality.”

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<sup>39</sup> United States Code, title 33, section 1342(o).

<sup>40</sup> Code of Federal Regulations, title 40, section 122.44(b).

<sup>41</sup> Water Code section 13020 (Stats. 1969, ch. 482).

<sup>42</sup> Water Code section 13000 (Stats. 1969, ch. 482).

<sup>43</sup> *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (Cal. Ct. App. 5th Dist. 2005) 127 Cal.App.4th 1544, at pp. 1565-1566. See also Water Code section 13370 *et seq.*

<sup>44</sup> Water Code section 13160 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats 1976, ch. 596).

In order to achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the CWA, employs a combination of water quality standards and point source pollution controls.<sup>45</sup>

Porter Cologne sections 13240-13247 address the development and implementation of regional water quality control plans, including “water quality objectives,” defined in section 13050 to mean “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.”<sup>46</sup> Section 13241 provides that 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.” The section directs the regional boards to consider, when developing water quality objectives:

- (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.<sup>47</sup>

Beneficial uses, in turn, are defined in section 13050 as including, but 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.”<sup>48</sup> In addition, section 13243 permits a regional board to define “certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”<sup>49</sup>

Sections 13260-13274 address the development of “waste discharge requirements,” which section 13374 states “is the equivalent of the term ‘permits’ as used in the Federal Water

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<sup>45</sup> Water Code section 13142 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1979, ch. 947; Stats. 1995, ch. 28).

<sup>46</sup> Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247), ch. 847 (SB 206); Stats. 1996, ch. 1023 (SB 1497)).

<sup>47</sup> Water Code section 13241 (Stats. 1969, ch. 482; Stats. 1979, ch. 947; Stats. 1991, ch. 187 (AB 673)).

<sup>48</sup> Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247); Stats. 1995, ch. 847 (SB 206); Stats. 1996 ch. 1023 (SB 1497)).

<sup>49</sup> Water Code section 13243 (Stats. 1969, ch. 482).

Pollution Control Act, as amended.”<sup>50</sup> Section 13263 permits the regional boards, after a public hearing, to prescribe waste discharge requirements “as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system.” Section 13263 also provides that the regional boards “need not authorize the utilization of the full waste assimilation capacities of the receiving waters,” and that the board may prescribe requirements although no discharge report has been filed, and may review and revise requirements on its own motion. The section further provides that “[a]ll discharges of waste into waters of the state are privileges, not rights.”<sup>51</sup> Section 13377 permits a regional board to issue waste discharge requirements “which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act].”<sup>52</sup> In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit “if a discharge is to waters of both California and the United States.”<sup>53</sup>

California’s Antidegradation Policy (State Water Resources Control Board Resolution NO. 68-16 adopted October 24, 1968)

In 1968, the SWRCB adopted Resolution 68-16, formally entitled “Statement of Policy With Respect to Maintaining High Quality of Waters In California,” to prevent the degradation of surface waters where background water quality is higher than the established level necessary to protect beneficial uses. That executive order states the following:

WHEREAS the California Legislature has declared that it is the policy of the State that the granting of permits and licenses for unappropriated water and the disposal of wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State; and

WHEREAS water quality control policies have been and are being adopted for waters of the State; and

WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;

NOW, THEREFORE, BE IT RESOLVED:

Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will

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<sup>50</sup> Water code section 13374 (Stats. 1972, ch. 1256).

<sup>51</sup> Water Code section 13263(a-b); (g) (Stats. 1969, ch. 482; Stats. 1992, ch. 211 (AB 3012) Stats. 1995, ch. 28 (AB 1247), ch. 421 (SB 572)).

<sup>52</sup> Water Code section 13377 (Stats. 1972, ch. 1256; Stats. 1978, ch. 746).

<sup>53</sup> Exhibit A, Test Claim, at p. 7.



not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

In implementing this policy, the Secretary of the Interior will be kept advised and will be provided with such information as he will need to discharge his responsibilities under the Federal Water Pollution Control Act.

### **C. Regulatory History**

The Santa Clara River is the largest river system in southern California that remains in a relatively natural state. The River originates in the San Gabriel Mountains in Los Angeles County, runs through Ventura County, and flows into the Pacific Ocean between the cities of San Buenaventura (Ventura) and Oxnard. Land uses within the watershed include agriculture, open space, and residential uses.<sup>54</sup> Resolution R4-2008-012, adopted by the Regional Board, states that “[r]evenue from the agricultural industry within the Santa Clara watershed is estimated at over \$700 million annually, and residential use is increasing rapidly both in the upper and lower watershed.”<sup>55</sup> Reaches 5 and 6 of the Santa Clara River are located upstream of the Blue Cut gauging station, near the Los Angeles/Ventura County line, between the cities of Fillmore (in Ventura County) and Santa Clarita in Los Angeles County; Reach 4B is in Ventura County.<sup>56</sup> Claimant operates two WRPs that discharge into Reaches 4B, 5 and 6.<sup>57</sup>

In 1975, the Regional Board established water quality objectives for chloride in the Santa Clara River. The 1975 objectives for surface waters were established, in accordance with the State Antidegradation Policy (State Board Resolution No. 68-16), and the federal antidegradation policy (40 C.F.R. 131.12), at a chloride concentration of 90mg/L in Reach 5 and 80 mg/L in Reach 6 (then known as Reaches 7 and 8).<sup>58</sup> The 1975 objectives were based on background concentrations of chloride and intended to protect the beneficial uses identified in the 1975 Basin Plan, including off-stream agricultural irrigation.”<sup>59</sup> The Basin Plan included chloride objectives

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<sup>54</sup> See Exhibit A, Test Claim, at p. 34; Exhibit B, LA Regional Board Comments, at p. 1.

<sup>55</sup> Exhibit A, Test Claim, at p. 34.

<sup>56</sup> See Exhibit B, Resolution R4-2007-018, at paragraphs 4-6, describing subdividing Reach 4 into Reaches 4A and 4B, for purposes of TMDL revision.

<sup>57</sup> Exhibit A, at pp. 49-52, Resolution R4-2008-012, describing conditional waste load allocations for Valencia and Saugus WRPs.

<sup>58</sup> See Exhibit A, at p. 151, Exhibit 6, LA Regional Board Resolution 97-02.

<sup>59</sup> *Ibid.*

between 50 and 150 mg/L for the remaining reaches of the Santa Clara River.<sup>60</sup> When the SWRCB set the water quality objectives in 1975, it “assumed the chloride concentrations in imported waters would remain relatively low.”<sup>61</sup> However, in the years following, “chloride concentrations in the imported water supply into the Los Angeles Region increased,” and in 1978 the Board “modified the water quality objectives for chloride...to 100 mg/L for both reaches.”<sup>62</sup>

In 1990 the Regional Board adopted a resolution responding to the changing conditions of the imported water supply related to drought (referred to by both the claimant and the Regional Board as the “Drought Policy”). For dischargers into the Santa Clara River who applied for relief under the Drought Policy, chloride concentrations were permitted “in the discharger’s effluent to be the lesser of: (1) 250 mg/L; or (2) the chloride concentration of supply water plus 85 mg/L.”<sup>63</sup> The board renewed the Drought Policy in 1993 and 1995 “because the chloride levels in supply waters remained higher than the chloride levels before the onset of the drought.” In 1997, the Regional Board rescinded the Drought Policy and revised the water quality objectives for chloride for the Los Angeles River, Rio Hondo, and the San Gabriel River, but not for the Santa Clara River, “due to the potential for future adverse impacts to agricultural resources in Ventura County.” The board “granted temporary variances to certain dischargers in the Santa Clara River watershed, including the Valencia and Saugus WRPs.”<sup>64</sup> The interim effluent limits of 190 mg/L were applied for three years to the two facilities.<sup>65</sup>

In 1998 the Santa Clara River “appeared for the first time on the state’s federally required 303(d) list of impaired waterbodies for chloride.”<sup>66</sup> Reaches 5 and 6 of the Upper Santa Clara River did not meet the 100 mg/L water quality objective (WQO), and “[b]eneficial uses of the Upper Santa Clara River, including agricultural supply water and groundwater recharge were listed as impaired.”<sup>67</sup> The Valencia and Saugus WRPs, which are owned and operated by the District, are two major point sources that discharge to the upper reaches of the River.<sup>68</sup> The two WRPs are

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<sup>60</sup> *Ibid.*

<sup>61</sup> Exhibit B, at p. 507, L.A. Regional Board Resolution 97-02, paragraph 2.

<sup>62</sup> Exhibit B, at p. 502, Attachment 56, 1978 Revisions to the Water Quality Control Plan for the Santa Clara River Basin.

<sup>63</sup> See Exhibit B, Attachment 57, at p. 507, L.A. Regional Board Resolution 97-02, paragraph 2.

<sup>64</sup> Exhibit B, LA Regional Board Comments, at p. 10; Attachment 57, at p. 507 [L.A. Regional Board Resolution 97-02, paragraph 2].

<sup>65</sup> Exhibit B, LA Regional Board Comments, at p. 10.

<sup>66</sup> *Ibid* [referring to the Clean Water Act section 303(d), codified at 33 U.S.C. 1313(d), which requires states to identify and report to the EPA on those waters within its boundaries for which the effluent limitations have not proven effective “to implement any water quality standard applicable to such waters”]. See also, Exhibit A, Test Claim, at p. 9.

<sup>67</sup> Exhibit B, LA Regional Board Comments, at p. 10. See also Exhibit B, LA Regional Board Comments, Attachment 58, at p. 523 [L.A. Regional Board Resolution 03-088, paragraph 2].

