

## **Item 1**

### **Proposed Minutes**

#### **COMMISSION ON STATE MANDATES**

Location of Meeting: via Zoom  
March 24, 2023

Present: Member Gayle Miller, Chairperson  
Representative of the Director of the Department of Finance  
Member Lynn Paquin  
Representative of the State Controller, Vice Chairperson  
Member Lee Adams  
County Supervisor  
Member Scott Morgan  
Representative of the Director of the Office of Planning and Research  
Member Renee Nash  
School District Board Member  
Member Spencer Walker  
Representative of the State Treasurer

Absent: Member Sarah Olsen  
Public Member

*NOTE: The transcript for this hearing is attached. These minutes are designed to be read in conjunction with the transcript.*

#### **CALL TO ORDER AND ROLL CALL**

Chairperson Miller called the meeting to order at 10:07 a.m. Executive Director Halsey announced that Ms. Olsen had contacted staff to say that she would not be able to attend this meeting and then she called the roll. Members Adams, Miller, Morgan, Nash, Paquin, and Walker all indicated that they were present.

#### **APPROVAL OF MINUTES**

Chairperson Miller asked if there were any objections or corrections to the January 27, 2023 minutes. There was no response. Member Adams made a motion to adopt the minutes. Member Walker seconded the motion. Chairperson Miller asked if there was any public comment on the minutes. There was no response. Executive Director Halsey called the roll. The Commission voted to adopt the January 27, 2023 hearing minutes by a vote of 6-0 with Member Olsen absent.

#### **PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA**

Chairperson Miller asked if there was any public comment. There was no response.

**HEARINGS AND DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 7 (GOV. CODE, § 17551, 17557, 17559, and 17570) (action)**

Executive Director Halsey swore in the parties and witnesses participating in the Article 7 portion of the hearing.

**APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181.1(c) (info/action)**

Item 2 Appeal of Executive Director Decisions

Executive Director Halsey presented this item, stating that Item 2 is reserved for appeals of Executive Director decisions and that there were no appeals to consider for this hearing.

**TEST CLAIMS**

Item 3 *California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and, XVIII, Adopted May 22, 2009, 09-TC-03*

County of Orange, Orange County Flood Control District; and the Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach, and Villa Park, Claimants

Chief Legal Counsel Camille Shelton presented this item and recommended that the Commission adopt the Proposed Decision to partially approve this Test Claim.

David Burhenn and Amada Carr appeared on behalf of the claimants. Donna Ferebee appeared on behalf of the Department of Finance. Jennifer Fordyce, Catherine Hagan, and Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Santa Ana Regional Water Quality Control Board. Bryan Brown, of Myers Nave, appeared on behalf of Interested Person Alameda Countywide Clean Water Program.

Following statements by Mr. Burhenn, Ms. Carr, Ms. Ferebee, Ms. Hagan, and Mr. Brown, Chairperson Miller asked if there was any public comment or questions from the board. There was no response. Following statements by Chief Legal Counsel Shelton and Mr. Burhenn, Chairperson Miller asked if there were any additional questions from the board or if any other party or witness or the public had any additional comments. There was no response. Following statements by Member Adams and Member Morgan, Member Adams made a motion to adopt the Proposed Decision. Member Nash seconded the motion. Executive Director Halsey called the roll. The Commission voted to adopt the Proposed Decision by a vote of 6-0 with Member Olsen absent.

## **PARAMETERS AND GUIDELINES**

Item 4      *Juveniles: Custodial Interrogation, 21-TC-01*

Welfare and Institutions Code Section 625.6 as Amended by Statutes 2020, Chapter 335, Section 2 (SB 203)

County of Los Angeles, Claimant

Senior Commission Counsel Juliana Gmur presented this item and recommended that the Commission adopt the Proposed Decision and Parameters and Guidelines.

Fernando Lemus appeared on behalf of the County of Los Angeles. Donna Ferebee appeared on behalf of the Department of Finance.

Following statements by Mr. Lemus and Ms. Ferebee, Chairperson Miller asked if there was any questions from Members or public comment. There was no response.

Chairperson Miller made a motion to adopt the Proposed Decision and Parameters and Guidelines. Member Adams seconded the motion. Executive Director Halsey called the roll. The Commission voted to adopt the Proposed Decision and Parameters and Guidelines by a vote of 6-0 with Member Olsen absent.

## **PARAMETERS AND GUIDELINES AMENDMENTS**

Item 5      *Racial and Identity Profiling, 21-PGA-01*

Government Code Section 12525.5, as added and amended by Statutes 2015, Chapter 466 (AB 953); Statutes 2017, Chapter 328 (AB 1518); California Code of Regulations, Title 11, Sections 999.224, 999.225, 999.226, 999.227, 999.228, and 999.229, as added by Register 2017, No. 46

City of Claremont, Requester

Executive Director Halsey stated that the requester contacted Commission staff, stated that they agree with the staff analysis, will not appear for this item, and thanked the Commissioners and staff for their time on this request.

Senior Commission Counsel Eric Feller presented this item and recommended that the Commission adopt the Proposed Decision and Parameters and Guidelines Amendment.

Donna Ferebee appeared on behalf of the Department of Finance.

Following a statement by Ms. Ferebee, Chairperson Miller asked if there was any questions from Members or public comment. There was no response. Member Walker made a motion to adopt the Proposed Decision and Parameters and Guidelines Amendment. Member Nash seconded the motion. Executive Director Halsey called the roll. The Commission voted to adopt the Proposed Decision and Parameters and Guidelines Amendment by a vote of 6-0 with Member Olsen absent.

## **HEARINGS ON COUNTY APPLICATIONS FOR FINDINGS OF SIGNIFICANT FINANCIAL DISTRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 17000.6 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 2 (info/action)**

- Item 6 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer

Executive Director Halsey stated that Item 6 is reserved for county applications for a finding of significant financial distress, or SB 1033 applications, and that no SB 1033 applications have been filed.

## REPORTS

- Item 7 Legislative Update (info)

Program Analyst Jill Magee presented this item.

- Item 8 Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar (info)

Chief Legal Counsel Camille Shelton presented this item.

- Item 9 Executive Director: Budget, Workload Update, and Tentative Agenda Items for the May 2023 and July 2023 Meetings (info)

Executive Director Halsey presented this item.

## **CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (info/action)**

The Commission adjourned into closed executive session at 11:26 a.m., pursuant to Government Code section 11126(e). The Commission met in closed session to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; to confer with and receive advice from legal counsel regarding potential litigation; and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

### A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126(e):

#### Trial Courts:

1. *County of Los Angeles v. Commission on State Mandates, Malia M. Cohen as State Controller*  
Los Angeles County Superior Court, Case No. 23STCP00036  
(*Municipal Stormwater and Urban Runoff Discharges Consolidated IRC*, 19-0304-I-04, 20-0304-I-06, 20-0304-I-08, 20-0304-I-09, 20-0304-I-10, 20-0304-I-11, and 20-0304-I-13)
2. *Coast Community College District, et al. v. Commission on State Mandates*,  
Sacramento County Superior Court, Case No. 34-2014-80001842  
Third District Court of Appeal, Case No. C080349  
On Remand from the California Supreme Court, Case No. S262663  
[*Minimum Conditions for State Aid*, 02-TC-25/02-TC-31  
(Education Code Sections 66721, 66721.5, 66722, 66722.5, 66731, 66732,

66736, 66737, 66738, 66740, 66741, 66742, 66743, 70901, 70901.5, 70902, 71027, 78015, 78016, 78211.5, 78212, 78213, 78214, 78215, 78216, 87482.6, and 87482.7; Statutes 1975, Chapter 802; Statutes 1976, Chapters 275, 783, 1010, and 1176; Statutes 1977, Chapters 36 and 967; Statutes 1979, Chapters 797 and 977; Statutes 1980, Chapter 910; Statutes 1981, Chapters 470 and 891; Statutes 1982, Chapters 1117 and 1329; Statutes 1983, Chapters 143 and 537; Statutes 1984, Chapter 1371; Statutes 1986, Chapter 1467; Statutes 1988, Chapters 973 and 1514; Statutes 1990, Chapters 1372 and 1667; Statutes 1991, Chapters 1038, 1188, and 1198; Statutes 1995, Chapters 493 and 758; Statutes 1998, Chapter 365, 914, and 1023; Statutes 1999, Chapter 587; Statutes 2000, Chapter 187; and Statutes 2002, Chapter 1169; California Code of Regulations, Title 5, Sections 51000, 51002, 51004, 51006, 51008, 51012, 51014, 51016, 51018, 51020, 51021, 51022, 51023, 51023.5, 51023.7, 51024, 51025, 51027, 51100, 51102, 53200, 53202, 53203, 53204, 53207, 53300, 53301, 53302, 53308, 53309, 53310, 53311, 53312, 53314, 54626, 54805, 55000, 55000.5, 55001, 55002, 55002.5, 55004, 55005, 55006, 55100, 55130, 55150, 55160, 55170, 55182, 55200, 55201, 55202, 55205, 55207, 55209, 55211, 55213, 55215, 55217, 55219, 55300, 55316, 55316.5, 55320, 55321, 55322, 55340, 55350, 55401, 55402, 55403, 55404, 55500, 55502, 55510, 55512, 55514, 55516, 55518, 55520, 55521, 55522, 55523, 55524, 55525, 55526, 55530, 55532, 55534, 55600, 55601, 55602, 55602.5, 55603, 55605, 55607, 55620, 55630, 55750, 55751, 55752, 55753, 55753.5, 55753.7, 55754, 55755, 55756, 55756.5, 55757, 55758, 55758.5, 55759, 55760, 55761, 55762, 55763, 55764, 55765, 55800, 55800.5, 55801, 55805, 55805.5, 55806, 55807, 55808, 55809, 55825, 55827, 55828, 55829, 55830, 55831, 58102, 58104, 58106, 58107, 58108, 59404, and 59410; Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002); and "Program and Course Approval Handbook" Chancellor's Office California Community Colleges (September 2001).]

#### Courts of Appeal:

1. *County of San Diego v. Commission on State Mandates, Department of Finance, State Controller*  
Fourth District Court of Appeal, Case No. D079742  
San Diego County Superior Court, Case No. 37-2020-00009631-CU-WM-CTL  
(*Youth Offender Parole Hearings (17-TC-29)*)

#### California Supreme Court

1. *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al.* (petition and cross-petition)  
California Supreme Court, Case No. S277832 (Petition for review filed 12/22/22)  
Third District Court of Appeal, Case No. C092139  
Sacramento County Superior Court Case No. 34-2010-80000604  
[*Discharge of Stormwater Runoff*, Order No. R9-207-000 (07-TC-09), California Regional Water Control Board, San Diego Region Order No. R9-2007-001,

NPDES No. CAS0108758, Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c) iv-vii & x-xv, and L]

## B. POTENTIAL LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126(e):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members or staff.

## C. PERSONNEL

To confer on personnel matters pursuant to Government Code section 11126(a)(1).

## **RECONVENE IN PUBLIC SESSION**

At 12:03 p.m., the Commission reconvened in open session.

