BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections, B.2.; C., F.4.d., F.4.e., and Attachment E., Section II.C.; Section D.; F.1.d.1., 2., 4., 7., F.1.h.; F.1.f.; F.2.d.3., F.2.e.6.e.; F.1.i., F.3.a.10.; F.3.b.4.a.ii.; F.3.d.1.-5.; G.1.-5.; K.3.a.-c.; Attachment E., Section II.E.2.-5.; and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6., Adopted November 10, 2010 Filed on November 10, 2011[1] County of Riverside, Riverside County Flood Control and Water Conservation District, Cities of Murrieta, Temecula, and Wildomar, Claimants	Case No.: 11-TC-03 *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2023*) (*Served October 3, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on September 22, 2023.

Heather Halsey, Executive Director

[1] Note that the Test Claim was revised on December 2, 2011, and April 28, 2017, and was corrected on August 5, 2021.

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DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2023. David Burhenn appeared on behalf of the claimants. Jennifer Fordyce and Catherine Hagan appeared on behalf of the State Water Resources Control Board and the San Diego Regional Water Quality Control Board (Water Boards). Donna Ferebee and Marilyn Munoz appeared on behalf of the Department of Finance.

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

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 5-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Regina Evans, Representative of the State Controller, Vice Chairperson	Absent

[1] Note that the Test Claim was revised on December 2, 2011, and April 28, 2017, and was corrected on August 5, 2021.

Member	Vote
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Absent
Sarah Olsen, Public Member	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim, which was timely filed, alleges reimbursable costs mandated by the state for the County of Riverside, Riverside County Flood Control and Water Conservation District (District), Cities of Murrieta, Temecula, and Wildomar (claimants), to comply with conditions of the National Pollutant Discharge Elimination System Program (NPDES) permit, Order No. R9-2010-0016 (test claim permit) issued by the California Regional Water Quality Control Board, San Diego Region (Regional Board). The claimants have properly pled the following sections of the test claim permit pursuant to Government Code section 17553, alleging these sections impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution: Sections B.2.; C., F.4.d., F.4.e., and Attachment E., Section II.C.; Section D.; F.1.d.1., 2., 4., 7., F.1.h.; F.1.f.; F.2.d.3., F.2.e.6.e.; F.1.i., F.3.a.10.; F.3.b.4.a.ii.; F.3.d.1.-5.; G.1.-5.; K.3.a.-c.; Attachment E., Section II.E.2.-5.; and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6.

The Commission finds that some of the sections of the test claim permit pled by the claimants impose a state-mandated new program or higher level of service, and others do not.

Section B.2., of the test claim permit removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited list of non-stormwater discharges requiring the claimants to effectively prohibit them from entering the MS4 by implementing a program to detect and remove these illicit discharges. This provision is required by federal law when the discharge is identified as a source of pollution[2] and was required under the prior permit.[3] Thus, the Commission finds the provision is not new. Both the claimants and the Regional Board identified landscape irrigation,

[2] Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1).

[3] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section B.2.); see also, Exhibit J (33), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 (November 16, 1990), page 48, which states: "However, the Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate."

irrigation water, and lawn watering as a source of non-stormwater pollution[4] leaving the Regional Board with no discretion, but to remove the exemption and require the claimants to effectively prohibit these non-stormwater discharges from entering the MS4 in compliance with federal law. Reimbursement under article XIII B, section 6 of the California Constitution is not required if the statute or executive order imposes a requirement that is expressly mandated by federal law.[5] Moreover, this provision it is not new but simply makes the claimants comply with longstanding federal law which prohibits non-stormwater discharges.[6]

Sections C., and F.4.d., and F.4.e., and Section II.C. of Attachment E., of the test claim permit require dry weather monitoring and field screening for 18 pollutants specified in the permit, and if a pollutant is shown to exceed the non-stormwater action level (NAL), which is based on existing water quality standards, then the claimants are required to investigate, identify and remove the source of the illicit, non-stormwater discharge. The Commission finds that these sections of the permit do not mandate a new program or higher level of service. Instead, the test claim permit simply identifies action levels for each pollutant consistent with existing water quality standards that, if detected in dry weather monitoring and field screening to be in excess of the action level, triggers the investigation, identification of the discharge, removal, and reporting activities required by existing federal law.[7] The claimants do not violate the permit by exceeding the action level, as implied by the claimants; rather a violation occurs only if a permittee fails to timely implement the required actions following an exceedance of an action level.[8] In this sense, the action levels established in the test claim permit function the same as the prior permit, which required the claimants to identify criteria to determine if significant sources of pollutants were present in dry weather non-stormwater discharges consistent with water quality objectives.[9] Under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers

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[4] Exhibit A, Test Claim, filed November 10, 2011, pages 473-476 (Fact Sheet/Technical Report).

[5] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 71; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879-880; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; Government Code section 17556(c).

[6] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[7] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.41, 122.48, and Part 27 (reporting).

[8] Exhibit A, Test Claim, filed November 10, 2011, page 203 (Directive C.3.).

[9] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

Section D. of the test claim permit establishes Stormwater Action Levels (SALs) for seven pollutants that, if shown to be in excess of the SAL during monitoring, the claimant is required to implement stormwater controls and reduce the discharge to the maximum extent practicable (MEP) to meet water quality standards. The Commission finds that the following new activities required by Section D.2. (and Attachment E., Section II.B., which is incorporated by reference into Section D. of the test claim permit) mandates a new program or higher level of service:

- Collaborate with all permittees to develop a year-round, watershed based, wet weather MS4 discharge monitoring program to sample a representative percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[10]
- The principal copermittee shall submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented.[11]

However, the remaining requirements to implement the monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not mandate a new program or higher level of service. The SALs themselves do not impose any new mandated activities. The SALs imposed by the test claim permit are simply numbers that reflect the existing water quality standards applicable to the waterbodies in the Basin Plan, the California Toxics Rule (CTR), and the US EPA Water Quality Criteria for the pollutants at issue, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to address those exceedances by implementing or modifying BMPs to the MEP. Thus, the Regional Board has imposed an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing federal requirements to monitor, implement BMPs, and report exceedances to the Regional Board.[12]

Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5., of the test claim permit requires, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of

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[10] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[11] Exhibit A, Test Claim, filed November 10, 2011, pages 206 and 309 (test claim permit, Section D.2., which incorporates by reference Attachment E., Section II.B.3.).

[12] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv); Code of Federal Regulations, title 40, section 122.44(i)(1); Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.).

water quality standards, an updated Standard Stormwater Mitigation Plan (SSMP) for review of priority development projects proposed by residential, commercial, industrial, mixed-use, and public project proponents and the implementation of LID site design BMPs at new development and redevelopment projects; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs. The Commission finds that:

- All LID, hydromodification, and retrofitting costs required by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. of the test claim permit and incurred and triggered by a project proponent of a *municipal* priority development project are not mandated by the state and do not impose a new program or higher level of service because such costs are incurred at the discretion of the local agency, are not unique to government, and do not provide a governmental service to the public.[13]
- The remaining new LID, hydromodification, and retrofitting administrative, planning, and regulatory activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.5. are mandated by the state and impose a new program or higher level of service.

Section F.1.f. of the test claim permit requires each copermittee, as part of their Jurisdictional Runoff Management Program (JRMP), to develop and maintain a watershed-based database.[14] The database shall track and inventory all approved structural post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential projects within its jurisdiction since July 2005; conduct inspections of the projects as specified; and verify that approved post-construction BMPs are operating effectively and have been adequately maintained as specified in the permit.[15] The Commission finds that, *except* as applicable to a claimant's own municipal development (which is not mandated by the state)[16], the

[13] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815-817.

[14] Exhibit A, Test Claim, filed November 10, 2011, page 21, 57-58 (Test Claim narrative).

[15] Exhibit A, Test Claim, filed November 10, 2011, pages 221-222 (test claim permit, Section F.1.f.).

[16] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368

following activities are newly required by Section F.1.f., of the test claim permit and constitute state-mandated new programs or higher levels of service:

- Develop and maintain a watershed-based database to track and inventory all projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[17]
- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[18]
- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[19]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[20]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[21]

All other activities required by Section F.1.f. are not new and, thus, do not impose a new program or higher level of service.

(*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815-817.

[17] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[18] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[19] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[20] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[21] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

Sections F.2.d.3. and F.2.e.6.e. of the test claim permit require the claimants to require the implementation of Active/Passive Sediment Treatment (AST)[22] at construction sites that are determined by the copermittee to be an exceptional threat to water quality, and to review site monitoring data, if the site monitors its runoff, as part of construction site inspections.[23] The Commission finds that Section F.2.d.3. imposes a state-mandated new program or higher level of service only when the claimant is acting in its regulatory capacity and is performing the following activity for construction sites other than its own:

- Require implementation of AST for sediment at construction sites other than its own (or portions thereof) that are determined to be an exceptional threat to water quality.[24]

However, with respect to a local agency's own *municipal* construction sites, the requirement to implement AST is not mandated by the state, but is triggered by a local discretionary decision to construct new municipal projects.[25] Moreover, implementing AST at a local agency's own municipal construction site does not impose a new program or higher level of service because such costs are not unique to government and do not provide a governmental service to the public. The Commission also finds that Section F.2.e.6.e. of the test claim permit, which requires that inspections of construction sites must include a review of facility monitoring data results if the site monitors its runoff, is not new, and does not impose a new program or higher level of service.

Sections F.1.i., and F.3.a.10. of the test claim permit require erosion and sediment control BMPs after construction of new unpaved roads and during maintenance activities on unpaved roads. Federal law requires permittees to reduce the discharge of pollutants to the MEP[26] and to submit a proposed management program including operating and maintaining public streets, roads, and highways to reduce the impact on

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[22] Active/Passive Sediment Treatment is defined as "[u]sing mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge. Exhibit A, Test Claim, filed November 10, 2011, page 283 (test claim permit, Attachment C).

[23] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 59-60. The claimants have not alleged any other activities in Section F.2.d., and, thus, only Sections F.2.d.3. and F.2.e.6.e. of the test claim permit are analyzed in this Decision.

[24] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

[25] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815-817.

[26] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

receiving waters.[27] The prior permit required the prevention or reduction of pollutants in runoff to the MEP during all phases of construction[28] and from all existing development including roads.[29] Thus, these requirements are not new and, if anything, they simply clarify the existing legal requirement to assess a site's compliance with local ordinances and water quality standards.[30] Accordingly, the Commission finds that Sections F.1.i., and F.3.a.10. are not new requirements imposed or shifted by the state, and do not constitute a new program or higher level of service.

Section F.3.b.4.a.ii. of the test claim permit requires that the inspection of industrial and commercial sites include a review of site monitoring data if the site monitors its runoff. The Commission finds that the requirement imposed by Section F.3.b.4.a.ii. clarifies the existing legal requirement to assess a site's compliance with local ordinances and water quality standards, but is not a new requirement and does not impose a new program or higher level of service. Federal regulations require that large and medium MS4 dischargers demonstrate adequate legal authority, through ordinance, permit, or other means, to prohibit illicit discharges;[31] control pollutants to the MS4 from stormwater discharges associated with industrial activity; carry out inspections, surveillance, and monitoring to ensure compliance with the permit conditions;[32] reduce pollutants from runoff from commercial areas; and perform inspections to implement and enforce ordinances.[33] The prior permit required the permittees to have adequate legal authority to control pollutant discharges into and from the MS4 through ordinance, statute, permit, contract, or other similar means;[34] and inspections of all industrial and commercial facilities that could contribute a significant pollutant load to the MS4.[35] Although the prior permit did not expressly state that reviewing facility monitoring data results, if the site monitors its runoff, was required as part of the inspection, it did expressly require that the inspections of industrial and commercial facilities include "but not be limited to" an assessment of the site's compliance with local ordinances and permits related to stormwater runoff, including the implementation and maintenance of designated

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

[28] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.5.a.(8)).

[29] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.b.).

[30] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[31] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[32] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(A), (F).

[33] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A), (B).

[34] Exhibit A, Test Claim, filed November 10, 2011, pages 575-576 (Order R9-2004-0001, Section D.1.).

[35] Exhibit A, Test Claim, filed November 10, 2011, pages 589-590 (Order R9-2004-0001, Section H.2.a.b.).

minimum BMPs, and visual observations for non-stormwater discharges, potential illicit connections, and potential discharge of pollutants in stormwater runoff.[36] The prior permit also required the permittee to carry out all inspections and monitoring, and to enforce local stormwater ordinances on industrial and commercial facilities "as necessary to maintain compliance with this Order," including the permit's receiving water limitations and prohibitions banning any discharge of pollutant and non-stormwater discharges into the MS4 that would cause or contribute to the violation of water quality standards.[37] Thus, these requirements are not new and, if anything, the requirement to review monitoring data results, if the site monitors its runoff, simply clarifies the existing legal requirement to assess a site's compliance with local ordinances and water quality standards. Moreover, there has been no shift of costs from the State to the claimants. The claimants enforce their local permits, plans, and ordinances, and the Water Boards enforce the General Industrial Permit.[38] In addition, the test claim permit states that if the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible claimant to inspect this facility during the same year is deemed satisfied.[39]

Sections G.1.-5. of the test claim permit require the copermittees in a watershed management area to develop a workplan to assess and prioritize the water quality problems within the watershed's receiving waters, identify sources of the highest priority water quality problems, develop a watershed-wide BMP implementation strategy to abate the highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the watershed management area.[40] The requirement for a watershed workplan is not new. Under the prior permit, the claimants were required to collaborate with other watershed permittees to develop and implement a watershed stormwater management plan (watershed SWMP).[41] However, Sections G.1.d, G.3., G.4., and G.5. of the test claim permit mandate a new program or higher level of service for the following new activities:

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[36] Exhibit A, Test Claim, filed November 10, 2011, pages 589-591 (Order R9-2004-0001, Section H.2.a., b., d.).

[37] Exhibit A, Test Claim, filed November 10, 2011, pages 574-575, 592 (Order R9-2004-0001, Prohibitions and Receiving Water Limitations; Industrial/Commercial Inspections, Section H.2.e.).

[38] Exhibit A, Test Claim, filed November 10, 2011, page 441 (Fact Sheet/Technical Report, Finding D.3.a.).

[39] Exhibit A, Test Claim, filed November 10, 2011, page 244 (test claim permit, Section F.3.b.4.(e)).

[40] Exhibit A, Test Claim, filed November 10, 2011, pages 255-257 (test claim permit, Sections G.1.-G.5.).

[41] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Sections K.1., 2.).

- The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[42]
- The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[43]
- The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[44]
- The annual watershed review meetings shall be open to the public and adequately noticed.[45]
- Each permittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[46]

Section K.3.a.-c. of the test claim permit requires that each claimant prepare an individual JRMP annual report that covers implementation of its jurisdictional activities during the past annual reporting period, and specifies the contents of the annual report, which claimants contend includes a new reporting requirements that constitute a reimbursable state-mandated program.[47] The Commission finds that Sections K.3.a. and K.3.b. do not impose any new activities. The Commission also finds that Sections K.3.c.1.-4. impose some new requirements to include new information in the annual report, an annual reporting checklist, and new information identified in Table 5, and except for reporting on the claimant's own municipal projects (which is not mandated by

[42] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d.).

[43] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

[44] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[45] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[46] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[47] Exhibit A, Test Claim, filed November 10, 2011, pages 262-267 (test claim permit, Section K.3.).

the state)[48], the new requirements are mandated by the state and impose a new program or higher level of service.

Section II.E.2.-5. of Attachment E., which is part of the Monitoring and Reporting Program (MRP), requires the claimants to perform the following special studies: Sediment Toxicity Study; Trash and Litter Investigation; Agricultural, Federal and Tribal Input Study; and MS4 Receiving Water and Maintenance Study.[49] The Commission finds that that Attachment E., Sections II.E.2.-5. mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Finally, the claimants plead particular language that appears in Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit, which address development, construction, municipal facilities, industrial/commercial facilities, residential areas, retrofitting and education, and contain language that provides that each updated JRMP and the components of the program "must . . . effectively prohibit non-storm water discharges, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards."[50] The claimants contend that the language imposes new requirements to develop and implement the components in Section F. "in a manner that guarantees that those programs will prevent the discharge of pollutants at a level that could cause or contribute to a violation of any water quality standard as well as to prevent illicit discharges to the MS4," and that such requirements go beyond the MEP standard of federal law and constitute a new or higher level of service.[51] The claimants further allege that the requirements now subject them to sanctions, including civil penalties and injunctive relief, for the failure to achieve water quality standards.[52] The Commission finds that the language at issue in Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit does not impose any new requirements and, therefore, does not mandate a new program or higher level of service. Federal law has long required the claimants "to implement and enforce an ordinance, orders or similar means *to prevent illicit discharges to the municipal separate storm sewer system*"[53] and

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[48] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815-817.

[49] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 75-81, 297-324 (Test Claim narrative; Attachment E.) The claimants did not plead the other special studies addressed in Attachment E., Sections II.E.6. and 7. and, thus, this Decision does not address those studies.

[50] Exhibit A, Test Claim, filed November 10, 2011, page 208 (test claim permit, Section F.).

[51] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative).

[52] Exhibit A, Test Claim, filed November 10, 2011, page 81 (Test Claim narrative).

[53] United States Code, title 33, section 1342(p)(3)(B)(ii), emphasis added.

to "effectively *prohibit non-stormwater discharges into the storm sewers*."[54] Both of these limitations address discharges coming *into* the MS4. The claimants assert that the verb "prevent" is more stringent that "prohibit." However, this is not the case. Black's Law Dictionary defines prohibit as: "To prevent, preclude, or severely hinder."[55] Merriam-Webster Dictionary defines prohibit as, "to prevent from doing something."[56] Thus, prevention is part of, and not more stringent than, prohibition. Moreover, the requirement to prohibit non-storm water discharges *through and from* their MS4 systems, implement a program to prevent illicit discharges, and monitor to identify illicit discharges and exempted discharges that are a source of pollution, has been in the claimants' permits for the last 20 years.[57] Federal law requires that NPDES permits include conditions to achieve water quality standards and objectives.[58] And receiving water limitations and prohibition of discharges into and from MS4s in a manner causing a condition of pollution, causing exceedances of water quality objectives, or causing a violation of water quality standards, have been in all permits since 1999 when the State Water Resources Control Board (State Board) issued precedential order 99-05.[59] Thus, the requirement to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards is not new.

In order to be reimbursable, the new mandated activities must result in increased costs mandated by the state, forcing local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[60] In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim. Government Code section 17556(d) states that the Commission shall not find costs mandated by the

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[54] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1) (71 FR 33639, June 12, 2006), emphasis added.

[55] Exhibit J (1), Black's Law Dictionary (11th ed. 2019), prohibit.

[56] Exhibit J (32), Merriam-Webster Dictionary, prohibit, https://www.merriam-webster.com/dictionary/prohibit?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (accessed on April 4, 2022).

[57] Exhibit A, Test Claim, filed November 10, 2011, page 413 (Fact Sheet/Technical Report).

[58] United States Code, title 33, section 1311(b)(1)(C); United States Code, title 33, section 1342(o)(3) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.41(d), 122.44(d)(1).

[59] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573, (Order R9-2004-0001, Section A.1.-3.); Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, State Water Board Order WQ 2015-0075, pages 221-222.

[60] California Constitution, article XIII B, section 6; Government Code sections 17514, 17561(a); *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

state when "[t]he local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The Commission finds that:

a. The new state-mandated activities do not result in costs mandated by the state for Riverside County Flood and Water Conservation District because there is no evidence in the record that the District was forced to spend its "proceeds of taxes," but instead used assessment revenue and contract funds from the County and cities.[61]

b. The County and cities have regulatory fee authority sufficient as a matter of law to fund the new state-mandated activities required related to LID (Section F.1.d.1., 2., 4., 7.), Hydromodification (Section F.1.h.), Retrofitting (Section F.3.d.1-5.), BMP Maintenance Tracking (Section F.1.f.), and Active/Passive Sediment Treatment (Section F.2.d.3.) pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities.

c. The County and cities have constitutional and statutory authority to charge property-related fees for the new state-mandated requirements related to the SALs Wet Weather MS4 Discharge Monitoring Program (Section D.2.); Watershed Workplan (Sections G.1.-5.); the Annual JRMP Reporting requirements (Sections K.3.c.1.-4. and Table 5.); and Special Studies (Section II.E.2.-5. of Attachment E.). Based on *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, and *Department of Finance v. Commission on State Mandates*,[62] these fees are subject to the voter approval requirement in article XIII D, section 6(c) from November 10, 2010, the beginning date of the potential period of reimbursement, to December 31, 2017, and, thus, the fee authority is not sufficient as a matter of law during this time period to fund the costs of the mandated activities. Under these limited circumstances,

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[61] Exhibit A, Test Claim, filed November 10, 2011, pages 102-103 (Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017) and pages 104-105, paragraph 5 (Declaration of David Garcia, Project Manager within the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District dated April 27, 2017); Exhibit J (37), Santa Margarita River Region, Report of Waste Discharge (ROWD), January 15, 2009, pages 1, 16; Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 13; Exhibit J (24), Excerpt from Riverside County Flood Control and Water Conservation District's Annual Budget, Fiscal Year 2011-2012, pages 5, 6; Exhibit J (25), Excerpt from Riverside County Flood Control and Water Conservation District's Comprehensive Annual Financial Report for Year Ending June 30, 2015, pages 7, 9, 18.

[62] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581 (review denied March 1, 2023).

Government Code section 17556(d) does not apply, and there are costs mandated by the state. Any fee revenues received must be identified as offsetting revenue. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, other state funds, and other funds that are not the claimant's proceeds of taxes shall be identified and deducted from this claim.

Based on *Paradise Irrigation District* case and the Legislature's enactment of Government Code sections 57350 and 57351 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state on or after January 1, 2018, to comply with these activities, because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

Accordingly, the Commission denies this Test Claim with respect to the Riverside County Flood and Water Conservation District.

The Commission partially approves this Test Claim for the County of Riverside and the city copermittees only, and finds that the activities listed in the Conclusion impose a reimbursable state-mandated program from November 10, 2010, the beginning date of the potential period of reimbursement, to December 31, 2017.

All other activities and sections of the test claim permit pled by the claimants and costs claimed are denied.

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COMMISSION FINDINGS

I. Chronology

11/10/2010	The California Regional Water Quality Control Board, San Diego Region (Regional Board) issued the test claim permit, Order No. R9-2010-0016.
11/10/2011	The claimants filed the joint Test Claim.[63]
12/02/2011	The claimants revised the Test Claim by adding supplemental declarations.
01/13/2012-01/17/2013	The Water Boards requested five extensions of time to file comments, which were granted for good cause.
03/20/2013	The claimants requested the Test Claim be put on inactive status due to pending litigation, which was approved on March 22, 2013.
03/08/2017	Commission staff issued Notice of Incomplete Joint Test Claim Filing.
03/16/2017	The claimants requested an extension to respond to the Notice of Incomplete Joint Test Claim Filing, which was approved for good cause.
04/28/2017	The claimants filed their response to the Notice of Incomplete Joint Test Claim Filing.
05/08/2017	Commission staff issued Notice of Complete Joint Test Claim Filing, Removal From Inactive Status, Schedule for Comments, Renaming of Matter, Request for Administrative Record, and Notice of Tentative Hearing Date.
05/22/2017-08/16/2017	The Water Boards requested three extensions of time to file comments on the Test Claim, which were approved for good cause.
09/20/2017	The Department of Finance (Finance) filed comments on the Test Claim.[64]
09/22/2017	The Water Boards filed comments on the Test Claim and filed the Administrative Record on Order R9-2010-0016.[65]
10/03/2017-11/20/2017	The claimants requested two extensions of time to file rebuttal comments, which were approved for good cause.
12/14/2017	The claimants filed rebuttal comments.[66]

[63] Exhibit A, Test Claim, filed November 10, 2011.

[64] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017.

[65] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017.

[66] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017.

08/05/2021	The claimants filed corrected original supporting documentation.
03/13/2023	Commission staff issued the Draft Proposed Decision.[67]
03/28/2023	The Water Boards requested an extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
03/29/2023	The claimants requested an extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
05/19/2023	The Water Boards filed comments on the Draft Proposed Decision.[68]
05/19/2023	The claimants filed comments on the Draft Proposed Decision.[69]
05/22/2023	Finance filed late comments on the Draft Proposed Decision.[70]
08/23/2023	The claimants file late comments on the Draft Proposed Decision.[71]

II. Background

A. History of the Federal Regulation of Municipal Stormwater

The law commonly known today as the Clean Water Act (CWA) is the result of major amendments to the Federal Water Pollution Control Act enacted in 1977. The history that follows details the evolution of the federal law and implementing regulations which are applicable to the case at hand. The bottom line is that CWA's stated goal is to *eliminate* the discharge of pollutants into the nation's waters by 1985.[72] "*This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act.*"[73] The CWA utilizes a permit program that was established in 1972, the National Pollutant Discharge Elimination System (NPDES), as the primary means of enforcing the Act's effluent limitations. As will be made apparent by the following history, the goal of eliminating the discharge of pollutants into the nation's waters was still far from being achieved as of 2010, when the test claim

[67] Exhibit E, Draft Proposed Decision, issued March 13, 2023.

[68] Exhibit F, Water Boards' Comments on the Draft Proposed Decision, filed May 19, 2023.

[69] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023.

[70] Exhibit H, Finance's Late Comments on the Draft Proposed Decision, filed May 19, 2023.

[71] Exhibit I, Claimants' Late Comments on the Draft Proposed Decision, filed August 23, 2023.

[72] United States Code, title 33, section 1251(a)(1).

[73] *Natural Res. Def. Council v. Costle* (D.C.Cir. 1977) 568 F.2d 1369, 1371, emphasis added.

permit was issued, and the enforcement, rather than being strict, has taken an iterative approach, at least with respect to municipal stormwater dischargers.

Regulation of water pollution in the United States finds its beginnings in the Rivers and Harbors Appropriation Act of 1899, which made it unlawful to throw or discharge "any refuse matter of any kind or description…into any navigable water of the United States, or into any tributary of any navigable water."[74] This prohibition survives in the current United States Code today, qualified by more recent provisions of law that authorize the issuance of discharge permits with specified restrictions to ensure that such discharges will not degrade water quality or cause or contribute to the violation of any water quality standards set for the water body by the United States Environmental Protection Agency (US EPA) or by states on behalf of US EPA.[75]

In 1948, the federal Water Pollution Control Act "adopted principles of State-Federal cooperative program development, limited federal enforcement authority, and limited federal financial assistance."[76] Pursuant to further amendments to the Act made in 1965, "States were directed to develop water quality standards establishing water quality goals for interstate waters." However, the purely water quality-based approach "lacked enforceable Federal mandates and standards, and a strong impetus to implement plans for water quality improvement. The result was an incomplete program that in Congress' view needed strengthening."[77]

Up until 1972, many states had "water quality standards" that attempted to limit pollutant concentrations in their lakes, rivers, streams, wetlands, and coastal waters. Yet the lack of efficient and effective monitoring and assessment tools and the sheer difficulty in identifying pollutant sources resulted in a cumbersome, slow, ineffective system that was unable to reverse growing pollution levels in the nation's waters. In 1972, after earlier state and federal laws failed to sufficiently improve water quality, and rivers that were literally on fire provoked public outcry, the Congress passed the Federal Water Pollution Control Act Amendments, restructuring the authority for water pollution control to regulate individual point source dischargers and generally prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge was authorized by a NPDES permit. The 1972 amendments also consolidated authority in the Administrator of US EPA.

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[74] United States Code, title 33, section 401 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152).

[75] See United States Code, title 33, sections 1311-1342 (CWA 301(a) and 402); Code of Federal Regulations, title 40, section 131.12.

[76] Exhibit J (10), EPA, Advanced Notice of Proposed Rule Making, (Federal Register / Vol. 63, No. 129 / July 7, 1998 / Proposed Rules), https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf (accessed on September 12, 2022), page 4.

[77] Exhibit J (10), EPA, Advanced Notice of Proposed Rule Making, (Federal Register / Vol. 63, No. 129 / July 7, 1998 / Proposed Rules), https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf (accessed on September 12, 2022), page 4.

In 1973, US EPA adopted regulations to implement the Act which provided exclusions for several types of discharges including "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity" and have not been identified "as a significant contributor of pollution."[78] This particular exclusion applied only to municipal separate storm sewer systems (MS4s). As a result, as point source pollutant loads were addressed effectively by hundreds of new treatment plants, the problem with polluted runoff (i.e., both nonpoint source pollution and stormwater discharges) became more evident.

However, in 1977 the Court in *Natural Resources Defense Council v. Costle* held that the US EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and that to do so contravened the Legislature's intent.[79] The Act prohibits "the discharge of any pollutant by any person" without an NPDES permit.[80] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from *any* point source."[81] A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[82] Thus, when an MS4 discharges stormwater contaminated with pollutants from a pipe, ditch, channel, gutter or other conveyance, it is a point source discharger subject to the requirements of the CWA to obtain and comply with an NPDES permit or else be found in violation of the CWA.

Stormwater runoff "…is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground."[83] Polluted stormwater runoff is commonly transported

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[78] Code of Federal Regulations, title 40, sections 124.5 and 124.11 (30 FR 18003, July 5, 1973).

[79] *Natural Res. Def. Council v. Costle* (D.C.Cir. 1977) 568 F.2d 1369, 1379 (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements).

[80] United States Code, title 33, section 1311(a).

[81] United States Code, title 33, section 1362(12)(A), emphasis added.

[82] United States Code, title 33, section 1362(14).

[83] See United States Code, title 33, section 122.26(b)(13) and Exhibit J (15), EPA, National Pollutant Discharge Elimination System (NPDES) Stormwater Program, Problems with Stormwater Pollution, https://www.epa.gov/npdes/npdes-stormwater-program (accessed on September 13, 2022).

through MS4s, and then often discharged, untreated, into local water bodies.[84] As the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[85]

Major amendments to the Federal Water Pollution Control Act were enacted in the federal Clean Water Act of 1977, and the federal act is now commonly referred to as the Clean Water Act (CWA). CWA's stated goal is to eliminate the discharge of pollutants into the nation's waters by 1985.[86] "This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act."[87]

MS4s are thus established point sources subject to the CWA's NPDES permitting requirements.[88]

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted CWA section 402(p), codified at United States Code, title 33, section 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 1342(p)(2) and (3) require

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[84] Exhibit J (19), EPA, NPDES Stormwater Program, Stormwater Discharges from Municipal Sources, https://www.epa.gov/npdes/stormwater-discharges-municipal-sources (accessed on September 13, 2022).

[85] *Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 840-841 (citing *Natural Res. Def. Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1295, and Regulation for Revision of the Water Pollution Control Program Addressing Storm Water (64 Fed.Reg. 68722, 68724, 68727 (December 8, 1999) codified at Code of Federal Regulations, title 40, parts 9, 122, 123, 124)).

[86] United States Code, title 33, section 1251(a)(1).

[87] *Natural Res. Def. Council v. Costle* (D.C.Cir. 1977) 568 F.2d 1369, 1371.

[88] *Natural Res. Def. Council v. Costle* (D.C.Cir. 1977) 568 F.2d 1369, 1379 (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements); *Natural Res. Def. Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1295-1298.

NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation with the first permits to issue by not later than 1991 or 1993, depending on the size of the population served by the MS4.[89]

Generally, NPDES permits issued under the CWA must "contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health."[90] A NPDES permit specifies "an acceptable level of a pollutant or pollutant parameter in a discharge." [91]

With regard to MS4s specifically, the 1987 amendments require control technologies that reduce pollutant discharges to the maximum extent practicable (MEP), including best management practices (BMPs), control techniques and system design and engineering methods, and such other provisions as the Administrator[92] deems appropriate for the control of such pollutants.[93] A statutory anti-backsliding requirement was also added to preserve present pollution control levels achieved by dischargers by prohibiting the adoption of less stringent effluent limitations[94] than those already contained in their discharge permits, except in certain narrowly defined circumstances.[95]

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

> The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's

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[89] United States Code, title 33, section 1342(p)(2)-(4); *Natural Res. Def. Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1296.

[90] Exhibit J (18), EPA, NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed on September 13, 2022).

[91] Exhibit J (18), EPA, NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed on September 13, 2022).

[92] Defined in United States Code, title 33, section 1251(d) (section 101(d) of the CWA) as the Administrator of the U. S. Environmental Protection Agency.

[93] United States Code, title 33, section 1342(p)(3). This is in contrast to the "best available technology" standard that applies to the treatment of industrial discharges (see United States Code, title 33, section 1311(b)(2)(A)).

[94] The Senate and Conference Reports from the 99th Congress state that these additions were intended to "clarify the Clean Water Act's prohibition of backsliding on effluent limitations." See H.R. Conf. Rep. No. 99-1004 (1986), emphasis added; see also S. Rep. No. 99-50, 45 (1985).

[95] United States Code, title 33, section 1342(o); see Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 99-1004, 153 (1986).

> waters." (33 U.S.C. § 1251(a).) Toward this end, the Act provides for two sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. (See §§ 1311, 1314.) "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. (See § 1313.) These standards supplement effluent limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." (*EPA v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).)[96]

The CWA thus employs two primary mechanisms for controlling water pollution: identification and standard-setting for bodies of water (i.e. 303(d) listings of impaired water bodies and the setting of water quality standards), and identification and regulation of dischargers (i.e. the inclusion of effluent limitations consistent with water quality standards in NPDES permits).

In 1990, pursuant to CWA section 1342, US EPA issued the "Phase I Rule" regulating large and medium MS4s. The Phase I Rule and later amendments thereto, in addition to generally applicable provisions of the CWA and its implementing regulations and other state and federal environmental laws, apply to the permit at issue in this Test Claim.

B. Key Definitions

1. Water Quality Standards

A "water quality standard" defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.[97] The term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the CWA, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements which may be adopted by the federal or state government and may be found in a variety of places including but not limited to Code of Federal Regulations, title 40, sections 131.36, 131.38, and California state adopted water quality control plans and basin plans.[98] A TMDL is a regulatory term in the CWA, describing a plan for restoring impaired waters that identifies the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards. Federal law requires the states to adopt an anti-degradation policy which at minimum protects existing uses and requires that existing high quality

[96] *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101-102.

[97] Code of Federal Regulations, title 40, part 131.2.

[98] Code of Federal Regulations, title 40, part 130.7(b)(3).

waters be maintained to the maximum extent possible unless certain findings are made.[99]

The water quality criteria can be expressed in narrative form, which are broad statements of desirable water quality goals, or in a numeric form, which identifies specific pollutant concentrations.[100] When water quality criteria are met, water quality will generally protect the designated use.[101] Federal regulations state the purpose of a water quality standard as follows:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.[102]

With respect to standard-setting for bodies of water, section 1313(a) of the United States Code provides that existing water quality standards may remain in effect unless the standards are not consistent with the CWA, and that the Administrator "shall promptly prepare and publish" water quality standards for any waters for which a state fails to submit water quality standards, or for which the standards are not consistent with the CWA.[103] In addition, states are required to hold public hearings from time to time but "at least once each three year period" for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

> Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [US EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration

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[99] Code of Federal Regulations, title 40, part 131.12.

[100] *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1403.

[101] Code of Federal Regulations, title 40, section 131.3(b).

[102] Code of Federal Regulations, title 40, section 131.2.

[103] United States Code, title 33, section 1313(a). Note that section 1313 was last amended by 114 Stat. 870, effective Oct. 10, 2000.

> their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[104]

In general, if a body of water is identified as impaired under section 303(d) of the CWA, it is necessarily exceeding one or more of the relevant water quality standards.[105]

2. Total Maximum Daily Loads (TMDLs).

Section 303(d) of the CWA, codified at United States Code, title 33, section 1313(d), requires that each state "identify those waters within its boundaries for which the effluent limitations…are not stringent enough to implement any water quality standard applicable to such waters." The identification of waters not meeting water quality standards is called an "impairment" finding, and the priority ranking is known as the "303(d) list."[106] The state is required by the Act to "establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters."[107]

After the waters are ranked, federal law requires that "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS [water quality standards] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters."[108] A TMDL is defined as the sum of the amount of a pollutant allocated to *all point sources* (*i.e.*, the sum of all waste load allocations, or WLAs), plus the amount of a pollutant allocated for nonpoint sources and natural background. A TMDL is essentially a plan setting forth the amount of a pollutant allowable that will attain the water quality standard necessary for beneficial uses.[109]

303(d) lists and TMDLs are required to be submitted to the Administrator "not later than one hundred and eighty days after the date of publication of the first identification of

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[104] United States Code, title 33, section 1313(c)(2)(A), effective October 10, 2000.

[105] See United States Code, title 33, section 1313(d)(1)(A) (codifying CWA § 303(d) and stating: "Each State shall identify [as impaired] those waters within its boundaries for which the effluent limitations … are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.").

[106] Code of Federal Regulations, title 40, part 130.7(d)(1); see also *San Francisco Baykeeper, Inc. v. Browner* (N.D. Cal 2001) 147 F.Supp.2d 991, 995.

[107] United States Code, title 33, section 1313(d)(1)(A).

[108] Code of Federal Regulations, title 40, part 130.7(c)(1).

[109] Code of Federal Regulations, title 40, part 130.2.

pollutants under section 1314(a)(2)(D) [of the CWA]" and thereafter "from time to time," and the Administrator "shall either approve or disapprove such identification and load not later than thirty days after the date of submission."[110] A complete failure by a state to submit a TMDL for a pollutant received by waters designated as "water quality limited segments" pursuant to the CWA, will be construed as a constructive submission of no TMDL, triggering a nondiscretionary duty of the federal EPA to establish a TMDL for the state.[111] If the Administrator disapproves the 303(d) list or a TMDL, the Administrator "shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement [water quality standards]."[112] Finally, the identification of waters and setting of standards and TMDLs is required as a part of a state's "continuing planning process approved [by the Administrator] which is consistent with this chapter."[113]

If a TMDL has been established for a body of water identified as impaired under section 303(d), an NPDES permit must contain limitations that "must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard, including [s]tate narrative criteria for water quality."[114] And, for new sources or discharges, the limitations must ensure that the source or discharge will not cause or contribute to the violation of water quality standards and will not violate the TMDL.[115]

3. Municipal Separate Storm Sewer System (MS4)

A "Municipal Separate Storm Sewer System" (or MS4) refers to a collection of structures designed to gather stormwater and discharge it into local streams and rivers. A storm sewer contains untreated water, so the water that enters a storm drain and then into a storm sewer enters rivers, creeks, or the ocean at the other end is the same water that entered the system.

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[110] United States Code, title 33, section 1313(d)(2); see also *San Francisco Baykeeper, Inc. v. Browner* (N.D. Cal. 2001) 147 F.Supp.2d 991, 995.

[111] United States Code, title 33, section 1313(d)(1)(A), (C), (d)(2); see also *San Francisco Baykeeper, Inc. v. Browner* (9th Circuit, 2002) 297 F.3d 877.

[112] United States Code, title 33, section 1313(d)(2).

[113] United States Code, title 33, section 1313(d-e).

[114] Code of Federal Regulations, title 40, section 122.44(d)(1)(i), emphasis added.

[115] Code of Federal Regulations, title 40, section 122.4(i). See also Code of Federal Regulations, title 40, section 130.2(i); *Friends of Pinto Creek v. EPA* (9th Cir. 2007) 504 F.3d 1007, 1011 ("A TMDL specifies the maximum amount of a particular pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.").

4. Best Management Practices (BMPs)

The acronym "BMP" is short for Best Management Practice. In the context of water quality, BMPs are methods, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and non-point source discharges including stormwater. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during, and after pollution-producing activities.

C. Specific Federal Legal Provisions Relating to Stormwater Pollution Prevention

1. Federal Anti-degradation Policy

When a TMDL has not been established, however, a permit may be issued provided that the new source does not degrade water quality in violation of the applicable anti-degradation policy. Any increase in loading of a pollutant to a waterbody that is impaired because of that pollutant would degrade water quality in violation of the applicable anti-degradation policy. Federal law, Code of Federal Regulations, title 40, section 131.12(a)(1), requires the state to adopt and implement an anti-degradation policy that will "maintain the level of water quality necessary to protect existing (in stream water) uses."

NPDES permits must include conditions to achieve water quality standards and objectives and generally may not allow dischargers to backslide.[116]

2. Requirement to Effectively Prohibit Non-Stormwater Discharges

CWA section 402(p)(3)(B)(ii) requires that permits for MS4s "shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers."

3. Standard Setting for Dischargers of Pollutants: NPDES Permits

Section 1342 of the CWA provides for the NPDES program, the final piece of the regulatory framework under which discharges of pollutants are regulated and permitted, and applies whether or not a TMDL has been established. Section 1342 states that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this

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[116] United States Code, title 33, section 1311(b)(1)(C), which states, "in order to carry out the objective of this chapter there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards"; section 1342(o)(3), which states, "In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters"; and Code of Federal Regulations, title 40, section 122.44(d)(1), which states that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."

title."[117] Section 1342 further provides that states may submit a plan to administer the NPDES permit program, and that upon review of the state's submitted program "[t]he Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State."[118]

Whether issued by the Administrator or by a state permitting program, all NPDES permits must ensure compliance with the requirements of sections 1311, 1312, 1316, 1317, and 1343 of the Act; must be for fixed terms not exceeding five years; can be terminated or modified for cause, including violation of any condition of the permit; and must control the disposal of pollutants into wells.[119] In addition, NPDES permits are generally prohibited, with some exceptions, from containing effluent limitations that are "less stringent than the comparable effluent limitations in the previous permit."[120] An NPDES permit for a point source discharging into an impaired water body must be consistent with the WLAs made in a TMDL, if a TMDL is approved and is applicable to the water body.[121]

4. The Federal Toxics Rules (40 CFR 131.36 and 131.38)

In 1987, Congress amended CWA section 303(c)(2) by adding subparagraph (B) which requires that a state, whenever reviewing, revising, or adopting new water quality standards, must adopt numeric criteria for all toxic pollutants listed pursuant to section 307(a)(1) for which criteria have been published under section 304(a). Section 303(c)(4) of the CWA authorizes the U.S. EPA Administrator to promulgate standards where necessary to meet the requirements of the Act. The federal criteria below are legally applicable in the State of California for inland surface waters, enclosed bays, and estuaries for all purposes and programs under the CWA.

5. National Toxics Rule (NTR)

For the 14 states that did not timely adopt numeric criteria as required, U.S. EPA promulgated the National Toxics Rule (NTR) on December 22, 1992 (57 FR 60848). About 40 criteria in the NTR apply in California.

6. The California Toxics Rule (CTR)

The "California Toxics Rule" is also a federal regulation, notwithstanding its somewhat confusing name. On May 18, 2000, U.S. EPA adopted the CTR. The CTR promulgated new toxics criteria for California to supplement the previously adopted NTR criteria that applied in the State. U.S. EPA amended the CTR on February 13, 2001. U.S. EPA promulgated this rule to fill a gap in California water quality standards that was created

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[117] United States Code, title 33, section 1342(a)(1).

[118] United States Code, title 33, section 1342(a)(5); (b).

[119] United States Code, title 33, section 1342(b)(1).

[120] United States Code, title 33, section 1342(o).

[121] Code of Federal Regulations, title 40, section 122.44(d).

in 1994 when a state court overturned the state's water quality control plans which contained water quality criteria for priority toxic pollutants, leaving the state without numeric water quality criteria for many priority toxic pollutants as required by the CWA.

California had not adopted numeric water quality criteria for toxic pollutants as required by CWA section 303(c)(2)(B), which was added to the CWA by Congress in 1987 and was the only state in the nation for which CWA section 303(c)(2)(B) had remained substantially unimplemented after the US EPA's promulgation of the NTR in December of 1992.[122] The Administrator determined that this rule was a necessary and important component for the implementation of CWA section 303(c)(2)(B) in California.

In adopting the CTR, U.S. EPA states:

> EPA is promulgating this rule based on the Administrator's determination that numeric criteria are necessary in the State of California to protect human health and the environment. The Clean Water Act requires States to adopt numeric water quality criteria for priority toxic pollutants for which EPA has issued criteria guidance, the presence or discharge of which could reasonably be expected to interfere with maintaining designated uses.

And:

> Numeric criteria for toxic pollutants allow the State and EPA to evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Numeric criteria also provide a more precise basis for deriving water quality-based effluent limitations (WQBELs) in National Pollutant Discharge Elimination System (NPDES) permits and wasteload allocations for total maximum daily loads (TMDLs) to control toxic pollutant discharges. Congress recognized these issues when it enacted section 303(c)(2)(B) to the CWA.

D. The California Water Pollution Control Program

1. Porter-Cologne

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[123] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain

[122] Federal Register, Volume 64, Number 97, page 7.

[123] Water Code section 13020 (Stats. 1969, ch. 482).

> the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[124]

The state water pollution control program was again modified, beginning in 1972, so that the code would substantially comply with the federal CWA, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[125]

Section 13160 provides that the State Water Resources Control Board (State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto."[126] Section 13001 describes the state and regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the CWA, employs a combination of water quality standards and point source pollution controls.[127]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, also known as basin plans.[128] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[129] and provide the underlying basis for most of the regional board's actions (e.g., NPDES permit conditions, cleanup levels). Basin plans consist of three elements:

- Determination of beneficial uses;

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[124] Water Code section 13000 (Stats. 1969, ch. 482).

[125] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1565-1566; see also Water Code section 13370 *et seq*.

[126] Water Code section 13160 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1976, ch. 596).

[127] Water Code section 13142 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1979, ch. 947; Stats. 1995, ch. 28).

[128] Water Code sections 13240-13247.

[129] Water Code sections 11352-11354.

- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[130]

Porter Cologne sections 13240-13247 address the development and implementation of regional water quality control plans (i.e., basin plans), including "water quality objectives," defined in section 13050 as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[131] Section 13241 provides that each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." The section directs the regional boards to consider, when developing water quality objectives:

> (a) Past, present, and probable future beneficial uses of water.
>
> (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
>
> (c) Water quality conditions that could reasonably by achieved through the coordinated control of all factors which affect water quality in the area.
>
> (d) Economic considerations.
>
> (e) The need for developing housing within the region.
>
> (f) The need to develop and use recycled water.[132]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to, "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[133] In addition, section 13243 permits a regional board to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."[134]

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[130] Water Code section 13050(j); see also section 13241.

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

[132] Water Code section 13241 (Stats. 1969, ch. 482; Stats. 1979, ch. 947; Stats. 1991, ch. 187 (AB 673)).

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

[134] Water Code section 13243 (Stats. 1969, ch. 482).

Sections 13260-13274 address the development of "waste discharge requirements," which section 13374 states "is the equivalent of the term 'permits' as used in the Federal Water Pollution Control Act, as amended."[135] Section 13263 permits the regional boards, after a public hearing, to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system." Section 13263 also provides that the regional boards "need not authorize the utilization of the full waste assimilation capacities of the receiving waters," and that the board may prescribe requirements although no discharge report has been filed, and may review and revise requirements on its own motion. The section further provides that "[a]ll discharges of waste into waters of the state are privileges, not rights."[136] Section 13377 permits a regional board to issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act]."[137] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit if a discharge is to waters of both California and the United States.

The California Supreme Court explained the interplay between state and federal law in *Department of Finance v. Commission on State Mandates* as follows:

> California was the first state authorized to issue its own pollutant discharge permits. (Citations omitted.) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid*.) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (Citations omitted.)

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[135] Water code section 13374 (Stats. 1972, ch. 1256).

[136] Water Code section 13263(a), (b), (g) (Stats. 1969, ch. 482; Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247); Stats. 1995, ch. 421 (SB 572)).

[137] Water Code section 13377 (Stats. 1972, ch. 1256; Stats. 1978, ch. 746).

In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit nonstorm water discharges into the storm sewers, and must "require controls to reduce the discharge of pollutants *to the maximum extent practicable*." (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase "maximum extent practicable" is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (d)(2)(i)-(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid*.)[138]

2. California's Anti-degradation Policy (State Water Resources Control Board Resolution No. 68-16 adopted October 24, 1968)

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

> WHEREAS the California Legislature has declared that it is the policy of the State that the granting of permits and licenses for unappropriated water and the disposal of wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State; and
>
> WHEREAS water quality control policies have been and are being adopted for waters of the State; and
>
> WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;
>
> NOW, THEREFORE, BE IT RESOLVED:

[138] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757.

> Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.
>
> Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.
>
> In implementing this policy, the Secretary of the Interior will be kept advised and will be provided with such information as he will need to discharge his responsibilities under the Federal Water Pollution Control Act.

State Board Resolution 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California, is the policy that the State asserts incorporates the federal antidegradation policy. The Water Quality Control Plans in turn (i.e., Basin Plans) require conformity with State Board Resolution 68-16. Therefore, any provisions in a permit that are inconsistent with the State's anti-degradation policy are also inconsistent with the Basin Plan.

3. Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004

The May 1990 Administrative Procedures Update, entitled Antidegradation Policy Implementation for NPDES Permitting, APU 90-004, provides guidance for the State's regional boards in implementing the State Board's Resolution No. 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California, and the Federal Antidegradation Policy, as set forth in Code of Federal Regulations, title 40, part 131.12. It states that "If baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives."[139]

4. Statewide Plans: The Ocean Plan, the California Inland Surface Waters Plan (ISWP), and, the Enclosed Bays and Estuaries Plan (EBEP)

California has adopted an Ocean Plan, applicable to interstate waters, and two other state-wide plans which establish water quality criteria or objectives for all fresh waters, bays and estuaries in the State.

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[139] Exhibit J (40), State Water Resources Control Board, Administrative Procedures Update, 90-004, page 4.

a. California Ocean Plan

Section 303(c)(3)(A) of the CWA provides that "[a]ny State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the [U.S. EPA] Administrator." Section 303(c)(3)(C) further provides that "[i]f the [U.S. EPA] Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section." Thus, beginning October 18, 1972, states were required to adopt water quality laws applicable to intrastate waters or else allow the U.S. EPA to adopt such standards for them.

California's first adopted its Ocean Plan in July 6, 1972, and as applicable to this test claim, has amended it in 1978, 1983, 1988, 1990, 1997, 2001, 2005, and 2009.[140] The Ocean Plan was also amended five times after the adoption of the test claim permit.

b. The California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP)

On April 11, 1991, the State Board adopted two statewide water quality control plans, the California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP). These statewide plans contained narrative and numeric water quality criteria for toxic pollutants, in part to satisfy CWA section 303(c)(2)(B). The water quality criteria contained in these statewide plans, together with the designated uses in each of the Basin Plans, created a set of water quality standards for waters within the State of California.

[140] California first adopted its Ocean Plan on July 6, 1972, and has amended it in 1978 (Order 78-002, adopted 1/19/1978), 1983 (Order 83-087, adopted 11/17/1983), 1988 (Order 88-111, adopted 9/22/1988), 1990 (Order 90-027, amendment regarding new water quality objectives in Table B, adopted 3/22/1990), 1997 (Order 97-026, amendment regarding revisions to the list of critical life stage protocols used in testing the toxicity of waste discharges, adopted 3/20/1997), 2001 (Order 2000-108, amendment regarding Table A, chemical water quality objectives, provisions of compliance, special protection for water quality and designated uses, and administrative changes, adopted 11/16/2000), 2005 (Order 2005-0013, amendment regarding Water Contact Bacterial Standards, adopted 1/20/2005; Order 2005-0035, amendments regarding (1) Reasonable Potential, Determining When California Ocean Plan Water Quality-Based Effluent Limitations are Required, and (2) Minor Changes to the Areas of Special Biological Significance, and Exception Provisions, 4/21/2005) and 2009 (Order 2009-0072, amendments regarding total recoverable metals, compliance schedules, toxicity definitions, and the list of exceptions, adopted 9/15/2009).

Specifically, the two plans established water quality criteria or objectives for all fresh waters, bays and estuaries in the State.

Section 303(c)(2)(B) of the federal CWA requires that states adopt numeric criteria for priority pollutants for which EPA has issued criteria guidance, as part of the states' water quality standards. As discussed above, U.S. EPA promulgated these criteria in the CTR in 2000 because the State court overturned two of California's water quality control plans (the ISWP and the EBEP) in 1994 and the State failed to promulgate new plans, so the State was left without enforceable standards. The federal toxics criteria apply to the State of California for inland surface waters, enclosed bays, and estuaries for "all purposes and programs under the CWA" and are commonly known as "the California Toxics Rule" (CTR).[141] There are 126 chemicals on the federal CTR[142] and the State Implementation Policy (SIP) for Implementation of the Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries adds another 6 isomers of chlorinated dioxins and 10 isomers of chlorinated furans for optional use in California (however, these are required to be used in the California Ocean Plan).

The EBEP was later adopted with respect to sediment quality objectives for toxic pollutants by the State Board on September 16, 2008 (Resolution No. 2008-0070), effective on January 5, 2009, and has been amended twice after the adoption of the test claim permit on April 6, 2011 (Resolution No. 2011-0017), effective on June 8, 2011 and June 5, 2018 (Resolution No. 2018-0028), effective March 11, 2019.

Likewise, the following adopted amendments, all of which were adopted after the test claim permit at issue in this case, were incorporated into the ISWP:

- Part 1: Trash Provisions, adopted on April 7, 2015 (Resolution No. 2015-0019), effective on December 2, 2015
- Part 2: Tribal Subsistence Beneficial Uses and Mercury Provisions, adopted on May 2, 2017 (Resolution No. 2017-0027), effective on June 28, 2017
- Part 3: Bacteria Provisions and Variance Policy, adopted on August 7, 2018 (Resolution No. 2018-0038), effective on February 4, 2019
- State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (for waters of the United States only), adopted April 2, 2019 (Resolution No. 2019-0015), effective May 28, 2020.

5. Basin Plans (also known as Water Quality Control Plans)

The Basin Plan is a regional board's master water quality control planning document for a particular water basin. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also must include any TMDL programs of implementation to achieve water quality objectives.[143] Basin Plans

[141] Code of Federal Regulations, title 40, Part 131, May 18, 2000.

[142] See Code of Federal Regulations, title 40, Part 131, May 18, 2000.

[143] Water Code section 13241.

must be adopted by the regional board and approved by the State Board, the California Office of Administrative Law (OAL), and U.S. EPA, in the case of action on surface waters standards.[144]

E. The History of the Test Claim Permit

The claimants are the owners of an interconnected MS4 which lies within the Santa Margarita Hydrologic Unit, one of the eleven hydrologic units of the San Diego Region.[145] The Upper Santa Margarita Watershed is approximately 548 square miles and includes the County of Riverside, the Cities of Murrieta, Temecula, and Wildomar, as well as portions of the Cleveland and San Bernardino National Forests, and the Cahuilla, Ramona, Pauma, and Pechanga Indian Reservations.[146] The claimants' MS4 discharges its runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, and, ultimately, the Pacific Ocean.[147] "Over 40 percent of the water used in the watershed is locally produced. In addition, surface and ground water from the Upper Santa Margarita Watershed flow to Fallbrook in San Diego County and the U.S. Marine Corps Base Camp Pendleton where it is used as part of the municipal and domestic water supply."[148]

The test claim permit, Order No. R9-2010-0016,[149] is the fourth iteration of the NPDES permit for the claimants' MS4 (fourth term permit). In 1990, the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the City of Temecula (copermittees)[150] obtained a first-term permit. Following its incorporation in 1992, the City of Murrieta was added as a copermittee to that permit. In 1998, the Regional Board adopted the second-term permit. The U.S. EPA objected to the 1998 permit due to the receiving water limitations language, which the U.S. EPA determined did not comply with the federal CWA and its implementing regulations. U.S. EPA

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[144] Water Code section 13245; United States Code, title 33, section 1313(c)(1).

[145] Exhibit A, Test Claim, filed November 10, 2011, pages 184-185 (test claim permit, Finding C.7.).

[146] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, Section V.C., page 8.

[147] Exhibit A, Test Claim, filed November 10, 2011, pages 184-185 (test claim permit, Finding C.7.).

[148] Exhibit A, Test Claim, filed November 10, 2011, page 395 (Fact Sheet/Technical Report, Discussion of Finding C.5.), footnote omitted.

[149] R9-2010-0016 is both an "order" of the Regional Board and an NPDES "permit." This analysis will refer to it as the "test claim permit."

[150] The claimants are interchangeably referred to as permittees, as used in the prior permit and copermittees, as used in the test claim permit.

reissued the second-term permit and the Regional Board issued an addendum to incorporate U.S. EPA's permit.[151]

In 2004, the Regional Board adopted the third-term permit, Order No. R9-2004-0001 (prior permit).[152] At the time that the prior permit was adopted, the Upper Santa Margarita Watershed had significant pollutant issues: Murrieta Creek and a portion of the Santa Margarita River were CWA section 303(d) listed for phosphorus and the Santa Margarita Lagoon was listed for eutrophication. Pollutants of concern included sedimentation, iron, manganese, and total dissolved solids. Other existing or potential sources of the following pollutants that may cause, or contribute to an excursion above a State water quality standard were identified: nitrogen, diazinon and other pesticides, herbicides, heavy metals and other toxics, oil and grease, total suspended solids, nutrients, pathogens, and trash.[153]

The prior permit represented a shift in the Regional Board's approach to permitting, using for the first time detailed, specific requirements to achieve the minimum level of implementation. The prior permit, however, did not address all of the water quality challenges faced by the copermittees.[154] Discharges from the MS4 continued to be the leading cause of water quality impairment with increases in toxicity and the number of CWA section 303(d) listed water bodies continued to increase.[155]

In July 2010, the cities of Murrieta and Wildomar, which fall within the jurisdiction of both the Santa Ana Regional Board and the San Diego Regional Board, made a request, under California Water Code section 13228, that the San Diego Regional Board act as the regulating authority for their MS4 permits including the portions of the cities that fall within the Santa Ana Regional Board's jurisdiction. On September 28, 2010, the executive officers of the two Regional Boards signed agreements making the requested designation.[156]

On November 10, 2010, the Regional Board adopted the test claim permit.[157] The City of Wildomar was added as a copermittee for the first time because it was just

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[151] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, Section V.A., page 8.

[152] R9-2004-0001 is both an "order" of the Regional Board and an NPDES "permit." This analysis will refer to it as the "prior permit."

[153] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, Section VI.B., Table 1, pages 16-18.

[154] Exhibit A, Test Claim, filed November 10, 2011, page 374 (Fact Sheet/Technical Report).

[155] Exhibit A, Test Claim, filed November 10, 2011, page 374 (Fact Sheet/Technical Report).

[156] Exhibit J (46), Excerpt from Santa Ana Regional Water Quality Control Board Order R8-2013-0024, page 2.

[157] Exhibit A, Test Claim, filed November 10, 2011, page 182 (test claim permit).

incorporated in 2008 and was covered under the unincorporated part of the county in the prior permits.[158] The test claim permit increases the emphasis on watershed-focused discharge management. As explained by the Fact Sheet: "There are several reasons for this shift in emphasis. An emphasis on watersheds is necessary to shift the focus of the Copermittees from program development and implementation to water quality results. After over 20 years of Copermittee program implementation, it is critical that the Copermittees link their efforts with positive impacts on water quality."[159]

This Test Claim pleads the following provisions of the test claim permit:

A. The requirement to address three categories of urban irrigation runoff that formerly were considered exempt non-stormwater discharges, contained in Section B.2.;[160]

B. The requirement to monitor for, report and address exceedances of non-stormwater action levels, contained in Sections C. and F.4.d., F.4.e., and Attachment E., Section II.C.;[161]

C. The requirement to monitor for, report and address exceedances of stormwater action levels, contained in Section D.;[162]

D. Requirements relating to the Priority Development Projects, low impact development and hydromodification, contained in Section F.1.d.1., 2., 4., 7., and F.1.h.;[163]

E. Requirements to track the construction and operation of post-construction best management practices ("BMPs"), contained in Section F.1.f.;[164]

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[158] Exhibit A, Test Claim, filed November 10, 2011, page 388 (Fact Sheet/Technical Report, Finding B.1.).

[159] Exhibit A, Test Claim, filed November 10, 2011, page 375 (Fact Sheet/Technical Report, Section V.).

[160] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 35-36 (Test Claim narrative).

[161] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 39-42 (Test Claim narrative).

[162] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 44-45 (Test Claim narrative).

[163] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 46-52 (Test Claim narrative).

[164] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 57-58 (Test Claim narrative).

F. Requirements relating to the control of pollutants from construction sites, contained in Section F.2.d.3. and F.2.e.6.e.;[165]

G. Requirements relating to the development and implementation of BMPs for unpaved roads, contained in Sections F.1.i. and F.3.a.10.;[166]

H. Requirements relating the inspection of monitoring of commercial/industrial sources, contained in Section F.3.b.4.a.ii.;[167]

I. Requirements relating to the retrofitting of existing development, contained in Section F.3.d.1.-5.[168];

J. Requirements relating to the development and implementation of the Watershed Water Quality Workplan, contained in Section G.1.-5.;[169]

K. Requirements relating to the JRMP Annual Report, contained in Section K.3.a.-c.;[170]

L. Requirements to perform special studies, contained in the Monitoring and Reporting Program, Attachment E. Section II.E.2.-5.;[171] and

M. Requirements that programs relating to development, construction, municipal facilities, industrial/commercial facilities, residential areas, retrofitting and education ensure that stormwater runoff not cause or contribute to a violation of a water quality standard and "prevent" illicit discharges into the MS4, contained in Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6.[172]

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[165] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 59-60 (Test Claim narrative).

[166] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 61-62 (Test Claim narrative.

[167] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 63-64 (Test Claim narrative).

[168] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 65-66 (Test Claim narrative).

[169] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 68-70 (Test Claim narrative).

[170] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 72-73 (Test Claim narrative).

[171] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 75-77 (Test Claim narrative).

[172] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 81-83 (Test Claim narrative).

III. Positions of the Parties and Interested Parties

A. County of Riverside, Riverside County Flood Control and Water Conservation District, and the Cities of Murrieta, Temecula, and Wildomar, Claimants

As will be covered within the analysis of the specific sections pled below, the claimants contend that the test claim permit includes numerous new requirements that exceed what is required under federal law.[173] The claimants note that the Commission has twice found the imposition of reimbursable state-mandated programs in MS4 permits issued by the Los Angeles and the San Diego regional boards.[174]

The claimants assert that the CWA leaves substantial discretion to the states in adopting permits noting that "[t]he California Supreme Court recognized the dual nature of NPDES permitting in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.[175] The Court, in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, expressly rejected the argument that just because a provision was in a stormwater NPDES permit, it was "'ipso facto, required by federal law.'"[176] The claimants contend that under definitive guidance provided by the court in *Department of Finance* regarding how to determine what constitutes a federal versus state mandate, the test claim permit's requirements are state, not federal, mandates.[177] The claimants also contend that the decision in *Department of Finance* has three relevant holdings. First, the claimants assert that the decision sets forth the test to determine if a permit requirement is a federal or state mandate, that is, if the state has discretion to impose the requirement and does so by virtue of a true choice, then the requirement is state-mandated.[178] Second, the claimants assert that the decision addresses whether the Commission must defer to the Water Boards as to what constitutes a federal mandate. The claimants further assert that the court concludes

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[173] Exhibit A, Test Claim, filed November 10, 2011, page 21 (Test Claim narrative).

[174] Exhibit A, Test Claim, filed November 10, 2011, page 23 (Test Claim narrative) citing *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Test Claim Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21; *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Test Claim No. 07-TC-09.

[175] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 3-4.

[176] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 4 quoting *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

[177] Exhibit A, Test Claim, filed November 10, 2011, pages 30-35 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[178] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, page 35, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

that the Commission must make that determination by applying California's constitutional, statutory, and common law to the issue of reimbursement. The claimants concede that the Commission must defer to the Water Boards' expertise if the regional board found that the permit conditions were the only means to implement the MEP standard, however, the regulatory language must be examined to establish the scope and detail required by the federal law.[179] Third, the claimants assert that the court concludes that the state bears the burden to establish an exception under Government Code section 17556.[180] The claimants contend that the test claim permit does not contain the necessary findings to establish that the requirements are only federal mandates and the Water Boards cite general regulatory authority to support their specific requirements.[181]

The claimants further contend that the test claim permit is not based on the federal MEP standard, but rather on the water quality standards established in the state's Basin Plan requiring compliance under state, not federal, authority.[182]

The claimants further assert that the requirements in the test claim permit are new programs and higher levels of service.[183] The claimants contend that the test claim permit imposed requirements uniquely on local government, and are not based on the claimants' voluntary acts.[184]

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[179] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 11-12, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768-769, 771.

[180] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 11-12, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[181] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 11-12.

[182] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 12-14.

[183] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 14-16; Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 5-13, Sections C., D., F.4.d., F.4.e. and Attachment E., Section II.C. (NALs and SALs); pages 16-17, Section F.1.f. (BMP maintenance tracking); pages 17-18, Section F.2.d.3. (AST); pages 18-22, Sections F.1.i. and F.3.a.10. (unpaved roads); pages 22-24, Section F.3.b.4.a.ii. (industrial and commercial inspections); pages 24-27, Sections G.1.-5. (Watershed Workplan); page 27, Section K.3.a.-.c. (annual reporting); pages 30-31, Sections F., F. 1., F.l.d., F.2., F.2.a.-d. and F.6.

[184] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 22-23; Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 31-32; see also pages 13-15, Sections F.1.d. and F.1.h., (LID, hydromodification, and priority development projects); pages 15-16, Section F.3.d. (retrofitting existing development); pages 16-17, Section F.1.f. (BMP maintenance tracking); pages 18-22, Sections F.1.i. and F.3.a.10. (unpaved roads); pages 24-27, Sections G.1.-5. (Watershed Workplan); pages 28-29, Section K.3.a.-.c. (annual reporting).

The claimants then assert that Water Boards have not demonstrated that the requirements are the only method to meet the MEP standard or are required by federal law, contending that the Water Boards' findings regarding federal law are not entitled to deference and the Water Boards have too narrow of a reading of the application of *Department of Finance* to the test claim permit.[185] Specifically, the claimants argue that the test claim permit, itself, states it is based on both federal and state law.[186] The claimants state that Finding E.6., which addresses whether the test claim permit is a state mandate, is not entitled to deference under *Department of Finance* as the Commission has exclusive jurisdiction to make that determination.[187] The claimants state that the court in *Department of Finance* considered the Water Boards' argument, that the test claim permit requirements are derived from federal law and that the US EPA would have included the same requirements, and rejected it.[188]

The claimants argue that the test claim permit imposes costs mandated by the state and the claimants lack fee authority to cover the costs of complying with the test claim permit, so Government Code section 17556(d) does not apply. The claimants allege that the costs are not recoverable through fees due to the application of Proposition 26, which amended article XIII C of the California Constitution to define most fees as taxes unless the fee falls within certain exceptions.[189] The claimants argue that they can only charge fees in the amount necessary to recover program costs and the payor can only be charged for the portion of costs attributable to the burdens on or direct benefits to that payor. If the charge does not fall within that definition of a fee, the charge is a tax and must be approved by the voters. The claimants conclude that charges for a specific purpose, such as the costs to comply with the test claim permit, would be a special tax and require the approval of two-thirds of the voters.[190]

Regarding the funding sources for the Riverside County Flood Control and Water Conservation District, the claimants state, "Without agreeing to the correctness of the DPD's conclusions regarding the use of benefit assessment funds and 'proceeds of taxes,' to the extent that the District identifies further evidence relevant to this section of the DPD, it will consider presenting such evidence at the hearing on the Test Claim."[191]

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[185] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 17-22.

[186] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 17-18.

[187] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 19-20.

[188] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, pages 21-22.

[189] Exhibit A, Test Claim, filed November 10, 2011, pages 27-28 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 32-33.

[190] Exhibit A, Test Claim, filed November 10, 2011, pages 27-28 (Test Claim narrative).

[191] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 31.

Finally, the claimants argue that SB 231, which amended Government Code sections 53750 and 53751 regarding the definition of "sewers," should not be relied upon by the Commission to deny subvention for costs incurred after January 1, 2018, because "SB 231 is an unconstitutional attempt by the Legislature to rewrite history."[192]

B. Department of Finance

Finance defers to the Water Boards on the issues of whether the test claim permit imposes a new program or higher level of service and the impact of the decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.[193] Regarding the issue of fee authority, Finance states that the claimants have fee authority "undiminished by Propositions 2018 or 26."[194] Finance contends that Proposition 26 specifically excludes assessments and property-related fees imposed under Proposition 218.[195] Finance further contends that the claimants can impose property-related fees under their police powers. Finance relies on the holding in *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, that to the extent that a local government has authority to charge for program costs, those charges cannot be recovered as a state-mandated cost. Finance argues that holding applies to this Test Claim: "Local governments can choose to not submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates."[196] Finance adds that its position "is supported by *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 244 which found that the majority protest procedure does not negate a claimant's fee authority."[197] Finance concludes that the claimants have sufficient authority to charge fees regardless of political feasibility. Finance also contends that Government Code section 17556(d) applies in that there can be no finding of a reimbursable state-mandated program when the claimants have the authority to impose fees sufficient to pay for the permit activities.[198] However, if the Commission should find a reimbursable

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[192] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 35-42.

[193] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, page 1.

[194] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, page 1.

[195] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, page 1, citing California Constitution, article XIIIC, section 1(e)(7).

[196] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, page 1.

[197] Exhibit H, Finance's Late Comments on the Draft Proposed Decision, filed May 22, 2023, page 1.

[198] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, pages 1-2.

state-mandated program, Finance points to the offsetting revenue identified by the claimants and notes the Commission should identify those revenues as well.[199]

C. The Water Boards

As will be covered in more detail in the analysis below, the Water Boards contend that, when adopting the test claim permit, "the San Diego Water Board found that provisions and requirements were necessary to meet the maximum extent practicable standard (MEP) and are based exclusively on federal law."[200] The Water Boards contend that the claimants are not entitled to subvention for complying with the test claim permit because they have not shown that the requirements are new programs or higher level of services, are unique to local agencies, or that exceptions to the subvention requirement do not apply.[201]

The Water Boards further contend that the decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 (*Department of Finance*), when applied to the test claim permit, will yield a finding that there is no state mandate due to the following differences between the facts of the case and the facts of this Test Claim. Specifically, the Water Boards assert, this test claim raises the following issues which were not addressed in *Department of Finance*:

1. Here, the Regional Board specifically found the permit requirements at issue in this test claim are federal mandates, unlike the regional board in the *Department of Finance case*;

2. The parties in *Department of Finance* did not dispute that the requirements were new and were not included in the prior permit, which is not true here since the Water Boards contend that the requirements of test claim permit *were* contained in prior permits and are not new;

3. There was no evaluation in *Department of Finance* of whether the requirements were required under a TMDL or other federal law, such as the requirement to effectively prohibit non-stormwater discharges into their MS4s;

4. None of the requirements evaluated by the court in *Department of Finance* were included in any US EPA issued permits, which is not the case here;

5. The issue of whether the local government had the authority to levy fees or assessments pursuant to Government Code section 17556(d) was not determined by the court in *Department of Finance*;

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[199] Exhibit B, Finance's Comments on the Test Claim, filed September 20, 2017, page 2.

[200] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 2.

[201] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 2.

6. The Supreme Court in *Department of Finance* did not consider that the requirements are generally applicable and not unique to government;

7. The Supreme Court in *Department of Finance* did not evaluate the permittees' voluntary participation in the NPDES program.[202]

With regard to the test claim permit, the Water Boards contend that the requirements were in prior permits and are not new. Any changes to those requirements are not a higher level of service because the changes are mere refinements of existing requirements and are consistent with the US EPA's guidance that the iterative process making each permit more refined and detailed than the last. Also, mere direction from the San Diego Water Board to reallocate resources is not sufficient to show a shifting of costs from the state to the local government.[203]

The Water Boards contend that the Regional Board's findings regarding federal law are entitled to deference. In contrast to the Regional Board in *Department of Finance*, the Regional Board here, when issuing the test claim permit, specifically found "[I]t is entirely the federal authority that forms the legal basis to establish the permit provisions."[204] And "this Order implements the federally mandated requirements under the CWA" including "federal requirements to effectively prohibit non-stormwater discharges, to reduce the discharge of pollutants in storm water to the MEP."[205] The Water Boards reason that if they were not authorized to issue permits, the US EPA would have issued a similar permit. "Therefore, in issuing the permit provisions necessary to comply with federal law, the San Diego Water Board exercised its duty under federal law."[206] Relying on *Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, the Water Boards argue that in exercising its duty, the San Diego Water Board required compliance with federal mandates and, in exercising its discretion as required by federal law, the Regional Board imposed requirements necessary to implement federal law. This supports a conclusion that the requirements in the test claim permit are federal mandates. The holding in *Department of Finance* does not conflict with this conclusion as the permit at issue in that case had its roots in both state and federal law, whereas the test claim permit is rooted only in federal law. The Water Boards conclude that the Regional

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[202] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 3-4.

[203] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 10-12, 15-16.

[204] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 13, citing 2010 Permit Fact Sheet, page F-34.

[205] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 13-14.

[206] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 12.

Board's findings that the requirements were necessary to implement the MEP standard are entitled to deference under *Department of Finance.*[207]

The Water Boards also contend that the requirements in the test claim permit are not unique to government as the US EPA requires control of municipal and non-municipal stormwater discharges. Numerous provisions of the permit are laws of general applicability. While the requirements in the test claim permit apply only to the public entity copermittees, the substantive actions required are not unique to that class of permittee and other permits impose similar requirements on non-local agencies.[208]

Finally, the Water Boards contend that the claimants have voluntarily undertaken to participate in the MS4 program as there is no requirement for them to do so and the claimants have not demonstrated that they cannot cover any costs by imposing fees as has been done by the cities of Alameda, San Clemente, San Jose, and Santa Cruz.[209]

The Water Boards comments on to the Draft Proposed Decision, assert that the sections on the Watershed Workplan, Section G.1.-5., and the Annual JRMP Report, Section K.3.c.1.-4., should be denied because the requirements are not new or, if found to be mandated, the costs of implementation should be found to be de minimis.[210]

Finally, the Water Boards assert that the reimbursement period for the Test Claim should end on January 6, 2016, when the test claim permit was superseded by Order No. R9-2015-0100 which became effective on January 7, 2016.[211] The Water Boards contend that the claimants have had fee authority during the effective period of the test claim permit. The Water Boards characterize Proposition 218 as a power sharing measure between local property owners and local government which does not deprive the local government of its fee authority. Thus, the Water Boards conclude that the claimants have had fee authority for the entire reimbursement period and Government Code section 17556(d) bars all reimbursement.[212]

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[207] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 13-15.

[208] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 16-17.

[209] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 18-19.

[210] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 2-4.

[211] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 4-5.

[212] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 5-6.

IV. Discussion

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

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[213] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[214]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[215]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[216]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[217]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased

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

[214] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[215] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[216] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[217] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[218]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[219] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[220] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[221]

A. The Test Claim Was Timely Filed Pursuant to Government Code Section 17551(c) Because the Test Claim Was Filed Within Twelve Months of the Effective Date of the Test Claim Permit, with a Period of Reimbursement Beginning November 10, 2010.

The Test Claim was filed on November 10, 2011. The effective date of the test claim permit is November 10, 2010.[222] At the time of filing, the Government Code section 17551 provided that "test claims shall be filed not later than 12 months following the effective date of a statute or executive order…."[223] As the Test Claim was filed within 12 months following the effective date of the test claim permit, the Test Claim was timely filed.

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claim was filed on November 10, 2011, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2010. However, since the test claim permit has a later effective date, the potential period of reimbursement for this Test Claim begins on the permit's effective date, November 10, 2010.

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

[219] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[220] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[221] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[222] Exhibit A, Test Claim, filed November 10, 2011, page 269 (test claim permit).

[223] Government Code section 17551(c) (Stats. 2007, ch. 329).

B. Some of the Sections Pled by the Claimants Impose a State-Mandated New Program or Higher Level of Service.

1. The Requirements of Section B.2. of the Test Claim Permit, Addressing Formerly Exempted Non-Stormwater Discharges That Have Been Identified as a Source of Pollutants, Do Not Mandate a New Program or Higher Level of Service Because Existing Federal Law Requires the Claimants to Prohibit Non-Stormwater Discharges.

The claimants have pled Section B.2. of the test claim permit,[224] which removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited discharge list.[225] Thus, the claimants are now required to effectively prohibit landscape irrigation, irrigation water, and lawn watering from entering the MS4 by implementing a program to detect and remove these illicit discharges, just like other prohibited non-stormwater discharges.

The Commission finds that Section B.2. does not mandate a new program or higher level of service.

a. Background

i Federal law requires that if an exempt discharge is identified as a pollutant, the permittee is required to effectively prohibit the illicit discharge from entering the municipal separate storm sewer system.

Federal law distinguishes between stormwater discharges and non-stormwater discharges. Stormwater is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage; events related to precipitation."[226] A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[227]

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[224] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 35-36 (Test Claim narrative).

[225] Section B.2. of the test claim permit exempts the following non-stormwater discharges: diverted stream flows, rising ground water, uncontaminated ground water infiltration (as defined at Code of Federal Regulations, title 40, section 35.2005(20)) to MS4s, uncontaminated pumped ground water, foundation drains, springs, water from crawl space pumps, footing drains, air conditioning condensation, flows from riparian habitats and wetlands, water line flushing, discharges from potable water sources not subject to NPDES Permit No. CAG679001 other than water main breaks, individual residential car washing, and dechlorinated swimming pool discharges. Exhibit A, Test Claim, filed November 10, 2011, pages 200-201 (test claim permit, Section B.2.).

[226] Code of Federal Regulations, title 40, section 122.26(b)(13).

[227] Code of Federal Regulations, title 40, section 122.26(b)(2) defines "Illicit discharge" as "any discharge to a municipal separate storm sewer that is *not* composed entirely of storm water except discharges pursuant to a NPDES permit (*other than the NPDES*

Federal law requires that, in order to achieve water quality standards and objectives, permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[228] Those discharge categories that are not prohibited from entering into the MS4 continue to be exempt unless the discharge is identified by a municipality as a source of pollutants to waters of the United States. If a discharge is identified as a pollutant, the municipality is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[229]

ii. The prior permit conditionally exempted landscape irrigation, irrigation water, and lawn watering from the list of non-stormwater discharges that permittees were prohibited from discharging.

Section B.2. of the prior permit provided a list of exempt non-stormwater discharges that included landscape irrigation, irrigation water, and lawn watering, which were not prohibited from being discharged into the MS4.[230] Section B.2. further stated that the listed categories of non-stormwater discharges are not prohibited "unless a Permittee or the SDRWQCB identifies the discharge category as a source of pollutants to waters of the U.S."[231] The prior permit also required each permittee to "examine its Illicit Discharge Monitoring results collected in accordance with Requirement J.3 of this Order and Section II.B of the MRP [Monitoring and Reporting Program] to identify water quality problems which may be the result of any non-prohibited discharge category(ies) listed above in Requirement B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above."[232] In addition, permittees were required to "investigate and inspect any portion of the MS4 that, based on visual observations, monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in Section B. of this

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permit for discharges from the municipal separate storm sewer) and discharges resulting from firefighting activities." Emphasis added.

[228] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[229] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1).

[230] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573 (Order R9-2004-0001, Section B.2.).

[231] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section B.2.).

[232] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section B.4.).

Order)."[233] If a non-prohibited discharge category was identified by a permittee as a source of pollutant to the waters of the United States during the term of the permit, the permittee was required by the prior permit to prohibit the discharge or to implement Best Management Practices (BMPs) to reduce the discharge of the pollutant to the MEP and submit a report to the Regional Board.[234]

b. Section B.2. of the test claim permit removes landscape irrigation, irrigation water, and lawn watering from the exemption, but does not mandate a new program or higher level of service.

Section B.2. of the test claim permit removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited discharge list.[235] Thus, the claimants are now required to effectively prohibit landscape irrigation, irrigation water, and lawn watering from entering the MS4 by implementing a program to detect and remove these illicit discharges, just like other prohibited non-stormwater discharges.

The Fact Sheet for the test claim permit explains that removal of landscape irrigation, irrigation water, and lawn watering discharges from the exemption was based on the claimants' and the Regional Board's identification of these discharges as sources of pollutants to the waters of the United States:

> Discharges from landscape irrigation have been identified by the San Diego Water Board and the Copermittees as a source of pollutants and conveyance of pollutants to waters of the United States in the following:
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> - In educational materials developed by The Cities and County of Riverside "Only Rain in the Storm Drain" Pollution Prevention Program, the Landscape and Garden brochure states: "Soil, yard wastes, *over-watering* [] and garden chemicals become part of the urban runoff mix that winds it [sic] way through streets, gutters and storm drains before entering lakes, rivers, streams, etc."
> - In an educational survey developed by The Cities and County of Riverside "Only Rain in the Storm Drain" Pollution Prevention Program

[233] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

[234] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section B.2.).

[235] Section B.2. of the test claim permit exempts the following non-stormwater discharges: diverted stream flows, rising ground water, uncontaminated ground water infiltration (as defined at Code of Federal Regulations, title 40, section 35.2005(20)) to MS4s, uncontaminated pumped ground water, foundation drains, springs, water from crawl space pumps, footing drains, air conditioning condensation, flows from riparian habitats and wetlands, water line flushing, discharges from potable water sources not subject to NPDES Permit No. CAG679001 other than water main breaks, individual residential car washing, and dechlorinated swimming pool discharges. Exhibit A, Test Claim, filed November 10, 2011, pages 200-201 (test claim permit, Section B.2.).

distributed at Public Outreach events, the answer to the question about where lawn irrigation water goes states: *"Water that leaves your lawn from irrigation ... can pick up motor oil and grease from vehicles,* excess *fertilizer from your lawn, bacteria from pet waste, and* excess *pesticides from your yard. These pollutants can be carried down streets and storm drains directly to our* streams, *lakes and rivers without treatment!"*

- In 2006, the State Water Board allocated Grant funding to the Smarttimer/Edgescape Evaluation Program (SEEP). The project targets irrigation runoff by retrofitting existing development and documenting the conservation and runoff improvements. The Grant Application states that "Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators". Furthermore, the grant application states that "Regional program managers agree that the reduction and/or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the Basin Plan and Bacteria TMDL over the long term". This is reinforced in the project descriptions and objectives: "Elevated dry-weather storm drain flows, composed primarily ... of landscape irrigation water wasted as runoff, carry pollutants that impair recreational use and aquatic habitats all along Southern California's urbanized coastline. Storm drain systems carry the wasted water, along with landscape derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean. Given the local Mediterranean climate, excessive perennial dry season stream flows are an unnatural hydrologic pattern, causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the nearshore marine environment". The basis of this grant project is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, they indicate that the alteration of natural flows is impacting the Beneficial Uses of waters of the State. The results of this study can be applied broadly to any area where over-irrigation takes place, including Riverside County. Preliminary results from the study indicate that that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants.
- In the Watershed Action Plan Annual Report(s) for the 2006-2007 reporting period, submitted by the County of Orange, Orange County Flood Control District and Copermittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds, the Orange County Copermittees, within their Watershed Action Strategy Table for Fecal Indicator Bacteria state that *"Support programs to reduce or eliminate the discharge of anthropogenic dry weather nuisance flow throughout the [. . .]*

watershed. Dry weather flow is *the transport medium for bacteria and other 303(d) constituents of concern".* Additionally, they state that *"conditions in the MS4 contribute to high* seasonal *bacteria propagation in-pipe during warm weather. Landscape irrigation* is a *major contributor to dry weather flow, both* as *surface runoff due to over-irrigation and overspray onto pavements; and* as *subsurface seepage that finds its way into the MS4."*

- In the Carlsbad Watershed Urban Runoff Management Program (WURMP) Fiscal Year 2008 Annual Report, submitted by the Carlsbad Watershed Copermittees (Cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista, and the County of San Diego), the Carlsbad Watershed Copermittees state *"The Carlsbad Watershed Management Area (WMA) collective watershed strategy identifies bacteria, sediment, and nutrients* as *high priority water quality pollutants in the Agua Hedionda (904.3 - bacteria and sediment), Buena Vista (904.2 - bacteria), and San Marcos Creek (904.5 - nutrients) Hydrologic Areas. Bacteria, sediment, and nutrients have been identified* as *potential discharges from over-irrigation."*
- In Appendix D of the San Diego Bay WURMP 2007-2008 Annual Report, submitted by the San Diego Bay Watershed Copermittees (Cities of Chula Vista, Coronado, Imperial Beach, La Mesa, Lemon Grove, National City, and San Diego, the County of San Diego, the Port of San Diego, and the San Diego County Airport Authority), the San Diego Bay Watershed Copermittees identified *over-irrigation of lawns* from business and/or residential land uses as a likely pollutant source for bacteria, pesticides, and sediment.
- On September 28, 2006 Governor Arnold Schwarzenegger approved Assembly Bill 1881, The Water Conservation in Landscaping Act (AB 1881, Laird) [Civil Code section 65591 et seq. (Stats. 2006, ch. 559)]. The act requires cities, counties, and charter cities and charter counties, to adopt landscape water conservation ordinances by January 1, 2010. Additionally, the law required the Department of Water Resources (DWR) to prepare a Model Water Efficient Landscape Ordinance for use by local agencies. The Water Efficient Landscape Ordinance was approved by the Office of Administrative Law on September 10, 2009. All local agencies were required to adopt a water efficient landscape ordinance by January 1, 2010. Local agencies could adopt the Water Efficient Landscape Ordinance developed by DWR, or an ordinance considered at least as effective as the Model Ordinance. The Water Efficient Landscape Ordinance includes a requirement that local agencies prohibit runoff from irrigation (§ 493.2): *"Local agencies shall prevent water waste resulting from inefficient landscape irrigation by* prohibiting runoff from leaving the target landscape *[emphasis added] due to low head drainage,*

overspray, or other similar conditions where water flows onto adjacent property, non-irrigated areas, *walks, roadways, parking lots, or structures. Penalties for violation of these prohibitions shall be established locally."*

- On October 08, 2009, the State of California Department of Water Resources issued a letter to all cities and counties within the State of California giving reminder of required adoption of the Water Efficient Landscape Ordinance. The letter states that: *"Other benefits include reduced irrigation runoff,* reduced pollution of waterways *[emphasis added], drought resistance, and less green waste."*
- On December 18, 2009, the San Diego Water Board adopted Order. No. R9-2009-0002, the fourth-term Orange County permit, which found that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. Landscape irrigation, irrigation water, and lawn watering were categories removed from the list of non-storm water discharges not prohibited to be discharged into the MS4.
- The San Diego Water Board has responded to complaints about and observed runoff from over-irrigation entering the MS4s in the Riverside County portion of the San Diego Region.[236]

The claimants contend that federal law does not support the prohibition of landscape irrigation, irrigation water, and lawn watering, noting that federal regulations require the claimants to address — not prohibit — non-stormwater discharges or flows when the discharges are identified by the municipality — not the Regional Board — as sources of pollutants.[237]

The claimants further contend that they did not identify landscape irrigation, irrigation water, and lawn watering as sources of pollution,[238] but only prepared the educational outreach materials to educate and prevent these discharges from becoming problematic:

> While the 2010 Permit Fact Sheet states that educational outreach materials utilized by the Copermittees identified these categories of runoff as a source and conveyance of pollutants to the MS4 (Fact Sheet, pp. 108-09), those materials were prepared as a preventative measure, to educate the public and prevent these discharges from becoming

[236] Exhibit A, Test Claim, filed November 10, 2011, pages 473-476 (Fact Sheet/Technical Report), emphasis in original.

[237] Exhibit A, Test Claim, filed November 10, 2011, page 36 (Test Claim narrative), citing Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[238] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 4-5.

> problematic, and did not represent a determination by Claimants that those discharges were a demonstrated problem within the watershed. In comments to the RWQCB during the development of the 2010 Permit, Claimants in fact stated that none of the municipalities had identified irrigation runoff as a source of pollutants requiring prohibition. [Footnote 6: The Fact Sheet also cites other support for the elimination of the exemption for irrigation water runoff, but this "evidence" relates to findings for other municipalities, or generally for the state, and not for the Copermittees. *See* Fact Sheet, pp. 109-10.] (*See* District Comment Letter dated September 7, 2010 and Attachment 6 (included in Section 7)). Thus, in adding this provision, the RWQCB relied on no actual determination of impairment within the jurisdiction of the Claimants.[239]

The claimants also state that the Smarttimer Edgescape Evaluation Program (SEEP), referenced above as a rationale for the removal of the exemption of landscape irrigation, irrigation water, and lawn watering discharges, did not involve the claimants, but rather Orange County municipalities, the Metropolitan Water District of Southern California, the Department of Agriculture and south Orange County water districts.[240]

The claimants contend that there is a distinction between identifying a particular discharger and identifying an entire category of discharges pointing to the preamble to the federal regulations, which "makes clear that the permittees' illicit discharge program need not prevent discharges of the 'exempt' categories into the MS4 'unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.'"[241] Thus, the claimants agree that "individual discharges within exempt categories must be addressed when the particular discharge is a source of pollutants to waters of the U.S.," but assert that "federal regulations do not allow for removing entire categories of exempt non-storm water discharges."[242] Moreover, the prohibition of all irrigation runoff is impracticable and "may not be significant enough to ever be discharged from the MS4 into receiving waters or contain pollutants in violation of any water quality standard."[243]

Finally, in comments on the Draft Proposed Decision, the claimants argue that the requirements impose a reimbursable state-mandated program as follows:

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[239] Exhibit A, Test Claim, filed November 10, 2011, page 37 (Test Claim narrative); see also, Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 5.

[240] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 5, footnote 8 citing Exhibit J (45) Supplemental Fact Sheet for Tentative Order R9-2009-0002, April 15, 2009, pages 12-13.

[241] Exhibit A, Test Claim, filed November 10, 2011, page 37 (Test Claim narrative), citing 55 Federal Register 47995 (November 16, 1990).

[242] Exhibit A, Test Claim, filed November 10, 2011, page 37 (Test Claim narrative).

[243] Exhibit A, Test Claim, filed November 10, 2011, page 38 (Test Claim narrative).

> First, "federal requirements" exempted irrigation-related discharges from the "effectively prohibit" non-stormwater discharge requirement *unless* they were identified by the *municipalities* as a source of pollutants to waters of the United States. [Fn. omitted.] The 2004 Permit did not require Claimants to address these discharges unless, *in the discretion of permittee or the Water Board*, they should be. Test Claim Permit Section B.2 removed that discretion, requiring Claimants to now address such discharges-a "new" requirement. A "program is 'new' if the local government had not previously been required to institute it." *County of Los Angeles v. Comm. on State Mandates* (2003)110 Cal.App.4th 1176, 1189; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 ("*Lucia Mar*").
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> Second, general federal regulatory language does not impose a federal mandate if the regulation leaves the manner of implementation to the discretion of the permittee. See *LA County Permit Appeal I*. [Fn. omitted.] Here, the language of the federal regulation left the discretion as to whether to include irrigation-related discharges to the permittees.
>
> In addition, "the application of Section 6 . . . does not turn on whether the underlying obligations to abate pollution remain the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a higher level of existing services*." Dept. of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 559 ("*LA County Permit Appeal II*). The additional obligations imposed on Claimants by removal of the exemption, such as required changes to the CMP [Coordinated Monitoring Program] and JRMP and additional monitoring, represented a "higher level of service" to the public, contrary to the conclusion in the DPD. What constitutes a "higher level of service" are "a state mandated increases in the services provided by local agencies in existing programs." [Fn. omitted.][244]

The Water Boards contend that the claimants identified landscape irrigation, irrigation water, and lawn watering as significant dry weather, non-stormwater contributors of pollutants to MS4s during the permit development process as stated in the test claim permit. "Where, as here, a municipality has identified previously exempt categories of non-storm water discharges as sources of pollutants, the categories represent illicit discharges and must be prohibited in compliance with the CWA."[245] Moreover, the permit record "reflects statewide recognition of the pollution caused by overirrigation"

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[244] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 5.

[245] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 20 citing to United States Code, title 33, section 1342(p)(3)(B)(ii), requiring permits for municipal stormwater discharges "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."

and “that pollution in irrigation waters is ubiquitous and would be extremely difficult to isolate and address on a site-by-site basis.”[246] Requiring the claimants “to address only individual sites, rather than the categories of irrigation waters, as they suggest, would not satisfy the federal requirements.”[247]

The Water Boards further contend that the requirements in the test claim permit are not new as the prior permit include prohibitions on non-stormwater discharges in the MS4 unless authorized by a separate permit or authorized as a category of exempted non-stormwater discharges. The prior permit also addressed removing the exemptions when categories are identified as sources of pollutants.[248]

> When the municipality has provided information showing that a category of discharge is a source of pollutants, federal law requires it to address the category in a manner similar to other recognized illicit discharges under the federal nonstorm water provisions in place for decades. Implementation of this decades-old standard does not amount to imposition of a new program or any higher level of service than was previously in place.[249]

The Water Boards conclude that the Commission should give significant weight to the conclusion of the Regional Board in its decision to prohibit landscape irrigation, irrigation water, and lawn watering.[250]

The Commission finds that Section B.2. of the test claim permit does not mandate a new program or higher level of service.

The CWA requires that permits adopted by the Water Boards for discharges from municipal storm sewers “shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers.”[251] Federal regulations expressly state that the program to detect and remove illicit discharges into the MS4 shall address “all types of illicit discharges,” including the following “categories” of non-stormwater discharges “where such discharges are identified by the municipality as sources of pollutants to waters of the United States: . . ., “landscape irrigation,” . . ., “irrigation

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[246] Exhibit C, Water Boards’ Comments on the Test Claim, filed September 22, 2017, page 20.

[247] Exhibit C, Water Boards’ Comments on the Test Claim, filed September 22, 2017, page 20.

[248] Exhibit C, Water Boards’ Comments on the Test Claim, filed September 22, 2017, page 20.

[249] Exhibit C, Water Boards’ Comments on the Test Claim, filed September 22, 2017, page 20.

[250] Exhibit C, Water Boards’ Comments on the Test Claim, filed September 22, 2017, page 20.

[251] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

water," . . . [and] "lawn watering."[252] The preamble to the Federal regulations refers to "components of discharges" that are not prohibited from entering the MS4 unless "such discharges are specifically identified on a case-by-case basis as needing to be addressed":

> … in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.[253]

The preamble also refers to the "classes" of non-stormwater discharges that are not prohibited in all cases:

> Several commenters suggested that either the definition of "storm water" should include some additional classes of nonprecipitation sources, or that municipalities should not be held responsible for "effectively prohibiting" some classes of nonstorm water discharges into their municipal storm sewers. The various types of discharges addressed by these comments include . . . landscape irrigation, . . . irrigation waters, . . . lawn watering . . . . Most of these comments were made with regard to the concern that these were commonly occurring discharges which did not pose significant environmental problems.
>
> EPA disagrees that the above described flows will not pose, in every case, significant environmental problems. At the same time, it is unlikely Congress intended to require municipalities to effectively prohibit . . . seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers. It should be noted that the legislative history is essentially silent on this point. Accordingly, EPA is clarifying that section 402(p)(3)(B) of the CWA (which requires permits for municipal separate storm sewers to "effectively" prohibit non-storm water discharges) does not require permits for municipalities to prohibit certain discharges or flows of nonstorm water to waters of the United States through municipal separate storm sewers in all cases.[254]

Accordingly, federal law does not support the claimants' assertion that each individual discharge be treated on a case-by-case basis; it's the type of discharge that is treated on a case-by-case basis.

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[252] Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1).

[253] Exhibit J (33), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 (November 16, 1990), page 6.

[254] Exhibit J (33), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 (November 16, 1990), page 48.

Moreover, the decision to remove an exemption is not discretionary as suggested by the claimants. Rather, when approving a jurisdiction-wide NPDES permit, the Regional Board is required by federal law to address and effectively prohibit a previously exempted category of a non-stormwater discharge *when* the discharge is identified as a source of pollution.[255] In this case, the record shows that landscape irrigation, irrigation water, and lawn watering were identified as sources of bacteria, pesticides, and sediment. The claimants identified to their residents that landscape irrigation, irrigation water, and lawn watering can be a source of non-stormwater pollution in their education materials and survey as part of the "Only Rain in the Storm Drain" Pollution Prevention Program.[256] In addition, the Regional Board found ample evidence in the surrounding areas of the state, and through complaints in Riverside County, that landscape irrigation, irrigation water, and lawn watering discharges into the MS4 were sources and conveyances of bacteria, pesticides, and sediment to waters of the United States. The State Board, in its grant funding materials for the SEEP program, stated that irrigation runoff contributes flow and pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators, and that the reduction or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the Basin Plan and Bacteria TMDLs over the long term.[257] Moreover, state law previously required local government to adopt a Water Efficient Landscape Ordinance to prohibit irrigation runoff from leaving the target landscape, and required local agencies to either adopt the following model ordinance or its equivalent:[258]

> (a) Local agencies shall prevent water waste resulting from inefficient landscape irrigation by prohibiting runoff from leaving the target landscape due to low head drainage, overspray, or other similar conditions where water flows onto adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures. Penalties for violation of these prohibitions shall be established locally.
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> (b) Restrictions regarding overspray and runoff may be modified if:
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> (1) the landscape area is adjacent to permeable surfacing and no runoff occurs; or

[255] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1).

[256] Exhibit A, Test Claim, filed November 10, 2011, pages 473-474 (Fact Sheet/Technical Report).

[257] Exhibit A, Test Claim, filed November 10, 2011, pages 473-476 (Fact Sheet/Technical Report).

[258] Civil Code section 65594 (Stats. 2006, ch. 559).

(2) the adjacent non-permeable surfaces are designed and constructed to drain entirely to landscaping.[259]

Federal law requires the Regional Board to establish conditions to ensure compliance with all applicable requirements of the CWA and regulations, including the prohibition of illicit non-stormwater discharges.[260] Accordingly, since landscape irrigation, irrigation water, and lawn watering were identified as sources and conveyances of pollutants, the Regional Board had no discretion, but was required by federal law to remove the exemption and require the claimants to effectively prohibit these non-stormwater discharges from entering the MS4 by implementing a program to detect and remove the discharge.[261] Reimbursement under article XIII B, section 6 of the California Constitution is not required if the statute or executive order imposes a requirement that is expressly mandated by federal law.[262]

In addition, the loss of the exemption from the federal law requirement to prohibit landscape irrigation, irrigation water, and lawn watering does not constitute a new program or higher level of service. The Supreme Court has clarified that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[263] Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided," or be unique to local government.[264] In this case, the prior permit required that if either a claimant or the Regional Board identifies a discharge category as a source of pollutants to the waters of the United States, then the discharge category represents an illicit discharge and must be prohibited in compliance with the CWA and,

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[259] California Code of Regulations, title 23, section 493.2 (Register 2009, Number 37).

[260] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.43(a).

[261] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1).

[262] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 71; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879-880; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; Government Code section 17556(c).

[263] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, emphasis in original.

[264] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

thus, that provision is not new.[265] Moreover, federal law has long required that all dischargers, including private industrial dischargers and local governments, effectively prohibit "all types" of non-stormwater discharges identified as sources of pollutants to waters of the United States.[266] Thus, the requirements associated with effectively prohibiting landscape irrigation, irrigation water, and lawn watering, which are known sources of non-stormwater pollutants, do not change or increase that level or quality of service to the public; they simply make the claimants comply with existing federal law to prohibit non-stormwater discharges.

Accordingly, the Commission finds that Section B.2. of the test claim permit does not mandate a new program or higher level of service.

2. Sections C., F.4.d. and F.4.e., and Section II.C. of Attachment E. of the Test Claim Permit, Which Address Non-Stormwater Dry Weather Action Levels (NALs), Do Not Mandate a New Program or Higher Level of Service Because the Requirements Are Not New, But Simply Implement Federal Law.

The claimants have pled Sections C. (Non-Stormwater Dry Weather Action Levels) and F.4.d. and F.4.e. (Illicit Discharge Detection and Elimination) and Section II.C., of Attachment E. of the test claim permit,[267] which address non-stormwater dry weather action levels (NALs) for fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, methyl blue active substances (MBAS), iron, manganese; and the priority pollutants: cadmium, copper, chromium III, chromium IV (hexavalent), lead, nickel, silver, and zinc.[268] The claimant states more specifically that:

> Sections C and portions of F.4 of the 2010 Permit (as well as the provisions of Section II.C of the Permit's Monitoring and Reporting Program ("MRP"), Attachment E) required Claimants to comply with new requirements relating to "Non-Stormwater Dry Weather Action Levels" or "NALs." These requirements included programmatic investigation,

[265] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section B.2.).

[266] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1). In addition, MS4 dischargers must demonstrate adequate legal authority, through ordinance, permit, or other means, to prohibit illicit discharges from others to the MS4. Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[267] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 39-42 (Test Claim narrative).

[268] Exhibit A, Test Claim, filed November 10, 2011, pages 204-205 (test claim permit, Section C.5.)

monitoring and reporting requirements, as well as action items stemming from a NAL exceedance.[269]

These sections generally require monitoring and field screening for pollutants as specified in the permit, and if a pollutant is shown to be in excess of the NAL, then the claimant is required to investigate and identify and remove the source of the illicit, non-stormwater discharge.

As explained below, the Commission finds that that Sections C and F.4.d. and F.4.e. and Section II.C. of Attachment E. do not require the claimant to perform new activities and, therefore, these sections do not mandate a new program or higher level of service. Instead, the test claim permit simply identifies action levels for each pollutant consistent with existing water quality standards that, if detected in dry weather monitoring and field screening to be in excess of the action level, triggers the investigation, identification of the discharge, removal, and reporting activities required by existing federal law. The claimants do not violate the permit by exceeding the action level, as implied by the claimants; rather a violation occurs only if a permittee fails to timely implement the required actions following an exceedance of an action level.[270] In this sense, the action levels established in the test claim permit function the same as the prior permit, which required the claimants to identify criteria to determine if significant sources of pollutants were present in dry weather non-stormwater discharges consistent with water quality objectives.[271] Under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

a. Background

i. Federal law requires permittees to effectively prohibit non-stormwater discharges into the storm sewers by implementing a program to detect and remove illicit discharges.

In order to achieve water quality standards, federal law requires that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[272] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies:

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[269] Exhibit A, Test Claim, filed November 10, 2011, page 39.

[270] Exhibit A, Test Claim, filed November 10, 2011, page 203 (Directive C.3.).

[271] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

[272] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

> Illicit discharges enter the MS4 system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the MS4 from cracked sanitary systems, spills collected by drain outlets, or paint or used oil dumped directly into the drain). The result is untreated discharges that contribute high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies. Pollutant levels from these illicit discharges have been shown in EPA studies to be high enough to significantly degrade receiving water quality and threaten aquatic, wildlife, and human health.[273]

Examples of illicit non-stormwater discharges include sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[274]

To "effectively prohibit" non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges, which under federal law shall contain the following:

- A description of a program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4.[275]
- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated.[276]
- A description of procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[277]
- A description of procedures to prevent, contain, and respond to spills that may discharge into the MS4;
- A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;

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[273] Exhibit J (20), EPA, Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination Minimum Control Measure, Fact Sheet 2.5 (EPA 833-F-00-007), January 2000, revised December 2005.

[274] Exhibit J (20), EPA, Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination Minimum Control Measure, Fact Sheet 2.5 (EPA 833-F-00-007), January 2000, revised December 2005.

[275] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[276] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2).

[277] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(3).

- A description of educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- A description of controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[278]

Federal law also requires a permittee to have a proposed monitoring program for representative data collection that describes the location of outfalls or field screening points to be sampled, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of the sampling equipment.[279]

In addition, federal law requires that NPDES permits include specific requirements for the proper collection, management, and electronic reporting of data about the NPDES program to ensure that there is timely, complete, accurate, and nationally-consistent set of data about the NPDES program.[280] All NPDES permits must also specify requirements for recording and reporting monitoring results.[281]

Federal law requires that the permittees file an annual report by the anniversary date of the issuance of the permit that includes a summary of monitoring data accumulated throughout the year and any necessary revisions to the assessment of controls.[282]

In addition, federal law requires that permittees keep monitoring records that identify the date, place, and time of sampling; the individual who performed the sampling; the date the analyses were performed; the individual who performed the analysis; the analytical techniques or methods used; and the result of the analyses.[283]

And federal law requires reporting within 24 hours of any noncompliance which may endanger health or the environment as follows:

> The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A report shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times), and if the noncompliance has not been corrected, the anticipated time it is expected

[278] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[279] Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(A)-(D).

[280] Code of Federal Regulations, title 40, sections 122.44 and 122.48, and part 127.

[281] Code of Federal Regulations, title 40, section 122.48.

[282] Code of Federal Regulations, title 40, section 122.42(c).

[283] Code of Federal Regulations, title 40, section 122.41(j)(3).

to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.[284]

ii. The prior permit required the permittees to develop a dry weather monitoring program to include numeric criteria for pollutants to determine when an exceedance occurred. Investigation, inspection, follow-up and reporting requirements were required if an exceedance of the numeric criteria was detected and the permittee had to immediately eliminate all detected illicit discharges, discharge sources, and connections.

The prior permit contained the following receiving water limitations and discharge prohibitions:

- Discharges into and from MS4s causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the State are prohibited.
- Discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water or groundwater are prohibited.
- Discharges from MS4s that cause or contribute the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect the beneficial uses of receiving waters) are prohibited.
- Discharges are also subject to the prohibitions in the Basin Plan, which includes but is not limited to, illicit discharges that are not composed entirely of stormwater, which are prohibited.[285]

Section B.1.-3. of the prior permit required each permittee to "effectively prohibit all types of non-stormwater discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit" or the discharge falls within a non-prohibited category of discharges.[286]

Section J. required each permittee to develop and implement an illicit discharge detection and elimination program to actively seek and eliminate illicit discharges and connections to the MS4, including the requirement to develop a dry weather monitoring program and numeric criteria for pollutants that will trigger follow-up investigations to identify and remove the source causing the exceedance. The program must include the following, at minimum:

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[284] Code of Federal Regulations, title 40, section 122.41(l)(6).

[285] Exhibit A, Test Claim, filed November 10, 2011, pages 572, 573, 598-599 (Order R9-2004-0001, Sections A., C.1., and Attachment A.).

[286] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573 (Order R9-2004-0001, Sections B.1.-B.3.).

- Implement a program to actively seek and eliminate illicit discharges and connections into its MS4. The program shall address all types of illicit discharges and connections excluding those non-storm water discharges that are exempt.[287]
- Develop or obtain an up-to-date labeled map of its entire MS4 and the corresponding drainage areas, the accuracy of which shall be confirmed and updated at least annually.[288]
- Implement the illicit discharge monitoring program in accordance with Section II.B. of the MRP to detect illicit discharges and connections.[289]
- Investigate and inspect any portion of its MS4 that, based on visual observations, monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water.[290]
- Develop numeric criteria to determine when follow-up actions will be necessary and include the criteria and follow-up procedures in each permittees' Individual Storm Water Management Plan (SWMP).[291]
- Eliminate all illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection. Illicit discharges that are a serious threat to public health or the environment must be eliminated immediately.[292]
- Implement and enforce ordinances, orders, or other legal authority to prevent and eliminate illicit discharges and connections to its MS4.[293]

[287] Exhibit A, Test Claim, filed November 10, 2011, page 593 (Order R9-2004-0001, Section J.1.).

[288] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.2.).

[289] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.3.).

[290] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

[291] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

[292] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.5.).

[293] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.6.).

- Take appropriate actions to prevent, respond to, contain and cleanup sewage spills into the MS4 and to prevent the contamination of surface water, ground water and soil to the MEP.[294]
- Promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s including the development and operation of a public hotline capable of receiving reports in both English and Spanish, 24 hours per day/seven days per week.[295]
- Respond to and resolve each reported incident and summarize all reported incidents and resolution in the annual report.[296]
- Facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes including educational activities, public information activities, and establishment of collection sites.[297]

The requirements of the illicit discharge monitoring program are in Section II.B. of the MRP and required each permittee to develop and implement a program that meets or exceeds the listed requirements within 365 days of the adoption of the prior permit. The program was required to be included in the each permittee's individual SWMP.[298] The program requirements under the prior MRP program were as follows:

- The program had to be designed to emphasize frequent, geographically widespread inspections, monitoring, and follow-up investigations to detect illicit discharges and connections.[299]
- Use the MS4 map and select illicit discharge monitoring stations at accessible points (i.e., outfalls, manholes or open channels), located downstream of potential sources of illicit discharges (i.e., commercial, industrial, and residential

[294] Exhibit A, Test Claim, filed November 10, 2011, pages 594-595 (Order R9-2004-0001, Section J.7.).

[295] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section J.8.).

[296] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section J.8.).

[297] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section J.9.).

[298] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B., page 9.

[299] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B., page 9.

areas), and *in a quantity sufficient to represent the MS4* and detect illicit discharges that may occur throughout the system.[300]

- Inspect each station at least twice between May 1st and September 30th of each year, *and more frequently if necessary to comply with Section J. of the prior permit* [the Illicit Discharge Detection and Elimination Program].[301]
- In addition to the monitoring stations, permittees were required to inspect all other dry weather flows that are observed or reported.[302]
- Record the following information at each inspected site: time since last rain, quantity of last rain, site descriptions, flow estimation, and visual observations.[303]
- If flow or ponded water is observed at a station and there has been at least 72 hours of dry weather, a field screening analysis using suitable methods to estimate the following constituents shall be conducted: specific conductance or calculate total dissolved solids,[304] turbidity, pH, temperature, and dissolved oxygen.[305]
- If field screening analysis or visual observations at a site indicate a potential illicit discharge, a sample shall be collected and analyzed for: total hardness, oil and grease, ammonia nitrogen, total phosphorus, copper (total and dissolved), surfactants (MBAS), diazinon, chlorpyrifos, lead (dissolved), nitrate nitrogen, E. coli, total coliform, and fecal coliform.[306]

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[300] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.1.a., page 9.

[301] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.1.a., page 9, emphasis added.

[302] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.1.b., page 9.

[303] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.a., page 9.

[304] Total suspended solids (TSS) are particles that are larger than 2 microns found in the water column, whereas turbidity is an optical determination of water clarity. Exhibit J (29), Fondriest Environmental, Inc., "Turbidity, Total Suspended Solids and Water Clarity." Fundamentals of Environmental Measurements, June 13, 2014, pages 2-3, https://www.fondriest.com/environmental-measurements/parameters/water-quality/turbidity-total-suspended-solids-water-clarity/ (accessed on April 5, 2022).

[305] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.b., page 9.

[306] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.c., pages 9-10.

- The permittees "shall" develop numeric criteria for field screening and analytical monitoring results that will trigger follow-up investigations to identify the source causing the exceedance of the criteria.[307]
- The permittees "shall" implement the follow-up investigation procedures identified in Section J.4. of the prior permit in the event of an exceedance of the criteria.[308] As indicated above, Sections J.4. and J.5. of the prior permit required the following:

    4. Investigation/Inspection and Follow-Up

    Each Permittee shall investigate and inspect any portion of its MS4 that, based on visual observations, monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in Section B of this Order). Each Permittee shall develop numeric criteria in accordance with Section II.B.3. of the MRP to determine when follow-up actions will be necessary. Numeric criteria and follow-up procedures shall be described in each Permittees' Individual SWMP.

    5. Elimination of Illicit Discharges and Connections

    Each Permittee shall eliminate all illicit discharges, illicit discharge sources, and illicit connections *as soon as possible after detection*. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. *Illicit discharges that are a serious threat to public health or the environment must be eliminated immediately*.[309]

- Annually report on the Illicit Discharge Detection and Elimination Program, which was required to include the following information:

    (i) Number of illicit discharges, connections and spills reported and/or identified during the reporting period;

    (ii) Number of illicit discharges or connections investigated during the reporting period and the outcome of the investigations;

    (iii) Number and types of enforcement actions taken for illicit discharges or connections during the reporting period;

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[307] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.3., page 10.

[308] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.3., page 10.

[309] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Sections J.4. and J.5.), emphasis added.

(iv) Number of times your agency's hotline was called during the reporting period, as compared to previous reporting periods;

(v) Number and location of dry weather monitoring sites that were monitored during the reporting period;

(vi) Summary of Illicit Discharge Monitoring Program results, including: 1) All inspection, field screening, and analytical monitoring results; 2) All follow-up and elimination activities; and 3) Any proposed changes to station locations and/or sampling frequencies; and

(vii) An assessment of overall program effectiveness based on the measurable goals established in the Permittee's Individual SWMP.[310]

- An annual monitoring report was also due, which had to include a discussion of the pollutants of concern and their potential sources, a "discussion of any relevant information or conclusions from the Illicit Discharge Monitoring Program," and a discussion of the progress towards meeting the goals of the prior permit.[311]

In addition to the illicit discharge monitoring program, the MRP under the prior permit included receiving waters monitoring, which along with wet weather monitoring, required the permittees to monitor mass loadings at the following triad stations and analyze a minimum of two dry weather samples from each triad stations per monitoring year: Lower Temecula Creek, Lower Murrieta Creek at United States Geological Survey Weir, and a reference station representative of natural, undeveloped conditions. "Permittees shall evaluate the reference station annually for suitability and select new reference stations as needed."[312] At each triad station, permittees were required to analyze the first sampling for the full EPA priority pollutant list identified in Code of Federal Regulations, title 40, section 122, appendix D, which includes 232 pollutants and water properties. For the remaining sampling events, analysis could be reduced to the constituents listed below, "*unless data from the first storm indicate the need for additional constituents*."[313]

Trace metals: total cadmium, total chromium, total copper, total nickel, total lead, total zinc;

Nutrients: ammonia, total Kjeldahl nitrogen, nitrate, total phosphorus;

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[310] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.7., page 13.

[311] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.B.1.3., page 16.

[312] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., pages 2-3.

[313] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., page 3, emphasis added.

Bacteria: total coliform, fecal coliform, E. coli;

Pesticides: diazinon, chlorpyrifos, other organophosphate pesticides;

Conventionals: temperature, pH, hardness, specific conductance, dissolved oxygen, MBAS;

Polycyclic aromatic hydrocarbons;

Volatiles; and

Total suspended solids.[314]

The permittees were required to use the data results from the receiving water monitoring to evaluate the extent and cause of the pollutants in receiving waters. Specifically, the permittees were required to use Toxicity Identification Evaluations (TIEs) to determine the causes and Toxicity Reduction Evaluations (TREs) to identify sources.[315]

In addition, the receiving water monitoring program included tributary monitoring where the permittees were required to:

- Collect a grab sample from two dry weather events during each monitoring year at the following four tributary stations: (1) Warm Springs Creek, near the confluence with Murrieta Creek; (2) Santa Gertudis Creek, near the confluence with Murrieta Creek; (3) Long Canyon Creek near the confluence with Murrieta Creek; and (4) Redhawk Channel, near the confluence with Temecula Creek.[316]
- If flow is insufficient to collect a sample, this shall be documented in the subsequent annual report.[317]
- Tributary samples shall be analyzed for constituents of concern. Constituents of concern shall be determined based on exceedances of water quality objectives at respective triad and dry weather monitoring stations, as well as land uses in the area.[318]

Section B of the prior permit, which prohibits non-stormwater discharges into the MS4, then required that "Each Permittee shall examine its Illicit Discharge Monitoring results

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[314] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Table 1, pages 3-4.

[315] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.4., page 5.

[316] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.5.a., page 7.

[317] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.5.b., page 8.

[318] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.5.c., page 8.

collected in accordance with Requirement J.3 of this Order and Section II.B of the MRP to identify water quality problems which may be the result of any non-prohibited discharge category(ies) listed above in Requirement B.2. *Follow-up investigations shall be conducted as necessary* to identify and control any non-prohibited discharge category(ies) listed above."[319]

In addition, Section C of the prior permit, which identifies the receiving water limitations, required that if exceedance(s) of water quality standards persist notwithstanding implementation of the SWMP and other requirements of this Order, the Permittee shall assure compliance with water quality standards by notifying and submitting a report to the Regional Board, and revising its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.[320]

Finally, the prior permit identified the federal law requirement that permittees shall report to the Regional Board any noncompliance that may endanger health or the environment, orally within 24 hours and written submission within five days of when the permittee becomes aware of the situation.[321]

b. The requirements imposed by Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit do not mandate a new program or higher level of service.

i. Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit establish NALs for specified pollutants and when an exceedance of a NAL is detected during monitoring, the permit requires investigation, inspection, follow-up and reporting and requires the claimant to immediately eliminate all detected illicit discharges, discharge sources, and connections.

The test claim permit contains the same receiving water limitations and discharge prohibitions as the prior permit, including the requirement to effectively prohibit non-stormwater discharges into the MS4 unless authorized by another permit or not prohibited and the prohibition of discharges from the MS4 that cause or contribute to a violation of water quality standards.[322]

While the prior permit directed the copermittees to develop numeric criteria for pollutants to determine when an exceedance of a pollutant occurred requiring follow-up

[319] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section B.4.), emphasis added.

[320] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.) , e emphasis added.

[321] Exhibit A, Test Claim, filed November 10, 2011, page 602 (Order R9-2004-0001, Attachment B.)

[322] Exhibit A, Test Claim, filed November 10, 2011, pages 199-200, 270-271 (test claim permit, Sections A. and B., and Attachment A.).

actions and elimination of the illicit discharge, the test claim permit establishes numeric action levels "to help provide an assessment of the effectiveness of the prohibition of non-storm water discharges" specifically for fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, methyl blue active substances (MBAS), iron, manganese in inland surface waters, and for priority pollutants (cadmium, copper, chromium III, chromium IV (hexavalent), lead, nickel, silver, and zinc), and requires the permittees to monitor for these action levels.[323] The action levels are based on existing narrative or numeric water quality objectives and criteria defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP).[324] Specifically, action levels for fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, MBAS, iron, and manganese in inland surface waters were established as follows:

> For discharges to inland surface waters, action levels are based on the USEPA water quality criteria for the protection of aquatic species, the USEPA water quality criteria for the protection of human health, water quality criteria and objectives in the applicable State plans, effluent concentration available using best available technology, and 40 CFR 131.38. Since the assumed initial dilution factor for the discharge is zero and a mixing zone is not allowed, a non-storm water discharge from the MS4 could not cause an excursion from numeric receiving water quality objectives if the discharge is in compliance with the action levels contained in the Order.[325]

And action levels for the priority pollutants were established as follows:

> Priority pollutants analyzed included Cadmium, Copper, Chromium, Lead, Nickel, Silver and Zinc. These priority pollutants are likely to be present in non-storm water MS4 discharges (see Finding C.3) though dissolved metal effluent monitoring was not conducted under the previous Order. The most stringent applicable water quality criteria have been identified for these seven metals and, excluding Chromium (VI), and all are dependent on receiving water hardness. The conversion factors for Cadmium and Lead are also water hardness dependent (40 CFR [section] 131.38(b)(2)). These levels are established as the action levels for these constituents.

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[323] Exhibit A, Test Claim, filed November 10, 2011, pages 204-205 (test claim permit, Section C.5.).

[324] Exhibit A, Test Claim, filed November 10, 2011, page 480 (Fact Sheet/Technical Report).

[325] Exhibit A, Test Claim, filed November 10, 2011, page 481 (Fact Sheet/Technical Report).

> While effluent monitoring is not available from the previous Order, the monitoring that was done for metal concentrations in receiving waters often lacked a measurement of receiving water hardness. Due to the multiple point source discharges of non-storm water from the MS4, a discharge may enter a receiving water whose hardness will vary temporally. In addition, hardness may vary spatially within and among receiving waters.
>
> However, other information is available to determine the appropriateness of an action level. Existing monitoring concentrations absent of receiving water data, no dilution credit or mixing zone allowance, current 303(d) listings of receiving waters for other pollutants, receiving water monitoring data, and the classification of waters as critical habitat for endangered and species of concern, provide evidence that NALs are appropriate for these priority pollutants at this time in order to ensure that the Copermittees comply with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s.[326]

NALs were established because the Regional Board found that dry weather monitoring in receiving waters that was conducted under the prior permit identified the presence of bacteria, pH, dissolved oxygen, nitrate, turbidity, MBAS, and metals, all in concentrations that exceed water quality criteria.[327] The Regional Board also found that the exceedances relating to non-stormwater discharges now require it to establish TMDLs for the pollutants to eliminate the impairment in the waters and until that is done, early control actions are warranted and required:

> . . . there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria (including Fecal Coliform and E. Coli), Copper, Manganese, Iron, Chlorpyrifos, Diazinon, Sulfates, Phosphorous, Nitrogen, Total Dissolved Solids (TDS), and Toxicity. In accordance with CWA section 303(d), the San Diego Water Board is required to establish TMDLs for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.[328]

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[326] Exhibit A, Test Claim, filed November 10, 2011, pages 481-482 (Fact Sheet/Technical Report, Directive C).

[327] Exhibit A, Test Claim, filed November 10, 2011, page 481 (Fact Sheet/Technical Report, Discussion of Directive C).

[328] Exhibit A, Test Claim, filed November 10, 2011, page 463 (Fact Sheet/Technical Report, Discussion of Finding E.9.).

The activities required by the test claim permit are cross-referenced in Sections C., F.4.d. and F.4.e., and Section II.C. of Attachment E., and are listed below with citations to each activity.

1. Each copermittee, beginning no later than July 1, 2012, must implement the NAL monitoring as described in Attachment E. of this Order.[329]
2. Attachment E. is the Monitoring and Reporting Program for the test claim permit, and Section II.C. of Attachment E., which the claimants pled, requires each copermittee to collaborate with the other copermittees to conduct, and report on a year-round watershed based dry weather non-storm water MS4 discharge monitoring program.[330] The following monitoring components are required:
    a. MS4 Outfall monitoring. Sampling stations must be located at major outfalls to allow monitoring of effluent at the end of pipe prior to discharge into the receiving waters and other outfall sampling points (or any other point of access such as manholes) identified by the copermittees as potential high risk sources of polluted effluent. The copermittees are required to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea.[331]
    b. Clearly identify each dry weather effluent analytical monitoring station on the MS4 map as either a separate geographic information system (GIS) layer or a map overlay.[332]

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[329] Exhibit A, Test Claim, filed November 10, 2011, pages 202, 250 (test claim permit, Sections C.1., F.4.d.). Section C.1. states that, "Each copermittee, beginning no later than July 1, 2012, must implement the NAL monitoring as described in Attachment E of this Order." Section F.4.d. requires that each copermittee to conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Attachment E.

[330] Exhibit A, Test Claim, filed November 10, 2011, page 309 (test claim permit, Attachment E., Section II.C.) The Findings in the test claim permit state that "Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. In some cases, however, this added flexibility provides more, and possibly more effective, alternatives for minimizing waste discharges." (Exhibit A, Test Claim, filed November 10, 2011, page 193 (test claim permit, Finding 4.a.).

[331] "A representative percentage determination must consider hydrologic conditions, total drainage area of the site, population density of the site, traffic density, age of the structures or buildings in the area, and land use types (commercial, residential and industrial)." Exhibit A, Test Claim, filed November 10, 2011, pages 309-310 (test claim permit, Section C.4.; Attachment E., Sections II.C.1.a.(1) and II.C.1.b.(1), footnote 12).

[332] Exhibit A, Test Claim, filed November 10, 2011, page 309 (test claim permit, Attachment E., Section II.C.2.a.(2)).

c. Develop or update written procedures and implement effluent analytical monitoring including field observations, monitoring, and analyses to be conducted. These procedures must be consistent with 40 CFR part 136, Guidelines Establishing Test Procedures for the Analysis of Pollutants. At a minimum, the procedures must meet the following criteria:

- Sampling Frequency. Sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. All monitoring conducted must be preceded by a minimum of 72 hours of dry weather.
- If a ponded MS4 discharge is observed at a monitoring station, record the observation and collect at least one grab sample. Estimate the discharge flow by measuring the width of water surface, approximate depth of water, and approximate flow velocity.
- Effluent samples must undergo analytical laboratory analysis for (a) all constituents described in Table 1. Analytical Testing for Mass Loading and Stream Assessment of this Order,[333] (b) constituents with assigned NALs, and (c) Total Residual Chlorine.
- If the station is dry (i.e. no flowing or ponded MS4 discharge is observed), make and record all applicable observations on the MS4 outfall and receiving waters, including any evidence of past non-stormwater flows and the presence of trash.[334]

3. Investigate Source of Exceedance:

a. Develop or update response criteria for dry weather non-stormwater effluent analytical monitoring results that include the NALS as described in Section C., an evaluation of LC_{50} levels for toxicity to appropriate test organisms,[335] and a

[333] Table 1 Analytical Testing for Mass Loading (II.A.1.) and Stream Assessment (II.A.2.): Conventionals, Nutrients, Hydrocarbons: Total Dissolved Solids, Total Suspended Solids, Turbidity, Total Hardness, pH, Specific Conductance, Temperature, Dissolved Oxygen, Total Phosphorus, Dissolved Phosphorus, Nitrite, Nitrate, Total Kjeldahl Nitrogen, Ammonia, Biological Oxygen Demand, 5-day, Chemical Oxygen Demand, Total Organic Carbon, Dissolved Organic Carbon, Methylene Blue Active Substances, Oil and Grease, Sulfate. Pesticides: Diazinon, Chlorpyrifos, Malathion, Carbamates, Pyrethroids. Metals (Total and Dissolved): Arsenic, Cadmium, Total Chromium, Hexavalent Chromium, Copper, Lead, Iron, Manganese, Nickel, Selenium, Zinc, Mercury, Silver, Thallium. Bacteriological (mass loading): E. coli, Fecal Coliform, Enterococcus. (Exhibit A, Test Claim, filed November 10, 2011, page 301 (test claim permit, Attachment E., Table 1).

[334] Exhibit A, Test Claim, filed November 10, 2011, pages 250, 310 (test claim permit, Section F.4.d.; Attachment E., Section II.C.1.b.).

[335] Median lethal concentration, or LC50, is the average concentration of a chemical capable of killing one-half of a population of test animals exposed to the chemical under

consideration of 303(d) listed waterbodies and environmentally sensitive areas, to determine when follow-up investigations will be performed in response to monitoring.[336]

b. In response to an exceedance of a NAL, the copermittees having jurisdiction must investigate and seek to identify the source of the exceedance in a timely manner, as follows:

- Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.
- Field screen data. Within two business days of receiving dry weather field screening results that exceed action levels, the copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the annual report.
- Analytical data. Within five business days of receiving analytical laboratory results that exceed action levels, the copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the annual report.[337]

c. Depending on the source of the exceedance, the following action must be taken:[338]

- If the source is natural in origin and in conveyance into the MS4, then the copermittee must report its findings and documentation of its source investigation in its annual report.[339]
- If the source is an illicit discharge or connection, then the copermittee must eliminate the discharge to its MS4 and report the findings, including any enforcement actions taken, and documentation of the source investigation in its annual report. If the copermittee is unable to eliminate

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test conditions. Exhibit J (30), Medical Dictionary, LC50, https://medical-dictionary.thefreedictionary.com/LC50 (accessed on April 6, 2022).

[336] Exhibit A, Test Claim, filed November 10, 2011, pages 251, 311 (test claim permit, Section F.4.e.1.; Attachment E., Section II.C.2.a.).

[337] Exhibit A, Test Claim, filed November 10, 2011, pages 251, 311 (test claim permit, Section F.4.e.2.; Attachment E., Section II.C.2.b.).

[338] Exhibit A, Test Claim, filed November 10, 2011, pages 202, 311 (test claim permit, Section C.2.; Attachment E., Section II.C.2.b.).

[339] Exhibit A, Test Claim, filed November 10, 2011, page 202 (test claim permit, Section C.2.a.).

the source of discharge prior to the annual report submittal, then the copermittee must submit, as part of its annual report, its plan and timeframe to eliminate the source.[340]

- If the source is an exempted category of non-stormwater discharge, then the copermittee must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition. The copermittee must submit its findings including a description of the steps taken to address the discharge and the category of discharge in its annual report. The steps taken must include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge and the anticipated schedule for doing so. The copermittee must submit a summary of its findings with the Report of Waste Discharge.[341]
- If the source is a non-storm water discharge in violation or potential violation of an existing separate NPDES permit, then the copermittee must report, within three business days, the findings including all pertinent information regarding the discharger and discharge characteristics to the Regional Board.[342]
- If the source is unidentifiable after taking and documenting reasonable steps to do so, then the copermittee must perform additional focused sampling. If the results of the additional sampling indicate a recurring exceedance of NALs with an unidentified source, then the copermittee must update its programs (including, where applicable, updates to the watershed workplan, retrofitting considerations, and program effectiveness work plans) within a year to address the common contributing sources and include the updates in its annual report.[343]

d. Respond to notifications: Each copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) made to the copermittee in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.[344]

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[340] Exhibit A, Test Claim, filed November 10, 2011, page 202 (test claim permit, Section C.2.b.).

[341] Exhibit A, Test Claim, filed November 10, 2011, page 202 (test claim permit, Section C.2.c.).

[342] Exhibit A, Test Claim, filed November 10, 2011, pages 202-203 (test claim permit, Section C.2.d.).

[343] Exhibit A, Test Claim, filed November 10, 2011, page 203 (test claim permit, Section C.2.e.).

[344] Exhibit A, Test Claim, filed November 10, 2011, pages 251 (test claim permit, Section F.4.e.3.).

e. Report, during any annual reporting period in which one or more exceedances of NALs have been documented, a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.[345]

The test claim permit further explains that an exceedance of a NAL does not alone constitute a violation of the permit, but could indicate non-compliance with the requirement to effectively prohibit non-stormwater discharges. A failure to timely undertake required source investigation and elimination actions following an exceedance of a NAL, however, is a violation of the permit.

> An exceedance of an NAL does not alone constitute a violation of the provisions of this Order. An exceedance of an NAL may indicate a lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. Neither the absence of exceedances of NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order.[346]

ii. The requirements imposed by Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit do not mandate a new program or higher level of service.

The claimants contend that Sections C., F.4.d. and F.4.e., and Section II.C. of Attachment E. impose reimbursable state-mandated activities and that federal law does not require the imposition of numeric action levels for pollutants for MS4 NPDES permit holders.

> The language of the CWA, as well as the relevant authority discussing federal requirements for an MS4 NPDES Permit under the Act, confirm that no numeric limits, whether or not styled as "action levels," are *required* to be included within an MS4 permit. (*See, e.g., Defenders of Wildlife, supra*, 191 F.3d at 1163 and 1165 ["Industrial discharges must comply strictly with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges;" "the *statute unambiguously demonstrates* that Congress did not require municipal storm-sewer dischargers to strictly comply with 33 U.S.C. §

[345] Exhibit A, Test Claim, filed November 10, 2011, page 203 (test claim permit, Section C.3.).

[346] Exhibit A, Test Claim, filed November 10, 2011, page 203 (Directive C.3.).

1311(b)(1)(C).”]; *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874 (“*BIA*”) (“With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards without specific numeric effluent limits and to instead impose ‘controls to reduce the discharge of pollutants to the maximum extent practicable.’”); *Divers’ Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256 (“In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality based numerical limitations.”); State Board Order No. 2000-11, p. 3 (“In prior orders this Board has explained the need for the municipal stormwater programs *and the emphasis on BMPs in lieu of numeric effluent limitations*.”)(emphasis supplied); State Board Order No. 2006-12, p. 17 [“Federal regulations do not require numeric effluent limitations for discharges of stormwater.”]; and State Board Order No. 91-03, pgs. 30-31 (“*We . . . conclude that numeric effluent limitations are not legally required*. Further we have determined that the program of prohibitions, source control measures and ‘best management practices’ set forth in the Permit constitutes effluent limitations as required by law.’”) (emphasis supplied).[347]

The claimants further contend that NALs are similar to strict numeric effluent limits in that they impose new mandated requirements on the claimants to address exceedances of NALs. Upon an exceedance, the claimants are required to implement various measures to comply with NALs, regardless of the feasibility of complying. Failure to address NAL exceedances is a violation of the test claim permit. “In light of these facts, the NAL mandates went beyond what is required to be imposed in an MS4 permit, and was therefore not a federal mandate. Having only general authority in the CWA regulations, the RWQCB made a ‘true choice’ in deciding to impose these specific mandates.”[348]

Finally, the claimants contend that there were no NAL-related requirements in the prior permit and, in response to the Draft Proposed Decision, the claimants contend that the following activities are new:

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[347] Exhibit A, Test Claim, filed November 10, 2011, page 42 (Test Claim narrative); see also, Exhibit G, Claimants’ Comments on the Draft Proposed Decision, filed May 19, 2023, page 7.

[348] Exhibit A, Test Claim, filed November 10, 2011, page 43 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, 765; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593; Exhibit G, Claimants’ Comments on the Draft Proposed Decision, filed May 19, 2023, page 7.

Section II.C.I.a.(I) of the Test Claim Permit Monitoring and Reporting Program (Attachment E to the Test Claim Permit) ("Test Claim Permit MRP") required that permittees "must" sample "at major outfalls" and "[o]ther outfall sampling points... identified by the Copermittees as potential high risk sources of polluted effluent or as identified under Section C.4 of the Order." The Test Claim Permit also required permittees to develop monitoring plans "to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year."[Fn. omitted.]

By comparison, the Monitoring and Reporting Program under the 2004 Permit, No. R9- 2004-001 ("2004 Permit MRP") gave permittees the discretion to select "Illicit Discharge Monitoring stations" within their jurisdiction. The 2004 Permit MRP required that permittees "inspect" Illicit Discharge Monitoring stations twice per year. Only if there was the presence of ponded or flowing water was a "field screening" required, and then, only if the field screening indicated a potential illicit discharge, would a sample be required to be collected for analysis. 2004 Permit MRP at 9.

The Test Claim Permit afforded Claimants no such discretion; all sampling stations were required to be monitored and sampled for multiple additional analytes not required under the previous 2004 Permit. In the Test Claim Permit Fact Sheet, the Water Board itself acknowledged that this was an increase in services required of permittees: "The Order requires an increase in the number and type of pollutants sampled in non-storm water from major outfalls.... This Order requires non-storm water discharges to be sampled for *additional* pollutants . . ." [Fn. omitted.]

The DPD concludes that the outfall monitoring requirement, though not required in the 2004 Permit, was not "new" because federal NPDES regulations required that dischargers must effectively monitor for permit compliance. DPD at 111. However, those regulations did not specify where dischargers must monitor - the Test Claim Permit did, and the outfall monitoring represented a significant increase in the monitoring obligations imposed on permittees. Under *LA County Permit Appeal I supra*, the general federal NPDES monitoring provisions did not represent a federal mandate. Similarly, those requirements did not mean that the increased sample analysis requirements in the Test Claim Permit were not "new," as the DPD concludes (at 112).

The Test Claim Permit also imposed increased programmatic requirements related to dry weather flows. The 2004 Permit allowed permittees the discretion to establish "numeric criteria" for field screening and analytical monitoring result "that will trigger follow-up investigations to identify the source causing the exceedance of the criteria" and to describe the numeric criteria and follow-up procedures in their Storm Water Management Plans. [Fn. omitted.] By contrast, the Test Claim Permit

specified a detailed reporting and analytical matrix for permittees. For example, if the permittees believed the source of a NAL exceedance was natural in origin, they were required to "report its findings and documentation of its source investigation" to the Water Board in their Annual Report. [Fn. omitted.] There was no similar requirement in the 2004 Permit.

If water quality data or conditions indicated a potential illegal discharge or connection, the Test Claim Permit required permittees to address them "immediately" (for "obvious illicit discharges") and to initiate an investigation within two business days (of receiving dry weather field screening results that exceeded NALs) or within five business days (of receiving analytical laboratory results that exceeded NALS) to identify the source or to document the rationale for why the discharge "does not pose a threat to water quality and does not need further investigation." Such documentation was to be included in the Annual Report. [Fn. omitted.] The 2004 Permit required none of these specific investigation and documentation obligations.

Under the Test Claim Permit, if a permittee was unable to identify the source of a NAL exceedance "after taking and documenting reasonable steps to do so," it was required to perform "additional focused sampling."[Fn. omitted.] If the results of that sampling indicated a recurring exceedance of NALs from an unidentified source, the permittee was required to "update its programs within a year to address the common contributing sources that may be causing such an exceedance."[Fn. omitted.] The permittee's Annual Report was required to include such updates, including where applicable, updates to watershed workplans, retrofitting considerations and program effectiveness work plans. [Fn. omitted.] None of these requirements was in the 2004 Permit.

Permittees were also required during any annual reporting period in which one or more NAL exceedances were documented to include "a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters." [Fn. omitted.] This requirement was not in the 2004 Permit.[349]

The Water Boards contend that the imposition of NALs do not constitute a reimbursable state-mandated program, but are necessary to meet the federal requirement that each permittee effectively prohibit all types of unauthorized non-storm water discharges into its MS4. This requirement has been in place for decades. The NALs provisions are designed to help achieve compliance with the federal standard — not to impose a new program or a higher level of service. The level of service is the same as has been

[349] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 9-10.

required and expected of copermittees in prior permits. Like the test claim permit, the prior permit contained specific non-stormwater or dry-weather monitoring and follow-up requirements, for example:[350]

> Directive B.1., ["Each permittee shall effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or authorized in accordance with Requirements B.2. and B.3 below."], Directive B.4, "Each Permittee shall examine its Illicit Discharge Monitoring results ... to identify water quality problems which may be the result of any non-prohibited discharge category(ies) listed above in Requirement B.2. Follow-up investigations shall be conducted as necessary to identify and control ... [,]" and Directive J.4., "Each Permittee shall develop numeric criteria in accordance with section I1.B.3 of the MRP to determine when follow-up actions will be necessary."[351]

The Water Boards further contend that the action levels are based on applicable water quality objectives from the Basin Plan and other water quality control plans. The determination to include action levels resulted from evaluation of available information leading to the conclusion that claimants' reliance on existing BMPs for almost 20 years had yet to result in compliance with applicable water quality standards.[352]

The Commission finds that the requirements imposed by Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit do not mandate a new program or higher level of service.

First, the claimants mistakenly rely on provisions of the CWA that require NPDES permits authorizing *stormwater* discharges from MS4s, to reduce the discharge of pollutants to the maximum extent practicable (MEP) under 33 U.S. Code section 1342(p)(3)(B)(iii), to argue that the requirements in Sections C. and F.4.d. and F.4.e. of the test claim permit are mandated by the state. Federal law includes a separate, more stringent requirement for *non-stormwater* discharges into the MS4. As indicated in the background for this section, 33 U.S. Code section 1342(p)(3)(B)(ii) requires that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."[353] The distinction between the requirements for stormwater and non-stormwater discharges is explained in Finding 14 of the test claim permit as follows:

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[350] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 22-23.

[351] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 23, footnote 114.

[352] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 21-22.

[353] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

> Non-storm water (dry weather) discharge from the MS4 is not considered storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable(MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal . . . *Stormwater Discharges* (emphasis added)" from the MS4. Rather, non-storm water discharges, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited.[354]

US EPA adopted regulations to implement the effective prohibition of non-stormwater discharges into the MS4 on November 16, 1990, by requiring operators of MS4s to submit, as part of their application for a NPDES permit, a description of their existing management program to control pollutants from the MS4 and the existing program to identify illicit connections to the MS4.[355] The application must also include the results of a field screening analysis for illicit connections and illegal dumping.[356] The federal regulations require that field screening points or major outfalls shall be randomly located throughout the storm sewer system and selected by placing a grid over a drainage system map that identifies those cells of the grid that contain a segment of the storm sewer system or major outfall. The field screening analysis shall include a narrative description of visual observations made during dry weather periods. If any flow is observed, grab samples must be collected and analyzed for color, odor, turbidity, the presence of an oil sheen or surface scum, and any other relevant observations regarding the potential presence of non-stormwater discharges or illegal dumping. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (surfactants) shall be provided, along with a flow rate.[357]

Federal regulations also require a proposed management program to detect and remove illicit discharges.[358] The program must include a description of procedures for ongoing field screening activities, including areas or locations to be evaluated;[359] and procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[360] Federal regulations also contain reporting requirements.[361] When adopting these regulations, the US EPA stated the following:

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[354] Exhibit A, Test Claim, filed November 10, 2011, page 187 (test claim permit, Finding 14.).

[355] Code of Federal Regulations, title 40, section 122.26(d)(1)(v).

[356] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(D).

[357] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(D).

[358] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[359] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2).

[360] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(3).

[361] Code of Federal Regulations, title 40, sections 122.48, 122.41.

> Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer. As discussed in more detail below, today's rule begins to implement the "effective prohibition" by requiring municipal operators of municipal separate storm sewer systems serving a population of 100,000 or more to submit a description of a program to detect and control certain non-storm water discharges to their municipal system. Ultimately, such non-storm water discharges through a municipal separate storm sewer must be either removed from the system or become subject to an NPDES permit . . . .[362]

If a municipality does not implement a program to detect and remove illicit discharges, or fails to obtain an NPDES permit to specifically allow for the discharge, then the municipality violates the CWA and such noncompliance constitutes "grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application" under federal law.[363]

Accordingly, federal law has long required the claimants to effectively prohibit non-stormwater discharges by implementing a program to detect and remove illicit discharges, which includes field screening and monitoring; preparing a map overlay of the monitoring stations and field screening points; procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater pollution; removal of the discharge; and reporting the results. These activities are not new.

In addition, the claimants mistakenly contend that the NALs "are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittees to meet such numeric limits."[364] The test claim permit simply identifies action levels for each pollutant that, if detected in monitoring and field screening to be in excess of the action level, triggers the investigation, identification of the discharge, removal, and reporting activities required by federal law. The claimants do not violate the permit by exceeding the NAL, as implied by the claimant; a violation occurs only if the claimant fails to timely implement the required actions following an exceedance of an action

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[362] Exhibit J (33), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 (November 16, 1990), page 6.

[363] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), and 122.41(a).

[364] Exhibit A, Test Claim, filed November 10, 2011, page 43 (Test Claim narrative).

level.[365] [366] In this sense, NALs established in the test claim permit function the same as the numeric criteria required by the prior permit.[367]

Moreover, the numeric criteria required under the prior permit were not set at "discretionary" levels, as suggested by the claimants.[368] Rather, the prior permit required the numeric criteria to be set at limits that would detect the presence of an illicit discharge and to ensure compliance with the receiving water limitations and discharge prohibitions, which prohibited discharges from the MS4 that cause or contribute to exceedances of water quality standards or that contribute to pollution in the receiving waters.[369] Under the prior permit, if an exceedance of the numeric criteria for a pollutant was found, follow up investigations were required to identify and remove any illicit discharge and control any exempt, non-prohibited discharge.[370] Thus, the numeric

[365] Exhibit A, Test Claim, filed November 10, 2011, page 203 (test claim permit, Section C.3.).

[366] This is in contrast to the industrial dischargers, which are subject to strict liability standards for exceeding effluent limits. Industrial dischargers are required to meet applicable effluent limitations with the "best practicable control technology currently available," and are required to achieve "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance…or any other Federal law or regulations, or required to implement any applicable water quality standard established pursuant to this chapter." United States Code, title 33, section 1311(b)(1)(C); *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1166. The US EPA's Multi-Sector General Permit for Stormwater Discharges, applicable to industrial activity, states simply, "Your discharge must be controlled as necessary to meet applicable water quality standards." Any exceedance of an applicable water quality standard by an industrial discharger requires corrective action, reporting, and potential monetary penalties for failing to strictly comply with the effluent limit. Exhibit J (14), EPA, Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity, May 27, 2009, pages 21-24, 183, ("The CWA provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act…").

[367] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Section J.4.).

[368] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 9.

[369] Exhibit A, Test Claim, filed November 10, 2011, pages 572, 573, 598-599 (Order R9-2004-0001, Sections A., C.1., and Attachment A.).

[370] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section B.4.), emphasis added.

criteria under the prior permit triggered the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

The NALs do the same thing. As indicated above, the CWA requires that NPDES permits for MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."[371] Federal law also requires that if a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board must develop permit limits as necessary to meet water quality standards.[372] In this case, the Regional Board found, based on the dry weather monitoring in receiving waters conducted under the prior permit, that concentrations of bacteria, pH, dissolved oxygen, nitrate, turbidity, MBAS, and metals exceed water quality criteria, and that the exceedances relating to non-stormwater discharges require it to now establish TMDLs.[373] Thus, the Regional Board established the action levels that trigger the federally-required activities to detect and eliminate the presence of an illicit discharge and to comply with water quality standards. Like the prior permit that required the numeric criteria to protect water quality standards, the NALs were established by the Regional Board "at levels appropriate to protect water quality standards [, which] is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges."[374] The action levels are based on previously adopted numeric or narrative water quality objectives and criteria for pollutants in the receiving waters as identified in the Ocean Plan; the Basin Plan; the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP); and the California Toxics Rule.[375] The action levels determine the presence of an illicit discharge detected with monitoring and field screening, which then triggers the existing federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board. Thus, under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers existing federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

The test claim permit, however, does contain more specificity to effectively prohibit non-stormwater discharges, remove the illicit discharge, and to protect the region's water quality standards, when compared to the prior permit. The claimants contend that these changes mandate the permittees to perform new activities, which they allege were not

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[371] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

[372] Code of Federal Regulations, title 40, section 122.44(d)(1).

[373] Exhibit A, Test Claim, filed November 10, 2011, pages 463, 482 (Fact Sheet/Technical Report).

[374] Exhibit A, Test Claim, filed November 10, 2011, page 197 (test claim permit, Finding E.10.).

[375] Exhibit A, Test Claim, filed November 10, 2011, pages 197-198 (test claim permit, Finding E.10.).

required by the prior permit. However, while there may be more specificity in the language, the claimants are not mandated by the test claim permit to perform any new activities.

The claimants allege that under the prior permit, the permittees had to select the monitoring stations and inspect only twice per year, and conduct field screening only if there was a presence of ponded or flowing water. But now, the claimants allege the test claim permit requires that all sampling stations be monitored, inspected, and sampled all year.[376]

However, the test claim permit requires sampling of a *representative percentage* of major outfalls within each hydrologic area to allow monitoring of effluent at the end of pipe prior to discharge into the receiving waters, and other outfall sampling points (or any other point of access such as manholes) identified by the claimants as potential high risk sources of polluted effluent.[377] If a ponded MS4 discharge is observed at a monitoring station, the permittees are required to record the observation and collect at least one grab sample. These requirements are not new. The prior permit did not specifically require monitoring at major outfalls, but required that the monitoring stations be at accessible points, *including outfalls*, manholes or open channels located downstream of potential sources of illicit discharges (i.e., commercial, industrial, and residential areas), and *in a quantity sufficient to represent the MS4 and detect illicit discharges that may occur throughout the system*.[378] In addition to the monitoring stations, permittees were required to inspect all dry weather flows that were observed or reported.[379] The Fact Sheet explains that "[w]hile it is important to assess all major outfall discharges from the MS4 to the receiving waters, to date the Copermittees have implemented a dry weather monitoring program that has consisted of 4 water quality parameters collected in receiving waters, not major outfalls."[380] However, the federal CWA has always required an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit, including the receiving water limitations and discharge prohibitions.[381] And federal law also requires field screening points located downstream of any sources of

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[376] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 9-10.

[377] Exhibit A, Test Claim, filed November 10, 2011, pages 203, 309 (test claim permit, Section C.4; Attachment E., Section II.C.1.a.1.).

[378] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.1.a., page 9, emphasis added.

[379] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Sections II.B.1.b. and II.B.2.b., page 9.

[380] Exhibit A, Test Claim, filed November 10, 2011, page 478 (Fact Sheet/Technical Report).

[381] United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, sections 122.43(a), 122.44(i)(1).

suspected illegal or illicit activity.[382] Here, the Regional Board found that dry weather monitoring in receiving waters that was conducted under the prior permit identified the presence of bacteria, pH, dissolved oxygen, nitrate, turbidity, MBAS, and metals, all in concentrations that exceed water quality criteria, and that the exceedances related to non-stormwater discharges.[383] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[384] Thus, the prior permit specifically required monitoring stations "*in a quantity sufficient to represent the MS4 and detect illicit discharges."* The specificity of the sampling locations in the test claim permit does not constitute a new state-mandated activity.

Moreover, under the prior permit, if flow or ponded water was observed at a station and there has been at least 72 hours of dry weather, a field screening analysis was required and a sample collected for analysis.[385] The same is true under the test claim permit.[386]

The test claim permit also specifies that claimants must "conduct, and report on a year-round watershed based Dry Weather Non-stormwater MS4 Discharge Monitoring Program."[387] The prior permit required that "dry weather analytical and field screening monitoring shall be conducted at each identified station at least twice between May 1st and September 30th of each year, *or as more frequently as the Permittee determines is necessary to comply with the order*."[388] The Findings in the test claim permit indicate that the permittees had not previously complied with applicable water quality standards and did not effectively prohibit non-stormwater discharges under the prior permit. Finding 9 states the following:

> The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicate that the majority of the

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[382] California Code of Regulations, title 40, section 122.26 d)(1)(iv)(D).

[383] Exhibit A, Test Claim, filed November 10, 2011 , pages 463, 481 (Fact Sheet/Technical Report, Discussion of Finding E.9. and Directive C.).

[384] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[385] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.b., page 9.

[386] Exhibit A, Test Claim, filed November 10, 2011, pages 250, 310 (test claim permit, Section F.4.d.; Attachment E., Section II.C.1.b.).

[387] Exhibit A, Test Claim, filed November 10, 2011, page 309 (test claim permit, Attachment E., Section II.C.).

[388] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.1.a., page 9, emphasis added.

> monitored receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are the leading cause of such impairments in Riverside County.[389]

And Finding 14 states that "dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the CWA."[390] The claimants were therefore required by the prior permit to conduct dry weather monitoring and field screening more often than twice per year, and as necessary to comply with the receiving water limitations and discharge prohibitions. Thus, a year-round monitoring program is not a new requirement.

The claimants also contend that monitoring is now required for additional pollutants, relying on the Fact Sheet, which states the following:

> The Order requires an increase in the number and type of pollutants sampled in nonstorm water from major outfalls. To date, Copermittees have not sampled major outfalls, only receiving waters, and sampling was limited to total dissolved solids, dissolved oxygen, pH, turbidity and specific conductance. Additional sampling was generally, though not always, conducted by Copermittees if initial sampling exceeded a Copermittee threshold. With the exception of dissolved oxygen, the current thresholds do not represent water quality objectives, as sampling may not trigger a threshold, but may still be exceeding a water quality objective. This Order requires non-storm water discharges to be sampled for additional pollutants including indicator bacteria, nutrients (nitrate and phosphorous), Methylene Blue Active Substances (MBAS), pesticides and metals. These pollutants are expected to be present in nonstorm water discharges, are pollutants for which receiving waters are 303(d) listed as impaired or have been identified as present through receiving water monitoring.[391]

The Fact Sheet is consistent with the illicit discharge monitoring requirements in the prior Monitoring and Reporting Program, which required that if flow or ponded water is observed at a station and there has been at least 72 hours of dry weather, a field screening analysis using suitable methods to estimate the following constituents shall be conducted for the following: specific conductance or calculate total dissolved solids,

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[389] Exhibit A, Test Claim, filed November 10, 2011, page 186 (test claim permit, Finding 9.).

[390] Exhibit A, Test Claim, filed November 10, 2011, page 187 (test claim permit, Finding 14.).

[391] Exhibit A, Test Claim, filed November 10, 2011, page 478 (Fact Sheet/Technical Report).

turbidity, pH, temperature, and dissolved oxygen.[392] The test claim permit now requires that effluent samples be analyzed for the constituents with assigned NALs (fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, methyl blue active substances (MBAS), iron, manganese in inland surface waters, and priority pollutants (cadmium, copper, chromium III, chromium IV (hexavalent), lead, nickel, silver, and zinc); all constituents described in Table 1. Analytical Testing for Mass Loading and Stream Assessment of this Order,[393] and (c) Total Residual Chlorine.[394]

However, monitoring for those pollutants is not new. The prior permit's Monitoring and Reporting Program also required that if field screening analysis or visual observations at a site indicate a potential illicit discharge, then a sample was required to be collected and analyzed for total hardness, oil and grease, ammonia nitrogen, total phosphorus, copper (total and dissolved), surfactants (MBAS), diazinon and chlorpyrifos (pesticides), lead (dissolved), nitrate nitrogen, E. coli, total coliform, and fecal coliform.[395] In addition, the prior permit required the claimants to monitor mass loadings at three stations and analyze a minimum of two dry weather samples from each station, with the first sampling to include an analysis of the *full EPA priority pollutant list* identified in Code of Federal Regulations, title 40, section 122, appendix D, that includes 232 pollutants and water properties. For the remaining sampling events, analysis could be reduced to about 25 constituents (including metals, bacteria, pesticides, and nutrients), "*unless data from the first storm indicate the need for additional constituents*."[396] The findings of the prior permit explain that the most common categories of pollutants in

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[392] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.b., page 9.

[393] Table 1 Analytical Testing for Mass Loading (II.A.1.) and Stream Assessment (II.A.2.): Conventionals, Nutrients, Hydrocarbons: Total Dissolved Solids, Total Suspended Solids, Turbidity, Total Hardness, pH, Specific Conductance, Temperature, Dissolved Oxygen, Total Phosphorus, Dissolved Phosphorus, Nitrite, Nitrate, Total Kjeldahl Nitrogen, Ammonia, Biological Oxygen Demand, 5-day, Chemical Oxygen Demand, Total Organic Carbon, Dissolved Organic Carbon, Methylene Blue Active Substances, Oil and Grease, Sulfate. Pesticides: Diazinon, Chlorpyrifos, Malathion, Carbamates, Pyrethroids. Metals (Total and Dissolved): Arsenic, Cadmium, Total Chromium, Hexavalent Chromium, Copper, Lead, Iron, Manganese, Nickel, Selenium, Zinc, Mercury, Silver, Thallium. Bacteriological (mass loading): E. coli, Fecal Coliform, Enterococcus. (Exhibit A, Test Claim, filed November 10, 2011, page 301 (test claim permit, Attachment E., Table 1).

[394] Exhibit A, Test Claim, filed November 10, 2011, pages 250, 310 (test claim permit, Section F.4.d.; Attachment E., Section II.C.1.b.).

[395] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B.2.c., pages 9-10.

[396] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., pages 2-4, emphasis added.

urban runoff include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), and trash, and that the discharge of these pollutants may cause the concentration of pollutants to exceed water quality standards and result in a condition of pollution, contamination, or nuisance, all of which are prohibited under the receiving water limitations and discharge prohibitions.[397] And, as indicated above, the NALs were established because the Regional Board found that dry weather monitoring in receiving waters that was conducted under the prior permit identified the presence of bacteria, pH, dissolved oxygen, nitrate, turbidity, MBAS, and metals, all in concentrations that exceed water quality criteria.[398] The prior permit, in Section J., therefore required each permittee to develop and implement an illicit discharge detection and elimination program to actively seek and eliminate "*all types* of illicit discharges and connections excluding those non-storm water discharges that are exempt."[399] Thus, the monitoring requirements are not new.

The claimants also contend that the deadlines to investigate an exceedance mandates a new activity or cost. The test claim permit does include deadlines to investigate the potential illicit discharge when screening results exceed action levels and to report to the Regional Board.[400] Although the requirements to investigate and report were contained in the prior permit and are not new, the prior permit did not specify deadlines. The prior permit did say, however, that each permittee shall eliminate all illicit discharges, illicit sources, and illicit connections *as soon as possible after detection*.[401] A deadline may affect the timing, but it does not require that any new activities be performed.

In addition, the claimants contend that the test claim permit requires the permittees to conduct additional focused sampling if they are unable to identify the source of the illicit discharge, which the claimants allege was not required by the prior permit. However, federal law requires that permits for discharges from MS4s "shall include a requirement

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[397] Exhibit A, Test Claim, filed November 10, 2011, page 567 (Order R9-2004-0001, Findings 5 and 6).

[398] Exhibit A, Test Claim, filed November 10, 2011, page 481 (Fact Sheet/Technical Report, Discussion of Directive C).

[399] Exhibit A, Test Claim, filed November 10, 2011, page 593 (Order R9-2004-0001, Section J.1.).

[400] Exhibit A, Test Claim, filed November 10, 2011, pages 202-203, 251, 311 (test claim permit, Sections C.2.d., F.4.e.2., and Attachment E., Section II.C.2.b.).

[401] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Sections J.4. and J.5.), emphasis added.

to effectively prohibit non-stormwater discharges into the storm sewers."[402] Thus, permittees would have to continue their investigation to identify the source if the source could not be initially identified. In addition, the prior Monitoring and Reporting program required that the permittees' program include "*follow-up investigations* to detect illicit discharges and connections."[403] The prior Monitoring and Reporting program also required each permittee to eliminate all illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection, and that illicit discharges that are a serious threat to public health or the environment must be eliminated *immediately*.[404] Thus, the requirement in the test claim permit to conduct additional focused sampling when the source is not immediately identified is not new. As the permit recognized:

> As operators of the MS4s, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or exceedances of water quality objectives.[405]

The claimants also allege that the requirement in the test claim permit to update the programs within a year (including, where applicable, updates to the watershed workplan, retrofitting considerations, and program effectiveness work plans) if the results of the additional sampling indicate a recurring exceedance of NALs with an unidentified source, and to include the updates in the annual report, are new and mandated by the state.[406] However, the prior Monitoring and Reporting program required an assessment of overall program effectiveness based on the measurable goals established in the Permittee's Individual SWMP.[407] And Section K.2. of the prior permit required,

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[402] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[403] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.B., page 9.

[404] Exhibit A, Test Claim, filed November 10, 2011, page 594 (Order R9-2004-0001, Sections J.4. and J.5.), emphasis added.

[405] Exhibit A, Test Claim, filed November 10, 2011, page 569 (Order R9-2004-0001, Finding 20)

[406] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, referring to Exhibit A, Test Claim, filed November 10, 2011, page 203 (test claim permit, Section C.2.e.).

[407] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.7., page 13.

- An assessment of the water quality of all receiving waters based upon existing water quality data and results from the receiving waters and illicit discharge monitoring programs in the MRP.[408]
- An identification and prioritization of major water quality problems caused or contributed to by MS4 discharges and the likely sources of the problems.[409]
- A time schedule for implementation of short and long-term recommended activities needed to address the highest priority water quality problem(s).[410]

Section K.4. of the prior permit also required the permittees to meet with the other permittees in the watershed, at least once a year, to review and assess available water quality data, from the MRP and other reliable sources, to assess program effectiveness, and to review and update the watershed SWMP.[411] And Section C of the prior permit required that "if an exceedance(s) of water quality standards persist notwithstanding implementation of the SWMP and other requirements of this Order, the Permittee shall assure compliance with water quality standards by notifying and submitting a report to the Regional Board, and revising its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required."[412] Thus, the requirement in the test claim permit to update the programs within a year (including, where applicable, updates to the watershed workplan, retrofitting considerations, and program effectiveness work plans) if the results of the additional sampling indicate a recurring exceedance of NALs with an unidentified source, is not new.

Nor are the reporting requirements to the Regional Board new, as asserted by the claimants. The test claim permit requires the claimants to include in the annual report to the Regional Board, the field screening data for their investigations to determine the source of the discharge, the analysis of that data, and a report of the permittee's findings (whether the source is natural in origin or an illicit discharge).[413] If the station is dry (i.e. no flowing or ponded MS4 discharge is observed), make and record all applicable observations on the MS4 outfall and receiving waters, including any evidence

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[408] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.c.).

[409] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

[410] Exhibit A, Test Claim, filed November 10, 2011, pages 595-596 (Order R9-2004-0001, Section K.2.e.).

[411] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.4.).

[412] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.), emphasis added.

[413] Exhibit A, Test Claim, filed November 10, 2011, pages 251, 311 (test claim permit, Section F.4.e.2.; Attachment E., Section II.C.2.b.).

of past non-stormwater flows and the presence of trash.[414] If the source is an exempted category of non-stormwater discharge, then the permittee's findings and a description of the steps taken to address the discharge must be included in the annual report.[415] If a permittee is unable to eliminate the source of the discharge, then the annual report is required to include the permittee's revised plan and timeframe to eliminate the source.[416]

Federal law, however, already requires that permittees keep monitoring records that identify the date, place, and time of sampling; the individual who performed the sampling; the date the analyses were performed; the individual who performed the analysis; the analytical techniques or methods used; and the results of the analyses.[417] Federal law then requires that an annual report be filed by the permittees by the anniversary date of the issuance of the permit that includes a summary of monitoring data accumulated throughout the year and any necessary revisions to the assessment of controls.[418] Under the prior permit's Monitoring and Reporting program, the permittees were also required to annually report on the Illicit Discharge Detection and Elimination Program, and include: 1) *All* inspection, field screening, and analytical monitoring results; 2) *All* follow-up and elimination activities; and 3) Any proposed changes to station locations and/or sampling frequencies.[419] Section C of the prior permit, which identifies the receiving water limitations, also required that if exceedances of water quality standards persist notwithstanding implementation of the SWMP and other requirements of the Order, the permittee was required to assure compliance with water quality standards by notifying and submitting a report to the Regional Board.[420] Thus, these test claim activities are not new.

The test claim permit also requires that if one or more exceedances of NALs have been documented, the annual report is required to include a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination,

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[414] Exhibit A, Test Claim, filed November 10, 2011, pages 250, 310 (test claim permit, Section F.4.d.; Attachment E., Section II.C.1.b.).

[415] Exhibit A, Test Claim, filed November 10, 2011, page 202 (test claim permit, Section C.2.c.).

[416] Exhibit A, Test Claim, filed November 10, 2011, page 202 (test claim permit, Section C.2.b.).

[417] Code of Federal Regulations, title 40, section 122.41(j)(3).

[418] Code of Federal Regulations, title 40, section 122.42(c).

[419] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.7., page 13, emphasis added.

[420] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.), emphasis added.

or nuisance in the receiving waters.[421] This requirement is not new. As indicated above, federal law and the prior permit required the permittees to submit an annual report with a summary of all monitoring data and the results of all analyses.[422] The annual monitoring report was required to include a discussion of the pollutants of concern and their potential sources, a "discussion of any relevant information or conclusions from the Illicit Discharge Monitoring Program," and a discussion of the progress towards meeting the goals of the prior permit.[423] The goals of the prior permit are identified in the receiving water limitations and discharge prohibitions, which prohibit "Discharges into and from MS4s causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the State . . . ."[424] Thus, the requirement to describe whether an exceedance of a NAL caused, threatened to cause, or contributed to a condition of pollution in the receiving waters is not new.

The test claim permit also requires that if the source is a non-stormwater discharge in violation or potential violation of an existing separate NPDES permit, then the copermittee must report, within three business days, the findings including all pertinent information regarding the discharger and discharge characteristics to the Regional Board.[425] This requirement is not new. Under federal law, non-stormwater discharges that are not exempt are prohibited.[426] Both federal law and the prior permit required that permittees shall report to the Regional Board any noncompliance that may endanger health or the environment, orally within 24 hours and written submission within five days of when the permittee becomes aware of the situation, which contained a description of the noncompliance and its cause (which would have to include information regarding the discharger and the discharge characteristics); the period of noncompliance, including exact dates and times), and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.[427] The

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[421] Exhibit A, Test Claim, filed November 10, 2011, page 203 (test claim permit, Section C.3.).

[422] Code of Federal Regulations, title 40, sections 122.41(j)(3), 122.42(c); Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.7., page 13.

[423] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.B.1.3., page 16.

[424] Exhibit A, Test Claim, filed November 10, 2011, pages 572, 573, 598-599 (Order R9-2004-0001, Sections A., C.1., and Attachment A.).

[425] Exhibit A, Test Claim, filed November 10, 2011, pages 202-203 (test claim permit, Section C.2.d.).

[426] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[427] Code of Federal Regulations, title 40, section 122.41(l)(6); Exhibit A, Test Claim, filed November 10, 2011, page 602 (Order R9-2004-0001, Attachment B.).

change in the deadline to report this information from five days to three days does not impose a new requirement.

Finally, the analysis here is not at all like the arguments made by the State and rejected by the court in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, as asserted by the claimants.[428] There, the State argued that no stormwater permit would ever impose a new program or higher level of service because permit conditions are not imposed to provide a service to the public, but are imposed to enforce a general ban on pollution and that permit conditions are not unique to government since both public and private parties discharge pollutants and are required to obtain a permit to do so.[429] The court disagreed that reimbursement for *all* stormwater permit conditions would be denied under article XIII B, section 6 and held, as several prior courts have done, that to determine "whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. [Citations.] This is so even though the conditions were designed to satisfy the same standard of performance."[430]

This analysis complies with the court's ruling, and following the detailed analysis above, finds that the requirements imposed by Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit are not new when compared to prior law, and thus do not mandate a new program or higher level of service. The Supreme Court has clarified that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[431] The requirements imposed by the test claim permit are not new and do not change or increase the level or quality of service to the public. Federal law has long required that all dischargers, including private industrial dischargers and local governments effectively prohibit "all types" of non-stormwater discharges identified as sources of pollutants to waters of the United States.[432]

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[428] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 8.

[429] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 557-579.

[430] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579.

[431] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. Emphasis in original.

[432] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1). In addition, MS4 dischargers must demonstrate adequate legal authority, through ordinance, permit, or other means, to prohibit illicit discharges to the MS4, Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

Accordingly, the Commission finds that the requirements of Sections C. and F.4.d. and F.4.e., and Section II.C. of Attachment E. of the test claim permit do not mandate a new program or higher level of service.

3. Section D. of the Test Claim Permit, Which Addresses Stormwater Action Levels (SALs), Mandates a New Program or Higher Level of Service to Develop and Submit a Wet Weather MS4 Discharge Monitoring Plan to Sample a Representative Percentage of Major Outfalls. However, the Remaining Requirements Do Not Mandate a New Program or Higher Level of Service Because the Activities to Monitor the Pollutants at Issue, Determine if the Discharges Are Meeting Existing Water Quality Standards Identified in the SALs and If Not, Implement or Modify BMPs to Meet Water Quality Standards and Report that Information to the Regional Board Were Required by the Prior Permit and Are Mandated by Existing Federal Law.

The claimants pled Section D. of the test claim permit,[433] which establishes numeric stormwater action levels (SALs) that are incorporated into the wet weather monitoring for seven designated pollutants (turbidity,[434] nitrate and nitrite,[435] phosphorus and the

[433] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 44-45 (Test Claim narrative).

[434] "Turbidity is a measure of the clarity of a water body and is related to erosion and sedimentation which impacts streams and lakes." Exhibit I (21), EPA, Turbidity, https://nepis.epa.gov/Exe/tiff2png.cgi/P10070Q2.PNG?-r+75+-g+7+D%3A%5CZYFILES%5CINDEX%20DATA%5C06THRU10%5CTIFF%5C00000726%5CP10070Q2.TIF (accessed on April 7, 2022).

[435] "Most nitrogenous materials in natural waters tend to be converted to nitrate, so all sources of combined nitrogen, particularly organic nitrogen and ammonia, should be considered as potential nitrate sources. Primary sources of organic nitrates include human sewage and livestock manure, especially from feedlots. The primary inorganic nitrates which may contaminate drinking water are potassium nitrate and ammonium nitrate both of which are widely used as fertilizers…. Nitrate in drinking water can be responsible for a temporary blood disorder in infants called methemoglobinemia (blue baby syndrome). In infants less than six months old, a condition exists in their digestive systems which allows for the chemical reduction of nitrate to nitrite. The nitrite absorbs through the stomach and reacts with hemoglobin to form methemoglobin, which does not have the oxygen carrying capacity of hemoglobin. Thus, the oxygen deficiency in the infant's blood results in the 'blue baby' syndrome. When the nitrate-contaminating source is removed, the effects are reversible. Since ingestion of water containing high nitrate concentrations can be fatal to infants and livestock, the U.S. EPA has established a level of 10 mg/L total nitrate (measured as nitrogen) as the Maximum Contaminant Level Goal (MCLG) and Maximum Contaminant Level (MCL) in drinking water." Exhibit J (44), Water Quality Association, Nitrate/Nitrite Fact Sheet, 2014, pages 2-3,

following metals: cadmium, copper, lead, and zinc). The action levels are based on US EPA Rain Zone 6 Phase I MS4 monitoring data for pollutants in stormwater, and reflect the water quality standards in the Basin Plan, the federal California Toxics Rule (CTR), and the US EPA Water Quality Criteria.[436] Section D. requires the copermittees to develop and "implement the Wet Weather MS4 Discharge Monitoring as described in Attachment E of this Order," to monitor MS4 outfalls and implement stormwater controls to reduce the discharge of these pollutants in stormwater to the MEP so as not to exceed the SALs.[437] "[I]t is the goal of the SALs, through the iterative and MEP process, to have MS4 storm water discharges meet all applicable water quality standards."[438]

The claimants identify the following "mandated" activities and costs:

> Section D of the Permit required Claimants to conduct end-of-pipe assessments to determine SAL compliance metrics at major outfalls during wet weather. Claimants were required to identify and perform field verification of major outfalls owned by them, perform water quality sampling at a representative percentage of major outfalls and identified stations in each hydrologic subarea, perform analysis and prepare reports on the status and outcome of SAL exceedances, and where necessary, update their compliance programs to address SAL exceedances.
>
> In response to these requirements, the District, with funding contributed by the Claimants through the Implementation Agreement, retained a consultant to develop and finalize a sampling and analysis plan, develop a followup response program and procedures and laboratory coordination, conduct SAL sampling and analysis on behalf of each Claimant, utilize analysis and source identification results in [sic] develop annual updates to the Watershed Workplan and Monitoring Reports, and where necessary, coordinate development of model updates to compliance programs to address SAL exceedances. The Claimants incurred additional direct costs implementing these requirements.[439]

As indicated above, the claimants contend that Section D. requires them to "prepare reports on the status and outcome of SAL exceedances." The claimants pled only Section D., and did not also plead Attachment E. The plain language of Section D.

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https://www.wqa.org/Portals/0/Technical/Technical%20Fact%20Sheets/2014_NitrateNitrite.pdf (accessed on April 7, 2022).

[436] Exhibit A, Test Claim, filed November 10, 2011, page 431 (Fact Sheet/Technical Report, Finding D.1.h.).

[437] Exhibit A, Test Claim, filed November 10, 2011, pages 205-206 (test claim permit, Section D.).

[438] Exhibit A, Test Claim, filed November 10, 2011, page 490 (Fact Sheet/Technical Report).

[439] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 46 (Test Claim narrative).

incorporates by reference only "the Wet Weather MS4 Discharge Monitoring as described in Attachment E," which is in Section II.B. of Attachment E.[440] Section D. does not reference the Monitoring Reporting Program in Section III. of Attachment E., and, thus, the Commission does not have jurisdiction to determine whether the requirements in the Monitoring Reporting Program of Attachment E. constitute a reimbursable state-mandated program.[441]

As described below, the Commission finds that the following new activities required by Section D.2. (and Section II.B. of Attachment E., which is incorporated by reference into Section D. of the test claim permit) mandate a new program or higher level of service:

- Collaborate with all permittees to develop a year-round, watershed based, wet weather MS4 discharge monitoring program to sample a representative percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[442]
- The principal copermittee shall submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented.[443]

However, the remaining requirements to implement the monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not mandate a new program or higher level of service. The SALs imposed by the test claim permit are simply numbers that reflect the existing water quality standards applicable to the waterbodies in the Basin Plan, the California Toxics Rule (CTR), and the US EPA Water Quality Criteria for the pollutants at issue, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to address those exceedances by implementing or modifying BMPs to the MEP as required by existing federal law. Thus, the Regional Board has imposed an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing federal requirements to monitor, implement BMPs, and report exceedances to the Regional Board.

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[440] Exhibit A, Test Claim, filed November 10, 2011, pages 307-309 (test claim permit, Attachment E., Section II.B.).

[441] Exhibit A, Test Claim, filed November 10, 2011, pages 321-324 (test claim permit, Attachment E., Section III.). Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state.

[442] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[443] Exhibit A, Test Claim, filed November 10, 2011, pages 206 and 309 (test claim permit, Section D.2. and Attachment E., Section II.B.3.).

a. Background

i. Federal law requires permittees to effectively monitor and implement BMPs to achieve water quality standards, and established water quality criteria for the pollutants at issue in Section D.

Federal law requires that permits for discharges from municipal storm sewers "shall prescribe conditions . . . to assure compliance with the requirements of [the permit], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."[444]

Federal law further requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[445] Federal regulations define "best management practices" as:

> . . . schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[446]

Applications for an NPDES permit from medium and large MS4 dischargers are required to identify the following information, including monitoring and BMPs proposals, to reduce pollutants to the MEP:

- The location of known municipal storm sewer system outfalls discharging to waters of the United States.[447]
- A list of water bodies that receive discharges from the MS4, including downstream segments, lakes, and estuaries, where pollutants from the system discharges may accumulate and cause water degradation, and a description of water quality impacts.[448]
- Existing quantitative data describing the volume and quality of discharges from the MS4, including a description of the outfalls sampled, sampling procedures and analytical methods used.[449]

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[444] United States Code, title 33, section 1342(a)(2) (Public Law 100-4).

[445] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[446] Code of Federal Regulations, title 40, section 122.2.

[447] Code of Federal Regulations, title 40, section 122.26(d)(1)(iii)(B).

[448] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(C).

[449] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(B).

- A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls that are currently being implemented.[450]
- The quality and quantity of discharges covered in the permit application, including:
    - Quantitative data from representative outfalls or field screening points that include samples of effluent analyzed for the organic pollutants listed in Table II and the pollutants in Table III of appendix D of 40 C.F.R. part 122 (which include, as relevant here, cadmium, copper, lead, and zinc); and for total suspended solids, total dissolved solids, Chemical Oxygen Demand (COD), Biological Oxygen Demand (BOD), oil and grease, fecal coliform, fecal streptococcus, pH, total Kjeldahl nitrogen, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, and nitrate/nitrite.
    - Estimates of the annual pollutant load and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls for BOD_5, COD, total suspended solids, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. The estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods.
    - A proposed monitoring program for representative data collection that describes the location of outfalls or field screening points to be sampled, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of the sampling equipment.[451]
- A proposed management program that covers the duration of the permit. The management program "shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." The proposed programs will be considered when developing permit conditions to reduce pollutants in discharges to the MEP.[452]

[450] Code of Federal Regulations, title 40, section 122.26(d)(1)(v).

[451] Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(A)-(D).

[452] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

Federal law then requires the Regional Board to establish conditions, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements of the CWA and its implementing regulations.[453]

In addition, when the Regional Board determines that an MS4 discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board is required by federal law to develop NPDES permit effluent limits as necessary to meet water quality standards.[454]

Water quality standards and criteria protect the beneficial uses of any given waterbody and are developed by the states, and included in the Regional Board's Basin Plans.[455] States are required to adopt water quality standards and criteria based on sound scientific rationale that identifies sufficient parameters or constituents to protect the designated use, and numerical values related to any constituents should be based on the US EPA's guidance documents or other defensible methods.[456] US EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.[457] And the US EPA's water quality criteria for human health and aquatic life include recommended numeric criteria for the pollutants identified in Section D., of the test claim permit.[458] In addition, on May 18, 2000, the US EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR).[459] As the courts have explained, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the Clean Water Act'" [460] as follows:

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[453] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.43(a).

[454] Code of Federal Regulations, title 40, section 122.44(d)(1).

[455] United States Code, title 33, section 1313(a), (c)(1); Code of Federal Regulations, title 40, sections 131.6, 131.10-131.12; Water Code sections 13240, 13241.

[456] Code of Federal Regulations, title 40, section 131.11.

[457] United States Code, title 33, section 1314(a).

[458] Exhibit J (16), EPA, National Recommended Water Quality Criteria - Aquatic Life Criteria Table, https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table (accessed on April 7, 2022); Exhibit J (17), EPA, National Recommended Water Quality Criteria – Human Health Criteria Table, https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table (accessed on April 7, 2022); United States Code, title 33, section 1312.

[459] Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31682, 31711, May 18, 2000).

[460] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

> The EPA's Summary of the Final CTR Rule provides that "[t]hese Federal criteria are legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for all purposes and programs under the Clean Water Act." [Citation omitted] "All waters (including lakes, estuaries and marine waters) . . . are subject to the criteria promulgated today. Such criteria will need to be attained at the end of the discharge pipe, unless the State authorizes a mixing zone."[461]

All of the metals identified in Section D. of the test claim permit are priority toxic pollutants identified in the CTR.[462]

The CWA requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit.[463] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[464] Federal regulations further require that samples and measurements taken for the purpose of monitoring shall be "representative" of the monitored activity and shall be retained for at least five years.[465] Federal law does not require monitoring of each stormwater source at the precise point of discharge, but a monitoring scheme must be established "sufficient to yield data which are representative of the monitored activity."[466] Monitoring must be conducted according to approved test procedures, unless another method is required as specified.[467] Approved testing procedures for sampling, sample preservation, and analyses are located in federal regulations.[468]

Monitoring results must be reported, including any instances of noncompliance.[469] In addition, the permittee is required by federal regulations to report any noncompliance

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[461] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 926, citing 65 Federal Register, pages 31682, 31701.

[462] Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31717, May 18, 2000).

[463] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1).

[464] Code of Federal Regulations, title 40, sections 122.26(d)(2)(i)(F), 122.48(b); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[465] Code of Federal Regulations, title 40, sections 122.41(j), 122.48(b).

[466] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[467] Code of Federal Regulations, title 40, section 122.41(j).

[468] Code of Federal Regulations, title 40, Part 136.

[469] Code of Federal Regulations, title 40, sections 122.41(l)(4), (7); 122.22, 122.48; Code of Federal Regulations, title 40, Part 127.

that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall state whether the noncompliance has been corrected and the steps taken or planned to reduce or eliminate the noncompliance.[470]

> *ii. The prior permit required receiving water monitoring during wet and dry seasons and implementation of best management practices (BMPs) to achieve water quality standards, and if an exceedance occurred, the permittee was required to notify the Regional Board and modify best management practices (BMPs) to meet water quality standards.*

The prior permit required the permittees to meet receiving water limitations that prohibited the discharge of pollutants from the MS4 that cause or contribute to a violation of water quality standards as follows:

1. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses of receiving waters) are prohibited.
2. Each permittee shall comply with Requirement C.l, Prohibition A.2, and Prohibition A.4 as it applies to Prohibition No. 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in urban runoff discharges in accordance with the SWMP and other requirements of this Order including any modifications.[471]

Prohibition A.2., referred to above, prohibited discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater.[472] Prohibition A.4. stated that "[i]n addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order."[473] Prohibition 5 in Attachment A to the prior permit states that the "discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited."[474]

If an exceedance of a pollutant was detected, the permittee was required by Section C.2., of the receiving water limitations to notify the Regional Board and revise its

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[470] Code of Federal Regulations, title 40, section 122.41(l)(6).

[471] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.).

[472] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section A.2.).

[473] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section A.4.).

[474] Exhibit A, Test Claim, filed November 10, 2011, page 598 (Order R9-2004-0001, Attachment A, Section A.5.).

stormwater management program (SWMP) and monitoring plan to implement additional BMPs as follows:

> 2. … The SWMP shall be designed to achieve compliance with Requirement C. I, Prohibition A.2, and Prohibition A.4 as it applies to Prohibition 5 in **Attachment A** of this Order. If exceedance(s) of water quality standards persist notwithstanding implementation of the SWMP and other requirements of this Order, the permittee shall assure compliance with Requirement C. I, Prohibition A.2, and Prohibition A.4 as it applies to Prohibition 5 in **Attachment A** of this Order by complying with the following procedure:
>
> a) Upon a determination by either a permittee or the SDRWQCB that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the permittee shall promptly notify and thereafter submit a report to the SDRWQCB that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the SWMP annual report unless the SDRWQCB directs an earlier submittal. The report shall include an implementation schedule. The SDRWQCB may require modifications to the report;
>
> b) Submit any modifications to the report required by the SDRWQCB within 30 days of notification;
>
> c) Within 30 days following SDRWQCB approval of the report described above, the permittee shall revise its SWMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;
>
> d) Implement the revised SWMP and monitoring program in accordance with the approved schedule.[475]

In addition, Section K.2. of the prior permit required the permittees to collaborate with all other permittees to develop and implement a Watershed SWMP for the Upper Santa Margarita Watershed."[476] The Watershed SWMP had to include:

[475] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.), emphasis in original.

[476] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.).

- An assessment of the water quality of all receiving waters based upon existing water quality data and results from the receiving waters and illicit discharge monitoring programs required by the Monitoring and Reporting Program.[477]
- An identification and prioritization of major water quality problems caused or contributed to by MS4 discharges and the likely sources of the problems.[478]
- A time schedule for implementation of short and long-term recommended activities needed to address the highest priority water quality problem(s).[479]

Section K.4. of the prior permit also required the permittees to meet with the other permittees in the watershed, at least once a year, to review and assess available water quality data, from the MRP and other reliable sources, to assess program effectiveness, and to review and update the watershed SWMP.[480]

In addition, Section L. of the prior permit required the permittees to comply with the Monitoring and Reporting program (MRP).[481] The MRP required the permittees to monitor receiving waters through core monitoring, regional monitoring, and special studies.[482] Core monitoring included mass loading, water column toxicity testing, bioassessment, follow-up analysis and action, and tributary monitoring.[483] Core monitoring required the use of stations where three types of monitoring occur: chemical, toxicity, and bioassessment. At these stations, called triad stations, the copermittees take both wet season — October 1 through April 30[484] — and dry season water samples for analysis.[485] The stations were located at Lower Temecula Creek, Lower Murrieta Creek at the United States Geological Survey Weir, and a

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[477] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.c.).

[478] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

[479] Exhibit A, Test Claim, filed November 10, 2011, pages 595-596 (Order R9-2004-0001, Section K.2.e.).

[480] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.4.).

[481] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section L.)

[482] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., page 2.

[483] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.I.1.-5., pages 2-7.

[484] Exhibit A, Test Claim, filed November 10, 2011, page 616 (Order R9-2004-0001, Attachment C.).

[485] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., page 2.

representative reference station at a place of the copermittee's choosing which must be evaluated annually for suitability.[486] The first wet weather sample required analysis for the full US EPA priority pollutant list that includes 232 pollutants and water properties, including nitrate and nitrate, phosphorus, and the metals at issue here.[487] Thereafter, the required analysis was limited to 25 pollutants and water properties, including the metals at issue here.[488] When there was a lack of sampling data, the permittees were required to submit an explanation with the annual report.[489]

The prior MRP required that "[w]hen results from the chemistry, toxicity, and bioassessment monitoring described above indicate urban runoff-induced degradation, Permittees shall evaluate the extent and causes of urban runoff pollution in receiving waters and prioritize management actions to eliminate or reduce sources."[490] Toxicity Identification Evaluations (TIEs) were used to determine the cause of toxicity, and Toxicity Reduction Evaluations (TREs) were used to identify the source of the pollutants.[491] The TRE was required to include all reasonable steps to identify the source of toxicity and propose appropriate BMPs, which were then required to be submitted to the Regional Board for review. Within 30 days following approval by the Regional Board, the permittees were required to revise their SWMPs to incorporate the modified BMPs.[492]

The permittees were also required to sample and test four specific tributaries for constituents of concern, which were determined from exceedances of water quality

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[486] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.I.1.a., page 2.

[487] The list is codified at Code of Federal Regulations, title 40, section 122, Appendix D.

[488] Trace metals: total cadmium, total chromium, total copper, total nickel, total lead, total zinc; Nutrients: ammonia, total Kjeldahl nitrogen, nitrate, total phosphorus; Bacteria: total coliform, fecal coliform, E. coli; Pesticides: diazinon, chlorpyrifos, other OP [organophosphate] pesticides; Conventionals: Temperature, pH, hardness, specific conductance, dissolved oxygen, MBAS [methyl blue active substances]; PAHs [polycyclic aromatic hydrocarbons]; Volatiles (dry weather only); and total suspended solids. Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Table 1, page 4.

[489] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.I.1., pages 2-4.

[490] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.I.4., page 5.

[491] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.I.4., pages 5-7.

[492] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.I.4., page 7.

objectives from the testing of the triad samples and land use, during two storm events and two dry weather events each monitoring year.[493]

The prior MRP further required the permittees to "participate and coordinate with federal, state, and local agencies and other dischargers in the Santa Margarita Watershed in development and implementation of a regional watershed monitoring program as directed by the Executive Officer."[494] The intent of a regional monitoring program was "to address watershed-wide issues" and "to maximize the efforts of all monitoring partners using a more cost-effective monitoring design and to best utilize the pooled resources of the watershed."[495] The prior Monitoring and Reporting Program further provided that "[d]uring a coordinated watershed sampling effort, the Permittees' sampling and analytical effort may be reallocated to provide a regional assessment of the impact of discharges to the watershed."[496]

Finally, the principal permittee was required to submit an annual report on the receiving waters monitoring that included a description of the monitoring results and answers to the following questions:

- Are conditions in receiving waters protective, or likely to be protective, of beneficial uses?
- What is the extent and magnitude of the current or potential receiving water problems?
- What is the relative urban runoff contribution to the receiving water problem(s)?
- What are the sources of urban runoff that contribute to receiving water problem(s)?
- Are conditions in receiving waters getting better or worse?[497]

The fourth-year monitoring report also had to include the following information:

- A discussion of any long-term trends that can be detected from existing data (from all previous permit terms).
- Recommendations for future monitoring based on the results of previous efforts and the progress towards answering the management questions

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[493] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.I.5., pages 7-8.

[494] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.II., page 8.

[495] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Sections II.A. and II.A.II., pages 2, 8.

[496] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.II., page 8.

[497] 2004 MRP, Section III.B., page 16 (which refers to the questions in Section II.A., on page 2.)

listed in Section II.A. of this MRP (bulleted above) and achieving the goals listed in Section I. of this MRP.[498]

- Recommended modifications to individual or watershed SWMPs to address identified source of pollutants in urban runoff.[499]

The prior permit stated that "nothing in this Order shall be construed to relieve the permittee from civil or criminal penalties for noncompliance."[500]

b. Except for the requirements to develop and submit a Wet Weather MS4 Discharge Monitoring Plan as described in Attachment E., Section D. of the test claim permit (SALs), does not mandate a new program or higher level of service.

i. Section D. of the test claim permit establishes stormwater action levels (SALs) for turbidity, nitrate and nitrite, phosphorus, cadmium, copper, lead, and zinc, and requires the claimants to develop monitoring plans to sample a representative percentage of the major outfalls, monitor and implement best management practices (BMPs), and when an exceedance of a stormwater action level (SAL) occurs, the copermittees are required to notify the Regional Board and modify the best management practices (BMPs).

The test claim permit, at Finding C.9., explains that the copermittees' monitoring data showed persistent violations of water quality objectives and that runoff discharges are a leading cause of water quality impairments in Riverside County:

> The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring

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[498] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, page 2. Section 1 of the 2004 MRP identifies the following goals:

1. Assess compliance with Order No. R9-2004-001;
2. Measure and improve the effectiveness of the SWMPs;
3. Assess the chemical, physical, and biological impacts of receiving waters resulting from urban runoff;
4. Characterize urban runoff discharges;
5. Identify sources of specific pollutants;
6. Prioritize drainage and sub-drainage areas that need management actions;
7. Detect and eliminate illicit discharges and illicit connections to the MS4; and
8. Assess the overall health of receiving waters.

[499] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, page 16.

[500] Exhibit A, Test Claim, filed November 10, 2011, page 606 (Order R9-2004-0001, Attachment B, Standard Provisions).

> stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Riverside County.[501]

The Fact Sheet further explains that water quality in receiving waters downstream of the MS4 discharges failed to meet CTR standards and Basin Plan objectives:

> The Copermittees have produced data that demonstrates water quality objectives are frequently not met during dry and wet weather. The 2009 Report of Waste Discharge and the 2008-2009 Annual Reports document that receiving water monitoring stations often fail to meet water quality objectives established in the Basin Plan.
>
> Water quality in receiving waters downstream of MS4 discharges fail to meet California Toxics Rule standards [footnote omitted] and Basin Plan objectives. Data submitted in the MS4 Annual Reports indicate that at various times chemical, bacteria, pesticide, and metal concentrations may exceed water quality objectives in receiving waters in both wet and dry weather conditions.
>
> There are no other significant NPDES permitted discharges to the creeks. For instance, there are no live-stream discharges of treated waste water in the Riverside County area of the Santa Margarita watershed. The few NPDES permits in the watershed are mainly for recycled water which only discharges occasionally during the rainy season. Because the water quality monitoring indicates exceedances of water quality standards and MS4 discharges are the main source of pollutants in the watersheds, it can be inferred that the MS4 discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Riverside County.[502]

Thus, Section D.1. of the test claim permit establishes numeric SALs for turbidity, nitrate and nitrite, phosphorus, cadmium, copper, lead, and zinc that are incorporated into the monitoring requirements for wet weather. The Fact Sheet explains:

> SALs were developed based upon receiving water monitoring results and CWA section 303(d) impaired waters listings. Nitrogen, Copper and Phosphorous are all pollutants for which receiving waters are 303(d) listed as impaired and for which sufficient data was available to develop SALs. Additionally, receiving water monitoring, including from storm events monitored by the Copermittees, has demonstrated excursions and/or

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[501] Exhibit A, Test Claim, filed November 10, 2011, page 374 (test claim permit, Finding C.9.).

[502] Exhibit A, Test Claim, filed November 10, 2011, page 401 (Fact Sheet/Technical Report, Discussion of Finding C.9.).

> potential excursions, often absent receiving water hardness, above water quality criteria for turbidity (NTU), Cadmium, Lead, and Zinc. SALs were not developed for some pollutants for which receiving waters are 303(d) listed as impaired due to a lack of representative data available. These pollutants are required to be monitored but are not subject to a SAL under the Order.[503]

SALs were developed by using the national US EPA Rain Zone 6 Phase I MS4 stormwater monitoring data which includes MS4 effluent data from Orange, San Diego, Los Angeles, Ventura and San Bernardino counties, were set as the 90th percentile of the dataset for each constituent, and reflect the water quality standards in the Basin Plan, the federal California Toxics Rule (CTR), and the US EPA Water Quality Criteria.[504] "[I]t is the goal of the SALs, through the iterative and MEP process, to have MS4 storm water discharges meet all applicable water quality standards,"[505] and that any exceedance of a SAL indicates BMPs being implemented are insufficient to protect the beneficial uses of waters:

> Since the first permit (adopted 20 years ago), Copermittees have utilized nonnumerical limitations (BMPs) to control and abate the discharge of any pollutants in storm water discharges to the MEP. Copermittees have been accorded 20 years to research, develop, and deploy BMPs that are capable of reducing storm water discharges from the MS4 to levels represented in SALs. Storm Water Action Levels are set at such a level that any exceedance of a SAL will clearly indicate BMPs being implemented are insufficient to protect the Beneficial Uses of waters of the State. Copermittee shall utilize the exceedance information as a high priority consideration when adjusting and executing annual work plans, as required by this Permit. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied to the MEP.[506]

Accordingly, Section D.1. of the test claim permit requires the copermittees to "implement the Wet Weather MS4 Discharge Monitoring as described in Attachment E. of this Order, and beginning three years after the Order adoption date, the Copermittees

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[503] Exhibit A, Test Claim, filed November 10, 2011, page 491 (Fact Sheet/Technical Report).

[504] Exhibit A, Test Claim, filed November 10, 2011, pages 376, 431-434, 484 (Fact Sheet/Technical Report).

[505] Exhibit A, Test Claim, filed November 10, 2011, page 490 (Fact Sheet/Technical Report).

[506] Exhibit A, Test Claim, filed November 10, 2011, page 433 (Fact Sheet/Technical Report, Discussion of Finding D.1.h.).

must annually evaluate their data compared to the Stormwater Action Levels (SALs)."[507] Section D.2. also requires the permittees "to develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea."[508] The following specific requirements are imposed by Sections D.1. and D.2., and the Wet Weather MS4 Discharge Monitoring program in Attachment E.:

- Each copermittee is required collaborate with the other copermittees to develop, conduct, and report on a year-round, watershed-based, wet weather MS4 discharge monitoring program. The monitoring program design, implementation, analysis, assessment, and reporting must be conducted on a watershed basis for each of the hydrologic subareas.[509]
- The principal copermittee is required to submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented. The description must identify and provide the rationale for all constituents monitored, locations of monitoring, frequency of monitoring, and analyses to be conducted with the data generated.[510]
- MS4 outfall monitoring. The monitoring program is required to be designed to sample a representative percentage of the major outfalls within each hydrologic subarea and must begin no later than the 2012-2013 monitoring year; is required to characterize pollutant discharges from MS4 outfalls in each watershed during wet weather; must include the rationale and criteria for

[507] Exhibit A, Test Claim, filed November 10, 2011, page 205 (test claim permit, Section D.1.).

[508] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[509] Exhibit A, Test Claim, filed November 10, 2011, pages 205-206, 307 (test claim permit, Section D.1. and 2.; Attachment E., Section II.B.).

[510] Exhibit A, Test Claim, filed November 10, 2011, page 309 (test claim permit, Attachment E., Section II.B.3.).

selection of outfalls to be monitored; must, at a minimum, include collection of samples for pollutants listed in Table 4;[511] and must comply with the SALs.[512]

- Samples must be collected during the first 24 hours of the stormwater discharge or for the entire storm water discharge if it is less than 24 hours. Grab samples may be utilized only for pH, indicator bacteria, dissolved oxygen, temperature and hardness. All other constituents must be sampled using 24-hour composite samples or for the entire stormwater discharge if the storm event is less than 24 hours.[513]
- Sampling to compare MS4 outfall discharges with total metal SALs is required to include a measurement of receiving water hardness at each outfall. If a total metal concentration exceeds a SAL in Section D., that concentration must be compared to the California Toxic Rule criteria and the EPA one-hour maximum concentration for the detected level of receiving water hardness associated with that sample. If it is determined that the sample's total metal concentration for that specific pollutant exceeds the SAL but does not exceed the applicable one-hour criteria for

[511] Table 4 of Attachment E. lists the following pollutants, including those with SALs: Conventionals, Nutrients, Hydrocarbons: Total Dissolved Solids, Total Suspended Solids, Turbidity, Total Hardness, pH, Specific Conductance, Temperature, Dissolved Oxygen, Total Phosphorus, Dissolved Phosphorus, Nitrite, Nitrate, Total Kjeldahl Nitrogen, Ammonia, 5-day Biological Oxygen Demand, Chemical Oxygen Demand, Total Organic Carbon, Dissolved Organic Carbon, Methylene Blue Active Substances, Oil and Grease, Sulfate: Pesticides: Diazinon, Chlorpyrifos, Malathion, Carbamates, Pyrethroids; Metals (Total and Dissolved): Arsenic, Cadmium, Total Chromium, Hexavalent Chromium, Copper, Lead, Iron, Manganese, Nickel, Selenium, Zinc, Mercury, Silver, Thallium; Bacteriological (mass loading): E. coli, Fecal Coliform, Enterococcus. Exhibit A, Test Claim, filed November 10, 2011, page 308 (test claim permit, Attachment E., Section II.B.) The Fact Sheet explains that "the Copermittees are required to monitor for those pollutants in 40 CFR 122.26(d)(2)(iii)(B); for 303(d) listed pollutants for the Santa Margarita Hydrologic Unit; and for pollutants with Storm Water Action Levels." Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report).

[512] Exhibit A, Test Claim, filed November 10, 2011, pages 206, 307 (test claim permit, Section D.2.; Attachment E., Section II.B.1.).

[513] Exhibit A, Test Claim, filed November 10, 2011, page 307, (test claim permit, Attachment E., Section II.B.1.a.).

the measured level of hardness, then the SAL shall be considered not exceeded for that measurement.[514] (Attachment E., Section II.B.1.b.)[515]

- SAL samples must be 24 hour time-weighted composites.[516]

- Source identification monitoring. The monitoring program shall identify sources of pollutants causing the priority water quality problems within each hydrologic subarea. The monitoring program is required to include focused monitoring which moves upstream into each watershed as necessary to identify sources. This monitoring program must be implemented within each hydrologic subarea and must begin no later than the 2012-2013 monitoring year.[517]

- Responding to an exceedance of a SAL. At each monitoring station, a running average of twenty percent or greater of exceedances of any discharge of stormwater from the MS4 to waters of the U.S. that exceed the SALs for turbidity, nitrate and nitrite, phosphorus, cadmium, copper, lead, and zinc requires the copermittee having jurisdiction to affirmatively augment and implement all necessary stormwater controls and measures to reduce the discharge of the associated class of pollutants to the MEP. The copermittees must utilize the exceedance information when adjusting and executing annual work plans. The copermittees must take the magnitude, frequency, and number of constituents exceeding the SAL, in addition to receiving water quality data and other information, into consideration when prioritizing and reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the copermittees have not reduced pollutants in storm water discharges to the MEP.[518]

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[514] Exhibit A, Test Claim, filed November 10, 2011, pages 307-308, (test claim permit, Attachment E., Section II.B.1.b.).

[515] The Fact Sheet explains that "when an exceedance of a SAL concentration is detected for a metal, the Copermittee must determine if that exceedance is above the existing applicable water quality limitation based upon the hardness of the receiving water. The water quality limitations Copermittees must use to assess total metal SAL exceedances are the California Toxic Rule (CTR) and USEPA National Recommended Water Quality Criteria for Freshwater Aquatic Life 1 hour maximum concentrations." Exhibit A, Test Claim, filed November 10, 2011, page 490 (Fact Sheet/Technical Report).

[516] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[517] Exhibit A, Test Claim, filed November 10, 2011, page 308, (test claim permit, Attachment E., Section II.B.2.).

[518] Exhibit A, Test Claim, filed November 10, 2011, page 205 (test claim permit, Section D.1.).

- Beginning three years after the Order adoption date, the Copermittees are required to annually evaluate their data compared to the SALs.[519]

At a minimum, outfalls that exceed SALs must be monitored in the subsequent year.[520]

Section D.3. states, "The absence of SAL exceedances does not relieve the Copermittees from implementing all other required elements of this Order."[521] Thus, Section D.3. imposes no requirements on the claimants.

Section D.4. states that "[t]his Order does not regulate natural sources and conveyances into the MS4 of constituents" identified in the section.[522] Thus, to be *relieved* of the requirements to implement stormwater controls, the copermittee "must demonstrate that the likely and expected cause of the SAL exceedance is *not* anthropogenic in nature" (generated from human activity).[523]

Accordingly, