

Item 1

Proposed Minutes

COMMISSION ON STATE MANDATES

Location of Meeting: via Zoom
October 27, 2023

Present: Member Joe Stephenshaw, Chairperson
Director of the Department of Finance
Member Lee Adams
County Supervisor
Member Regina Evans
Representative of the State Controller, Vice Chairperson
Member Jennifer Holman
Representative of the Director of the Office of Planning and Research
Member Renee Nash
School District Board Member
Member Sarah Olsen
Public Member
Member Spencer Walker
Representative of the State Treasurer

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 Stephenshaw called the meeting to order at 10:05 a.m., and welcomed new Commission designee from the State Controller's Office, Regina Evans, Chief of Staff. Executive Director Heather Halsey called the roll. Members Adams, Evans, Holman, Nash, Olsen, Stephenshaw, and Walker all indicated that they were present.

APPROVAL OF MINUTES

Chairperson Stephenshaw asked if there were any objections to or corrections of the September 22, 2023 minutes. There was no response. Member Olsen made a motion to adopt the minutes. Member Walker seconded the motion. Chairperson Stephenshaw asked if there was any public comment. There was no response. Executive Director Halsey called the roll. The Commission voted to adopt the September 22, 2023 hearing minutes by a vote of 6-0 with Member Nash abstaining.

PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA

Chairperson Stephenshaw 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 *Sex Offenders Registration: Petitions for Termination*, 21-TC-03
Statutes 2017, Chapter 541, Section 12 (SB 384), effective
January 1, 2018, operative July 1, 2021
County of Los Angeles, Claimant

Commission Counsel Anna Barich presented this item and recommended that the Commission adopt the Proposed Decision to deny this Test Claim.

Fernando Lemus, Lucia Gonzalez, and Dylan Ford appeared on behalf of the claimant. Chris Hill appeared on behalf of the Department of Finance.

Following statements by Mr. Lemus, Ms. Gonzalez, Mr. Ford, and Mr. Hill, Chairperson Stephenshaw asked if there was any public comment on this item. There was no response. Chairperson Stephenshaw asked if there were any questions from board members. Following discussion between Member Olsen, Chief Legal Counsel Camille Shelton, Commission Counsel Barich, and Member Adams, Chairperson Stephenshaw asked if there was a motion. Member Walker made the motion to adopt the staff recommendation. Member Holman seconded the motion. Executive Director Halsey called the roll. The Commission voted to adopt the Proposed Decision by a vote of 4-3 with Member Adams, Member Nash, and Member Olsen voting no.

Item 4 *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a. and Attachment D, Adopted December 16, 2009*, 10-TC-11
Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District, Claimants

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

Howard Gest appeared on behalf of the claimants. Donna Ferebee appeared on behalf of the Department of Finance. Catherine Hagan and Michael Lauffer appeared on

behalf of the State Water Resources Control Board and the San Diego Regional Water Quality Control Board.

Following discussion by the parties, Commission Members, and Commission staff, Chairperson Stephenshaw asked if there was any public comment on this item. There was no response. Chairperson Stephenshaw asked if there were any questions from members. There was no response. Following statements by Chief Legal Counsel Shelton and Mr. Gest, Chairperson Stephenshaw asked if there was any further discussion. Member Olsen made the motion to adopt the staff recommendation. Member Walker seconded the motion. Executive Director Halsey called the roll. The Commission voted to adopt the Proposed Decision by a vote of 7-0.

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 5 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 presented this item, stating that Item 5 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 6 Legislative Update (info)

Program Analyst Jill Magee presented this item.

- Item 7 Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar (info)

Chief Legal Counsel Camille Shelton presented this item.

- Item 8 Executive Director: Workload Update, and Tentative Agenda Items for the December 2023 and January 2024 Meetings (info)

Executive Director Halsey introduced new Assistant Executive Director, Administrative Services, Cristina Bardasu, and 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 11:13 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)

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 11:20 a.m., the Commission reconvened in open session.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Stephenshaw 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.

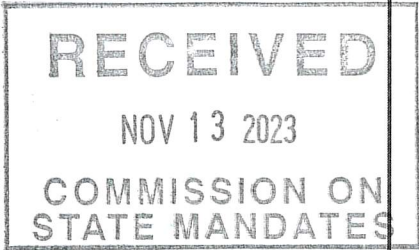
ADJOURNMENT

Chairperson Stephenshaw stated that with no further business to discuss, he would entertain a motion to adjourn. Member Nash made a motion to adjourn the meeting. Member Holman seconded the motion. Executive Director Halsey called the roll. The Commission adopted the motion to adjourn the October 27, 2023 meeting by a vote of 6-0 with Member Olsen absent at 11:22 a.m.

Heather Halsey
Executive Director

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES

PUBLIC MEETING



FRIDAY, OCTOBER 27, 2023

10:05 A.M.

ORIGINAL

MEETING HELD

VIA ZOOM

A VIDEO COMMUNICATIONS PLATFORM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

REPORTED BY:

KATHRYN S. SWANK
Certified Shorthand Reporter No. 13061
Registered Professional Reporter

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A P P E A R A N C E S

COMMISSIONERS PRESENT

JOSE STEPHENSHAW
Director
Department of Finance
(Chairperson of the Commission)

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

REGINA EVANS
Representative for MALIA COHEN
State Controller

LEE ADAMS III
Sierra County Supervisor
Local Agency Member

JENNIFER HOLMAN
Representative for SAMUEL ASSEFA, Director
Office of Planning & Research

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

SARAH OLSEN
Public Member

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COMMISSION STAFF

HEATHER A. HALSEY
Executive Director

ANNA BARICH
Commission Counsel

JILL MAGEE
Program Analyst

CAMILLE N. SHELTON
Chief Legal Counsel

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

2 *PUBLIC PARTICIPANTS*

3 DONNA FEREBEE
4 Department of Finance
5 (Items 4)

6 DYLAN FORD
7 County of Los Angeles
8 (Item 3)

9 HOWARD GEST
10 Burhenn & Gest
11 (Item 4)

12 LUCIA GONZALEZ
13 County of Los Angeles
14 (Item 3)

15 CATHERINE HAGAN
16 State Water Resources Control Board
17 and
18 San Diego Regional Water Quality Control Board
19 (Item 4)

20 CHRIS HILL
21 Department of Finance
22 (Items 3)

23 MICHAEL LAUFFER
24 State Water Resources Control Board
25 and
26 San Diego Regional Water Quality Control Board
27 (Item 4)

28 FERNANDO LEMUS
29 County of Los Angeles
30 (Item 3)

31 ---o0o---

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ERRATA SHEET

Page	Line	Correction
<u>15</u>	<u>24</u>	<u>Mr. Dylan Ford's make <u>mic</u></u>
<u>45</u>	<u>25</u>	<u>turbidity in <u>and</u> the metals</u>
<u>53</u>	<u>6-8</u>	<u>public⁷ and which the notice and agenda</u>
_____	_____	<u>are prohibiting <u>prohibited</u> from disclosing,</u>
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ITEM NO.	PAGE
I. Call to Order and Roll Call	8
II. Approval of Minutes Item 1 September 22, 2023	10
III. Public Comment for Matters Not on the Agenda (none)	11
IV. Proposed Consent Calendar for Items Proposed for Adoption on Consent Pursuant to California Code of Regulations, Title 2, Articles 7 and 8 (none)	--
V. Hearings and Decisions Pursuant to California Code of Regulations, Title 2, Article 7	
A. Appeals of Executive Director Decisions Pursuant to California Code of Regulations, Title 2, Section 1181.1(c)	14
Item 2 Appeal of Executive Director Decisions (none)	
B. Test Claims	
Item 3 Sex Offenders Registration: Petitions for Termination, 21-TC-03	14
	Statutes 2017, Chapter 541, Section 12 (SB 384), effective January 1, 2018, operative July 1, 2021
	County of Los Angeles, Claimant

I N D E X C O N T I N U E D

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ITEM NO.