## **REPORT FROM CLOSED EXECUTIVE SESSION**

Chairperson Miller reported that the Commission met in closed executive session pursuant to Government Code section 11126(e). The Commission conferred with and received advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and conferred with and received advice from legal counsel regarding potential litigation, and, pursuant to Government Code section 11126(a)(1) to confer on personnel matters.

## **ADJOURNMENT**

Hearing no further business, Chairperson Miller stated that she would entertain a motion to adjourn the meeting. Member Nash made a motion to adjourn the meeting. Member Morgan seconded the motion. Executive Director Halsey called the roll. The Commission adopted the motion to adjourn the March 24, 2023 meeting by a vote of 6-0 with Member Olsen absent at 12:05 p.m.

Heather Halsey  
Executive Director

STATE OF CALIFORNIA  
COMMISSION ON STATE MANDATES

RECEIVED

APR 25 2023

COMMISSION ON  
STATE MANDATES

PUBLIC MEETING

FRIDAY, MARCH 24, 2023

10:07 A.M.

MEETING HELD

VIA ZOOM

A VIDEO COMMUNICATIONS PLATFORM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

**ORIGINAL**

REPORTED BY:

KATHRYN S. SWANK

Certified Shorthand Reporter No. 13061

Registered Professional Reporter

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Roseville, California 95661  
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**A P P E A R A N C E S**

**COMMISSIONERS PRESENT**

GAYLE MILLER  
Representative for JOE STEPHENSHAW  
Director  
Department of Finance  
(Chairperson of the Commission)

SPENCER WALKER  
Representative for FIONA MA  
State Treasurer  
(Vice Chairperson of the Commission)

LEE ADAMS III  
Sierra County Supervisor  
Local Agency Member

SCOTT MORGAN  
Representative for SAMUEL ASSEFA, Director  
Office of Planning & Research

RENEE C. NASH  
Eureka Union School District  
School District Board Member

LYNN PAQUIN  
Representative for MALIA COHEN  
State Controller

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**COMMISSION STAFF**

ERIC FELLER  
Senior Commission Counsel

JULIANA GMUR  
Senior Counsel

HEATHER A. HALSEY  
Executive Director

JILL MAGEE  
Program Analyst

HEIDI PALCHIK  
Assistant Executive Director

1                    **A P P E A R A N C E S   C O N T I N U E D**

2

3                    **COMMISSION STAFF**

4                    CAMILLE N. SHELTON  
5                    Chief Legal Counsel

6                    **PUBLIC PARTICIPANTS**

7                    BRYAN BROWN  
8                    Meyers Nave  
9                    for  
10                  City of Dublin and Union City, Item 3

11                  DAVID BURHENN  
12                  Burhenn & Gest Law Firm  
13                  for  
14                  Item 3 Claimants

15                  AMANDA CARR  
16                  OC Environmental Resources  
17                  for  
18                  Item 3 Claimants

19                  DONNA FEREBEE  
20                  Department of Finance  
21                  for Items 3, 4, and 5

22                  JENNIFER FORDYCE  
23                  State Water Resources Control Board  
24                  and  
25                  Santa Ana Regional Water Quality Control Board  
                        for Item 3

                        CATHERINE HAGAN  
                        State Water Resources Control Board  
                        and  
                        Santa Ana Regional Water Quality Control Board  
                        for Item 3

                        MICHAEL LAUFFER  
                        State Water Resources Control Board  
                        and  
                        Santa Ana Regional Water Quality Control Board  
                        for Item 3

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*A P P E A R A N C E S C O N T I N U E D*

*PUBLIC PARTICIPANTS*

FERNANDO LEMUS  
County of Los Angeles, Item 4 Claimant

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Sections 999.224, 999.225,  
999.226, 999.227, 999.228,  
and 999.229, as added by  
Register 2017, No. 46  
  
City of Claremont, Requester

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1 FRIDAY, MARCH 24, 2023, 10:07 A.M.

2 ---o0o---

3 CHAIRPERSON MILLER: Good morning, everyone. The  
4 meeting of the Commission on State Mandates will come to  
5 order at 10:07 a.m. And welcome. Thank you for being  
6 here today.

7 Statutes of 2022, Chapter 48, amended the  
8 Bagley-Keene Open Meeting Act, and through July 1st,  
9 2023, we have the authority to hold public meetings  
10 through teleconferencing. The Commission, of course,  
11 continues its commitment to ensure that its public  
12 meetings are accessible to the public and that the  
13 public has the opportunity to observe the meeting and to  
14 participate by providing written and verbal comments on  
15 Commission matters.

16 And the materials today, including the notice,  
17 agenda, and witness list, are all available on our  
18 website, [www.csm.ca.gov](http://www.csm.ca.gov). And please go there under the  
19 "Hearings" tab. And in the event we experience any  
20 technical difficulties or we're bumped offline for any  
21 reason, we will restart and allow people to rejoin.

22 So with that, Ms. Palchik, if we could please take  
23 the roll to establish a quorum.

24 MS. HALSEY: Do you mean me? Ms. Halsey?

25 CHAIRPERSON MILLER: Oh, I'm sorry, Ms. Halsey.

1 MS. HALSEY: That's okay. Sure.

2 Member Olsen let staff know that she's not able to  
3 attend today's hearing.

4 Mr. Adams.

5 MEMBER ADAMS: Here.

6 MS. HALSEY: Ms. Miller.

7 CHAIRPERSON MILLER: Here.

8 MS. HALSEY: Mr. Morgan.

9 MEMBER MORGAN: Here.

10 MS. HALSEY: Ms. Nash.

11 MEMBER NASH: Here.

12 MS. HALSEY: Ms. Paquin.

13 MEMBER PAQUIN: Here.

14 MS. HALSEY: Mr. Walker.

15 MEMBER WALKER: Here.

16 CHAIRPERSON MILLER: Great. We have a quorum.

17 And our next item is Item 1. Are there any  
18 objections or corrections to the minutes of  
19 January 27th, 2023?

20 MEMBER ADAMS: Madam Chair, I would move approval  
21 as presented.

22 CHAIRPERSON MILLER: Great. Thank you, Mr. Adams.

23 MEMBER WALKER: I will second that.

24 CHAIRPERSON MILLER: Thank you, Mr. Walker.

25 It's been moved and seconded.

1 Any public comments on the minutes?

2 (No response.)

3 CHAIRPERSON MILLER: I don't see any.

4 May we take the roll, please, Ms. Halsey, on the  
5 minutes.

6 MS. HALSEY: Sure.

7 Mr. Adams.

8 MEMBER ADAMS: Aye.

9 MS. HALSEY: Ms. Miller.

10 CHAIRPERSON MILLER: Aye.

11 MS. HALSEY: Mr. Morgan.

12 MEMBER MORGAN: Aye.

13 MS. HALSEY: Ms. Nash.

14 MEMBER NASH: Aye.

15 MS. HALSEY: Ms. Paquin.

16 MEMBER PAQUIN: Aye.

17 MS. HALSEY: Mr. Walker.

18 MEMBER WALKER: Aye.

19 CHAIRPERSON MILLER: Great. The minutes are  
20 approved.

21 MS. HALSEY: Now we will take up public comment for  
22 matters not on the agenda. Please note that the  
23 Commission may not take action on items not on the  
24 agenda. However, it may schedule issues raised by the  
25 public for consideration at future meetings. We invite

1 the public to comment on matters that are on the agenda,  
2 as they are taken up.

3 CHAIRPERSON MILLER: Thank you.

4 Any public comment? Anyone wishing to comment on  
5 anything not on the agenda?

6 (No response.)

7 CHAIRPERSON MILLER: Ms. Palchik, do you see anyone  
8 raising their hand?

9 As a reminder, if you would like to make a public  
10 comment, please use the "raise hand" feature.

11 MS. PALCHIK: I see none, Madam Chair.

12 CHAIRPERSON MILLER: Great. Thank you very much.  
13 We will now move on the swearing in, please.

14 MS. HALSEY: Will the parties and witnesses for  
15 Items 3, 4, and 5 please turn on your video and unmute  
16 your microphones and please rise and state your names  
17 for the record.

18 Do you solemnly swear or affirm -- oh, sorry.  
19 Please state your names for the record. I was going too  
20 fast.

21 MR. BROWN: Bryan Brown.

22 MR. LEMUS: Fernando Lemus.

23 MS. HALSEY: Oh, sorry.

24 MR. BURHENN: David Burhenn. Item 3.

25 MS. CARR: Amanda Carr. Item 3.

1 MR. BROWN: Bryan Brown. Item 3.

2 MS. HAGAN: Catherine Hagan. Item 3.

3 MS. FORDYCE: Jennifer Fordyce. Item 3.

4 MR. LAUFFER: And Michael Lauffer. Item 3.

5 MS. FEREBEE: Donna Ferebee. Item 3, 4, and 5.

6 MS. HALSEY: Mr. Lemus, I see you are there, but I  
7 didn't hear you.

8 MR. LEMUS: Okay. I'm sorry. Fernando Lemus.  
9 Item 5.

10 (Parties/witnesses stood to be sworn or  
11 affirmed.)

12 MS. HALSEY: Do you solemnly swear or affirm that  
13 the testimony which you are about to give is true and  
14 correct, based on your personal knowledge, information,  
15 or belief?

16 (Yeses.)

17 MS. HALSEY: Thank you. Please be seated.

18 Item 2 is reserved appeals of Executive Director  
19 decisions, and there are no appeals to consider for this  
20 hearing.

21 Next is Item 3.

22 Chief Legal Counsel Camille Shelton will please  
23 turn on her video and unmute her microphone and present  
24 a proposed decision on a test claim on Order  
25 R8-2009-0030, adopted by the Santa Ana Regional Water

1 Quality Control Board.

2 At this time, we invite the parties and witnesses  
3 for Item 3 to please turn on their video and unmute  
4 their microphones.

5 MS. SHELTON: Good morning, everybody.

6 CHAIRPERSON MILLER: Good morning, Ms. Shelton.

7 MS. SHELTON: This test claim alleges reimbursable  
8 costs mandated by the State to comply with the 2009 test  
9 claim permit, issued by Santa Ana Regional Water Quality  
10 Control Board, which identifies waste load allocations  
11 for several pollutants in receiving waters to comply  
12 with total maximum daily loads, or TMDLs; and requires  
13 the claimants to monitor and implement best management  
14 practices to ensure compliance with those waste water  
15 quality standards; requires that low impact development  
16 and hydromodification prevention be considered in the  
17 planning and site design of new development and  
18 significant redevelopment projects, including municipal  
19 projects; addresses public education and outreach  
20 requirements, including to residential areas; and  
21 increases the scope of commercial and industrial  
22 inspections.

23 Staff finds that many activities alleged in the  
24 test claim are not new, but were required by prior law.  
25 Staff further finds that the requirement to use low

1 impact development and hydromodification planning  
2 principles for new or redeveloped municipal projects is  
3 not mandated by the State and is not unique to  
4 government; and, therefore, does not mandate a new  
5 program or higher level of service.

6 In addition, consistent with two recent Court of  
7 Appeal decisions, staff finds that the claimants have  
8 the authority to impose regulatory fees for all new  
9 mandated activities, relating to inspections of  
10 commercial and industrial facilities, and for the LID  
11 and hydromodification prevention planning requirements,  
12 which are sufficient as a matter of law to cover the  
13 costs; and, therefore, there are no costs mandated by  
14 the State for these activities.

15 Staff does recommend that the Commission partially  
16 approve the test claim for the new mandated  
17 requirements, to submit a proposed cooperative watershed  
18 program that will fulfill the requirements of the  
19 selenium TMDL; develop a constituent-specific source  
20 control plan for copper, lead, and zinc, including a  
21 monitoring program, to ensure compliance with waste load  
22 allocations for the San Gabriel River metals TMDL;  
23 comply with three new activities mandated to implement  
24 the public education program; and develop a pilot  
25 program to control pollutant discharges from common

1 interest areas and areas managed by homeowner  
2 associations or management companies.

3 Although the claimants can impose or increase  
4 property-related fees for these new mandated  
5 requirements, that authority is limited by Proposition  
6 218, which, until January 1st, 2018, requires voter  
7 approval before any fees can be imposed -- or can be  
8 imposed.

9 In accordance with the recent decision of the Third  
10 District Court of Appeal, when voter approval of the  
11 fees is required, the claimants do not have the  
12 authority to levy fees sufficient as a matter of law to  
13 cover the costs of these activities.

14 Thereafter, staff finds that there are costs  
15 mandated by the State for these activities from  
16 June 1st, 2009, through December 31st, 2017. Beginning  
17 January 1st, 2018, however, there are no costs mandated  
18 by the State since Senate Bill 231 amended the  
19 Government Code to make stormwater fees exempt from the  
20 voter approval requirement of Proposition 218.

21 Staff recommends that the Commission adopt the  
22 proposed decision to partially approve the test claim  
23 and authorize staff to make any technical or  
24 nonsubstantive change to the decision following the  
25 hearing.

1 CHAIRPERSON MILLER: Thank you very much,  
2 Ms. Shelton. I really appreciate it.

3 I am -- now if the parties and witnesses could  
4 please state the names for the record, we will begin  
5 with Mr. Burhenn and Ms. Carr for the claimants, if you  
6 would like to begin. And if you could state your names  
7 for me.

8 MR. BURHENN: Yes. This is Dave Burhenn, Burhenn &  
9 Gest Law Firm, for claimants in Item 3.

10 MS. CARR: And I'm Amanda Carr.

11 MS. PALCHIK: Madam Chair, you are muted.

12 CHAIRPERSON MILLER: Excuse me. I apologize.

13 Thank you very much. If you would like to begin,  
14 please, and then we will go to our other -- our other  
15 witnesses today.

16 MR. BURHENN: Thank you, Chair Miller and  
17 Commission Members.

18 As I said, my name is Dave Burhenn of the Law Firm  
19 of Burhenn & Gest. I'm here today representing the test  
20 claimants in this test claim. We appreciate the  
21 opportunity to make our arguments today via Zoom. It's  
22 a nice opportunity for me to finally see some of the  
23 folks at the Commission that I've been talking to by  
24 phone for years.

25 I want to start with an apology. And the apology

1 is that this will be a presentation full of acronyms,  
2 because if you are in environmental law, you deal and  
3 live with acronyms. So I'm just going to talk about  
4 three at the start, and then we can confuse you later on  
5 with some more.

6 The first is MS4. Municipal Separate Storm Sewer  
7 System permits. That's what we're talking about. Those  
8 are the public utilities at issue in this permit. And  
9 basically think of it as everything from the street  
10 gutter and catch basin outside your house to big pipes  
11 or channels, which discharge into waters like Newport  
12 Bay.

13 The second is BMP, best management practices. What  
14 are those? They could be a large physical structure  
15 that cleans stormwater or they could be a public  
16 education program. But you will hear a lot of  
17 discussion of BMPs.

18 The final one is TMDL, total maximum daily loads.  
19 We'll explain that a little bit more in the  
20 presentation, but, again, that's what we're talking  
21 about.

22 And for the court reporter, can you hear me? I  
23 will try to slow down. I can be a little bit of a fast  
24 talker.

25 I want to thank, first, Commission staff for

1 agreeing, in the proposed decision, that claimants have,  
2 in fact, used proceeds of taxes to pay for the  
3 requirements of this executive order.

4 I think the evidence of that is irrefutable, based  
5 not only on declarations, but also evidence collected in  
6 the ordinary course of business.

7 I also want to note that the cost of these permits  
8 is a challenge for local government, who have other  
9 obligations to meet. That is why we have turned to the  
10 Commission, pursuant to our constitutional rights, to  
11 seek a reimbursement of funds.

12 The record in this case is more than 7,000 pages  
13 long. I'm sure it's something that staff is probably  
14 not happy with, to manage that amount of paper.

15 There's lots of comments and evidence in that  
16 record that have come from claimants. We're not here  
17 today to dredge through all that evidence or to  
18 reintroduce all the -- those comments.

19 I am here focusing on certain aspects of the  
20 proposed decision. However, I do want to incorporate  
21 all of our prior comments and evidence into my  
22 presentation today by reference, so that it's clear that  
23 there is no waiver of any of that.

24 I would like to start by discussing section  
25 XVIII -- that's XVIII -- of the test claim permit, which

1 incorporates those TMDLs. And we're talking about  
2 section XVIII.B.4., B.7., B.8., B.9., C.1., and D.1.

3 The proposed decision denies reimbursement for all  
4 but two of those provisions on the ground that they are  
5 not new; that they were simply continuation requirements  
6 in the previous 2002 stormwater permit adopted by the  
7 Santa Ana Water Board.

8 What were those requirements?

9 There are seven of them and we're going to call  
10 them the seven requirements:

11 One, the discharges from the MS4 do not cause or  
12 contribute to exceedances or receiving water quality  
13 standards;

14 Two, that illegal and illicit non-stormwater  
15 discharges are prohibited from entering the MS4;

16 Three, the Drainage Area Management Plans, or  
17 DAMPs, had to be designed to achieve compliance with  
18 receiving water limitations through timely  
19 implementation of control measures and BMPs;

20 Four, that permittees continue to cause or  
21 contribute to an exceedance of water quality standards;  
22 they needed to notify and report that to the water  
23 board, and implement additional BMPs;

24 Five, the permittees were required to demonstrate  
25 compliance with discharge limitations and receiving

1 water limitations through timely implementation of those  
2 DAMPs.

3 Six, permittees were required to implement  
4 additional codes -- controls, if necessary, to meet --  
5 to reduce the discharge of pollutants in stormwater to  
6 the Maximum Extent Practicable, or MEP;

7 And, finally, that required permittees to comply  
8 with the 2002 permit's Monitoring and Reporting Program.

9 Now, I -- these provisions, in our view, do not  
10 support the argument that the 2009 -- the test claim  
11 permit is, in fact, not new. And we're making that  
12 argument not just based on the previous evidence and  
13 arguments we have made, but also a very recent case,  
14 *Department of Finance v. Commission on State Mandates*,  
15 which I believe was referred to by Ms. Shelton, which  
16 specifically holds that general requirements do not  
17 indicate the lack of a new requirement in a new permit  
18 that has a higher level of standard -- of service.

19 What is this case about?

20 This case actually involved a 2007 county  
21 stormwater permit for San Diego County. The State  
22 argued that because prior permits had some of the same  
23 requirements as the seven points we just made, that the  
24 discharge -- the requirements in that later permit were  
25 not new.

1           The State argued that just because a permit  
2 condition appeared in a prior permit, or had been  
3 updated to require additional expenditures, that didn't  
4 mean it was new because the condition -- the new  
5 condition was simply enforcing the same underlying  
6 pollution abatement obligations found in the previous  
7 permit.

8           The Court of Appeal didn't agree. It held that the  
9 application of Article XIII B, section 6, quote, "Does  
10 not turn on whether the underlying obligations to abate  
11 pollution remain the same. It applies if any executive  
12 order . . . required permittees to provide a new program  
13 or a higher level of service."

14           How do you determine when a permit condition is  
15 new?

16           The Court answered this question simply: We  
17 compare the legal requirements imposed by the new permit  
18 with those in effect before the new permit became  
19 effective. This is so, even though the conditions were  
20 designed to satisfy the same standard of performance.  
21 That holding applies here.

22           First, using the Court's test, a simple comparison  
23 of the provisions in the test claim permit and the 2002  
24 permit reveals that the test claim permit imposes  
25 significantly greater legal requirements due to the

1 incorporation of new TMDLs and implementation  
2 requirements associated with them. On that ground  
3 alone, section XVIII's requirements in the test claim  
4 permit are new.

5 I want to just note that the Water Boards, in fact,  
6 agreed with that newness point in their response to the  
7 original test claim, March 9th, 2011, on page 126, where  
8 they state, "Claimants correctly note that many of the  
9 TMDL-derived provisions in section XVIII.B. contain new  
10 requirements not found in the 2002 permits."

11 But there's another reason why these provisions are  
12 new. And that relates to how TMDLs function and the  
13 additional requirements that are placed on the  
14 permittees.

15 TMDLs are required for water bodies that are not  
16 meeting water quality standards. So to get those water  
17 bodies into compliance, TMDLs must be accomplished. In  
18 a TMDL, different sources that discharge into the  
19 affected water body are given numerical load allocations  
20 or waste load allocations, which happens to apply to MS4  
21 permittees, that set forth limits on the amount of  
22 pollutants that a party's discharges can contain,  
23 measured at the point where the discharge enters the  
24 waterline.

25 TMDLs and waste load allocations associated with

1 them don't automatically become enforceable once they  
2 are adopted. The record shows that many of the TMDLs,  
3 in the 2009 test claim permit, were adopted prior to  
4 that permit.

5 However, they are -- those do not become  
6 enforceable until they are adopted into a federal  
7 discharge permit, such as a test claim permit. So that,  
8 again, is an important point as it relates to the seven  
9 points that we just noted from the old permit.

10 Incorporating the test claim permit -- TMDLs  
11 incorporated into the test claim permit, therefore,  
12 created a significant difference between this permit and  
13 the 2002 permit. It means that permittees now are  
14 legally responsible for meeting those specific waste  
15 load allocations in their own discharges, something that  
16 was not required under the previous permit. And they  
17 are required to do so under a timeline.

18 For example, the requirement to meet receiving  
19 water limitations in the 2002 permit, one, by the way,  
20 which is also in the test claim permit, did not mean  
21 that permittees were also legally required to achieve a  
22 specific TMDL waste load allocation, because those were  
23 only applicable in the 2009 permit.

24 With regard to the remainder of the seven factors  
25 that we just discussed, that are cited in the proposed

1 decision, the San Diego permit case rejected two of  
2 them, as showing that there was a -- not a new  
3 requirement. That is, preventing non-stormwater  
4 discharges into the MS4 and the need to meet the Maximum  
5 Extent Practicable standard.

6 What the Court said there is those are -- those  
7 are, perhaps, underlying pollutant abatement standards,  
8 but they do not, themselves, mean that new requirements  
9 in a subsequent executive order, a test -- or a permit  
10 are new -- or rather, they are not new.

11 The DAMP requirements, which are a large part of  
12 the seven set of factors have been -- were aimed at  
13 achieving receiving water limitations in some cases, but  
14 they were not directed at achieving the TMDL waste load  
15 allocations.

16 Again, TMDLs are not self-executing. So the TMDLs  
17 in this test claim would not have been a performance  
18 goal for those DAMPs, since they weren't in the permit.

19 Also, DAMPs are only required to meet the MEP  
20 performance standard, which is less stringent than  
21 having to meet numeric objectives, such as a TMDL waste  
22 load allocation. Our November comments discuss that  
23 difference quite extensively.

24 Thus, there were no requirements in the DAMPs that  
25 had to meet TMDL requirements, unless those TMDL waste

1 load allocations were incorporated into the prior  
2 permit, and, again, they were not.

3 And, finally, the monitoring program, also cited by  
4 the proposed decision, certainly established a fairly  
5 extensive monitoring program, but the TMDL monitoring --  
6 and we're going to talk about some of that today -- was  
7 a higher level of service; a more extensive monitoring  
8 program that was triggered by the incorporation of the  
9 TMDLs into the test claim permit. That is a new program  
10 or higher level of service.

11 The proposed decision claims that the fecal  
12 coliform TMDL for Newport Bay was already incorporated  
13 into the 2002 permit and, thus, was not new.

14 In support, they cite a finding in that permit that  
15 the 2002 permit did, in fact, incorporate the fecal  
16 coliform TMDL. But a closer look at that suggests that  
17 this is wrong.

18 The TMDL incorporation section of the 2002 permit,  
19 which is section XVI, sets forth the numeric load  
20 allocations for nitrogen, phosphorous, and sediment  
21 TMDLs, which are not in this test claim.

22 However, section XVI reflects no load allocations  
23 for fecal coliform; only the requirement the permittees  
24 had to revise their DAMPs to include implementation  
25 measures and schedules for further studies related to

1 this TMDL.

2 The first permit to incorporate the specific  
3 numeric waste load allocations for the fecal coliform  
4 TMDL was the test claim permit, in section XVIII.C.1.,  
5 which is at issue today.

6 Turning to a different issue, the proposed decision  
7 finds that the preparation of a cooperative watershed  
8 program -- we will call that the CWP -- to address  
9 selenium TMDL, in section XVIII.B.8. of the test claim  
10 permit, in preparation of a Constituent-Specific Source  
11 Control Plan, or CSSP, for the San Gabriel River and  
12 Coyote Creek metals TMDL were -- are reimbursable state  
13 mandates. And this is obvious.

14 But I want to note another point: The test claim  
15 permit report requires not only preparation, but  
16 implementation of the CWP and the CSSP.

17 And section XVIII.B.8., for example, states that  
18 the program must be implemented upon regional board  
19 approval.

20 Section XVIII.B.9. requires the permittees to  
21 develop and implement the CSSP. However, while  
22 reimbursement of the CWP and CSSP preparation costs are  
23 allowed in the proposed decision, implementation costs  
24 are not.

25 The proposed decision does not explain its

1 rationale beyond citing those seven factors. But those  
2 factors are cited to show that the requirements were  
3 supposedly not new in the test claim permit. But if  
4 preparation of the CWP and the CSSP is a new mandate in  
5 the test claim permit, as the proposed decision agrees,  
6 then the implementation of programs set forth in those  
7 documents must also be a new program or higher level of  
8 service.

9 I would now like to call Amanda Carr, who is deputy  
10 director of OC Environmental Resources, to briefly  
11 discuss what implementation activities were undertaken  
12 under the CSSP and the CWP.

13 CHAIRPERSON MILLER: If you could state your name  
14 for the record.

15 I do just want to -- Mr. Burhenn, I just want to  
16 say that our staff -- part of what we do is go through  
17 pages and pages of documents. So that is -- that is our  
18 job and we do it with great integrity and pride. So  
19 there's never too much information.

20 But I do want to make sure that when we're  
21 presenting these ideas, that we are succinct and do it  
22 without repeating anything a previous presenter has  
23 repeated.

24 MR. BURHENN: Thank you, Chair -- Chair Miller. I  
25 will attempt to abridge the remainder of my comments.

1 CHAIRPERSON MILLER: Thank you.

2 If I could ask maybe Ms. Magee, we would like to  
3 share a document on the screen.

4 MS. PALCHIK: Thank you, Mr. Burhenn. Our IT team  
5 will share.

6 Are you referring to the Coyote Creek?

7 MR. BURHENN: Yes, ma'am. That is it.

8 CHAIRPERSON MILLER: Thank you.

9 And thank you for giving us -- letting us know that  
10 you wanted to share this on the screen. We appreciate  
11 it.

12 MR. BURHENN: Certainly. Thank you.

13 Good morning, Ms. Carr.

14 Could I ask you to provide the Commission members  
15 with a description of the role you play?

16 MS. CARR: Yes. Good morning. My name is Amanda  
17 Carr. I'm deputy director for OC Environmental  
18 Resources in Orange County Public Works. And in that  
19 role, I oversee the Orange County Stormwater Program for  
20 the County, the Orange County Flood Control District,  
21 and the 34 cities within Orange County.

22 MR. BURHENN: Thank you.

23 I also -- now I direct your attention to the  
24 document that's been shared on the screen.

25 Do you recognize that document?

1 MS. CARR: Yes. This is the CSSP that was  
2 developed by the consulting firm Camp Dresser & McKee.  
3 It's a series of four technical memorandums that cover a  
4 review of metals data within the Coyote Creek and San  
5 Gabriel River Watersheds.

6 It also then developed a monitoring program  
7 specifically for the Coyote Creek area within Orange  
8 County. And it reviewed the data -- a third technical  
9 memorandum reviewed the data from sub-watersheds within  
10 the Coyote Creek Watershed, identifying potential  
11 sources and best management practices to address those  
12 sources of metals within the watershed; and then,  
13 lastly, it developed a monitoring report outline for the  
14 reporting of the data from the monitoring plan.

15 MR. BURHENN: Thank you.

16 At this time, would it be in order to request that  
17 this document be added to the record?

18 MS. HALSEY: It has already been added and served.

19 MR. BURHENN: Thank you so much, Ms. Halsey.

20 Let's proceed then.

21 CHAIRPERSON MILLER: Thank you.

22 Would -- would you like us to continue sharing this  
23 screen?

24 MR. BURHENN: No, ma'am. Let's -- let's just go  
25 back. I think better just -- thank you very much.

1           CHAIRPERSON MILLER: Thank you.

2           MR. BURHENN: Ms. Carr, of the four elements of the  
3 CSSP that you described, did any require subsequent  
4 implementation?

5           MS. CARR: Yes. The monitoring program required  
6 subsequent implementation. In this program, six  
7 monitoring locations were required: One in Cypress,  
8 three in Buena Park, one in La Habra, and one in  
9 Fullerton.

10           And these stations were -- it was determined that  
11 monthly monitoring was necessary at these locations for  
12 physical parameters, such as hardness and temperature;  
13 pH, basically the physical quality of the water in the  
14 creek; as well as for the metals covered in the TMDL,  
15 including selenium -- or sorry, silver, cadmium,  
16 chromium, copper, nickel, lead, zinc, calcium, and  
17 magnesium.

18           MR. BURHENN: Was this monitoring done by the  
19 permittees as part of the core monitoring program  
20 required by the 2002 permit?

21           MS. CARR: No. This was an additional work.  
22 Basically this was actually approximately a five-fold  
23 increase in the monitoring that was done in this area  
24 under the permit, specifically for the TMDL.

25           Under the permit, what was -- had previously been

1 required was monitoring at three locations and  
2 semiannually; so at those locations twice per year and  
3 during three storm events.

4 Under the TMDL program, that frequency was now  
5 increased to monthly monitoring, as well as the  
6 locations were increased from three locations to six.

7 MR. BURHENN: Thank you.

8 And who paid for the cost of this monitoring?

9 MS. CARR: The monitoring was collectively paid for  
10 by the County, the Flood Control District, and the  
11 cities in the Coyote Creek Watershed.

12 MR. BURHENN: Thank you.

13 Are you familiar with the Cooperative Watershed  
14 Program regarding compliance with the selenium TMDL in  
15 Newport Bay Watershed?

16 MS. CARR: Yes. The CWP was designated as the  
17 compliance mechanism for the selenium TMDL within the  
18 test claim permit, and it required the development of  
19 strategies to address selenium within the Newport Bay  
20 Watershed.

21 MR. BURHENN: Are there particular problems that  
22 are faced by permittees in addressing selenium?

23 MS. CARR: Yes. Actually, selenium is an extremely  
24 challenging pollutant. This is a naturally occurring  
25 element that's sequestered in the soils within the

1 watershed.

2 So rather than typical stormwater pollutants that  
3 are generated through urban or industrial activities and  
4 that are washed off the land surface into the storm  
5 drain system, selenium enters the storm drain system  
6 through rising groundwater that leaks into storm drain  
7 pipes.

8 So it's not a controllable pollutant or volume of  
9 water. It responds to changes in groundwater in the  
10 watershed, and then it leaks into the pipe, which then  
11 discharges into the creek.

12 So this requires a whole new level of research and  
13 BMP development, different than any other stormwater  
14 pollutant.

15 MR. BURHENN: Thank you.

16 Did the permittees, subject to this TMDL, engage in  
17 the CWP?

18 MS. CARR: Yes. They did.

19 The -- we developed -- the CWP resulted in what we  
20 call the BMP Strategic Plan, or Best Management Practice  
21 Strategic Plan. The development of this plan overlapped  
22 with our response to a time schedule order for selenium  
23 that was issued shortly after the test claim permit. So  
24 the BMP Strategic Plan for selenium references both the  
25 test claim permit and the time schedule order

1 requirements.

2 MR. BURHENN: Thank you.

3 And could you briefly describe what tasks were to  
4 be implemented in the CWP?

5 MS. CARR: Yeah. The CWP broke it down -- broke  
6 down our activities into three categories: Early Action  
7 Requirements, Phase 1, and Phase 2. And each of these  
8 three phases depended on evaluation of the previous  
9 phases to develop the next steps.

10 So early action -- the early action phase really  
11 summarized activities that had been completed by the  
12 time the plan was eventually submitted. And the  
13 subsequent phases, Phase 1 and Phase 2, were the  
14 activities that were undertaken under the CWP.

15 MR. BURHENN: Right.

16 And again, briefly -- because I know time is  
17 going -- could you just lay out what Phase 1 tasks were  
18 completed under the CWP?

19 MS. CARR: Certainly.

20 Under the CWP tasks -- well, the Phase 1 tasks  
21 that -- four of which -- there were five tasks  
22 identified in Phase 1, four of which were completed.

23 Task 2 was a pollution prevention and source  
24 control plan best management practices, which focused  
25 on, really, control of -- attempting to control

1 groundwater levels within -- within the watershed as  
2 well as preventing groundwater from getting into the  
3 pipes.

4 So these would -- these resulted in special pipe  
5 fittings to prevent groundwater, limiting landscape  
6 water application, and also developing natural wetland  
7 system technologies to attempt to sequester selenium  
8 once it was mobilized in groundwater.

9 Task 3 was development of strategies for a  
10 particular sub-watershed within the Newport Bay, called  
11 the Big Canyon Wash Watershed. Those activities were  
12 subsequently implemented by the City of Newport Beach,  
13 as that watershed is solely within that city.

14 Task 4 was an evaluation of groundwater pump and  
15 treat technologies, and that was ultimately determined  
16 not to be practical as the -- frankly, the technology  
17 didn't work in reducing selenium to the levels that were  
18 required by the permit.

19 And lastly, Task 5 was an evaluation of diverting  
20 the discharges to the sanitary sewer. And that was  
21 completed and led to the development of the projects  
22 that were implemented in Task 2.

23 MR. BURHENN: Could you briefly describe those --

24 MS. CARR: Sorry. Phase 2. Yeah.

25 MR. BURHENN: I'm sorry.

1           Could you just briefly name and describe, briefly  
2 again, the projects that were undertaken in Phase 2  
3 under the CWP?

4           MS. CARR: Yeah. So in Phase 2, we evaluated  
5 locations of where the discharges could be diverted to  
6 the -- collected and discharged into the sanitary  
7 system.

8           That resulted in two projects: One was the Peters  
9 Canyon Wash Water Capture and Reuse Pipeline Project;  
10 and the second was the Santa Ana-Delhi Diversion  
11 Project.

12           Both of these projects were designed to divert  
13 high-selenium dry weather flows into the Orange County  
14 Sanitation District system, where it was treated and  
15 then discharged to the groundwater replenishment system  
16 managed by Orange County Water District for beneficial  
17 reuse.

18           MR. BURHENN: Thank you.

19           One last question: Were the projects that you have  
20 just described begun after the date of the BMP Strategic  
21 Plan, which I believe is January 1st, 2011?

22           MS. CARR: Yes. They were.

23           MR. BURHENN: Thank you very much. No further  
24 questions.

25           I would like to now finish our presentation. I

1 will amend -- I would try to speed it up. I certainly  
2 understand the Chair's admonition.

3 I think that the evidence suggested to you from  
4 Ms. Carr shows there were substantial implementation  
5 programs required by the CSSP and the CWP, that were  
6 undertaken and which we believe qualify for  
7 reimbursement and subvention of funds.

8 There is another comment in the proposed decision I  
9 want to briefly address. Namely, that the wastewater  
10 allocation for San Gabriel River metals TMDL were not  
11 unique to government, because other private discharges  
12 had similar allocations.

13 That's not the law.

14 This relates to what is a program under Article  
15 XVIII.B.6. And court cases have made it very clear that  
16 if you are either providing a service to the public,  
17 through your activities, which, clearly, these MS4  
18 permittees are, or the requirements of a test claim  
19 permit are unique to local government, then that meets  
20 the requirement of a section 6 program.

21 We discussed this in our November 6th comments, and  
22 I think they speak for themselves.

23 In addition, I want to talk about -- briefly  
24 about section XII of the test claim permit, which  
25 relates to priority development projects.

1           We had argued that these three projects -- two  
2 county administration buildings and a transitional home  
3 for the homeless -- were, in fact, practically  
4 compelled, because they were the only reasonable means  
5 to carry out core mandatory functions, or that the  
6 failure of us to do that would subject the government to  
7 certain severe penalties.

8           With respect to the transitional housing, we made  
9 the point that cities and counties no longer have the  
10 ability to ignore the homeless problem, and should not.  
11 And, thus, we're required, really, under penalty and  
12 potential litigation, to do projects such as the  
13 transitional housing project.

14           Similarly, with respect to the administration  
15 building, the only reasonable way to have county  
16 government in a place where people -- different  
17 departments could interact and the public could be there  
18 to see the activities of government.

19           I also would note that because of the nature of  
20 these structures and the services they must provide,  
21 there was no choice for the County but to build them at  
22 a size that qualified for them as PDPs, and that's  
23 subject to the LID and hydromodification mandates in the  
24 permit.

25           Finally, I want to briefly discuss SB 231. Senate

1 Bill 231 purports to change the definition of sewer  
2 services, which is exempt from the voter approval  
3 requirements in Article XVIII.D. to include stormwater  
4 sewers.

5 We believe that that is unconstitutional. We  
6 understand that the proposed decision is accepting it.  
7 I understand it still is technically good law. But the  
8 San Diego permit appeal case that we mentioned earlier  
9 made it very clear that SB 231 does not reflect the  
10 views of the voters when they adopted Prop 218, and we  
11 think that, ultimately, it's very important that SB 231  
12 be declared unconstitutional because it should not be  
13 used to deny reimbursement.

14 I began by talking about the cost of permit  
15 compliance. As one person remarked about these permits,  
16 the costs that local jurisdictions, including cities,  
17 counties, and other public entities incur, to comply  
18 with these requirements can be significant.

19 That person wasn't a mayor or a council member or a  
20 county supervisor. It was a state auditor herself. In  
21 the absence of adequate state funding for these  
22 increasingly complex stormwater permits, permits which  
23 local governments implement each and every day, these  
24 municipalities must continue to come to this Commission  
25 to seek assistance pursuant to the California

1 Constitution.

2 I want to thank you very much for this opportunity  
3 to speak on this important test claim, which is the  
4 first, I think of many, that will be heard by the  
5 Commission. And I would -- if required, I would like to  
6 reserve a few minutes for a response.

7 Thank you very much.

8 CHAIRPERSON MILLER: Great. Thank you very much  
9 for the thorough presentation. We appreciate it. And  
10 thank you for being here.

11 I do -- just for level set, that this Commission  
12 does not opine on the constitutionality of bills and  
13 laws. So that is not something that we're able to  
14 discuss today because that's not within our  
15 jurisdiction.

16 I think next we will move, please, to the  
17 Department of Finance. If you can unmute yourself and  
18 turn your camera on, please, Ms. Ferebee.

19 MS. FEREBEE: Hello. Thank you.

20 Hi. Good morning. Donna Ferebee with the  
21 Department of Finance. While the Department of Finance  
22 does not agree that this test claim permit imposes a  
23 reimbursable state mandate, we do acknowledge the  
24 decisions of the California Supreme Court and Court of  
25 Appeal.

1           We would like to say that we agree with the staff  
2 analysis finding that claimants have fee authority after  
3 December 31st, 2017, under SB 231. And Finance would  
4 like to defer now to the State Water Resources Control  
5 Board in Santa Ana Regional Water Control Board for  
6 further comment. And we join in their comments and  
7 testimony today.

8           Thank you.

9           CHAIRPERSON MILLER: Great. Thank you very much  
10 Ms. Ferebee.

11           Ms. Fordyce, Ms. Hagan, and Mr. Lauffer for the  
12 State Water Resources Control Board and Santa Ana  
13 Regional Water Quality Control Board, would you please  
14 unmute yourselves, turn your cameras on, and please --  
15 oh, there you are. Thank you very much. And if you  
16 could please state your names before you begin speaking,  
17 for our court reporter.

18           Sure.

19           MS. HAGAN: Can you hear me okay?

20           CHAIRPERSON MILLER: I can.

21           May I make sure that the court reporter can hear  
22 okay, please.

23           THE COURT REPORTER: It's a little fuzzy, but why  
24 don't you get going and I'll let you know if I cannot  
25 hear you.

1 CHAIRPERSON MILLER: If you could speak up a little  
2 bit. I think we're having a little audio issue. So  
3 just speak up as loudly as you can, please.

4 MS. HAGAN: Yes. My name is -- good morning,  
5 Commission Members and staff.

6 My name is Catherine Hagan, and I'm speaking today  
7 on behalf of the State Water Board and the Santa Ana  
8 Water Board.

9 Also with me today are Michael Lauffer with State  
10 Water Board's Chief Counsel and Assistant Chief Counsel  
11 Jennifer Fordyce.

12 I first want to acknowledge the Commission and the  
13 Commission staff's exhaustive and thorough work on this  
14 proposed decision.

15 The issues requiring analysis in this matter are  
16 extensive and complicated and have been affected and  
17 informed by years of litigation along the way. While  
18 the water boards don't always agree with all points with  
19 the Commission, we do greatly appreciate all of the very  
20 hard work that has gone into developing the proposed  
21 decision that you are considering today.

22 We plan to make only brief comments today, but I do  
23 want to reiterate that we affirm our written comments in  
24 this matter submitted previously, and note that we do  
25 not waive any issues raised in those written comments by

1 limiting our comments here today to a handful of points.

2 The water boards agree with a number of the  
3 conclusions in the Commission's proposed decision, and I  
4 will highlight a few of these here.

5 First, the water boards appreciate the detailed  
6 discussion of the permit's requirements in section XVIII  
7 of the permit, that claimants comply with waste load  
8 allocations for multiple pollutants, subject to total  
9 maximum daily loads; and that they conduct monitoring  
10 for these pollutants and implement best management  
11 practices to achieve compliance.

12 The water boards agreed with the Commission's  
13 conclusion that -- or the staff's conclusion that, for  
14 the most part, these challenge requirements are not new  
15 programs. Claimants were required, in a prior permit  
16 issued by the Santa Ana Water Board, to comply with  
17 water quality standards for these same pollutants and  
18 were also required to monitor and implement BMPs, best  
19 management practices, and reevaluate them if the  
20 monitoring showed continued exceedances of the pollutant  
21 standards.

22 The Commission's detailed analysis correctly notes  
23 that the permittees were already required to comply with  
24 water quality standards in their prior permit, and that  
25 inclusion of waste load allocation requirements to

1 protect these same standards does not result in the  
2 imposition of a new program or a higher level of  
3 service.

4 Also, it's important to note that the Santa Ana  
5 Water Board's inclusion of waste load allocations  
6 identified in total maximum daily loads effectively  
7 provides claimants with more time or a compliance plan,  
8 if you will, to meet water quality standards that have  
9 been in place in prior permits, but not yet achieved by  
10 the claimants.

11 The permit provisions at issue here are  
12 qualitatively different than those considered in the  
13 recent Third District Court of Appeal decision,  
14 considering the 2007 San Diego County MS4 permit test  
15 claim, where the Commission found permit conditions  
16 designed to meet a performance standard were a new  
17 program.

18 The Third District Court of Appeal was not  
19 evaluating the specific permit requirements. Instead,  
20 it was simply dealing with the standard as set forth in  
21 the Clean Water Act statutory test. It was not  
22 analyzing the specific permit requirements, and, here,  
23 in the Santa Ana case, there was an expressed prior  
24 permit requirement to comply with water quality  
25 standards.

1           As a result, Alameda County's contention -- and  
2 Mr. Burhenn's contention in his oral comments today --  
3 that the Commission's analysis here is contrary to the  
4 Third District Court of Appeals's recent decision is  
5 incorrect, in our view.

6           The Third District Court of Appeal decision was not  
7 evaluating the specific permit requirements, and it is  
8 inapplicable to the circumstances here, where the  
9 permittees have already been required to comply with  
10 water quality standards and have been given a schedule  
11 to do so.

12           The draft decision prepared by the Commission staff  
13 carefully considered the issue of whether the programs  
14 are new and considered the specific requirements in a  
15 prior permit as part of its analysis.

16           In doing so, staff, in the proposed decision, find  
17 them to be consistent with the Third District Court of  
18 Appeal decision, which is not applicable in this  
19 context, given the prior specific permit requirements.

20           Second, the water boards agree as well with the  
21 Commission staff's reasoning to deny the test claim as  
22 to the low impact development and hydromodification  
23 management requirements for a new development and  
24 significant redevelopment municipal projects,  
25 voluntarily carried out by local agencies such as

1 claimants.

2 The test claim permit does not compel local  
3 agencies to undertake development or redevelopment  
4 permits -- excuse me, projects. And we agree with the  
5 Commission's analysis on this point.

6 Finally, with regard to fee authority as a general  
7 matter, the water boards fully support the Commission  
8 staff's conclusion that in instances where the  
9 Commission finds that a test claim permit imposes a  
10 state mandate, claimants have fee authority to implement  
11 permit provisions and are not entitled to reimbursement  
12 for costs incurred from January 1st, 2018, forward.

13 The water boards' main point of disagreement that  
14 we want to bring to the Commission's attention concerns  
15 the proposed decision's conclusion that the provision  
16 regarding development of a cooperative watershed program  
17 to address selenium imposes a state mandate.

18 As stated in our written comments, the provision  
19 allowing development of this cooperative watershed  
20 program was included at claimant's urging and was  
21 designed to provide claimants the option to continue  
22 stakeholder-initiated work to address selenium, rather  
23 than directly complying with waste load allocations to  
24 implement the selenium total maximum daily load. The  
25 permit was intended to provide permittees with the

1 choice to develop this program.

2 For these reasons, the water boards do not agree  
3 that the permit taken as a whole mandates the  
4 development of the cooperative watershed program. And  
5 the test claim on this provision should be denied.

6 Last, we note -- do want to note that after the  
7 extremely lengthy process to get from the initial test  
8 claim to this proposed decision today, the water boards  
9 find it frustrating that it was not until after the  
10 draft proposed decision was released in August, that  
11 claimant submitted substantial amounts of evidence of  
12 costs that they claim were incurred to implement the  
13 challenge permit provisions.

14 In our view, such evidence is foundational to  
15 establishing the elements of a test claim in the first  
16 instance and should have been submitted sooner.  
17 Submittal at this late point in the process precluded  
18 the water boards' ability to respond in writing to this  
19 late evidence for the Commission hearing today.

20 In closing, we do want to reiterate our  
21 appreciation for the Commission's thoughtful and  
22 thorough proposed decision in this test claim matter.

23 And for the reasons stated today, and in our  
24 written comments, we ask that the proposed decision be  
25 revised to deny the test claim as to development of the

1 cooperative watershed program, and, otherwise, to adopt  
2 the proposed decision as drafted.

3 That concludes the water boards' remarks, and we're  
4 happy to answer any questions the Commission may have.

5 CHAIRPERSON MILLER: Great. Thank you very much.  
6 We're going to wait until after all the witnesses  
7 have spoken for questions.

8 For the Santa Ana Regional Water Control Board,  
9 did -- Mr. Lauffer, do you have any additional comments?

10 MR. LAUFFER: No.

11 MS. HAGAN: No. Neither Mr. Lauffer nor  
12 Ms. Fordyce have additional comments at this time.

13 CHAIRPERSON MILLER: Great. Thank you very much.  
14 We will now turn it to Mr. Brown. Do you have  
15 additional comments on behalf of Interested Person  
16 Alameda Countywide Clean Water Program?

17 MR. BROWN: Good morning. My name is Bryan Brown.  
18 I'm an attorney with Meyers Nave. We represent City of  
19 Dublin and Union City in consolidated test claims  
20 16-TC-03, et al., which are pending.

21 And we also are appearing on behalf of the Alameda  
22 County Countywide Clean Water Program, an interested  
23 member of the public.

24 And we join in to -- in Mr. Burhenn's comments.

25 We also -- I mean, I prepared a short presentation

1 about five minutes, but there is some overlap. But I  
2 think it is also in rebuttal to the State Board's  
3 comments.

4 So I will try to prevent an abbreviated version of  
5 that, if we can put that on the screen.

6 CHAIRPERSON MILLER: Please, thank you. Thank you  
7 very much.

8 And again, we don't want to repeat anything that's  
9 already been said.

10 MR. BROWN: Okay. Well, again, like others, I  
11 would like to thank the Commission for the opportunity  
12 to comment at this hearing. And I would like to thank  
13 Commission staff for the substantial amount of work they  
14 put into the proposed decision.

15 So I want to -- I don't want to repeat. So if we  
16 can just skip to Slide 2, please.

17 Next one, please.

18 This is -- and again, I'm commenting on the section  
19 XVIII TMDL requirements. And I thought it's instructive  
20 just to see what the State argued in the San Diego  
21 decision, that the Court of Appeal rejected. And the  
22 State, there, argued "that a condition that did not  
23 appear in prior permits or has been updated to require  
24 additional expenditures is not new because it does not  
25 increase permittees' underlying obligation to eliminate

1 or reduce the discharge of pollutants from their MS4s to  
2 the maximum extent practicable. Rather, the condition  
3 ensures compliance with the same standard that has  
4 applied since 1990 when the permittees obtained their  
5 first permit."

6 If you can go to the next slide, please.

7 The Court rejected this argument, stating (as  
8 read), "The application of Section 6 does not turn on  
9 whether the underlying obligation to abate pollution  
10 remains the same."

11 "To determine whether a program imposed by the  
12 permit is new, we compare the legal requirements imposed  
13 by the new permit with those in effect before the new  
14 permit became effective."

15 If you could slide to the next slide, please.

16 Now, on page 20, for example, the proposed decision  
17 makes the same arguments that were rejected by the State  
18 in the San Diego decision, relying on generalized  
19 preexisting Clean Water Act requirements.

20 So just -- next slide, please.

21 The proposed decision relies on, for example,  
22 "Prohibited illegal and illicit non-stormwater  
23 discharges from entering the MS4s."

24 If you can see under the Clean Water Act, section  
25 404(p)(3)(B)(ii), that's the same standard.

1           And in the San Diego case, they -- the State cited  
2 Clean Water Act's general requirement "to reduce the  
3 discharge of pollutants to the maximum extent  
4 practicable" under 404(p)(3)(B)(iii); you can see those  
5 two permit requirements are right next to each other in  
6 the Clean Water Act. And they are general -- general  
7 requirements.

8           So the State, in the proposed decision, made the  
9 same argument; rejected the San Diego case.

10          And to avoid repetition, I will conclude my  
11 comments here. And thank you very much for your time.

12          CHAIRPERSON MILLER: Thank you very much. I really  
13 appreciate that.

14          So before we turn it to board questions, I'm going  
15 to see if there's any other public comment on this  
16 matter. And really appreciate everyone taking the time  
17 this morning.

18          Any public comment? Anyone wishing to comment?  
19 Again, you can unmute yourself. You can raise your Zoom  
20 hand.

21          MS. PALCHIK: I'm seeing none, Madam Chair.

22          CHAIRPERSON MILLER: Great. Thank you,  
23 Ms. Palchik.

24          And for callers, just a reminder, that in order to  
25 provide public comment, you would push \*6.

1 (No response.)

2 CHAIRPERSON MILLER: Great. Seeing no public  
3 comment, I will now turn it to the board for questions.

4 (No response.)

5 CHAIRPERSON MILLER: No questions from the board?  
6 Ms. Shelton, were you going to --

7 MS. SHELTON: Madam Chair, yes. I would be happy  
8 to respond to some of the issues today, if the  
9 Commission would like that.

10 CHAIRPERSON MILLER: Yes. That was actually going  
11 to be my exact question. Thank you, Ms. Shelton.

12 MS. SHELTON: Okay. Thank you.

13 Mr. Burhenn, on -- for the claimants here, made a  
14 few points that I did want to respond to:

15 One, he did thank the Commission or the Commission  
16 staff for finding that all the claimants have used their  
17 proceeds of taxes.

18 This decision finds, specifically, that the five  
19 cities -- there were evidence -- there was in the record  
20 that they spent their proceeds of taxes on this program.  
21 We have a declaration from the County and the Flood  
22 Control District that they did, but we also question  
23 that, given the graphs that were included in their  
24 report of waste ditch discharge.

25 So with the finding and the evidence that those

1 five cities did spend their proceeds of taxes, the  
2 Commission can approve or partially approve this test  
3 claim. But the Controller still has the ability to go  
4 through and audit their reimbursement claims to  
5 determine whether, in fact, proceeds of taxes were used.

6 I do know that the principal permittee, which is  
7 the County, I believe, or the County Flood Control  
8 District, did take in money from cities, and they had  
9 some grant monies. And then to the extent they used  
10 those grant monies or monies from fees or monies from  
11 other cities, that were not their proceeds of taxes,  
12 that is not eligible for reimbursement.

13 So I just wanted to make that point clear.

14 On the TMDL provisions, the parties are talking  
15 about the 2002 Department of Finance case. And that  
16 case is absolutely distinguishable.

17 One, because the State was making the general  
18 argument that all NPDES stormwater permits were never  
19 going to be eligible for reimbursement because they did  
20 not impose a new program or higher level of service, but  
21 were simply used to enforce the same standard.

22 And in that case, those activities were determined  
23 to be new; there was no dispute about that. And so the  
24 Court, as the State Water Board just mentioned, did not  
25 do an analysis of the specific mandated activities in

1 this case.

2 Here, we are finding, there are specific activities  
3 that are new and mandated and recommend approval of  
4 those, but the requirements to comply with most of the  
5 TMDL provisions, which are just to simply implement the  
6 BMPs and to monitor are not new requirements.

7 Mr. Burhenn suggested that the monitoring is more  
8 expensive -- or extensive, and that might be true, but  
9 that would be an increased cost, but it's not a new  
10 program or higher level of service. It's not a  
11 different activity. The activities require the same in  
12 federal law and the same in the prior permit.

13 There was lots of discussion about the Cooperative  
14 Watershed Program.

15 First, let me just address the water board's  
16 argument that the plain language of the test claim  
17 permit states that the permittees must develop the  
18 Cooperative Watershed Program.

19 The Courts have determined that under rules of  
20 statutory interpretation, that the word "must" is  
21 typically mandatory. They suggest that the claimants  
22 had requested that requirement be placed in the permit.

23 And Government Code subsection 17556(a) does allow  
24 for a finding of no cost mandated by the State at a --  
25 with a specific request by a party or a claimant. But

1 you need evidence in the record of that, from the  
2 governing body that they requested that requirement or  
3 evidence of a delegated -- a letter from a delegated  
4 representative of a governing body. And we don't have  
5 any evidence of their request, so we can't make that --  
6 we can't make that finding.

7 On the implementation of the Cooperative Watershed  
8 Program, we are recommending that the Commission deny  
9 that -- deny that.

10 The implementation of the Cooperative Watershed  
11 Program is discretionary. They were given the choice of  
12 implementing that or implementing section IV under that  
13 provision. And section IV simply requires that they  
14 monitor and implement BMPs.

15 If they choose to implement the Cooperative  
16 Watershed Program, they are not required to comply with  
17 the waste load allocation. So, certainly, they had an  
18 incentive to implement the Cooperative Watershed  
19 Program, but it is not -- not required that they do so,  
20 and all of their activities are not new in that respect.

21 And just to mention, on the priority development  
22 projects for low-impact development and  
23 hydromodification, there, the claimant was requesting  
24 reimbursement specifically for municipal priority  
25 development projects. Those requirements are imposed on

1 all priority development projects, which are based on  
2 the size of the project and the -- the -- the size of  
3 the project and how each of those projects affect the  
4 water quality standards. They apply to both public and  
5 private projects and are simply not unique to local  
6 government. We are, therefore, recommending that the  
7 Commission deny those requirements. Even if the  
8 Commission were to find that they -- you know, the  
9 transitional housing and the civic center were mandated  
10 by the State, although there's no evidence of that --  
11 that they were practically compelled to do so. There's  
12 conclusions, but not any evidence from the governing  
13 body.

14 And that's all I have, and I'm happy to answer any  
15 questions.

16 CHAIRPERSON MILLER: Thank you very much.

17 We will turn it to Mr. Burhenn, at your request.

18 But before that, are there any additional questions  
19 for Ms. Shelton from the board?

20 (No response.)

21 CHAIRPERSON MILLER: Seeing none, I'm going to  
22 leave -- I'm going to limit this rebuttal just to about  
23 five minutes, quickly, just to see if there's any  
24 additional information, before I take it back to the  
25 board.

1           So Mr. Burhenn for the claimants, I would like to  
2 start with you or Ms. Carr.

3           MR. BURHENN: Yes. I will do -- I will handle it.  
4 Thank you. Thank you, Chair -- Chair Miller.

5           Yeah. I'm going to go under five. I've been going  
6 over all day.

7           First of all, I also want to add our thanks to  
8 Commission staff for a very thorough analysis. And even  
9 though we don't agree with all of it, it certainly was a  
10 major effort.

11           I would like to address a few comments by  
12 Ms. Shelton. Yes, when it comes to parameters and  
13 guidance, every claimant will have to justify its claim.  
14 We understand that.

15           With respect to the CSSP, which was not addressed  
16 by any of the other parties, that was a new project.  
17 That was a project that was not the existing monitoring,  
18 but a new monitoring project. It certainly involved  
19 additional costs, which are set forth in the declaration  
20 of Mr. Fortuna. But it is, in fact, a new program. And  
21 that was required by section XVIII.B.9. of the permit,  
22 which required a monitoring program.

23           So I would just like to make that point.

24           Thank you.

25           CHAIRPERSON MILLER: Thank you. I appreciate that.

1 Any -- Ms. Shelton, do you want to respond to that?

2 MS. SHELTON: Thank you.

3 You know, the issue of whether something is new is  
4 a question of law and it is determined based on the  
5 plain language of the permit and the -- what was  
6 required by prior -- the prior permit in federal law.  
7 And the requirement to comply with that  
8 constituent-specific source control program for metals  
9 was -- it just simply required monitoring and  
10 implementing BMPs. And those were the same activities  
11 that were required by the prior permit and by federal  
12 law.

13 There -- I'm sure you had increased costs, but the  
14 Courts have made it very clear that increased costs  
15 alone are not -- does not entitle you to reimbursement  
16 under Article XVIII.B., section 6.

17 CHAIRPERSON MILLER: Thank you, Ms. Shelton.

18 I do think that is -- that is often the question  
19 is -- is what is new. And I think there's a lot of  
20 mandate law that establishes that -- that costs alone do  
21 not constitute a new permitting.

22 Any other questions from board members?

23 (No response.)

24 CHAIRPERSON MILLER: Any other party or witness  
25 that wants to have any additional comment before we wrap

1 up?

2 I will turn it to Mr. Adams.

3 And then if any of the additional parties or  
4 witnesses would like to make an additional statement,  
5 please turn your camera on and raise your Zoom hand so  
6 that we know you would like to make an additional  
7 comment.

8 Mr. Adams, please.

9 MEMBER ADAMS: Thank you, Madam Chair.

10 I just wanted to mention, I appreciate the  
11 thoughtful and extensive work put into this by all  
12 involved. I understand there's -- I respect the  
13 difference of opinion, but I do support the staff  
14 recommendation.

15 Thanks.

16 CHAIRPERSON MILLER: Great. Thank you.

17 So just one last opportunity. It sounds like  
18 Mr. Adams is ready to make a motion. One last  
19 opportunity for either public comment or any of the  
20 witnesses or parties.

21 Would anyone like to make any final statements?

22 MEMBER MORGAN: Yeah. Scott Morgan, Office of  
23 Planning and Research. Yeah. Great work by everybody.

24 I do sympathize with the claimants. You know, we  
25 continue to pass along fees to local jurisdictions and,

1 ultimately, to local taxpayers. And I definitely  
2 sympathize. But I think it's a matter of law here and  
3 that I agree with the staff recommendation as well.

4 CHAIRPERSON MILLER: Great. Thank you, Mr. Morgan.

5 So seeing no additional public comment and seeing  
6 no additional comments by the claimants, I'm going to  
7 ask, actually, that you, Mr. Adams, if you would like to  
8 make that official motion for us to adopt this staff  
9 recommendations.

10 MEMBER ADAMS: Madam Chair, I would.

11 CHAIRPERSON MILLER: Great. Thank you, Mr. Adams.

12 And may we have a second?

13 MEMBER NASH: Second.

14 CHAIRPERSON MILLER: Great. Thank you, Ms. Nash.

15 We have a motion and a second. Moved by Mr. Adams;  
16 seconded by Ms. Nash.

17 And we are ready, Ms. Halsey, to please take the  
18 roll.

19 Mr. Adams.

20 MEMBER ADAMS: Aye.

21 MS. HALSEY: Ms. Miller.

22 CHAIRPERSON MILLER: Aye.

23 MS. HALSEY: Mr. Morgan.

24 MEMBER MORGAN: Aye.

25 MS. HALSEY: Ms. Nash.

1 MEMBER NASH: Aye.

2 MS. HALSEY: Ms. Paquin.

3 MEMBER PAQUIN: Aye.

4 MS. HALSEY: Mr. Walker.

5 MEMBER WALKER: Aye.

6 CHAIRPERSON MILLER: Great. That motion carries  
7 and the staff recommendation is adopted.

8 Again, to our parties and witnesses for the  
9 incredible amount of effort and work you put into this;  
10 thank you very much for being here. And, of course, to  
11 the team at the Commission on State Mandates, we are  
12 really grateful.

13 So move on to Item 4. I just want to let the  
14 committee know that our court reporter needs to take a  
15 break at 11:30. So I think what we are going to do is  
16 try and see how quickly we can move through this next  
17 item. And we may just take a quick pause at 11:30 and  
18 then, at that time, if the court reporter could give us  
19 an estimate of how long a recess we should take.

20 THE COURT REPORTER: Thanks, Madam Chair.

21 CHAIRPERSON MILLER: Thanks very much.

22 So with that, we will move to Item 4, please.

23 MS. HALSEY: Senior Commission Counsel Juliana Gmur  
24 will please turn on her video and unmute her microphone  
25 and present a proposed decision and parameters and

1 guidelines on Juveniles: Custodial Interrogation.

2 At this time, we invite the parties and witnesses  
3 for Item 4 to please turn on their video and unmute  
4 their microphones.

5 CHAIRPERSON MILLER: Thank you very much.

6 Ms. Gmur, good morning. Nice to see you.

7 MS. GMUR: Good morning.

8 These parameters and guidelines address a change to  
9 Welfare Institution Code section 625.6, requiring cities  
10 and counties to ensure that youths ages 16 and 17  
11 consult with legal counsel prior to custodial  
12 interrogation and before the waiver of any Miranda  
13 rights.

14 On January 27, 2023, the Commission adopted its  
15 test claim decision, finding that the test claim statute  
16 imposes a reimbursable State-mandated program within the  
17 meaning of Article XIII B, section 6, of the California  
18 Constitution.

19 The proposed parameters and guidelines identify the  
20 one activity approved by the Commission and include two  
21 sources of state funds as potential offsetting revenues.

22 No substantive comments were filed on the expedited  
23 parameters and guidelines.

24 Accordingly, staff recommends that the Commission  
25 adopt the proposed decision and parameters and

1 guidelines, and authorize staff to make any technical,  
2 nonsubstantive changes to the proposed decision  
3 following the hearing.

4 CHAIRPERSON MILLER: Great. Thank you very much.

5 If the parties and witnesses could please -- thank  
6 you. You have already done it. Could please state your  
7 names for the record, I appreciate it. Mr. Lemus, if  
8 you would like to start, for the County of Los Angeles,  
9 please.

10 MR. LEMUS: Yes. Good morning. My name is  
11 Fernando Lemus. I am the claimant representative for  
12 the County of Los Angeles. And I'm here to say that we  
13 have no further comments. We urge the Commission to  
14 adopt the Ps&Gs.

15 CHAIRPERSON MILLER: Thank you very much for that.  
16 Ms. Ferebee, please, for the Department of Finance.

17 MS. FEREBEE: Donna Ferebee, Department of Finance.

18 The Department of Finance has no objections to the  
19 adoption of the proposed decision and parameters and  
20 guidelines.

21 Thank you.

22 CHAIRPERSON MILLER: Thank you very much.

23 Any questions from the board?

24 (No response.)

25 CHAIRPERSON MILLER: Seeing none, thank you

1 Ms. Gmur.

2 Any public comment?

3 (No response.)

4 MS. PALCHIK: I see none, Madam Chair.

5 CHAIRPERSON MILLER: Great. Thank you very much.

6 Seeing none, may we have a motion, then, to adopt  
7 the staff recommendation, please.

8 I will move.

9 May we have a second, please.

10 MEMBER ADAMS: I would second, Madam Chair.

11 CHAIRPERSON MILLER: Thank you very much,

12 Mr. Adams.

13 Moved by Miller. Seconded by Adams.

14 Confirming no public comment. No board questions.

15 Ms. Halsey, will you please call the roll.

16 MS. HALSEY: Mr. Adams.

17 MEMBER ADAMS: Sorry. Couldn't get to my mute  
18 button.

19 Aye.

20 MS. HALSEY: Ms. Miller.

21 CHAIRPERSON MILLER: Aye.

22 MS. HALSEY: Mr. Morgan.

23 MEMBER MORGAN: Aye.

24 MS. HALSEY: Ms. Nash.

25 MEMBER NASH: Aye.

1 MS. HALSEY: Ms. Paquin.

2 MEMBER PAQUIN: Aye.

3 MS. HALSEY: Mr. Walker.

4 MEMBER WALKER: Aye.

5 CHAIRPERSON MILLER: Thank you. That motion  
6 carries.

7 We're going to try and see if, in the time we have  
8 allotted, we can get to Item 5, Please, Ms. Halsey.

9 MS. HALSEY: Sure.

10 Senior Commission Counsel Eric Feller will please  
11 turn on his video and unmute his microphone and present  
12 a proposed decision and parameters and guidelines  
13 amendment on Racial and Identity Profiling.

14 At this time we invite the parties and witnesses  
15 for Item 5 to please turn on their video and unmute  
16 their microphones.

17 The requester has contacted Commission staff and  
18 stated that they agree with the staff analysis and  
19 clarifying language to the parameters and guidelines and  
20 will not appear for this item. The requesters thanks  
21 the commissioners and the staff for their time on this  
22 request.

23 CHAIRPERSON MILLER: Thank you very much,  
24 Ms. Halsey.

25 Mr. Feller, please.

1 MR. FELLER: Good morning.

2 This item originated in a request to amend the  
3 Racial and Identity -- excuse me, Racial and Identity  
4 Profiling parameters and guidelines to authorize  
5 reimbursement to purchase cellular telephones loaded  
6 with Racial and Identity Profiling Act reporting  
7 software.

8 Staff finds the parameters and guidelines already  
9 authorize reimbursement for the -- (audio malfunction;  
10 court reporter clarification.)

11 Staff finds that the parameters and guidelines  
12 already authorize reimbursement for the costs incurred  
13 to comply with the reimbursable activities, including  
14 the requested cell phones, so the amendment is not  
15 necessary, and the request should be denied.

16 However, staff does recommend amending the  
17 reimbursable activities section to add clarifying  
18 language consistent with the test claim regulations  
19 that, quote, "In-car mobile data computers, laptops,  
20 tablets, or smartphones may be used to comply with this  
21 activity."

22 Staff also recommends that the Commission update  
23 section V.B., Indirect Cost Rates, to include updated  
24 citations to the federal law and indirect costs.

25 The parties filed comments agreeing with the

1 proposed decision, so staff recommends that the  
2 Commission adopt the proposed decision and parameters  
3 and guidelines amendment, and authorize staff to make  
4 any technical, nonsubstantive changes to the proposed  
5 decision following the hearing.

6 CHAIRPERSON MILLER: Great. Thank you very much.

7 If -- Ms. Ferebee for the Department of Finance, do  
8 you have any comments?

9 MS. FEREBEE: Yes. Donna Ferebee, Department of  
10 Finance.

11 The Department of Finance has no objections to the  
12 staff recommendation.

13 Thank you.

14 CHAIRPERSON MILLER: Thank you very much.

15 Any questions from the board?

16 (No response.)

17 CHAIRPERSON MILLER: Any public comment?

18 (No response.)

19 CHAIRPERSON MILLER: Anyone wishing to comment for  
20 any reason?

21 (No response.)

22 CHAIRPERSON MILLER: Seeing none, may we have a  
23 motion to adopt the staff recommendation?

24 MEMBER WALKER: So moved.

25 MEMBER NASH: Second.

1 CHAIRPERSON MILLER: Thank you, Mr. Walker.  
2 Moved by Mr. Walker. Seconded by Ms. Nash.  
3 Ms. Halsey, will you take the roll, please.  
4 Mr. Adams.

5 MEMBER ADAMS: Aye.

6 MS. HALSEY: Ms. Miller.

7 CHAIRPERSON MILLER: Aye.

8 MS. HALSEY: Mr. Morgan.

9 MEMBER MORGAN: Aye.

10 MS. HALSEY: Ms. Nash.

11 MEMBER NASH: Aye.

12 MS. HALSEY: Ms. Paquin.

13 MEMBER PAQUIN: Aye.

14 MS. HALSEY: Mr. Walker.

15 MEMBER WALKER: Aye.

16 CHAIRPERSON MILLER: Great. That motion carries  
17 and the staff recommendation is adopted.

18 We will now move to Item 6, please.

19 MS. HALSEY: Item 6 is reserved for county  
20 applications for a finding of significant financial  
21 distress, or SB 1033 applications.

22 No SB 1033 applications have been filed.

23 Next, Program Analyst Jill Magee will please turn  
24 on her video and microphone and present Item 7, the  
25 Legislative Update.

1 MS. MAGEE: Good morning.

2 The following are the legislative updates since the  
3 last time the Commission met:

4 First, AB 1306, State government. This bill  
5 proposes a nonsubstantive change to Government Code  
6 section 17552, which sets forth the sole procedure by  
7 which local agencies and school districts may claim  
8 reimbursement for costs mandated by the State.  
9 According to the author's office, this is a spot bill.

10 Second, AB 961, State mandates: claims. This bill  
11 proposes to amend Government Code section 17564 and  
12 reduce the statutorily minimum amount of costs incurred  
13 to file a mandate reimbursement claim from \$1,000 to  
14 \$800. According to the author's office, this is a spot  
15 bill.

16 Staff will continue to monitor legislation for  
17 bills that impact the mandates process.

18 Thank you.

19 CHAIRPERSON MILLER: Thank you, Jill.

20 Next, Chief Legal Counsel Camille Shelton will  
21 please turn on her video and microphone and present  
22 Item 8, the Chief Legal Counsel Report.

23 MS. SHELTON: Good morning.

24 We do have one recent decision from the California  
25 Supreme Court. They deny --

1 MS. PALCHIK: I'm sorry. I'm sorry. Camille, this  
2 is Heidi. I think we lost Ms. Miller. She is just  
3 reconnecting. One moment, please.

4 (Pause in proceedings.)

5 CHAIRPERSON MILLER: Ms. Halsey, I was kicked off  
6 Zoom. Was anyone else?

7 MS. HALSEY: No. Sorry about that.

8 CHAIRPERSON MILLER: No. I'm so sorry.

9 I will try -- I'm joining from my phone. I will  
10 try and rejoin from my computer.

11 Are we able to hear the report for Ms. Magee? Is  
12 she --

13 MS. HALSEY: She did present. I thought you had  
14 shut off your camera for a minute. I didn't realize you  
15 had been bumped out, so we kept going.

16 CHAIRPERSON MILLER: No worries at all. I  
17 appreciate that.

18 Where are we on the agenda then?

19 MS. HALSEY: Ms. Shelton is about to -- about to do  
20 her Chief Legal Counsel Report.

21 CHAIRPERSON MILLER: Great. Thank you,  
22 Ms. Shelton.

23 MS. SHELTON: Good morning.

24 We do have a recent decision by the California  
25 Supreme Court on the *Department of Finance v. Commission*

1 on *State Mandates* case. This was the case that we  
2 discussed in Item 3.

3 As you recall, the Third District Court of Appeal  
4 upheld the Commission's decision except for the finding  
5 of street sweeping, which is reversed, consistent with  
6 the Court's earlier decision in *Paradise Irrigation*  
7 *District*.

8 In December, the State filed a petition for review  
9 on the fee authority issues, as well as the Court's  
10 earlier decision, finding that the activities are  
11 mandated by the State and not by federal law.

12 On March 2nd, the Supreme Court denied review in  
13 that case.

14 On our litigation calendar, we have a trial setting  
15 conference set for April 13th, 2023, in *County of Los*  
16 *Angeles v. Commission on State Mandates*. That is the  
17 challenge on the Commission's decision on Municipal  
18 Stormwater and Urban Runoff Discharge Consolidated  
19 Incorrect Reduction Claims.

20 And that's all I have today.

21 CHAIRPERSON MILLER: Great. Thank you very much.  
22 I appreciate it.

23 We will now hear the Executive Director's Report.  
24 And Ms. Halsey, if we can try and do that in five  
25 minutes so that we can give our court reporter a break.

1 MS. HALSEY: Sure.

2 So first, our 2022/2023 budget. On April 18th,  
3 2023, the Commission's budget will be heard in Assembly  
4 Budget Subcommittee 4.

5 And then for workload, after this hearing, there  
6 are 39 pending test claims, 27 of which are regarding  
7 stormwater NPDES permits. There's also one parameters  
8 and guidelines active and pending.

9 On inactive status, pending the outcome of  
10 litigation, there is one more parameters and guidelines  
11 regarding stormwater discharges. Staff expects to  
12 complete all currently pending test claims by  
13 December 25th, 2025, and depending on staff and other  
14 workload. However, some of the test claims may be heard  
15 and decided earlier than currently indicated if they are  
16 consolidated for hearing.

17 And that is all I have.

18 CHAIRPERSON MILLER: Great. Thank you very much.

19 Are there any questions for Ms. Magee, Ms. Shelton,  
20 or Ms. Halsey at this time?

21 (No response.)

22 CHAIRPERSON MILLER: Seeing none, any public  
23 comments?

24 (No response.)

25 MS. PALCHIK: I see none, Madam Chair.

1 CHAIRPERSON MILLER: Great. Thank you very much.  
2 With that, we will now -- the Commission will now  
3 meet in closed executive session -- and Ms. Palchik sent  
4 you the link; it should be in your calendar at 12:30 --  
5 pursuant to Government Code section 11126(e), to confer  
6 with and receive advice from legal counsel for  
7 consideration and action, as necessary and appropriate,  
8 upon the pending litigation listed on the published  
9 notice and agenda; and also to confer with and receive  
10 advice from legal counsel regarding potential  
11 litigation.

12 The Commission will also confer on personnel  
13 matters, pursuant to Government Code section  
14 11126(a)(1).

15 And the committee will reconvene in open session in  
16 approximately 15 minutes. So with that, we will now  
17 adjourn into closed session.

18 If anyone has any questions, feel free to email me.  
19 But, again, it should be on your calendars for today at  
20 12:30, the closed session link.

21 Thank you and see you shortly.

22 (Closed session was held from  
23 11:26 a.m. to 12:03 p.m.)

24 CHAIRPERSON MILLER: Thank you so much for waiting.  
25 The Commission met in closed executive session,

1 pursuant to Government Code section 11126(e), to confer  
2 with and receive advice from legal counsel for  
3 consideration and action, as necessary and appropriate,  
4 upon the pending litigation listed on the published  
5 notice and agenda; and to confer with and receive advice  
6 from legal counsel regarding potential litigation.

7 And we also conferred on personnel matters pursuant  
8 to Government Code section 11126(a)(1).

9 And if there's no further business, any public  
10 comment? Any further questions from the board?

11 (No response.)

12 CHAIRPERSON MILLER: Seeing none, I will entertain  
13 a motion to adjourn, please.

14 MEMBER NASH: So moved.

15 CHAIRPERSON MILLER: Thank you, Ms. Nash.

16 MEMBER MORGAN: Second.

17 CHAIRPERSON MILLER: Thank you, Mr. Morgan.

18 It's been moved and seconded.

19 Ms. Halsey, if you will please call the roll to  
20 adjourn.

21 MS. HALSEY: Mr. Adams.

22 MEMBER ADAMS: Aye.

23 MS. HALSEY: Ms. Miller.

24 CHAIRPERSON MILLER: Aye.

25 MS. HALSEY: Mr. Morgan.

1 MEMBER MORGAN: Aye.

2 MS. HALSEY: Ms. Nash.

3 MEMBER NASH: Aye.

4 MS. HALSEY: Ms. Paquin.

5 MEMBER PAQUIN: Aye.

6 MS. HALSEY: Mr. Walker.

7 MEMBER WALKER: Aye.

8 CHAIRPERSON MILLER: Great. We are adjourned.

9 I really appreciate everyone's time today. Thank  
10 you very, very much, and have a great weekend. Take  
11 care.

12 (Proceedings concluded at 12:05 p.m.)

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CERTIFICATE OF REPORTER

I, KATHRYN S. SWANK, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing proceedings, heard via Zoom, were reported in shorthand by me, Kathryn S. Swank, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings nor in any way interested in the outcome of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of April 2023.

  
KATHRYN S. SWANK, CSR  
Certified Shorthand Reporter  
License No. 13061