<sup>68</sup> Exhibit A, Test Claim, at p. 34.

responsible for approximately 70 percent of the chloride loading to the River.<sup>69</sup> The Valencia and Saugus WRPs were not designed to remove chloride from waste water, and in fact have been contributing to elevated chloride concentrations due to the use of chlorine disinfection.<sup>70</sup>

In October of 2002, the Regional Board adopted Resolution 02-018, amending the Basin Plan to include a TMDL for chloride in the Santa Clara River. The same resolution also assigned “final WLAs to the Valencia and Saugus WRPs of 100 mg/L to be included also in their NPDES permits.” However, the TMDL resolution also included “interim WLAs for the [Saugus and Valencia facilities], to provide the District time to implement chloride source reduction, complete site-specific objective (“SSO”) studies, and make any necessary modifications to the WRPs.”<sup>71</sup> The District determined at the time that the TMDL would require approximately \$500 million in upgrades to its treatment facilities, including advanced treatment (desalination) at both WRPs in order to meet the effluent limitations of 100 mg/L chloride. The District appealed the decision to the SWRCB, which adopted Resolution 2003-0014, remanding the TMDL to the Regional Board for reconsideration of various items including: (1) an extension of the interim chloride limits, and (2) re-evaluation of the water quality objectives accounting for the beneficial uses to be protected, the quality of the imported water supply, and the impacts of drought periods.<sup>72</sup> In response, the Regional Board adopted Resolution 03-008,<sup>73</sup> which included interim WLAs and a phased implementation plan for the chloride TMDL, including a number of required studies. On May 6, 2004, the Regional Board adopted Resolution 04-004, which revised and superseded the interim WLAs and implementation plan adopted by Resolution 03-008. The TMDL was approved by the EPA, as amended by Resolution 03-008, and Resolution 04-004, on April 28, 2005.

In 2006, the board shortened the compliance period and the interim WLAs by two years; Resolution R4-2006-016 was approved by EPA June 12, 2008.<sup>74</sup> And finally, in 2008, the board shortened the compliance period by an additional year, but relaxed the chloride requirements as described in the next paragraph.<sup>75</sup>

Between 2005 and 2008, several special studies were conducted, as required under the prior TMDL.<sup>76</sup> On December 11, 2008, the Regional Board adopted Resolution R4-2008-012, saying:

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<sup>69</sup> Exhibit B, LA Regional Board Comments, at p. 11. See also, Exhibit A, Test Claim, at p. 48.

<sup>70</sup> Exhibit A, Test Claim, at pp. 7; 11-12; 175; Exhibit B, LA Regional Board Comments, at pp. 9-10.

<sup>71</sup> Exhibit A, Test Claim, at p. 10; Exhibit B, LA Regional Board Comments, at pp. 10-11.

<sup>72</sup> Exhibit B, at p. 523, Attachment 58, LA Regional Board Resolution 03-008.

<sup>73</sup> Exhibit B, at p. 523, Attachment 58, LA Regional Board Resolution 03-008.

<sup>74</sup> Exhibit B, Attachment 60, at p. 566, Regional Board Resolution R4-2006-016, Implementation Task 14. See also, Exhibit X, SCVSD Draft EIR, at p. 8.

<sup>75</sup> Exhibit B, Attachment 63, at p. 624, Regional Board Resolution R4-2006-016, Implementation Task 21.

<sup>76</sup> See Exhibit A, Attachment 1, at pp. 34-36 [Regional Board Resolution R4-2008-012, paragraphs 10-16].

“The completion of these TMDL special studies...has led to the development of an alternative TMDL implementation plan that addresses chloride impairment of surface waters and degradation of groundwater.”<sup>77</sup> The alternative plan is known as the Alternative Water Resources Management program; the AWRM includes:

...the development of site-specific objectives [SSOs] for chloride while protecting beneficial uses; chloride source reduction actions through the removal of self-regenerating water softeners; a switch from chlorine-based disinfection to ultraviolet disinfection at both WRPs; chloride load reduction actions through advanced treatment (like reverse osmosis and microfiltration) of a portion of the Valencia WRP’s effluent; supplemental water to enhance assimilative capacity of local groundwater or surface water; alternative water supply to protect salt-sensitive agricultural beneficial uses during drought conditions; construction of extraction wells and pipelines; and expansion of recycled water uses with[in] the Santa Clarita Valley.<sup>78</sup>

The SSOs adopted are 150 mg/L in Reaches 5 and 6 and 117 mg/L for Reach 4B, which is adjusted to 130 mg/L when the supply water has chloride levels above 80 mg/L.<sup>79</sup> The conditional WLAs for the Valencia and Saugus facilities are also 150 mg/L for discharges to Reaches 5 and 6, and 117 mg/L for discharge to Reach 4B.<sup>80</sup> The Resolution provides for the construction and implementation of advanced treatment (reverse osmosis desalination) at the Valencia facility, as well as a number of water supply control measures designed to attain the site specific objectives.<sup>81</sup> The relaxed requirements are conditioned upon “the Claimant’s full and ongoing implementation of the AWRM program.”<sup>82</sup> The 2008 resolution was approved by the State Water Board, OAL, and then finally by the U.S. EPA on April 6, 2010.<sup>83</sup>

This test claim was filed by Santa Clarita Valley Sanitation District on March 30, 2011. On July 29, 2011, the Regional Board filed comments on test claim.<sup>84</sup> On August 8, 2011, the Department of Finance (Finance) filed comments on the test claim.<sup>85</sup> On September 28, 2011,

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<sup>77</sup> Exhibit A, Attachment 1, at p. 36 [Regional Board Resolution R4-2008-012, paragraph 15].

<sup>78</sup> Exhibit A, Attachment 1, at p. 42 [Regional Board Resolution R4-2008-012, Table 3-A “Conditional Site Specific Objectives for the Santa Clara River Surface Waters].

<sup>79</sup> *Id.*, p. 42.

<sup>80</sup> *Id.*, at pp. 49-51.

<sup>81</sup> *Id.*, at p. 51.

<sup>82</sup> Exhibit B, LA Regional Board Comments, at p. 17. See also, Exhibit A, Test Claim, at p. 11 [“If the AWRM program is not timely implemented, the water quality objectives for chloride will revert back from the conditional SSOs to the current levels of 100 mg/L.”].

<sup>83</sup> Exhibit A, Test Claim, at p. 11; Exhibit B, LA Regional Board Comments, at p. 17.

<sup>84</sup> Exhibit B, LA Regional Board Comments.

<sup>85</sup> Exhibit C, Department of Finance Comments.

the District filed rebuttal comments in response to both Finance and Regional Board comments.<sup>86</sup>

### **III. Positions of the Parties**

#### **Santa Clarita Valley Sanitation District Position**

The District seeks reimbursement for costs associated with implementing the Alternative Water Resources Management program (AWRM) described in Resolution R4-2008-012. The AWRM includes technology upgrades at the two WRPs, as well as alternative water supply and groundwater management techniques in order to attain the site-specific objectives and waste load allocations of 150 mg/L for Reaches 5 and 6, and 117 mg/L for Reach 4B.<sup>87</sup> The District also alleges costs incurred in fiscal years 2009-2010 and 2010-2011 associated with Implementation Tasks outlined in the Resolution; these tasks primarily involve conducting studies and developing suggested revisions to the TMDL over a span of years commencing May 4, 2005.<sup>88</sup>

The District explains that the CWA “requires states to adopt water quality standards for the beneficial uses of waters of the United States and the water quality criteria for specific uses of those waters.” The Act further requires “continuing review and revision of the standards,” and requires states to “continually identify those waters of the United States within their boundaries that do not meet water quality standards (the ‘303(d) List’), rank them in order of priority for enforcement, and prepare TMDLs for those waters that will ensure re-attainment of the standard through action by regulated dischargers.” However, the District asserts that “[w]hile the Clean Water Act mandates these planning activities, it leaves to the states their evaluation and specific determination of regulatory requirements based, in part, upon site-specific factors.”<sup>89</sup>

The District argues that the Regional Board’s determination of water quality objectives, and eventually a TMDL for chloride, was discretionary regulatory activity that was not mandated by federal law. The District bases its conclusion that the TMDL was discretionary on the fact that the TMDL and WLAs have changed over time.

The District asserts that it “now faces enormous costs to ‘solve’ a problem that it has not created as does not control, and has already substantially mitigated by implementing a comprehensive chloride source reduction program within the sewer service area.” The District estimates its costs “to comply with the TMDL’s conditional SSOs and WLAs is \$250 million.”<sup>90</sup> The District acknowledges that “[s]ome of the compliance project costs may be paid from service charges,” but the District asserts that its “elected officials could not support the proposed rate increases in the face of fierce public opposition.” The District maintains that “a local agency does not fall under the fee increase exception [of section 17556(d)] if it is unable to obtain the requisite approval under the Proposition 218 process,” which requires a local agency to provide notice of any new or increased assessment. The District provided the notice, as required, and alleges that

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<sup>86</sup> Exhibit D, Claimant’s Rebuttal Comments.

<sup>87</sup> Exhibit A, Test Claim, at pp. 16; 49-51.

<sup>88</sup> Exhibit A, Test Claim, at pp. 13-17; 59-63.

<sup>89</sup> Exhibit A, Test Claim, at p. 5.

<sup>90</sup> Exhibit A, Test Claim, at p. 12.

it “received strong opposition amongst its constituents,” and “[a]s a result, the District has been unable to successfully implement a rate increase due to public resistance.”<sup>91</sup>

In response to the Regional Board’s comments on the test claim, the District’s rebuttal comments stress the discretion available to the Regional Board, which it believes demonstrates that the Resolution is not necessary to implement a federal mandate. The comments further state that the District’s “elected officials could not implement the proposed rate increase in the face of fierce public opposition;” that the District participated in developing the AWRM “only to protect, to the best of its ability, the interests of its ratepayers;” and that therefore “the District is entitled to subvention of the costs that have been and will be incurred as a result of this mandate.”<sup>92</sup>

In comments on the draft staff analysis, the District argues that it is “the passive recipient of imported high-chloride drinking water, which it must treat to prevent a speculative harm.” The District argues that the TMDL “requires the District to pay more than its fair share of cleanup costs to prevent speculative damage.” The District argues that it “has no legal authority to obtain reimbursement for the parties responsible for much of the chloride nor from the beneficiaries of the treatment,” and therefore the district “is being forced to pay to solve a speculative problem with origins and effects that are outside its jurisdiction.”<sup>93</sup> With respect to the draft staff analysis, the District argues that (1) the implementation tasks alleged in the test claim Resolution should not be denied on grounds that they are not new, because “the 2008 TMDL is the result of the final appeal of the original 2002 approval;” (2) the acceleration of implementation is a higher level of service; (3) the AWRM must be evaluated with reference to the pre-TMDL requirements, in order to determine whether it constitutes a new program or higher level of service; and (4) the District does not have sufficient fee authority to cover the costs of the program, because it is “subject to Prop. 218 protests and referenda on the rates necessary to support the TMDL facilities.”<sup>94</sup>

### **Los Angeles Regional Water Quality Control Board Position**

The Regional Board maintains that this test claim does not qualify for subvention. The Regional Board argues that CWA imposes a requirement to establish a TMDL for chlorides for an impaired water body. In addition the Regional Board asserts that that absent the AWRM plan, the claimant would be required to meet the water quality standard established for the Santa Clara River in the 2002 TMDL (and maintained in the revisions of 2004 and 2006) by the year 2015. The Regional Board argues that it has no discretion whether to adopt water quality objectives due to the listing of the Santa Clara River under section 1313(d) of the CWA. The Regional Board asserts that “[w]ater quality standards are adopted pursuant to the Clean Water Act, and *any* TMDL is required to attain and maintain the applicable water quality standards, no matter how many times these regulatory mechanisms are modified and amended.”<sup>95</sup> The Regional Board further argues that the alleged discretion exercised in allocating pollutant loading among

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<sup>91</sup> *Id.*, at p. 25.

<sup>92</sup> Exhibit D, Rebuttal Comments, at pp. 2-14.

<sup>93</sup> Exhibit J, Claimant Comments on Draft Staff Analysis, at pp. 1; 6.

<sup>94</sup> Exhibit J, Claimant Comments on Draft Staff Analysis, at pp. 2-6.

<sup>95</sup> Exhibit B, LA Regional Board Comments, at pp. 22-23.

various dischargers does not make the Resolution a state-mandated program: “a TMDL is not valid unless it contains wasteload and load allocations.” The Regional Board holds that “to protect beneficial uses, the Los Angeles Water Board had no choice but to assign wasteload allocations to each point source discharger, including the Claimant.”<sup>96</sup>

In addition, the Regional Board also argues that the Resolution does not impose a new program or higher level of service. The Regional Board argues that the chloride water quality objective was first established in 1975, and the 2008 Resolution was intended “to incorporate less-stringent site-specific objectives in order to support the Claimant’s AWRM program.” The Regional Board continues: “[t]hus, if anything, the 2008 Resolution imposed a *lower level* of service in order to make it less expensive for the Claimant to implement the existing 100 mg/L chloride water quality objective.” The Regional Board also asserts that it did not impose this program: “[t]he AWRM is the Claimant’s chosen method of complying with the Chloride TMDL and the water quality objectives.” Finally, the Regional Board argues that if the U.S. EPA had adopted a chloride TMDL for the Santa Clara River, which the applicable laws permit if the state fails to do so, “it would have done so without an implementation plan, since the U.S. EPA does not include implementation plans as part of their TMDLs.” In other words, the District has the Regional Board to thank for the gradual and phased implementation of the TMDL, which the Regional Board implied is less burdensome and expensive than a TMDL adopted by the Administrator of the U.S. EPA.<sup>97</sup>

Moreover, the Regional Board argues that “the 2008 Resolution is a regulatory provision of general applicability and not a new program or higher level of service.” The Regional Board asserts that “[w]ater quality objectives apply to a waterbody as a whole, and all dischargers are subject to them.” The Regional Board further states that “[l]ikewise, TMDLs must assign wasteload allocations and load allocations to all sources of the pollutant, both public agencies and private industry alike.” Therefore, the Regional Board concludes that “the challenged provisions treat dischargers with an even hand, irrespective of status (any point or nonpoint source) and are not peculiar to local agencies.”<sup>98</sup>

Finally, the Regional Board argues that three of the statutory exceptions of Government Code section 17556 are applicable. The Regional Board argues that the water quality standards and the TMDL contained in the Resolution are federally mandated, and therefore section 17556(c) applies.<sup>99</sup> The Regional Board argues also that section 17556(a) applies to bar this test claim because “the Claimant itself developed and proposed the AWRM program and then requested the Los Angeles Water Board to adopt the AWRM as part of its 2008 Resolution.”<sup>100</sup> And, the Regional Board argues that the District possesses fee authority within the meaning of section 17556(d). The Regional Board dismisses the claimant’s assertion that “the District’s board declined to adopt the proposed rate increases based on the expectations that any substantive rate

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<sup>96</sup> Exhibit B, LA Regional Board Comments, at p. 24.

<sup>97</sup> Exhibit B, LA Regional Board Comments, at p. 26.

<sup>98</sup> Exhibit B, LA Regional Board comments, at pp. 26-27.

<sup>99</sup> See Exhibit B, LA Regional Board Comments, at p. 28.

<sup>100</sup> Exhibit B, LA Regional Board Comments, at p. 29.

increase would be overturned by way of referendum due to fierce opposition from the district's ratepayer."<sup>101</sup> The Regional Board argues that "[t]he plain language of this exception is based on the Claimant's authority, not on the Claimant's practical ability in light of surrounding economic circumstances, to levy fees."<sup>102</sup> The Regional Board concludes that "[t]he Claimant cannot rely on mere speculation as to what could happen as a defense to the fee increase exception" of section 17556(d).<sup>103</sup>

In comments submitted on the draft staff analysis, the Regional Board substantially concurs with the analysis below, but reiterates that the Resolution is not a reimbursable mandate because it is not unique to government, and applies to the water body generally. The Board "respectfully requests that the Commission address this argument in the context of the Resolution as a whole and determine that the Resolution does not impose requirements unique to government."<sup>104</sup>

### **Department of Finance Position**

Finance argues that the TMDL does not impose a reimbursable state mandate because "(1) the regulations are required by section 303(d) of the federal Clean Water Act, (2) the regulations by themselves do not require the claimant to act, and (3) even if the regulations required action, claimant has fee authority sufficient to pay its costs." Finance also questions whether the claim may be time barred, because the Resolution was adopted by the Regional Board in December 2008, and the test claim was filed on March 30, 2011.<sup>105</sup>

### **Other Public Comment**

On October 9, 2013, Ms. Lynda Cook of Santa Clarita filed comments on the draft staff analysis. Ms. Cook asserted that residents of Santa Clarita should not be responsible for the costs of removing chloride from the Santa Clara River, because the residents of Santa Clarita are not the cause of high concentrations of chloride in the Santa Clara River. Ms. Cook further asserted that increased fees for sewer services are a tax, and should be subject to voter approval.<sup>106</sup>

On October 18, 2013 the City of Santa Clarita submitted written comments on the draft staff analysis, in which the City argued that "compliance with the Upper Santa Clara River Chloride Total Maximum Daily Load will cost our Santa Clarita Valley residents and businesses millions of dollars." The City argued that "[i]t is essential for the vitality of our community that compliance with State-created regulations, such as this one, be supported by the State."<sup>107</sup>

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<sup>101</sup> Exhibit B, LA Regional Board Comments, at pp. 30-31 [citing to Exhibit A, Test Claim, at p. 26].

<sup>102</sup> Exhibit B, LA Regional Board Comments, at p. 31 [citing *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, at pp. 401-402].

<sup>103</sup> Exhibit B, LA Regional Board Comments, at p. 31.

<sup>104</sup> Exhibit I, LA Regional Board Comments on Draft Staff Analysis, at pp. 1-2.

<sup>105</sup> Exhibit C, Department of Finance Comments, at pp. 1-2.

<sup>106</sup> Exhibit G, Public Comments on Draft Staff Analysis.

<sup>107</sup> Exhibit H, City of Santa Clarita Comments.



#### IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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 programs or increased level of service...

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>108</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>109</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>110</sup>
2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>111</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>112</sup>
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>113</sup>

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<sup>108</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>109</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>110</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>111</sup> *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

<sup>112</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>113</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>114</sup> 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.<sup>115</sup> 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.”<sup>116</sup>

**A. Threshold Issues: the Santa Clarita Valley Sanitation District is an Eligible Claimant Before the Commission; Resolution R4-2008-012 is an Executive Order within the Meaning of Article XIII B, Section 6; and the Test Claim is Timely Filed.**

1. The Santa Clarita Valley Sanitation District is an Eligible Claimant before the Commission.

Article XIII B, section 6 requires reimbursement for increased costs mandated by the state. “Costs mandated by the state” is defined to mean “any increased costs which a local agency or school district is required to incur...as a result of any statute...or any executive order implementing any statute...which mandates a new program or higher level of service of an existing program.”<sup>117</sup> “Local agency,” in turn, is defined to include “any city, county, special district, authority, or other political subdivision of the state.”<sup>118</sup>

However, not every “local agency,” as defined, is an eligible claimant before the Commission. In addition to an entity fitting the description above, the entity must also be subject to the tax and spend limitations of articles XIII A and XIII B. The California Supreme Court, in *County of Fresno v. State of California*,<sup>119</sup> explained the constitutional subvention requirement as follows:

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... 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*.<sup>120</sup>

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<sup>114</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>115</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>116</sup> *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

<sup>117</sup> Government Code section 17514 (Stats. 1984, ch. 1459).

<sup>118</sup> Government Code section 17518 (Stats. 1984, ch. 1459).

<sup>119</sup> *County of Fresno, supra*, 53 Cal.3d 482.

<sup>120</sup> *Id.*, at p. 487. Emphasis in original.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,<sup>121</sup> the Fourth District Court of Appeal concluded that redevelopment agencies were not eligible to claim reimbursement because their funding came primarily from tax increment financing, which the court determined, due to a valid statutory exemption, was not subject to the taxing and spending limitations of articles XIII A and XIII B:

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any “proceeds of taxes.” Nor do they raise, through tax increment financing, “general revenues for the local entity.” The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...<sup>122</sup>

Therefore, a local agency that does not collect and expend “proceeds of taxes” is not an eligible claimant before the Commission.<sup>123</sup>

Here, the District receives *at least some amount* of its funding from local taxes, and is subject to an appropriations limit for at least a portion of its revenues, and is therefore an eligible claimant. The State Controller’s Special Districts Annual Report for 2010-2011 indicates that the Santa Clarita Valley Sanitation District was subject to an appropriations limit for approximately one-third of its total revenue (nearly \$11 million), and made total appropriations subject to the appropriations limit in the amount of \$5,778,450.<sup>124</sup> Based on the foregoing, the Commission finds that the Santa Clarita Valley Sanitation District is an eligible claimant before the Commission.

2. The Regional Water Board’s Order is an Executive Order within the Meaning of Article XIII B, Section 6.

Article XIII B, section 6 provides that “[w]henver 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 programs or increased level of service...” Government Code section 17514 provides that costs mandated by the state includes “any increased costs which a local agency or school district is required to incur...as a result of...any executive order implementing any statute...which mandates a new program or higher level of service of an existing program...” Government Code section 17516

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<sup>121</sup> (Cal. Ct. App. 4th Dist. 1997) 55 Cal.App.4th 976

<sup>122</sup> *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at p. 986 [internal citations omitted].

<sup>123</sup> *Ibid.* See also, *County of Fresno, supra* (1991) 53 Cal.3d 482, at p. 487 [“[R]ead 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.”].

<sup>124</sup> Exhibit X, 2010-2011 Special Districts Annual Report Excerpts 1 and 2.

defines an “executive order” to mean “any order, plan, requirement, rule, or regulation issued by...[a]ny agency, department, board, or commission of state government.”<sup>125</sup>

Because Resolution R4-2008-012 is an order of a state board, the Commission finds that Resolution R4-2008-012 is an executive order within the meaning of article XIII B, section 6.

### 3. The Test Claim was Timely Filed.

Section 17551 provides that “[l]ocal agency and school district 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.”<sup>126</sup>

Section 1183 of the Commission’s regulations states that “within 12 months,” for purposes of test claim filing, “means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the claimant.”<sup>127</sup>

Finance has raised the statute of limitations found in section 17551, arguing that the test claim was filed on March 30, 2011, while the Resolution had an effective date of December 11, 2008. Finance further argues that the District “asserts that eligible costs under the claim include those for the entire fiscal year 2009-10.” Finance concludes that “[i]f no allegedly state-mandated costs were incurred until fiscal year 2009-2010, all claimed costs for that fiscal year would have had to be incurred after March 30, 2010 to not be time barred.”<sup>128</sup>

Finance’s first point, that the effective date of the Resolution would place this test claim beyond the time bar, has some merit. An effective date of December 11, 2008 would require that a valid test claim be filed by June 30, 2010.

The cover page of the test claim indicates that the Resolution was effective December 11, 2008, as Finance asserts. However, the Regional Board’s comments on the test claim state that the Resolution was effective April 6, 2010, the date of US EPA’s approval of the TMDL. In addition, a later settlement agreement between the District and the Regional Board is in accord, stating that the Resolution became effective April 6, 2010.<sup>129</sup> This is a logical conclusion because TMDLs and waste load allocations must be approved by the SWRCB, OAL,<sup>130</sup> and the Administrator of the US EPA.<sup>131</sup> An effective date of April 6, 2010, would require that a timely filed test claim be submitted on or before June 30, 2011. This test claim was filed March 30,

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<sup>125</sup> Government Code section 17516 (as amended by Stats. 2010, ch. 288 (SB 1169)).

<sup>126</sup> Government Code section 17551 (Stats. 2007, ch. 329 (AB 1222)).

<sup>127</sup> Code of Regulations, title 2, section 1183 (Register 2008, No. 17).

<sup>128</sup> Exhibit C, Department of Finance Comments, at p. 2. See also, Exhibit A, Test Claim, at p. 17; Exhibit D, Rebuttal Comments, at p. 13.

<sup>129</sup> Exhibit X, Settlement Agreement, at p. 4.

<sup>130</sup> Exhibit B, LA Regional Board Comments, at p. 8 [citing Water Code §§ 13245, 13246; Government Code § 11353]. See also, Exhibit A, Test Claim, at p. 6.

<sup>131</sup> Exhibit B, LA Regional Board Comments, at p. 8 [citing 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c)]. See also, Exhibit A, Test Claim, at p. 6.

2011, and therefore was filed before the expiration of the statute of limitations, based on the effective date agreed upon by the parties.

Based on the foregoing, the Commission finds that this test claim was timely filed.

**B. The Regional Water Board’s Resolution and Order does not Impose a New Program or Higher Level of Service within the Meaning of Article XIII B, Section 6.**

The District states that “Regional Board Resolution No. R4-2008-012 requires: (1) compliance with specific waste load allocations that will also be incorporated into the Saugus and Valencia WRPs’ NPDES permits; and (2) specific “implementation tasks” necessary for compliance.” The final waste load allocations, along with the Implementation Tasks, “are the subject of this test claim.”<sup>132</sup>

Attachment B to Resolution R4-2008-012 outlines the conditional site-specific objectives for Reaches 4B, 5, and 6, and conditional waste load allocations for the water discharged from the Valencia and Saugus WRPs to Reaches 4B, 5, and 6. The WLAs for the District’s WRP facilities are based on, and numerically identical to, the SSOs for the respective reaches (117 mg/L chloride for Reach 4B, and the discharge into Reach 4B; 150 mg/L chloride for Reaches 5 and 6, and for the discharge into Reaches 5 and 6).<sup>133</sup> All other point sources are assigned WLAs equal to 100 mg/L.<sup>134</sup> Attachment B also provides for the operation of reverse osmosis treatment at the Valencia WRP, the provision of supplemental water to Reach 4B when chloride concentrations exceed 117 mg/L, and the design and construction of advanced treatment facilities.<sup>135</sup> In addition, Attachment B outlines the following implementation tasks:

*4. The SCVSD will convene a technical advisory committee or committees (TAC(s)) in cooperation with the Regional Board to review literature, develop a methodology for assessment, and provide recommendations with detailed timelines and task descriptions to support any needed changes to the time schedule for evaluation of appropriate chloride threshold for Task 6... ¶*

*5. Groundwater/Surface Water Interaction Model: The SCVSD will solicit proposals, collect data, develop a model in cooperation with the Regional Board, obtain peer review, and report results. The impact of source waters and reclaimed water plans on achieving the water quality objective and protecting beneficial uses, including impacts on underlying groundwater quality, will also be assessed and specific recommendations for management developed for Regional Board consideration. The purpose of the modeling and sampling effort is to determine the interaction between surface water and groundwater as it may affect the loading of chloride from groundwater and its linkage to surface water quality.*

*6. Evaluation of Appropriate Chloride Threshold for the Protection of Sensitive Agricultural Supply Use and Endangered Species Protection: The SCVSD will prepare and submit a report on endangered species protection thresholds. The*

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<sup>132</sup> Exhibit A, Test Claim, at p. 13.

<sup>133</sup> Exhibit A, Test Claim, at pp. 46-53.

<sup>134</sup> Exhibit A, Test Claim, at p. 52.

<sup>135</sup> Exhibit A, Test Claim, at pp. 50-52; 58; 63.

*SCVSD will also prepare and submit a report presenting the results of the evaluation of chloride thresholds for salt sensitive agricultural uses, which shall consider the impact of drought and low rainfall conditions and the associated increase in imported water concentrations on downstream crops utilizing the result of Task 5.*

*7. Develop SSO for Chloride for Sensitive Agriculture: The SCVSD will solicit proposals and develop technical analyses upon which the Regional Board may base a Basin Plan amendment.*

*8. Develop Anti-Degradation Analysis for Revision of Chloride Objective by SSO: The SCVSD will solicit proposals and develop draft anti-degradation analysis for Regional Board consideration.*

*9. Develop a pre-planning report on conceptual compliance measures to meet different hypothetical final conditional wasteload allocations. The SCVSD shall solicit proposals and develop and submit a report to the Regional Board that identifies potential chloride control measures and costs based on different hypothetical scenarios for chloride SSOs and final conditional wasteload allocations.*

¶...¶

*17. a) Implementation of Compliance Measures, Complete Environmental Impact Report: The SCVSD shall complete a Wastewater Facilities Plan and Programmatic Environmental Impact Report for facilities to comply with final effluent permit limits for chloride.*

¶...¶

*20. The interim WLAs for chloride shall remain in effect for no more than 10 years after the effective date of the TMDL. Conditional SSO for chloride in the USCR shall be achieved. Final conditional WLAs for chloride in Reaches 4B, 5, and 6 shall apply by May 5, 2015. The Regional Board may consider extending the completion date of this task as necessary to account for events beyond the control of the SCVSD.<sup>136</sup>*

The District alleges the following costs mandated by Resolution R4-2008-012:

Summary of the Implementation Tasks Completed to Date:

TMDL Study/Task	Cost
TMDL Collaborative Process Facilitation Services (Task 4)	\$0.8 million
Ground Water Surface Water Interaction Model (Task 5)	\$3.1 million
Agricultural Chloride Threshold Study (Task 6)	\$0.7 million
Threatened and Endangered Species Study (Task 6)	\$0.1 million
Site Specific Objectives and Anti-Degradation Study (Task 7 & 8)	\$0.3 million
Chloride Compliance Cost Study (Task 9)	\$0.5 million

<sup>136</sup> Exhibit A, Test Claim, at pp. 59-63.