PAGE

B. Test Claims (Continued)

Item 4 California Regional Water
Quality Control Board, San
Diego Region, Order
No. R9-2009-0002,
Sections B.2.; C.; D.; F.1.d.;
F.1.d.7.i.; F.1.f.; F.1.h.;
F.3.a.4.c.; F.3.d.; F.4.b.;
F.4.d.; F.4.e.; G.6.; I.;
J.; K.1.b.4.n.; and, Only as
They Relate to the Reporting
Checklist, Section K.3.a. and
Attachment D, Adopted
December 16, 2009, 10-TC-11

Cities of Dana Point, Laguna
Hills, Laguna Niguel, Lake
Forest, Mission Viejo, San
Juan Capistrano, the County of
Orange, and the Orange County
Flood Control District,
Claimants

VI. 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

Item 5 Assignment of County
Application to Commission,
a Hearing Panel of One or
More Members of the Commission,
or to a Hearing Officer (none)

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ITEM NO.	PAGE
VII. Informational Hearings Pursuant to California Code of Regulations, Title 2, Article 8	
A. Reports	
Item 6 Legislative Update	52
Item 7 Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar	54
Item 8 Executive Director: Workload Update, and Tentative Agenda Items for the December 2023 and January 2024 Meetings	54
VIII. Closed Executive Session Pursuant to Government Code Sections 11126 and 11126.2	57
A. Pending Litigation	
B. Potential Litigation	
C. Personnel	
IX. Report from Closed Executive Session	57
Adjournment	58
Reporter's Certificate	59

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1 FRIDAY, OCTOBER 27, 2023, 10:05 A.M.

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3 CHAIRPERSON STEPHENSHAW: Okay. Good morning,
4 everyone. The meeting of the Commission on State
5 Mandates will come to order. Welcome to the webinar.

6 Statutes of 2023, Chapter 196, amended the
7 Bagley-Keene Open Meetings Act to extend, until
8 December 31st, 2023, the authority to hold public
9 meetings through teleconferencing. The Commission
10 continues its commitment to ensure that its public
11 meetings are accessible to the public and that the
12 public has the opportunity to observe the meeting and to
13 participate by providing written and verbal comment on
14 Commission matters.

15 Please note, the materials for today's meeting,
16 including the notice, agenda, and witness list, are all
17 available on the Commission's website at www.csm.ca.gov,
18 under the "Hearings" tab.

19 Also please note that in the event we experience
20 technical difficulties or the meeting is bumped offline,
21 we will restart and allow time for people to rejoin
22 before recommencing the meeting.

23 Please join me in welcoming new Commission designee
24 from the State Controller's Office, Regina Evans, Chief
25 of Staff for the State Controller.

1 Good morning, Regina. Good to see you.
2 Heather, will you please call the roll.
3 MS. HALSEY: Sure. Mr. Adams.
4 You are muted.
5 MEMBER ADAMS: Sorry. I was having trouble finding
6 the mute button.
7 I am here.
8 MS. HALSEY: Great.
9 Ms. Evans.
10 We don't have any sound for you, Ms. Evans. I
11 think she is frozen. I can see that she is there.
12 Ms. Holman.
13 MEMBER HOLMAN: Here.
14 MS. HALSEY: Ms. Nash.
15 MEMBER NASH: Here.
16 MS. HALSEY: Ms. Olsen.
17 MEMBER OLSEN: Present.
18 MS. HALSEY: Mr. Stephenshaw.
19 CHAIRPERSON STEPHENSHAW: Here.
20 MS. HALSEY: Mr. Walker.
21 MEMBER WALKER: Here.
22 CHAIRPERSON STEPHENSHAW: Do you want to try
23 Ms. Evans again?
24 MS. HALSEY: Ms. Evans, your sound is not working.
25 CHAIRPERSON STEPHENSHAW: We will continue to work

1 on the sound there and we will move on in the meantime.

2 So the next item is Item 1.

3 Are there any objections to or corrections of the
4 September 22nd, 2023, minutes?

5 MEMBER OLSEN: Move adoption.

6 MEMBER WALKER: Second.

7 MEMBER ADAMS: I would second.

8 CHAIRPERSON STEPHENSHAW: Is there any public
9 comment on this item?

10 (No response.)

11 CHAIRPERSON STEPHENSHAW: Are there any questions
12 from members?

13 (No response.)

14 CHAIRPERSON STEPHENSHAW: Is -- the item was moved,
15 I believe, by Member Olsen and seconded by Member
16 Walker.

17 Are we ready for the question? If there are no
18 further discussion, Heather, please call the roll.

19 MS. HALSEY: Mr. Adams.

20 MEMBER ADAMS: Aye.

21 MS. HALSEY: Ms. Evans.

22 Ms. Evans, are you shaking your head in the
23 affirmative?

24 Yes, I can see a thumbs-up there.

25 "Yes" for Ms. Evans.

1 Ms. Holman?

2 MEMBER HOLMAN: Yes.

3 MS. HALSEY: Ms. Nash.

4 MEMBER NASH: I was absent, so I will abstain.

5 MS. HALSEY: Ms. Olsen.

6 MEMBER OLSEN: Yes.

7 MS. HALSEY: Mr. Stephenshaw.

8 CHAIRPERSON STEPHENSHAW: Yes.

9 MS. HALSEY: Mr. Walker.

10 MEMBER WALKER: Yes.

11 MS. HALSEY: Thank you.

12 Now we will take up public comment for matters not
13 on the agenda. Please note that the Commission may not
14 take action on items not on the agenda. However, it may
15 schedule issues raised by the public for consideration
16 at future meetings.

17 We invite the public to comment on matters that are
18 on the agenda as they are taken up.

19 CHAIRPERSON STEPHENSHAW: Is there any public
20 comment?

21 (No response.)

22 CHAIRPERSON STEPHENSHAW: Hearing no public
23 comment --

24 MS. HALSEY: I'm seeing none.

25 CHAIRPERSON STEPHENSHAW: -- we'll -- we will move

1 to the next item.

2 MS. HALSEY: Let's move to the swearing in.

3 Will the parties and witnesses for Items 3 and 4
4 please turn on your video, unmute your microphones, and
5 please rise and state your names for the record.

6 Do you want to begin, Mr. Hill?

7 MR. HILL: Chris Hill, Department of Finance.

8 MS. HALSEY: Thanks.

9 Mr. Gest.

10 MR. GEST: Howard Gest for the claimants in Item 4.

11 MS. HALSEY: Thank you.

12 Lucia.

13 MS. GONZALEZ: Hi, good morning. Lucia Gonzalez
14 with the Office of County Counsel for Item 3.

15 MS. HALSEY: Thank you.

16 Fernando.

17 MR. LEMUS: Good morning. Fernando Lemus with the
18 Department of Auditor-Controller, County of Los Angeles,
19 for Item 3.

20 MS. HALSEY: Thank you.

21 Dylan. Oh, Dylan, we can't hear you. I will
22 circle back to you in a second.

23 Ms. Hagan.

24 MS. HAGAN: Catherine Hagan for the State Water
25 Resources Control Board and San Diego Water Board on

1 Item 4.

2 MR. LAUFFER: And Michael Lauffer with the State
3 Water Resources Control Board for Item Number 4.

4 MS. HALSEY: Great. Thank you.

5 Ms. Ferebee.

6 MS. FEREBEE: Donna Ferebee, Department of Finance,
7 for Item Number 4. Thank you.

8 MS. HALSEY: And Dylan, are we -- do we have sound?

9 (No response.)

10 MS. HALSEY: Still no sound. You might want to
11 check if you are -- sometimes my cord comes partly
12 unplugged and it could be that. No. You're having
13 technical difficulties. I will try to get someone to
14 assist you with that.

15 In the meantime, would everyone please rise and
16 raise their hand.

17 (Parties/witnesses stood to be sworn or
18 affirmed.)

19 MS. HALSEY: Do you solemnly swear or affirm that
20 the testimony which you are about to give is true and
21 correct, based on your personal knowledge, information,
22 or belief?

23 (Affirmative responses.)

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

25 Item 2 is reserved for appeals of Executive

1 Director decisions. There are no appeals to consider
2 for this hearing.

3 Next is Item 3. Commission Counsel Anna Barich
4 will please turn on her video and unmute her microphone
5 and present a proposed decision on Sex Offenders
6 Registration: Petitions for Termination, 21-TC-03.

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

10 MS. BARICH: Thank you, Heather. Good morning,
11 everyone.

12 This test claim was previously considered at the
13 September Commission hearing, but no action was taken.

14 The test claim statute established a procedure for
15 Tier 1 and 2 registered sex offenders, to petition to
16 terminate their duty to register as a sex offender 10 to
17 20 years after release from incarceration, placement,
18 commitment, or release on probation or other
19 supervision.

20 Under prior law, all convicted sex offenders had to
21 register for life. Termination from the registry
22 eliminates the crime of failing to register for that
23 person, and the process itself eliminates that crime for
24 all in the class of person who successfully petition.

25 The Commission asked staff to answer a few

1 questions for this hearing, which have been addressed in
2 the Executive Summary. No changes have been made to the
3 proposed decision except to update the hearing date,
4 chronology, the member information for the October
5 hearing, and add the September hearing transcript to the
6 exhibits and Table of Contents.

7 Staff finds that there are no costs mandated by the
8 State because the test claim statute eliminates a crime
9 or infraction within the meaning of Government Code
10 section 17556(g).

11 Staff recommends that the Commission adopt the
12 proposed decision to deny the test claim, and authorize
13 staff to make any technical, nonsubstantive changes
14 following the hearing.

15 Thank you.

16 CHAIRPERSON STEPHENSHAW: Parties and witnesses,
17 please state your name for the record.

18 MR. LEMUS: Okay. I will go first. My name is
19 Fernando Lemus. I am the claimant representative for
20 the County of Los Angeles. And I will turn it over to
21 Lucia Gonzalez.

22 MS. GONZALEZ: Good morning. My name is Lucia
23 Gonzalez.

24 May I just inquire if what -- Mr. Dylan Ford's mike
25 is working now before I proceed?

1 MR. FORD: May I test it?

2 (Yeses.)

3 MR. FORD: Thank you. My apologies.

4 MS. HALSEY: Working great.

5 MS. GONZALEZ: Okay. Thank you.

6 Claimant Los Angeles County is asking the
7 Commission grant the test claim. We believe that the
8 costs mandated -- that SB 384 did provide for a mandate
9 on LA County and that no exemption applies.

10 The Commission staff is urging the Commission to
11 find that although the constitutional requirement for
12 the State to reimburse the County applies, that an
13 exemption also applies; the exemption being that a crime
14 was eliminated.

15 The County believes that there has been no evidence
16 to support that contention. There is no crime that's
17 been eliminated. The failure to register is still a
18 crime, it still applies. And this segment of
19 individuals that successfully petition under 384 would
20 be inapplicable to be charged with the crime of failure
21 to register because of their ability to successfully
22 petition under 384.

23 I'm going to turn it over to Mr. Ford for
24 additional arguments.

25 MR. FORD: Thank you, Lucia. And thank you,

1 Commissioners, for having us again for this particular
2 item.

3 And in the wake of our previous discussion, I was
4 just trying to search for an analogy that I think
5 helped -- might help illustrate the claimant's arguments
6 here.

7 With respect to section 17556(g), again, the
8 specific language is that the exception applies when
9 there is an elimination of a crime.

10 And as my colleague mentioned, as Lucia stated, no
11 crime has been eliminated. Both the set of criminal
12 offenses that are encompassed by SB 384, and,
13 furthermore, the penalty statute, Penal Code section
14 290.018 are all unchanged as a result of the passage of
15 the legislation. So all those offenses remain.

16 So it's as if to say that, like, the crime -- I
17 think that the proposed decision's position is that it
18 does eliminate a crime for a potential class of people,
19 but the statute itself does not say "elimination of a
20 crime" or "elimination of potential prosecutions."

21 An analogy might be that if there was a law that
22 directed the closure of a state highway, for example, so
23 that people who would normally take that road to get to
24 work, to get to home, the closure of that road does not
25 eliminate the crime of speeding. It just eliminates the

1 possibility of speeding for that that particular class
2 of people.

3 Furthermore, if there was a statute that directed
4 the adjustment of the obligation to register one's
5 vehicle at a different -- rather than on an annual basis
6 to a different interval for certain class of people.
7 Again, that doesn't eliminate the crime of failure to
8 register the vehicle. It just changes the nature of the
9 obligation.

10 And, furthermore, we are talking about potential
11 prosecutions, which I believe that the proposed decision
12 is sort of premised upon. We have to remember that the
13 only people getting relief under the statute are the
14 people who are following the law and are registering as
15 required. So these are precisely the group of people
16 who would not be prosecuted because they are entitled
17 to -- their entitled to relief is premised upon the fact
18 that they are registering dutifully.

19 On that ground, we would argue that this exception
20 under subdivision (g) clearly does not apply because the
21 crime has not been eliminated. Maybe the potential
22 prosecutions are eliminated for a particular class of
23 people, but, again, this statute provides assistance to
24 those who are following the law dutifully.

25 So just as closure of a highway does not eliminate

1 the crime of speeding, this particular statute does not
2 eliminate the crime of failure to register.

3 Thank you.

4 CHAIRPERSON STEPHENSHAW: Thank you.

5 Department of Finance, do you have any questions?

6 MR. HILL: Thank you. Chris Hill, the Department
7 of Finance. The Department of Finance concurs with the
8 Commission staff's recommendation.

9 CHAIRPERSON STEPHENSHAW: Thank you, Mr. Hill.

10 Is there any public comment on this item?

11 (No response.)

12 CHAIRPERSON STEPHENSHAW: Are there any questions
13 from members?

14 Ms. Olsen?

15 MEMBER OLSEN: I'm getting stuck, I think, on --
16 perhaps it's a semantics issue, but I think it's a
17 relevant semantics issue.

18 And that is, in the new executive summary, there's
19 a really important word, I think. And it -- it occurs
20 multiple times in the executive summary, which is the
21 word "once," meaning "after which."

22 And my concern is that this actually creates
23 another -- a new administrative process, a new court
24 process, that local governments are required to
25 participate in. And only after that process happens is

1 there this potential for this idea that a crime has been
2 eliminated, so that there's this process beforehand,
3 that everybody has to participate in, in order to get to
4 what our staff is interpreting as an elimination of a
5 crime.

6 And I think that's where I'm stuck. I -- I kind of
7 side with the local governments on this one because of
8 that issue.

9 MS. SHELTON: Anna, do you want to go ahead and
10 respond to that, please?

11 MS. BARICH: I -- my main response to that is, any
12 time section 17556(g) comes into play, you are going to
13 have activities that are programmed that -- that under
14 other circumstances could be reimbursable.

15 The question now is whether or not there is a crime
16 that is eliminated. And this process of going through
17 the petitioning process and doing everything to
18 terminate the duty to register eliminates a crime.

19 MS. SHELTON: Let me also add to that. As you
20 recall, the County of San Diego case that was just
21 recently decided by the Fourth District Court of Appeal
22 dealt with the other portion of 17556(g), changing the
23 penalty for a crime.

24 There, the County was seeking reimbursement for the
25 process to conduct Franklin proceedings in court. And

1 those proceedings required evidentiary hearings and --
2 and the submittal of information for the court to
3 determine the youthful factors of the offender, for the
4 possibility of going to the parole board.

5 There, the court held that 17556(g) applied based
6 on the fact that, as a direct result of those statutes,
7 the person -- the possibility of that person's
8 sentencing and penalty being changed was there.

9 Here, it's the same thing. They are asking for the
10 process to go through when a person applies for the
11 termination of registration.

12 So you are always going to have -- all of the cases
13 that we have ever had dealing with 17556(g) always had a
14 process that went along with it, and that it was still
15 determined that reimbursement was not required.

16 So that's not a change in the staff interpretation.

17 MEMBER OLSEN: Thank you.

18 CHAIRPERSON STEPHENSHAW: Thank you.

19 Member Adams.

20 MEMBER ADAMS: Thank you, Mr. Chair.

21 I appreciate all the comments. I appreciated the
22 updated information.

23 But I too just cannot accept that there's been an
24 elimination of a crime. Section 290 still stays in --
25 in effect.

1 What has changed is the addition of the tiered
2 system that, again, adds required actions by local
3 government. And this -- again, it changes the
4 application of 290 to certain people and changes their
5 reporting period.

6 I would say, even for those folks, someone who has
7 a ten-year registration requirement and fails to report
8 at year 5 can still be charged. So the only thing,
9 again, that changes is how long they are being
10 monitored.

11 I will admit, there are certainly long-term savings
12 overall, both to the state and local governments, but,
13 in the meantime, there are short-term costs to local
14 government. And if this is all hanging on the
15 elimination of a crime, I just do not see that. I see
16 the crime -- 290 still stays in effect; it is not
17 changed at all; only how it's applied against certain
18 people.

19 MS. BARICH: Well, sir, my response to that would
20 be to consider the other previous test claims that we
21 have decided on, on 17556(g) grounds. For example, the
22 case that Ms. Gonzalez was -- brought up at the last
23 meeting, that 19 -- 97-TC-15, which was about -- which
24 was also about the Sex Offender Registry. And in that
25 case, they had expanded the list of crimes that create a

1 duty to register and in create -- and in expanding the
2 list of crimes that created a duty to register, even
3 though it didn't affect the statute that is used to
4 enforce the duty to register, it was still found to be
5 an -- created new crimes, because the people who were
6 guilty of those added offenses would not have been
7 guilty of a crime prior to the change in law.

8 Similarly, there is also the other test claim that
9 we refer to in our -- in the proposed decision. The --
10 the felony -- the felony murder case.

11 In that case, we found that there was an
12 elimination of a crime because, in that case, they had
13 changed the statute to -- that is used to describe who
14 can be charged for felony murder to exclude people who
15 do not have -- who do not have intent to kill when they
16 were committing their felony offense.

17 And in that -- and in that decision, we found that
18 that had eliminated a crime. In this case, we have
19 found that people who are -- do not have a duty to
20 register under -- under 290 no longer can be charged
21 under 290.0 -- .018. Therefore, a crime has been
22 eliminated.

23 MEMBER ADAMS: I -- I appreciate that. I would
24 note, in the felony murder rule case, I was on the
25 minority voting on that. I disagreed on that issue, and

1 I hope that maybe someday that's eliminated.

2 Thanks.

3 CHAIRPERSON STEPHENSHAW: Okay. Thank you for the
4 questions and the discussions. And also thanks to staff
5 for providing the information in response to questions
6 that were raised at the prior hearing.

7 With that, is there any further discussion?

8 MS. HALSEY: I'm seeing no hands raised.

9 CHAIRPERSON STEPHENSHAW: Okay. Is there a motion?

10 MEMBER WALKER: I move to adopt staff's
11 recommendation.

12 CHAIRPERSON STEPHENSHAW: There's been a motion.
13 Is there a second?

14 MEMBER HOLMAN: I will second that.

15 CHAIRPERSON STEPHENSHAW: It has been moved by
16 Member Walker; and seconded by Member Holman.

17 Are we ready for question or is there additional
18 discussion? If no further discussion, please call the
19 roll.

20 MS. HALSEY: Ms. Adams.

21 MEMBER ADAMS: No.

22 MS. HALSEY: Ms. Evans.

23 (No response.)

24 MS. HALSEY: Circle back.

25 Ms. Holman.

1 MEMBER HOLMAN: Yes.

2 MS. HALSEY: Ms. Nash.

3 MEMBER NASH: No.

4 MS. HALSEY: Ms. Olsen.

5 MEMBER OLSEN: No.

6 MS. HALSEY: Mr. Stephenshaw.

7 CHAIRPERSON STEPHENSHAW: Yes.

8 MS. HALSEY: Mr. Walker.

9 MEMBER WALKER: Yes.

10 MS. HALSEY: Ms. Evans, are you able to speak? I

11 know you just got your phone working.

12 MEMBER EVANS: Yes.

13 MS. HALSEY: Thank you.

14 CHAIRPERSON STEPHENSHAW: Thank you.

15 The motion, I believe, is carried. We have four

16 "yes" votes.

17 MS. HALSEY: That's right. 4 to 3.

18 Next, we will ask presenters for Item 3 to please

19 turn off their video and mute their microphones.

20 And next up is Item 4. Chief Legal Counsel Camille

21 Shelton will please turn on her video, unmute her

22 microphone, and present a proposed decision on Order

23 Number R9-2009-0002, adopted by the San Diego Regional

24 Water Quality Control Board, 10-TC-11.

25 At this time, we invite the parties and witnesses

1 for Item 4 to please turn on their video and unmute
2 their microphones.

3 MS. SHELTON: Thank you, Heather.

4 This test claim alleges reimbursable state mandated
5 activities arising from ten different sections in a 2009
6 stormwater permit issued by the San Diego Regional Water
7 Quality Control Board for the permittees in Orange
8 County.

9 Staff recommends that the Commission partially
10 approve this test claim for the following activities
11 from December 16th, 2009, through December 31st, 2017:

12 Number 1. Develop a monitoring plan to determine
13 stormwater action level compliance.

14 Number 2. Update the map of the entire stormwater
15 sewer system in GIS format and submit the GIS layers to
16 the regional board.

17 Number 3. Comply with the new mandated activities
18 identified in the "Conclusion," relating to the
19 effectiveness assessment of the Jurisdictional Runoff
20 Management Plan and the workplan to address high
21 priority water quality problems.

22 Number 4. Gather and include in the annual report
23 the new mandated information identified in the
24 "Conclusion."

25 And Number 5. Annually notice and conduct public

1 meetings to review and update the watershed workplan.

2 Reimbursement for these activities is denied
3 beginning January 1st, 2018, because the claimants have
4 fee authority sufficient as a matter of law to cover the
5 costs of these activities pursuant to Government Code
6 section 17556(d), and, thus, there are no costs mandated
7 by the State.

8 In addition, reimbursement for these activities
9 from any source, including but not limited to state and
10 federal funds, any service charges, fees, or
11 assessments, to offset all or part of the costs of this
12 program, and any other funds used that are not the
13 claimant's proceedings of taxes, including
14 transportation and use funds from Measure M2, levied by
15 and received from the Orange County Local Transportation
16 Authority, are required to be identified and deducted
17 from any claims submitted for reimbursement.

18 Finally, all other sections, activities, and costs
19 pled in the test claim are denied as either not imposing
20 a state-mandated new program or higher level of service,
21 or not resulting in costs mandated by the State.

22 Staff recommends that the Commission adopt the
23 proposed decision to partially approve the test claim,
24 and authorize staff to make any technical,
25 nonsubstantive changes to the proposed decision

1 following the hearing.

2 CHAIRPERSON STEPHENSHAW: Parties and witnesses,
3 please state your name for the record.

4 MR. GEST: Howard Gest, claimant representative.

5 MS. HAGAN: Catherine Hagan for the Water Board.

6 MR. LAUFFER: And Michael Lauffer for the Water
7 Board.

8 MS. FEREBEE: And Donna Ferebee for the Department
9 of Finance.

10 CHAIRPERSON STEPHENSHAW: Thank you.

11 Mr. Gest, for the claimants, would you like to
12 begin?

13 MR. GEST: Yes. Thank you.

14 Good morning, Chairperson, and Members of the
15 Commission. Howard Gest for the claimants.

16 First of all, we want to state our appreciation for
17 the amount of work that staff has put into this lengthy
18 decision. We support the proposed findings that certain
19 portions of the permit are reimbursable state mandates,
20 and we believe that those findings are proper. Because
21 the amount of work that went into this decision, we
22 don't want to see it to be infected by certain errors
23 that can be fixed.

24 So I would like to address two areas of the
25 decision this morning:

1 One, which is the monitoring in conjunction with
2 the stormwater action levels; and two is the TMDLs at
3 Baby Beach. We will continue to reserve oral arguments
4 that we have set forth in our test claim papers, the
5 narrative statement, and the comments. But I will limit
6 my comments this morning to these two areas.

7 First of all, I want to address the outfall
8 monitoring. Section D of the permit addresses
9 stormwater action levels. A stormwater action level is
10 a level of a contaminant or a pollutant in a discharge
11 which will trigger further steps by the permittees.

12 And as part of this stormwater action level set
13 forth in section D of the stormwater permit, the permit
14 requires the permittees to develop a monitoring plan to
15 sample a representative percentage of major outfalls.

16 And let me just stop for a minute and define a
17 couple of terms that we'll be referring to. You may be
18 familiar with them, but just to make sure we're all on
19 the same page.

20 You will hear me refer to "receiving waters," and
21 receiving waters are the water of body [sic] into which
22 the municipal stormwater permit system discharges. So
23 the receiving water might be Aliso Creek or one of the
24 other creeks or even the Pacific Ocean. That's a
25 receiving water.

1 An "outfall" is where the stormwater flood control
2 system, stormwater pipe, or channel discharges into the
3 receiving water.

4 So what this monitoring plan requires is that the
5 permittees develop a monitoring plan for a
6 representative percentage of these outfalls. And then
7 after developing that plan, implement that plan, and
8 based upon test results, if those test results are above
9 the stormwater action level, they have got to take
10 further additional steps.

11 Anna has indicated the proposed decision is --
12 proposes to find that the development of this plan is a
13 reimbursable state mandate, but the implementation of
14 the plan as -- the implementation of the monitoring, as
15 well as any actions that occurs as a result of that
16 monitoring, are not reimbursable mandates.

17 And we submit that the finding that the actual
18 implementation of the plan and these actions that are
19 taken as a result of a finding of a stormwater action
20 level are, in fact, reimbursable state mandates.

21 So, first of all, it is undisputed that this
22 monitoring and this monitoring plan is a new program.
23 It is new. The proposed decision so finds, on pages 186
24 and 187. This representative sampling did not occur
25 under the prior permit.

1 Let me just say, when I make references to the page
2 numbers, I'm referring to the proposed decision, which
3 does have, like, the first 38 pages of the executive
4 summary. So -- but I'm using that pagination. And, in
5 fact, the section of the decision that we're talking
6 about is generally found on pages 168 through 196 of the
7 proposed decision.

8 The -- so the Commission staff has suggested that
9 the adoption of this monitoring plan is new and is
10 reimbursable but not the actual implementation. This
11 doesn't make sense.

12 Let me give you an example, not in the context of
13 stormwater. Suppose the State had ordered a county or a
14 city or a school district to build a building, and the
15 State set forth the specifications for that building or
16 the goals that that building was to accomplish, and that
17 this building was for a specific purpose, to be used
18 only for a specific purpose, and the State designated
19 what that purpose would be.

20 It doesn't make sense for the Commission to then
21 say, well, the drafting of the architectural plans for
22 that building is reimbursable, but you know what, city,
23 county, school district, you have other buildings. And,
24 in the past, you know, those other buildings are used
25 for other purposes, and people go in and out of them and

1 they use them for other purposes, so the idea of having
2 a building is not new; and, therefore, we'll reimburse
3 you for the architectural plans that you have been
4 ordered to prepare, but not for the building itself.

5 Well, that doesn't make sense. If the State
6 mandated a new program, you get reimbursed for the
7 program.

8 Well, it's the same situation here for the
9 stormwater monitoring. It's undisputed that these are
10 new requirements. Yet, this Commission staff, in the
11 proposed decision, is proposing that you find --
12 although preparing the architectural plans for the
13 monitoring, preparing the plan, is reimbursable, when
14 you actually do the monitoring, you can't. Not because
15 this monitoring had been in existence before, but
16 because you had done other monitoring for other
17 purposes.

18 We submit that the stormwater action level program
19 in section D of the permit, which requires not only the
20 development of the plan, but the implementation of the
21 plan, the monitoring plan, are new, and that should be
22 reimbursed. And you should not find it not reimbursable
23 just because there are other programs that address other
24 issues.

25 It is also true for, actually, the implementation

1 and the work that is done, but we will submit on our
2 papers on that, and won't take your time on that issue
3 at this point.

4 The second issue that we find error in with respect
5 to this decision is with respect to what they call the
6 TMDLs at Baby Beach.

7 And, again, let me just define a couple terms:

8 "TMDL" is a short acronym for Total Maximum Daily
9 Load. And what a Total Maximum Daily Load is a planning
10 device where the water board adopts a -- basically a
11 number, which represents the amount of a pollutant or
12 contaminant that can exist in a receiving water without
13 being at such a high level that it impairs the -- what
14 they call the beneficial use, the use of that water for
15 swimming or for fishing or for something of that nature.
16 So the TMDL represents the amount of pollutants that
17 could be in that receiving water -- here, the Pacific
18 Ocean -- without interfering with the use of, in this
19 case, Baby Beach.

20 And part of the TMDL is composed of what they call
21 "load allocations," which are nonpoint sources, which
22 means that it's not a pipe or a channel; and also
23 "wasteload allocations," which refer to the amount of
24 pollutants that could be in the discharge from a point
25 source, which, in this case -- not using the technical

1 term -- we're talking about the pipe or the channel of
2 the permittee.

3 So what section I of the permit did was, they took
4 a TMDL that had been adopted for Baby Beach, relating to
5 indicator bacteria, and they put it in the permit. And
6 that TMDL required the permittees to reduce the amount
7 of bacteria in the discharge, in their discharges,
8 during dry water, over a three-and five-year period and
9 wet weather over a seven-and ten-year period.

10 It also required implementation of actions to
11 comply with that wasteload allocation.

12 Now, again, it is undisputed that this -- these are
13 new. Okay? The TMDL wasn't adopted until 2009, so it
14 could not have been in the prior permit, the 2002
15 permit. So it was -- this was put into this permit.

16 But the proposed decision -- and this section of
17 the proposed decision is found at pages 197 through 227
18 of the decision. The proposed decision is that even
19 though the TMDL is new, it is not reimbursable because,
20 under the old permit, there was a different provision
21 that said that discharges that cause or contribute to an
22 exceedance of a water quality standard in the receiving
23 water is prohibited.

24 This section also gets repeated and is included in
25 the new 2009 permit. The proposition that the TMDL is

1 not new, because there was this other, prior discharge
2 prohibition, which did not reference wasteload
3 allocations, did not reference the bacteria, did not
4 reference the time period, the -- the proposition that
5 it is still not new, because there was this other, prior
6 prohibition, fundamentally misunderstands what the TMDL
7 does and requires, as compared to discharge prohibition.

8 The discharge prohibition -- and I'm going to bring
9 you back again to the term "receiving water." The
10 discharge prohibition prohibits discharges that causes
11 or contributes to exceedance of a water quality standard
12 in the receiving water. The focus is on the receiving
13 water, that water of body -- that body of water that is
14 receiving the contaminant.

15 And it does not specify any specific action, but --
16 and that body of water receives contaminants from many
17 different sources.

18 Compared to the focus of that -- on the receiving
19 water, the TMDL wasteload allocation focuses on the
20 permittee's discharge from its outfall, and that is what
21 is being regulated under the TMDL.

22 So what you have here is a new regulation, new
23 requirements, that were not in the prior permit. And
24 all the -- the only reason why the proposed decision is
25 proposing to find that it is not reimbursable is because

1 the goal is the same. The standard of performance is
2 the same. What we are trying to do is keep the
3 receiving water clean, and the proposed decision is
4 saying, well, because that goal is the same, it's not
5 new.

6 Well, that's -- that is not what the test is. The
7 test for whether something is new was set forth most
8 recently by the Court of Appeal and Department of
9 Finance v. Commission, which is the San Diego permit
10 case, which was rendered in 2022. And that test is to
11 determine whether a program imposed by a permit -- and
12 this case also involved the stormwater permit.

13 And so they said the test is to determine whether a
14 program imposed by a permit is new, we compare the legal
15 requirements imposed by the new permit with those in
16 effect before the new permit became effective.

17 In other words, you compare the -- what is required
18 under our new 2009 San Diego permit with what -- the
19 prior permit. And then they say, "This is so even
20 though the conditions were designed to satisfy the same
21 standard of performance."

22 And that is where the Commission staff's proposed
23 decision errors, because they are saying, "Well, it's
24 the same standard of performance: Clean water in the
25 receiving water, and, therefore, it's the same." Yet,

1 the TMDL is a new requirement; undisputed that it's a
2 new requirement.

3 And so under this case, to determine whether it's
4 new and a new program, you look at what they are
5 requiring the permittees via the claimants to do. And
6 that is where the proposed decision errors.

7 And how -- how do you know, really, that it is new?
8 What is the evidence that this is new as opposed to what
9 was covered by the old discharge prohibition?

10 Well, the discharge prohibition was in the 2002
11 permit, and the discharge prohibition is also in section
12 A of the permit. If you were -- if it was the same
13 thing, you wouldn't need the TMDL.

14 But we know that the water boards don't take
15 frivolous actions. We know that they don't take
16 unnecessary actions. So, clearly, they felt that they
17 had to require something more of the claimants by
18 putting in the TMDL in section I. Otherwise, if it was
19 the same thing, they could have just kept the discharge
20 prohibition, which we already had.

21 And for that reason, we request that the Commission
22 find that the -- not only is the -- well, find that the
23 TMDL is a new -- new program.

24 Let me just say, in closing, very quickly, that
25 there's another basis on which the proposed decision

1 appears to find that the TMDL is not a new program. And
2 that is based on statements that federal law requires
3 compliance with water quality standards and, therefore,
4 this TMDL is not new. They don't say that this is a
5 federal mandate. They say it's a -- they concede that
6 the TMDL is a state mandate, but they say it's not new
7 because this is required.

8 Well, the concept that federal law requires
9 compliance with water quality standards for these MS4
10 municipal stormwater permit discharges is wrong. It is
11 simply wrong.

12 And so, first of all, so everybody understands,
13 water quality standards are criteria -- levels of
14 pollutants that are in the receiving water here, the
15 ocean or the creeks, again, to protect the -- what are
16 called beneficial uses, the ability to swim or fish in
17 those water bodies.

18 And the proposed decision, and in four different
19 places, references the fact that the permittees are
20 required to comply with water quality standards.

21 And as I say, that is just simply wrong. Since
22 1999, in the Ninth Circuit case of Defenders of Wildlife
23 v. Browner, it's been well established that for
24 municipal stormwater permittees, they are not required
25 to comply with water quality standards.

1 And that is referenced by the fact that they
2 compared what the municipal stormwater permittee is
3 required to do with what industrial or private parties
4 are required to do with their stormwater discharges.
5 And they said, Congress specifically found that the
6 industrial permittee, or the other permittee, is
7 required to comply with water quality standards, but for
8 municipal stormwater permittees, they have a different
9 standard. Not compliance with water quality standards,
10 but reduce the discharge of pollutants to the maximum
11 extent practicable.

12 And the state board, the State Water Resources
13 Control Board, concedes this point.

14 In their decision of -- which was relating to a Los
15 Angeles County stormwater permit, a review of that,
16 Water Quality Order 2015-0075, they explicitly state, in
17 the context of MS -- "NPDES permits for MS4s, however,
18 the Clean Water Act does not explicitly reference the
19 requirement to meet water quality standards."

20 And then they go on to say, they have the ability
21 to not require compliance. They can impose that
22 requirement by discretion, but they don't have to.

23 And so they, themselves, acknowledge that this
24 requirement is not imposed on MS4 permittees. And I
25 will just note, for the record, that there's at least

1 four different places in the proposed decision that
2 states that the permittees are required to comply with
3 water quality standards: On page 170; on page 189, when
4 they are talking about monitoring; and page 198; and
5 page 222, when they are talking about the TMDLs.

6 So for the reason I first stated, that the TMDL is
7 qualitatively different than the discharge prohibition,
8 and to the extent the second basis is set forth, that
9 MS4 permittees have to comply with water quality
10 standards, both of those are errors, and we would
11 request that the decision be modified both with respect
12 to implementation of the stormwater monitoring plan and
13 with respect to the TMDLs.

14 And as I say, we reserve and are not waiving any of
15 the other arguments that we have set forth in our
16 moving -- our test claim papers or comments.

17 Thank you very much.

18 CHAIRPERSON STEPHENSHAW: Thank you.

19 Next we will move to Department of Finance.

20 Do you have any comments?

21 MS. FEREBEE: Good morning. Donna Ferebee,
22 Department of Finance.

23 We have previously submitted written comment on the
24 test claim, and we won't reiterate those comments here.
25 We will, however, join in the Water Board's remarks

1 today.

2 Thank you.

3 CHAIRPERSON STEPHENSHAW: Thank you.

4 Ms. Hagan and Mr. Lauffer from the State Water
5 Resources Control Board and San Diego Regional Water
6 Quality Control Board, do you have any other comments?

7 MS. HAGAN: Yes, we do. Thank you. Good morning,
8 Commission Members and staff. My name is Catherine
9 Hagan. I'm with the State Water Board's Office of Chief
10 Counsel. And as you know, Michael Lauffer is also with
11 me here today.

12 The Water Boards appreciate and also want to
13 recognize the exhaustive work by Commission staff in
14 developing this proposed decision that you are
15 considering. We agree with a significant number of
16 recommendations in this proposed final decision.

17 We do want to identify our concern, however, with
18 the proposed decision's reversal from the draft that was
19 circulated with respect to section D.2., which is within
20 the stormwater action level provision, section D, that
21 Mr. Gest was referring to at the beginning of his
22 remarks.

23 Section D establishes the stormwater action levels
24 based on existing water quality standards, and section
25 D.2., in particular, requires permittees to develop a

1 monitoring plan to sample a representative percent of
2 the major outfalls within each hydrologic subarea, and
3 this is for the purposes of assessing compliance with
4 applicable water quality standards.

5 Section D.2., it's important to note, does not
6 require a monitoring plan for every outfall, just
7 representative percentage of outfalls.

8 This requirement is consistent with the federal MS4
9 regulations, which require representative monitoring of
10 outfalls. Specifically, the federal regulations require
11 permittees to include a proposed monitoring program for
12 representative data collection for the term of the
13 permit that describes the location of outfalls or field
14 screening points to be sampled; why the location is
15 representative; the frequency of samplings; parameters
16 to be sampled; and a description of the sampling
17 equipment.

18 This regulation is set forth in Code of Regulations
19 section 122.26(d)(2)(iii)(C).

20 Additionally, the federal regulations, that same
21 section, but ending in (iv)(E), also require permittees
22 to propose a monitoring program that includes a
23 description of the location of outfalls or field
24 screening points appropriate for representative data
25 collection, and a description of why the outfall or

1 field screening point is representative.

2 While the proposed final decision states, at
3 page 186, that "federal law does not require monitoring
4 of each stormwater source at the precise point of
5 discharge," citing the Natural Resources Defense Council
6 versus County of Los Angeles case, a 2013 federal
7 district court case, federal appellate court case,
8 the -- it is important to note that the same court
9 decision goes on and recognizes that these federal
10 regulations I described above require that permits
11 contain monitoring design to yield data that is
12 representative of the stormwater discharges.

13 The Court concludes that EPA regulations made clear
14 that while MS4 NPDES permits need not require monitoring
15 of each water source at the precise point of discharge,
16 it may instead establish a monitoring scheme sufficient
17 to yield data which are representative of the monitored
18 activities.

19 The Court also recognizes that these federal
20 regulations require permittees to propose a monitoring
21 program for representative data collection that
22 describes the location of outfalls or screening points
23 to be sampled, and explain why the sampling locations
24 are representative.

25 This further discussion in the NRDC case

1 underscores the federal -- that federal law requires the
2 type of monitoring that is included -- a monitoring
3 plan that is included or required to be developed
4 pursuant to section D.2.

5 For this reason, we would ask that the proposed
6 decision be revised to deny the test claim for section
7 D.2., along with the remainder of section D in its
8 entirety.

9 And, finally, while we continue to disagree with
10 some of the other proposed conclusions, we have already
11 expressed these concerns in our written comments in this
12 matter and so will not reiterate them here today.

13 We appreciate the opportunity to speak with you
14 today and are available to answer any questions the
15 Commission may have.

16 Thank you.

17 CHAIRPERSON STEPHENSHAW: Thank you.

18 Is there any public comment on this item?

19 (No response.)

20 MS. HALSEY: I'm seeing no hands raised.

21 CHAIRPERSON STEPHENSHAW: Okay. Are there any
22 questions from members?

23 (No response.)

24 CHAIRPERSON STEPHENSHAW: Seeing none there, I
25 see Camille came off. Did you want to make a comment?

1 MS. SHELTON: I'm happy to answer any questions
2 that you might have, and I'm willing and happy to
3 address both the stormwater action levels section and
4 the TMDL section, if you have questions there.

5 CHAIRPERSON STEPHENSHAW: Yeah. If you want to
6 make some brief comments in response to that, maybe --

7 MS. SHELTON: Sure. Sure.

8 So the stormwater action level section, let me just
9 kind of step back and explain what that is.

10 Under prior law, both federal law and the prior
11 permit, permittees were required to monitor wet weather
12 and dry weather samples, analyze those samples,
13 determine the source of any pollutants, and evaluate and
14 modify best management practices to control the
15 discharge of any pollutants to the water bodies.

16 Those are the same activities that are being
17 imposed by this -- the stormwater action level section
18 of the permit. All that a SAL is, it's just a number
19 that reflects the amount of pollutant in the water that
20 you know that is going to exceed water quality
21 standards. Those SALs or action level numbers are the
22 same as the water quality standards that were in prior
23 law.

24 The SALs were, you know, determined for or set for
25 nitrate and nitrite turbidity in the metals, and the

1 metals all have water quality standards that were set
2 long ago under the California Toxics Rule.

3 So the claimants were monitoring for those
4 pollutants under prior law. They had to analyze
5 samples. They had to determine whether those samples
6 had exceeded those water quality standards under prior
7 law, and they had to evaluate and modify best management
8 practices if they determined there was an exceedance.

9 In fact, the water board found that a discharge of
10 those pollutants were causing water quality impairments,
11 and there were several violations of water quality
12 standards under the prior permit for those pollutants.
13 So none of those activities are new.

14 And, in addition, federal law requires monitoring
15 sufficient to determine whether you are meeting water
16 quality standards. We strongly disagree with the
17 claimant that they weren't required to comply with water
18 quality standards under prior law, because the State
19 Water Board issued a precedential order, I think, back
20 in 1999, that required all the receiving water
21 limitation and discharge prohibitions to be included and
22 permits that did require that they meet water quality
23 standards and all of those in the Basin Plan. So none
24 of that is new.

25 The only new part that they had to do with the

1 adoption of this permit was to develop a monitoring
2 plan. And so how they do that is up to them, but the
3 fact that they had to do a new monitoring plan, we felt,
4 was a new mandated -- state mandated activity, and
5 that's why we recommended approval of the monitoring
6 plan itself for the stormwater action level requirement.
7 So that's SALs.

8 The TMDL at Baby Beach on bacteria, very much the
9 same kind of analysis. There, you had water quality
10 standards that were set long ago in federal law and in
11 state law for the three types of bacteria in coastal
12 waters. They -- state law, before this TMDL, said that
13 if you exceed those water quality standards, then your
14 beaches have to be closed. So the TMDL set the numeric
15 targets exactly at the same level as the water quality
16 standards in prior law, and simply requires the same
17 activities of monitoring, analyzing the samples,
18 determining the source, and modifying the BMPs. And for
19 the TMDL, they have to meet those water quality
20 standards by the interim and final deadlines.

21 The only difference between prior law and the
22 adoption of the TMDL was that the permittees now know
23 the percentage of bacteria they have to reduce in order
24 to meet water quality standards. There really is
25 nothing new there. The activities that are required to

1 be performed under prior law and under the test claim
2 permit are exactly the same. They just have to do a
3 better job to meet water quality standards.

4 And so that's all that -- those two sections
5 require.

6 CHAIRPERSON STEPHENSHAW: Thank you.

7 With that, is there any further discussion?

8 (No response.)

9 CHAIRPERSON STEPHENSHAW: If not, is there a
10 motion --

11 MR. GEST: Excuse me, Chairperson. Would you like
12 me to respond to some of those points?

13 CHAIRPERSON STEPHENSHAW: Sure. You can briefly
14 respond.

15 MR. GEST: Okay. So, first of all, with respect to
16 the TMDL, I would like to respond to the assertion that
17 it did not require any new activities, and that -- that
18 is not correct. I mean, the goals are the same: You
19 know, compliance with water quality standards at the
20 beach.

21 But the activity that is being ordered is
22 different. And so, again, under the Court of Appeals
23 decision in Department of Finance v. Commission, dealing
24 with San Diego, where it says that you have to look at
25 whether the legal requirements are the same or

1 different, and it does not matter, even though the
2 conditions were designed to satisfy the same standard of
3 performance.

4 Well, the argument is, well, you had to meet the
5 same standard of performance. You had to meet water
6 quality standards both before and after, but that's not
7 the test.

8 The test is, was a -- was there a legal obligation
9 imposed on the permittees? And there was a legal
10 obligation to comply with these wasteload allocations
11 that didn't exist before. And -- and that's the facts.

12 And so there's really no dispute about those facts,
13 so that under the Court of Appeals test, this is a new
14 program. And so -- so I wanted to respond to that
15 point.

16 And with respect to the monitoring, we were not
17 obligated -- the claimants were not obligated to sample
18 outfalls under the prior permit.

19 Under the new permit, we are required to sample
20 outfalls in wet weather. So that is new.

21 And, again, the goal is the same. The goal is
22 always the same. The goal is clean water. Everybody
23 wants clean water. The claimants spend a lot of money
24 trying to achieve clean water and they do a good job.

25 But, in this instance, the State is telling them

1 how to reach that goal. And that, then, becomes a
2 reimbursable state mandate.

3 Thank you very much.

4 CHAIRPERSON STEPHENSHAW: Thank you, Mr. Gest.

5 It looks like you want to make one more comment,
6 Camille. Go ahead.

7 MS. SHELTON: I just need to state that the
8 activities required by the TMDL section to monitor and
9 to amend your BMPs and to report to the regional board
10 are absolutely not new. And the fact that they had to
11 meet water quality standards by performing those same
12 activities under prior law is the fact.

13 So we apparently do disagree with the facts
14 presented. The fact -- the undisputed facts are -- the
15 only difference is that they set a TMDL, a number, to
16 determine the amount of discharge reduction in the
17 pollution that you have to reach. But the activities of
18 monitoring, implementing BMPs, and reporting your
19 results to the regional board are absolutely not new.

20 CHAIRPERSON STEPHENSHAW: Thank you.

21 Is there any further discussion?

22 Member Olsen?

23 MEMBER OLSEN: I will move the staff
24 recommendation.

25 CHAIRPERSON STEPHENSHAW: There's been a motion to

1 move the staff recommendation.

2 Is there a second?

3 MEMBER WALKER: Second.

4 CHAIRPERSON STEPHENSHAW: The motion to move the
5 staff recommendation has been made by Member Olsen and
6 seconded by Member Walker. Ready for -- are we ready
7 for the question or is there further discussion?

8 Seeing no further discussion, Heather, please call
9 the roll.

10 MS. HALSEY: Mr. Adams.

11 MEMBER ADAMS: Aye.

12 MS. HALSEY: Ms. Evans.

13 MEMBER EVANS: Aye.

14 MS. HALSEY: Ms. Holman.

15 MEMBER HOLMAN: Aye.

16 MS. HALSEY: Ms. Nash.

17 MEMBER NASH: Aye.

18 MS. HALSEY: Ms. Olsen. Ms. Olsen.

19 MEMBER OLSEN: Aye.

20 MS. HALSEY: Thank you.

21 Mr. Stephenshaw.

22 CHAIRPERSON STEPHENSHAW: Aye.

23 MS. HALSEY: Mr. Walker.

24 MEMBER WALKER: Aye.

25 CHAIRPERSON STEPHENSHAW: That motion is carried.

1 MS. HALSEY: We will now ask presenters for Item 4
2 to please turn off their video and mute their
3 microphones.

4 Item 5 is reserved for county applications for a
5 finding of significant financial distress, or SB 1033
6 applications. No SB 1033 applications have been filed.

7 Next, Program Analyst Jill Magee will please turn
8 on her video and microphone and present Item 6, the
9 Legislative Update.

10 MS. MAGEE: Good morning.

11 The following are the legislative updates since the
12 last time the Commission met. The Governor had, until
13 October 14th, 2023, to sign or veto legislation.

14 SB 544, Bagley-Keene Open Meeting Act:
15 Teleconferencing. This bill was chaptered on
16 September 22nd, 2023, and is effective on January 1st,
17 2024.

18 As discussed at the last Commission meeting, this
19 bill enacted additional alternative provisions under
20 which a state body may hold a meeting by teleconference,
21 including the following key provisions among several
22 other requirements.

23 The bill requires a majority of the members, a
24 quorum, to be physically present in a single
25 teleconference location, and at least one member to be

1 physically present at each teleconference location, all
2 of which are required to be accessible to the public and
3 from which members of the public may participate in the
4 meeting;

5 Authorizes a member's remote participation, which
6 location is not required to be accessible to the public,
7 and which the notice and the agenda are prohibiting from
8 disclosing if the other members who are physically
9 present at the same teleconference location constitute a
10 majority of the state body;

11 Authorizes a member's remote participation if the
12 member has a need related to a disability and notifies
13 the state body, in which case that member is counted
14 toward the majority of members required to be physically
15 present at the same teleconference location.

16 Thank you.

17 MS. HALSEY: Does anyone have any questions on
18 that?

19 (No response.)

20 MS. HALSEY: We will be implementing and working to
21 implement our hybrid meetings for the January meeting so
22 that we will be able to have participation both remotely
23 and in person at the same time.

24 Moving on, Chief Legal Counsel will please turn on
25 her video and microphone and present Item 7, the Chief

1 Legal Counsel Report.

2 MS. SHELTON: Thank you, Heather.

3 We have no new filings and no recent decisions, and
4 there's nothing pending on the litigation calendar at
5 this time. So I have nothing to report.

6 MS. HALSEY: Thank you.

7 Next is the Executive Director Report.

8 Cristina Bardasu will please turn on her video and
9 unmute her microphone for her introduction to the
10 Commission. And I am pleased to announce that our new
11 Executive Assistant Director -- or new Assistant
12 Executive Director -- sorry -- Administrative Services,
13 Cristina Bardasu, who began working with the Commission
14 on Monday, September 20 -- 25, 2003 [sic], is here with
15 us today for her first meeting as Assistant Executive
16 Director.

17 Ms. Bardasu earned her Bachelor's in Business
18 Administration from the University of Economy in
19 Romania, after which she attended the University of Law
20 in Romania for a year, which makes her a particularly
21 good fit for the Commission, with her legal background
22 as well.

23 She also earned her Certificate of Bookkeeping.

24 And Cristina is coming to us from the Department of
25 Education, Tobacco Use Prevention Education Program,

1 where she served as a Staff Services Manager I, and led
2 and supervised a team working on budget, contracts,
3 grants, personnel, legislation, and planning.

4 And prior to her promotion to management, she was
5 an AGPA in a lead capacity working on budgeting,
6 administrative, analytical, and technical assistance for
7 the Foster Youth Services and Coordinating Program.

8 And for those of you who have been with the
9 Commission for a long time, you might remember Cristina.
10 She also worked at the Commission in -- from 2016/2017,
11 where she adeptly handled the Commission's budgeting and
12 accounting functions at that time, establishing new
13 systems and means of tracking critical information. And
14 she also prepared a statewide cost estimate for the
15 Commission and was a lot of fun for Commission staff to
16 work with.

17 And we're delighted to have her as a new member of
18 our Executive Team.

19 MS. BARDASU: Thank you so much, Heather. And I'm
20 very glad to be part of the -- to rejoin this great
21 team. And thank you, everyone. And I'm looking to
22 working with you.

23 MS. HALSEY: Thank you, Cristina.

24 CHAIRPERSON STEPHENSHAW: Thank you, Cristina.
25 Welcome back to the Commission.

1 MS. BARDASU: Thank you.

2 MS. HALSEY: And next we will go to -- sorry -- our
3 workload update. After this hearing, there are 40
4 pending test claims, 36 of which are regarding
5 stormwater NPDES permits. There are also three
6 parameters and guidelines, two statewide cost estimates,
7 and one incorrect reduction claim pending. Commission
8 staff expect to complete all the currently pending test
9 claims and IRCs by approximately the July 24, 2026,
10 meeting.

11 And just as a reminder, we issue our draft analyses
12 for comment at least eight weeks prior to the hearing,
13 and then our proposed decisions two weeks prior to the
14 hearing. You can find all of our pending caseload on
15 our website, which we update -- and that is for all
16 caseload -- and we update that at least every two
17 months.

18 And that's all I have today.

19 With that, we can go into closed session.

20 CHAIRPERSON STEPHENSHAW: Thank you.

21 The Commission will now meet in closed executive
22 session pursuant to Government Code section 11126(e), to
23 confer with and receive advice from legal counsel for
24 consideration and action, as necessary and appropriate,
25 upon the pending litigation listed on the published

1 notice and agenda; and to confer with and receive advice
2 from legal counsel regarding potential litigation.

3 The Commission will also confer on personnel
4 matters pursuant to Government Code section 11126(a)(1).

5 We will reconvene in open session in approximately
6 15 minutes.

7 (Closed session was held from
8 11:13 a.m. to 11:20 a.m.)

9 CHAIRPERSON STEPHENSHAW: Thank you.

10 The Commission met in closed session -- in closed
11 executive session pursuant to Government Code section
12 11126(e) to confer with and receive advice from legal
13 counsel for consideration and action, as necessary and
14 appropriate, upon the pending litigation listed on the
15 published notice and agenda; and to confer with and
16 receive advice from legal counsel regarding potential
17 litigation.

18 The Commission also conferred on personnel matters
19 pursuant to Government Code section 11126(a)(1).

20 With no further business to discuss, I will
21 entertain a motion to adjourn.

22 MEMBER NASH: So moved.

23 CHAIRPERSON STEPHENSHAW: There has been a motion
24 to adjourn.

25 Is there a second?

1 MEMBER HOLMAN: I will second that.

2 CHAIRPERSON STEPHENSHAW: It has been moved by
3 Member Nash and seconded by Member Holman to adjourn
4 this meeting.

5 Heather, please call the roll.

6 MS. HALSEY: Mr. Adams.

7 MEMBER ADAMS: Aye.

8 MS. HALSEY: Ms. Evans.

9 MEMBER EVANS: Aye.

10 MS. HALSEY: Ms. Holman.

11 MEMBER HOLMAN: Aye.

12 MS. HALSEY: Ms. Nash.

13 MEMBER NASH: Aye.

14 MS. HALSEY: Ms. Olsen.

15 (No response.)

16 MS. HALSEY: We seem to have lost Ms. Olsen.

17 Mr. Stephenshaw.

18 CHAIRPERSON STEPHENSHAW: Aye.

19 MS. HALSEY: Mr. Walker.

20 MEMBER WALKER: Aye.

21 CHAIRPERSON STEPHENSHAW: Motion to adjourn is
22 carried. This meeting is now adjourned. Thanks, all.

23 (Proceedings concluded at 11:22 a.m.)

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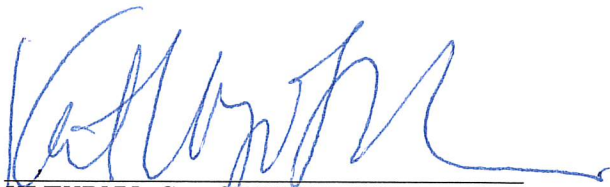
CERTIFICATE OF REPORTER

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 9th day of November 2023.


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

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