Facilities Plan & EIR (Task 17a)	\$1.1 million
Total TMDL Study Costs to Date	\$6.6 million

¶...¶

As previously indicated, the District has implemented a comprehensive chloride source reduction program within the sewer service area designed to reduce chloride levels in the WRP discharges in order to comply with final WLAs for chloride. (See Exh. 19). Specifically, the District implemented an innovative automatic water softener public outreach and rebate program, in compliance with Senate Bill 475, to remove automatic water softeners, which contribute significant amounts of chloride to the WRP discharges. The total cost of the program for removal of automatic water softeners, not including the cost of the District's staff time, is approximately \$4.8 million.<sup>137</sup>

The District goes on to state that compliance with the conditional SSOs and WLAs will require implementation of “ultra-violet light disinfection at both WRPs;” construction of advanced treatment facilities such as microfiltration-reverse osmosis and brine disposal for desalination; salt management facilities such as extraction wells and water supply conveyance pipelines; supplemental water; and alternative water supplies for the protection of beneficial uses.<sup>138</sup> These activities and costs are described as the AWRM. The District’s “present estimate of the cost to comply with the TMDL’s conditional SSOs and WLAs is \$250 million.”<sup>139</sup>

The District estimates its costs to implement the AWRM program as follows:

AWRM Project Element	Estimated Capital Cost
Facilities Plan & Environmental Impact Report (EIR)	\$2.5 million
Advanced Treatment [MF & RO]	\$30.0 million
Brine Disposal (Deep Well Injection, DWI)	\$53 million
Ventura Salt Export Facilities	
(a) MF/RO Conveyance Pipeline from Valencia WRP	\$46.5 million
(b) GW Extraction Wells in Ventura County	\$5.5 million
(c) Blend Water Pipeline from Wells to River	\$52.3 million
Supplemental Water from local pumped groundwater	\$30.0 million
Supplemental Water conveyance	\$12.0 million
UV Disinfection Facilities at Saugus & Valencia WRP	\$16.5 million
Removal of Automatic Water Softeners	\$2.4 million
Total Estimated Capital Cost	\$250.7 million <sup>140</sup>

Thus the District has alleged the above activities required by the 2008 Resolution, totaling approximately \$257 million in alleged increased costs. The analysis below addresses whether

<sup>137</sup> Exhibit A, Test Claim, at pp. 13-16.

<sup>138</sup> Exhibit A, Test Claim, at pp. 11-12.

<sup>139</sup> *Id.*, at p. 12.

<sup>140</sup> Exhibit A, Test Claim, at p. 16.

the activities alleged in the Implementation Tasks and the AWRM program constitute a new program or higher level of service.

1. Some of the Implementation Tasks alleged in the Resolution are not new.

Resolution R4-2008-012 constitutes a revision to the prior chloride TMDL for the Upper Santa Clara River, and therefore many of the implementation tasks included in the resolution may have already been completed, or, at minimum, were included in earlier versions of the TMDL that continued to be required when the 2008 Resolution was adopted and which have not been pled in this test claim, and are therefore not new, with respect to prior law. Activities that are not new, as compared with an earlier order or resolution in effect at the time the 2008 Resolution was adopted, do not constitute a new program or higher level of service and, thus, are not reimbursable in the context of the current test claim.<sup>141</sup>

Implementation Tasks 4, 5, 6, 7, 8, and 9, quoted above from Resolution R4-2008-012, are found in nearly identical language in Resolution 04-004,<sup>142</sup> and again in Resolution R4-2006-016, both of which were approved by EPA prior to the adoption of the test claim Resolution.<sup>143,144</sup>

Additionally, Implementation Tasks 4-9 are listed in the revised TMDL as having completion dates *prior to* the adoption and approval of the 2008 Resolution.<sup>145</sup> Moreover, these tasks appear to have indeed *been completed* prior to the adoption of Resolution R4-2008-012: the Resolution states that “[t]he Santa Clarita Valley Sanitation District (SCVSD) has completed all of the necessary special studies required by the Chloride TMDL (TMDL Task Nos 3, 4, 5, 6, 7, 8, 9, 10b, and 10c).” The Resolution further states that “[t]he completion of these TMDL special studies...has led to the development of an alternative TMDL implementation plan that addressed chloride impairment of surface waters and degradation of groundwater.”<sup>146</sup>

Based on the plain language of the Resolution itself, these Implementation Tasks were completed prior to the adoption of the Resolution. It appears that the tasks were repeated in the revised TMDL adopted December 11, 2008, but activities that were completed (and the costs thereby incurred) prior to July 1, 2009 are outside the period of eligibility for this test claim.<sup>147</sup> Moreover, activities that were required by a prior version of the TMDL are not new. Therefore,

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<sup>141</sup> *Lucia Mar Unified School District, supra*, (1988) 44 Cal.3d 830, at p. 835.

<sup>142</sup> See Exhibit B, LA Regional Board Comments, at p. 537 and following.

<sup>143</sup> Exhibit B, LA Regional Board Comments, at pp. 564-565.

<sup>144</sup> See Exhibit X, SCVSD Draft EIR, at p. 8 [stating that Resolution 04-004 was “in effect May 4, 2005,” and Resolution R4-2006-016 was “in effect June 12, 2008.”].

<sup>145</sup> E.g., Task 4: Convening a technical advisory committee to conduct literature review and develop methodology for assessment; Completion Date 05/04/2006; Task 5: Groundwater/Surface Water Interaction Model; Completion Date 11/20/2007.

<sup>146</sup> Exhibit A, Test Claim, at p. 36.

<sup>147</sup> Government Code section 17557(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.” This test claim was submitted on March 30, 2011, establishing eligibility for reimbursement beginning July 1, 2009].



all costs and activities alleged for Implementation Tasks 4, 5, 6, 7, 8, and 9 do not result in a state-mandated new program or higher level of service and are denied.

Implementation Task 17a, “Implementation of Compliance Measures, Complete Environmental Impact Report...” is found in Resolution R4-2006-016.<sup>148,149</sup> The claimant alleges \$613,530 for “Facilities Plan & EIR – Task 17” and \$774,890 for “Consultants (TMDL Task 17)” incurred in fiscal year 2009-2010. However, the activities of implementing compliance measures and completing an EIR are not *new*, with respect to prior law, and the resolution which first required these activities was not pled in this test claim. In fact, claimant was required to prepare the draft EIR by May 4, 2010 under prior law and an administrative civil liability complaint was brought by the Regional Board against the District “for the failure to complete Wastewater Facilities Plans and Programmatic Environmental Impact Reports by the required due date in 2011.”<sup>150</sup>

Based on the foregoing, the Commission finds that the Implementation Tasks found in the test claim Resolution, alleged to impose costs of approximately \$6.6 million, are not new requirements, when compared with prior law, and therefore cannot impose reimbursable costs mandated by the state.

Finally, the default TMDL, including WLAs of 100 mg/L for the Saugus and Valencia WRPs, which takes effect “if the District cannot comply with the AWRM program,” is not a new requirement. The Regional Board adopted a TMDL for Reaches 5 and 6 of the Santa Clara River in 2002, which “required the Districts to reduce the chloride levels in the Plants’ discharge.”<sup>151</sup> That TMDL was revised in 2004 and 2006, but the numerical limits were not altered. The TMDL in effect prior to the 2008 Resolution “has a numeric target of 100 mg/L, measured instantaneously and expressed as a chloride concentration, required to attain the water quality objective and protect agricultural supply beneficial use.”<sup>152</sup> In addition, the TMDL includes “waste load allocations (WLAs) [of] 100 mg/L for Valencia WRP and 100 mg/L for Saugus WRP.”<sup>153</sup> The numerical limits, which the parties acknowledge will control if the AWRM program is not fully and continuously implemented, were adopted in 2002, and approved by U.S. EPA in April 2005, and have not changed. The default WLAs are therefore not new, irrespective of whatever costs might be incurred to implement them.

In comments submitted in response to the draft staff analysis, the District argues that the above analysis “completely ignores the fact that the 2008 TMDL is the result of the final appeal of the original 2002 approval.” The District argues that the “entire TMDL process began in 2002 with the initial adoption of the TMDL, and was repeatedly administratively appealed and negotiated over six years until the District had exhausted all of its administrative remedies and was forced to

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<sup>148</sup> Exhibit B, LA Regional Board Comments, at p. 566.

<sup>149</sup> Exhibit X, SCVSD Draft EIR at p. 8 [stating that Resolution R4-2006-016 was “in effect” on June 12, 2008.].

<sup>150</sup> Exhibit X, LA Regional Board, Enforcement News, November 26, 2012.

<sup>151</sup> Exhibit A, Test Claim, at p. 175.

<sup>152</sup> Exhibit A, Test Claim, at p. 191 [Attachment A to Resolution R 02-018].

<sup>153</sup> *Id.*, at p. 192.

accept the 2008 order in the face of the threat of crippling fines.” The District further argues that “[t]o deny the Test Claim on the grounds that the state mandate is not “new” would be a Catch-22, since any Test Claim during the appeals process would have been unripe.” The District concludes that “because the 2002, 2005, and 2006 approvals are part and parcel of the 2008 TMDL, they were “pled” in this Test Claim.” Therefore, the District argues that “[t]he proper measure of whether the TMDL is a new or higher level of service is to compare the TMDL’s requirements with the existing or pre-TMDL requirements.”

This argument does not change the above analysis. As discussed above, a test claim must 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.”<sup>154</sup> In addition, section 17553 and the regulations require that a claimant identify “the specific sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate,” and include a “a detailed description of new activities and costs that arise from the mandate.”

Here, the District argues that the prior Basin Plan amendments are part and parcel of the 2008 Resolution, and were therefore effectively “pled.” But the test claim form cites only Resolution R4-2008-012. Moreover, even if the prior Resolutions were “pled” in this test claim as imposing state-mandated activities, the activities described in Implementation Tasks 4, 5, 6, 7, 8, and 9 would be well outside the statute of limitations described in section 17551, because those activities were already completed at the time the 2008 Resolution was adopted, and thus costs for those activities would necessarily have been “first incurred” prior to the adoption of the 2008 Resolution.<sup>155</sup>

In addition, the District is for the first time arguing that “the 2008 TMDL is the result of the final appeal of the original 2002 approval;”<sup>156</sup> in essence arguing that the District was not mandated to perform any of the activities described in the 2002, 2003, 2004, or 2006 orders until the “final appeal” was exhausted in the 2008 Resolution. The record does not support this interpretation: although Resolution 2002-018 was appealed to the SWRCB, and remanded to the District, the Regional Board on remand adopted Resolution 2003-008, amending Resolution 2002-018, which was ultimately approved by EPA on April 28, 2005, thus ending the administrative appeals process for the “original” TMDL, and giving its provisions the force of law.

Accordingly, the District completed the studies required by the “original” TMDL, and those activities are no longer “new” with respect to prior law. Finally, the “proper measure of whether the TMDL is a new or higher level of service” is not, as the District suggests, to compare Resolution 2008-012 to the “existing or pre-TMDL requirements.” Rather, the “proper measure” of a new program or higher level of service is, as with any other test claim, to compare the test claim statute or regulation with the law in effect immediately prior to the alleged mandate.<sup>157</sup>

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<sup>154</sup> Government Code 17551(c) (Stats. 2007, ch. 329 (AB 1222)).

<sup>155</sup> See Exhibit A, Test Claim, at pp. 34-36 [Resolution R4-2008-012, paragraphs 10; 13-15].

<sup>156</sup> Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 4.

<sup>157</sup> *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835 [“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 concerned*, since at the time section

Here, the requirements of Implementation Tasks 4-9 and 17a, and the chloride WLAs of 100 mg/L were in force at the time the 2008 test claim Resolution was adopted.

Based on the foregoing, Implementation Tasks 4, 5, 6, 7, 8, 9, and 17a are not new, with respect to prior law. In addition, the waste load allocations are not new, with respect to prior law. Therefore the Commission finds that none of these provisions constitutes a state-mandated new program or higher level of service.

2. Accelerating the implementation period of the final waste load allocations under Implementation Task 20 is not a new program or higher level of service resulting in increased costs mandated by the state.

Implementation Task 20 shortens the applicable period of the interim WLAs, thus accelerating the implementation of the final WLAs for the Saugus and Valencia WRPs, from 11 years to 10 years, commencing with the effective date of the 2002 TMDL.<sup>158</sup> The interim WLAs are designed to accommodate the time needed for the WRPs to implement desalination and other chloride reduction improvements. For the Saugus WRP, the interim WLA is described as “the sum of State Water Project treated water supply concentration plus 114 mg/L, as a twelve month rolling average,” but not to exceed 230 mg/L. For the Valencia WRP, the interim WLA is described as “the sum of State Water Project treated water supply concentration plus 134 mg/L, as a twelve month rolling average,” but not to exceed 230 mg/L.<sup>159</sup> These interim WLAs were originally intended to apply for two and one-half years, pursuant to the 2002 TMDL adopted by the Regional Board. That period was expanded to 13 years after appeal and remand from the SWRCB, and the revised schedule was approved by the SWRCB, OAL, and the Administrator of the U.S. EPA.<sup>160</sup> Resolution R4-2006-016 shortened the interim WLA period by two years, as follows:

The interim effluent limits for chloride shall remain in effect for *no more than 11 years after the effective date of the TMDL*. Water Quality Objective for chloride in the Upper Santa Clara River shall be achieved. The Regional Board may consider extending the completion date of this task as necessary to account for events beyond the control of the [District].<sup>161</sup>

Resolution R4-2008-012 shortened the implementation schedule again, providing that the interim WLAs “shall remain in effect for no more than 10 years after the effective date of the TMDL.”<sup>162</sup>

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59300 became effective they were not required to contribute to the education of students from their districts at such schools.”] (emphasis added).

<sup>158</sup> The 2002 Resolution was approved by U.S. EPA, after appeal, remand, and revision, on April 28, 2005. (See Exhibit A, Test Claim, at p. 45 [Attachment B to Resolution R4-2008-012].)

<sup>159</sup> Exhibit B, LA Regional Board Comments, at p. 543 [Resolution R4-04-004].

<sup>160</sup> Exhibit B, LA Regional Board Comments, at pp. 533 [Resolution R4-03-008]; 605 [Resolution R4-2008-012].

<sup>161</sup> Exhibit A, Test Claim, at p. 228; Exhibit B, LA Regional Board Comments, at p. 566 [emphasis added].

<sup>162</sup> Exhibit B, LA Regional Board Comments, at pp. 623-624.

Based on applicable case law there is no new program inherent in shortening the time frame for the interim WLAs. Pursuant to the test claim Resolution, the requirements of the interim WLAs remain the same, only the schedule is accelerated, and the final WLAs attach one year sooner. It may be argued that it costs more to implement the final WLAs one year sooner, but this change does not of itself constitute a new program or higher level of service.<sup>163</sup>

The court of appeal in *Long Beach Unified School District* declared that “[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.*”<sup>164</sup> The Supreme Court has also spoken on the requirement of a new program in *Lucia Mar Unified School District, supra*, in terms often repeated in later decisions: “We recognize that, as its made indisputably clear from 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.”<sup>165</sup> Accordingly, in *City of San Jose v. State of California*,<sup>166</sup> the court held that “withdrawal of funds to reimburse [for a program] was not a ‘new program’ under section 6,”<sup>167</sup> and that “there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>168</sup> Finally, not only is an increase in costs not tantamount to a higher level of service, there is no evidence in the record of the incremental cost increase which might be alleged based on accelerating the implementation of the final WLAs by one year.

Based on the foregoing, the Commission finds that Implementation Task 20 does not impose any new state mandated activities and does not result in a new program or higher level of service.

3. The Alternative Water Resources Management program is not a new program or higher level of service.

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<sup>163</sup> In comments submitted on the draft staff analysis, the District argues that the cases cited herein are distinguishable, and that no case “addresses the issue of accelerated timetables for the completion of a project.” While true that no case directly addresses the issue of an accelerated project, two of the three cited cases also ultimately conclude that the local government claimant has experienced a mandate, based on the facts of those cases. More importantly, however, the cases cited show that costs alone do not constitute a reimbursable mandate, unless those costs are shifted *from* the state *to* the local entity. (Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 5.)

<sup>164</sup> *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, at p. 173 [citing *County of Los Angeles, supra*, 43 Cal.3d at pp. 54-56] [emphasis added].

<sup>165</sup> *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835 [emphasis added].

<sup>166</sup> (1996) 45 Cal.App.4th 1802, at pp. 1811-1813.

<sup>167</sup> *City of San Jose, supra*, 45 Cal.App.4th at p. 1817.

<sup>168</sup> 45 Cal.App.4th at p. 1813 [citing *County of Los Angeles v. Commission on State Mandates, supra* (1995) 32 Cal.App.4th 805, at p. 817].

The California Supreme Court, in *County of Los Angeles I*,<sup>169</sup> addressed the phrase “new program or higher level of service” as follows:

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...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.<sup>170</sup>

Thus the Supreme Court articulated a multi-faceted test for “new program or higher level of service:” reimbursement requires (1) a new task or activity; (2) which constitutes an increase in service as compared to prior law; (3) and which either provides a service to the public, or imposes requirements uniquely upon government, rather than upon all persons and entities equally.

The Regional Board has argued that the Resolution cannot impose a new program or higher level of service because water quality objectives and TMDLs apply to a water body as a whole, and all dischargers are subject to them, “both public agencies and private industry alike.” The Commission need not address this argument,<sup>171</sup> since the AWRM program is an optional alternative to complying with the more stringent TMDL imposed by prior law, which claimant may choose to reject. Moreover, the requirements of the AWRM provide a lower level of service when compared to the law in effect immediately prior to the adoption of R4-2008-012. Therefore, based on the analysis below, the Commission finds that the AWRM does not impose a state mandated new program or higher level of service.

The Regional Board argues that Resolution R4-2008-12 cannot impose a new program or higher level of service because it “amended the Basin Plan to, among other things, adopt site-specific

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<sup>169</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, at p. 56.

<sup>170</sup> *Ibid.*

<sup>171</sup> In comments submitted on the draft staff analysis, the Regional Board entreats the Commission to consider this argument anyway: “The Board...respectfully requests that the Commission address this argument in the context of the Resolution as a whole and determine that the Resolution does not impose requirements unique to the government.” However, the Second District Court of Appeal has previously called this theory into question, when ruling on the constitutionality of the State Water Resources Control Board’s (and the Regional Boards’ by extension) categorical exemption from the definition of a reimbursable executive order, under prior section 17516. The court stated “the applicability of permits to public and private discharges 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. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, at p. 919.) In any event, the Commission need not address this issue because the AWRM program is voluntary, and constitutes a lower level of service than that required under prior law.

objectives for chloride in the Santa Clara River that are *less stringent* than the generally applicable water quality objectives that apply to other major dischargers to the Santa Clara River...<sup>172</sup> The Regional Board argues: “thus, if anything, the 2008 Resolution imposes a *lower level of service* in order to make it less expensive for the Claimant to implement” the TMDL.<sup>173</sup> The Commission agrees.

The first water quality objectives for the Santa Clara River were established in 1975, in which chloride objectives were set at 90 mg/L for Reach 5 and 80 mg/L for Reach 6.<sup>174</sup> In 1978, the Regional Board modified the chloride objectives to 100 mg/L for both Reaches 5 and 6. In 2002, the 100 mg/L objective was incorporated into a TMDL, pursuant to the impairment listing under section 303(d) of the Clean Water Act of certain reaches of the Santa Clara River, and the threat to salt-sensitive agriculture uses both within Reaches 5 and 6 and downstream.<sup>175</sup> Aside from variances and temporary relaxation of the objectives due to drought conditions in the 1990s, the 100 mg/L objective has remained the underlying standard from 1978 to the present.<sup>176</sup> Resolution R4-2008-012 plainly states that the TMDL then in effect is being amended, conditionally, to include the elements of the AWRM.<sup>177</sup> Therefore, the underlying water quality objectives and TMDL in effect are outside the subvention requirement, because any activities or requirements to meet the 100 mg/L objectives, or the TMDL, are not new, and are not pled in this test claim.

Both the District and the Regional Board agree that the AWRM contains “relaxed” requirements, as compared with the prior water quality objectives. The District describes the Resolution as follows:

The December 11, 2008 amendment to the Basin Plan also modified the chloride requirements. This amendment included the enactment of *relaxed site specific objectives* (“SSOs”) for chloride in the Santa Clara River conditioned upon the completion of activities set forth in the revised TMDL that contained new final WLAs and a detailed implementation plan.<sup>178</sup>

The Regional Board states:

In addition, the 2008 Resolution reduces the compliance costs the Claimant would otherwise incur. As detailed above, the 2008 Resolution was specifically adopted

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<sup>172</sup> Exhibit B, LA Regional Board Comments, at p. 2 [emphasis in original].

<sup>173</sup> Exhibit B, LA Regional Board Comments, at p. 26 [emphasis in original].

<sup>174</sup> Exhibit A, Test Claim, at p. 7; Exhibit B, LA Regional Board Comments, at p. 9.

<sup>175</sup> Exhibit A, Test Claim, at pp. 9-10; Exhibit B, LA Regional Board Comments, at pp. 10-11.

<sup>176</sup> Exhibit A, Test Claim, at pp. 7-11; Exhibit B, LA Regional Board Comments, at pp. 9-11.

<sup>177</sup> Exhibit A, Test Claim, at p. 36. See also, Exhibit B, LA Regional Board Comments, at p. 705 [transcript of December 11, 2008 hearing].

<sup>178</sup> Exhibit A, Test Claim, at p. 11 [emphasis added].

to incorporate relaxed site-specific objectives into the Basin Plan in order to implement the Claimant's proposed AWRM program.<sup>179</sup>

In addition, "implementation actions to attain [the prior TMDL] would require advanced treatment – that is, reverse osmosis – of the full effluent from the Saugus *and* Valencia plants with discharge into the ocean through a 43-mile brine line."<sup>180</sup> Under the AWRM, reverse osmosis desalination is only required at the Valencia WRP, and the waste is permitted to be disposed of through deep well injection.<sup>181</sup> The District estimates that implementing the advanced treatment upgrades at only one of the two facilities, along with other tasks, will cost only approximately \$250 million, as opposed to \$500 million under the prior TMDL.<sup>182</sup>

However, in comments submitted on the draft staff analysis, the District argues that "both the AWRM and the compliance plan adopted by the District on October 28, 2013 are designed to comply with Regional Board requirements that are far more stringent than the pre-TMDL standard," and that, as argued above, "the comparison must be between the pre-TMDL conditions and the present TMDL conditions – not comparisons between the various TMDL standards adopted during the appeals process spanning from 2002 to 2008."<sup>183</sup> As explained above, there is no support in mandates law for this position, and the requirements of the test claim Resolution are, as in all mandates cases, evaluated with reference to the law in effect immediately prior to the alleged test claim statute or executive order.<sup>184</sup>

There is nothing in the AWRM that imposes a higher level of service on this claimant. Resolution R4-2008-012 calls for the implementation of less-stringent requirements than under prior law, which the District has acknowledged will be less-expensive to implement. In addition, those requirements are conditional, and the default requirements, should the AWRM not continue to be fully implemented, are not new.

Based on the foregoing, the Commission finds that the AWRM program is not a new program or higher level of service, and the costs and activities thereunder are denied.

**C. Even if the Resolution Constitutes a State-Mandated New Program or Higher Level of Service, it Would not Impose Costs Mandated by the State Under Section 17556(d) Because the Claimant Has Sufficient Fee Authority, as a Sanitation District providing Sewer Services, to Cover the Costs of the Program.**

Government Code section 17556(d) provides that the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds that "the local agency or

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<sup>179</sup> Exhibit B, LA Regional Board Comments, at p. 29.

<sup>180</sup> Exhibit B, LA Regional Board Comments, at p. 719 [transcript of December 11, 2008 meeting] [emphasis added]. See also, Exhibit A, Test Claim, at p. 10 [TMDL estimated to cost \$500 million].

<sup>181</sup> Exhibit A, Test Claim, at p. 12; Exhibit B, LA Regional Board Comments, at p. 778-779.

<sup>182</sup> Exhibit A, Test Claim, at pp. 10; 12.

<sup>183</sup> Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 5.

<sup>184</sup> *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

school district 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*.<sup>185</sup> 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 I, 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 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*.<sup>186</sup>

Accordingly, in *Connell v. Superior Court of Sacramento County*,<sup>187</sup> the Santa Margarita Water District, among others, was denied reimbursement on the basis of its authority to impose fees on water users. The water districts submitted evidence “that rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water.”<sup>188</sup> The court concluded that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs.” Water Code section 35470 authorized the levy of fees to “correspond to the cost and value of the service,” and “to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose.”<sup>189</sup> The court held that the Districts had not demonstrated “that anything in Water Code section 35470 limits the authority of the Districts to levy fees “sufficient” to cover their costs,” and that therefore “the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry.”<sup>190</sup>

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the Controller’s office was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts’ authority to impose fees, even if there existed practical impediments to collecting

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<sup>185</sup> *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

<sup>186</sup> *Id.*, at p. 487.

<sup>187</sup> (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382

<sup>188</sup> *Id.*, at p. 399.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.



the fees. In making its decision the court noted that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is that “[t]o the extent a local agency or school district ‘has the authority’ to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.”<sup>191</sup> The court further noted that, “this basic principle flows from common sense as well. As the Controller succinctly puts it, ‘Claimants can choose not to require these fees, but not at the state’s expense.’”<sup>192</sup>

Here, Health and Safety Code section 5471 permits a sanitation district, “by 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 territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.”<sup>193</sup> This section provides “authority,” within the meaning of section 17556(d), based on the plain language of both Health and Safety Code section 5471 and Government Code section 17556.

Proposition 218, adopted by the voters in 1996, also known as the “Right to Vote on Taxes Act,” declared its purpose to protect taxpayers “by limiting the methods by which local governments exact revenue from taxpayers without their consent.” Proposition 218 added articles XIII C and XIII D to the Constitution;<sup>194</sup> article XIII D, section 6 lays out the procedures and requirements for “new or existing increased fees and charges:”

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*

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<sup>191</sup> *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

<sup>192</sup> *Ibid.*

<sup>193</sup> Health and Safety Code section 5471(a) (Stats. 2007, ch. 27 (SB 444)).

<sup>194</sup> Exhibit X, Text of Proposition 218.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision...

Section 6 thus provides that an agency seeking to impose or increase fees must identify the parcels and the amount proposed, and must provide written notice by mail to the record owners of the identified parcels, including notice of a public hearing, at which the agency is required to "consider all protests." Written protests by a majority of owners of the affected parcels are sufficient to defeat a fee increase. In addition, the section provides that new or increased fees are required to "not exceed the funds required to provide the property related service;" "not be used for any purpose other than that for which the fee or charge was imposed;" "not exceed the proportional cost of the service attributable to the parcel;" and be "actually used by, or immediately available to, the owner of the property in question." The section provides specifically that new fees or charges may not be imposed for general services such as police and

fire protection. Finally, voter approval is required “[e]xcept for fees or charges for sewer, water, and refuse collection services.”<sup>195</sup>

The District asserts that the fee authority case law discussed above is no longer on point “because the most significant cases predate the passage of [Proposition 218].” The District contends that “[t]his potential conflict is significant where a local agency is unable to obtain the requisite approval to implement a proposed fee increase.” The District asserts that it “attempted to implement the Proposition 218 process, but the elected public officials could not support the proposed rate increase in the face of fierce public opposition.” The District states that “[i]n 2010, the District’s board declined to adopt the proposed rate increases based on the expectation that any substantive rate increase would be overturned by way of referendum due to fierce opposition from the District’s ratepayers.”<sup>196</sup>

In addition, the District argues in comments on the draft staff analysis that it “has no legal authority to obtain reimbursement from the parties responsible for the majority of the chloride concentration, nor does it have the legal authority to obtain reimbursement from the beneficiaries of the treatment.” The District also argues that *Clovis Unified, supra*, “is distinguishable from this Test Claim,” in that the community college districts were “authorized under the Education Code to collect a specified sum of money from each student for health fees,” while the District, “in contrast, has no authority to raise sewer fees by a sum certain.” In addition, the District argues that it is “subject to Prop. 218 protests and referenda on the rates necessary to support the TMDL facilities,” while the community colleges in *Clovis Unified* were “not subject to Prop. 218 or referenda on the health fee because it was directly established by law.”<sup>197</sup>

However, based on the plain language of article XIII D, section 6, above, voter approval is not required for increases to water and sewer rates, and the absence of a statute providing for a specific dollar-amount fee increase is not relevant to the authority of sewer districts to raise fees.<sup>198</sup> All remaining limitations of article XIII D, must be satisfied (e.g., parcels must be identified, and amounts proposed must be calculated; fees shall not exceed the funds required to provide service; revenues may not be used for any other purpose; amount of a fee must be proportional to the cost of the service attributable to a parcel; a public hearing must be held and *if written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge*), but the parties’ comments only identify “written protests” as a limitation at issue here, and state that “elected public officials could not support the proposed rate increase.”

The Regional Board argues that “assuming that Proposition 218 does apply to Claimant’s proposals for rate increases...the number of written protests necessary to preclude the Board of Directors from passing rate increases under Proposition 218 was noticeably lacking.” Section 6(a)(2), states that “[i]f *written protests* against the proposed fee or charge are *presented by a majority of owners of the identified parcels*, the agency shall not impose the fee or charge.” The

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<sup>195</sup> California Constitution, article XIII D, section 6 (adopted November 5, 1996).

<sup>196</sup> Exhibit A, Test Claim, at p. 26.

<sup>197</sup> Exhibit J, Claimant Comments on Draft Staff Analysis, at p. 6.

<sup>198</sup> California Constitution, article XIII D, section 6(c) (adopted November 5, 1996).

Regional Board argues that there are nearly 69,000 parcels connected to the District’s sewerage system, and therefore “at least 34,449 written protests” would be a majority of the owners required to defeat a rate increase. At the May 26, 2009 and July 27, 2010 hearings the District received “203 written protests and 7, 732 written protests, respectively.”<sup>199</sup>

The District does not dispute the number of written protests needed, or the number received (the Regional Board’s mathematical reasoning presumes that all 69,000 parcels represent a single voting property owner, but the District fails to argue the point); rather the District argues that the District’s Board “quite reasonably believed that this large rate increase would be rejected if challenged by initiative.”<sup>200</sup> Section 3 of Proposition 218 provides that the initiative power to overturn a tax, fee, or assessment “shall not be prohibited or otherwise limited,” and the District maintains that an initiative to overturn the fee increase would qualify for the ballot with approximately 6,500 votes, based on the estimated number of voters in the last gubernatorial election who would be affected by the increase.<sup>201</sup> Therefore, the District concludes that the 7,732 written protests “exceeded the number of signatures needed to qualify an initiative that would overturn the rate increase.”<sup>202</sup>

But written protests are not tantamount to an initiative petition, and an initiative petition is not a successful referendum. The District acknowledges that its own board “declined to adopt the proposed rate increases based on the expectation that any substantive rate increase would be overturned by way of referendum.”<sup>203</sup> The Commission agrees with the Regional Board, in that “[t]he Claimant cannot rely on mere speculation as to what could happen as a defense to the fee increase exception” of section 17556(d).<sup>204</sup>

The District argues that the Commission’s decision on *Discharge of Stormwater Runoff* (07-TC-09) reflects the tension between Proposition 218 and the precedent of *Connell*,<sup>205</sup> discussed above, because the Commission found in that earlier test claim decision that Proposition 218 limited the authority of the local government to raise the necessary fees. *Connell* did not address Proposition 218, because the water districts did not allege that their authority to raise fees was impacted by Proposition 218.<sup>206</sup> The water districts in *Connell* instead urged an interpretation of “authority” under section 17556(d) that would necessarily include economic feasibility as a test of “sufficiency,” and the court rejected that interpretation. Moreover, the Commission’s decision in *Discharge of Stormwater Runoff* concluded that Proposition 218 was a barrier to raising

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<sup>199</sup> Exhibit B, LA Regional Board Comments, at p. 20 [citing “Letter from Stephen R. Maguin...to Council members” regarding responses to comments made during the public hearing on proposed rate increases].

<sup>200</sup> Exhibit D, Rebuttal Comments, at p. 11.

<sup>201</sup> Exhibit D, Rebuttal Comments, at p. 11, Fn. 8. See also article XIII C, section 3.

<sup>202</sup> Exhibit D, Rebuttal Comments, at p. 11.

<sup>203</sup> Exhibit A, Test Claim, at p. 26.

<sup>204</sup> Exhibit B, LA Regional Board Comments, at p. 31.

<sup>205</sup> (1997) 59 Cal.App.4th 382.

<sup>206</sup> *Id.*, at p. 402.

assessments or fees only because stormwater management charges were not “water” or “sewer” services provided directly to users, and thus exempt from the voter approval requirement of Proposition 218. The Commission concluded that without the exemption from voter approval under section 6(c), “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.”<sup>207</sup>

Therefore the Commission’s earlier decision, though it would not in any event be precedential, is distinguishable on the very same ground that renders *Connell* significantly poignant. The District cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c). The District would have the Commission recognize “political realities” as a test of the District’s “authority” under Health and Safety Code section 5471 to raise fees, but here, as in *Connell*, “the plain language of the statute defeats the Districts’ position.” The District asserts that “political realities...[made] it *impossible*” for the District to raise fees, but ultimately “the District’s board *declined to adopt the proposed rate increases...*”<sup>208</sup> In the same way that the court in *Connell* declined to find that an inability to market reclaimed water would undermine the “sufficiency” of the districts’ authority to raise fees, the Commission here declines to make a finding that political opposition undermines the authority of a sanitation district to raise fees.

Furthermore, the ground upon which the District seeks to distinguish *Clovis Unified*, that the District does not have statutory authority to raise rates by “a sum certain,” only serves to demonstrate why the Health Fee Elimination mandate was held to constitute a reimbursable new program offset by the authorized revenues, while this test claim Resolution does not impose costs mandated by the state under section 17556(d). The Health Fee Elimination mandate underlying *Clovis Unified* was approved for ongoing reimbursement in the test claim decision only *because* the fee authority of the community colleges was limited to a certain dollar amount, indexed to inflation, and that amount was held, as a matter of law, to be insufficient to cover the entire mandated cost of the program.<sup>209</sup> Had the community colleges held fee authority as broad as is provided to the District under Health and Safety Code section 5471, the result of the analysis under section 17556(d) in *Clovis Unified* would have been the same as discussed herein: where fee authority is sufficient to cover the costs of the mandated activities, there can be no reimbursable costs mandated by the state.

Based on the foregoing, the Commission finds that the District has not incurred increased costs mandated by the state, pursuant to section 17556(d).

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<sup>207</sup> *Discharge of Stormwater Runoff* (07-TC-09) at p. 106 [citing *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, at pp. 1358-1359 (concluding that city’s charges on developed parcels to fund stormwater management were property-related fees, but not covered by the exemption for water and sewer fees, and thus required voter approval)].

<sup>208</sup> Exhibit A, Test Claim, at p. 26 [emphasis added].

<sup>209</sup> See Education Code section 76355 (Stats. 2005, ch. 320); Test Claim Decision, Health Fee Elimination (CSM-4206).

## **V. Conclusion**

Based on the foregoing discussion and analysis, the Commission denies this test claim and concludes that Resolution No. R4-2008-012, adopted December 11, 2008, by the Los Angeles Regional Water Quality Control Board does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

## **Glossary of Frequently Used Water Quality Related Terms and Acronyms:**

Alternative Water Resources Management program (AWRM)	An alternative to meeting the prior TMDL and WLA requirements of the former basin plan. The requirements for the AWRM were included in a MOU entered into by the stakeholders which was then included in the revised Upper Santa Clara River TMDL and SSOs by Resolution R4-2008-012.
California Antidegradation Policy	A 1968 State Board policy that precludes water quality degradation in the state unless specific conditions are satisfied.
Clean Water Act (CWA)	The primary federal law governing water pollution. The CWA was enacted in 1972, to restore and maintain the chemical, physical, and biological integrity of the nation's waters and includes a goal to eliminate the discharge of pollutants into the navigable waters by 1985.
Effluent	Wastewater - treated or untreated - that flows out of a treatment plant, sewer, or industrial outfall; generally refers to wastes discharged into surface waters.
Environmental Impact Report (EIR)	A detailed statement prepared in accordance with California Environmental Quality Act (CEQA) whenever it is established that a project may have a potentially significant effect on the environment. The EIR describes a proposed project, analyzes potentially significant environmental effects of the proposed project, identifies a reasonable range of alternatives, and discusses possible ways to mitigate or avoid the significant environmental effects. (Pub. Resources Code §§ 21061, 21100 and 21151; Cal. Code Regs., tit. 14, § 15362.)
Federal Antidegradation Policy	The CWA's antidegradation policy is found in section 303(d) (and further detailed in federal regulations). Its goals are to 1) ensure that no activity will lower water quality to support existing uses, and 2) to maintain and protect high quality waters.

Porter-Cologne Water Quality Control Act	California's Porter-Cologne Water Quality Control Act was enacted in 1969 to allocate and to protect the waters of California. Through it, the State Board and regional boards were established. Many of its provisions mirror those of the CWA which was modeled, in part, on Porter-Cologne.
Reclaimed Water	Treated effluent that is considered to be of appropriate quality for an intended reuse application.
Regional Water Quality Control Boards (RWQCBs or Regional Boards)	The nine RWQCBs develop and enforce water quality objectives and implementation plans to protect the State's waters, recognizing local differences in climate, topography, geology and hydrology.
Site Specific Objective (SSO)	Water Quality Objectives (WQOs) adjusted to reflect localized site specific conditions. Usually initiated by a discharger to allow discharge of pollutants at greater than background levels.
State Water Resources Control Board(SWRCB or State Board)	The state board charged with protecting the waters of California. The SWRCB has joint authority of water allocation and water quality protection. It also oversees and supports the work of the regional boards (RWQCBs).
Total Maximum Daily Load (TMDL)	A calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.
Waste Load Allocation (WLA)	The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution (e.g., permitted waste treatment facilities).
Water Quality Objectives (WQOs)	Define the level of water quality that shall be maintained in a water body or portion thereof.
Water Reclamation Plant (WRP)	A plant which treats sewage and produces reclaimed water.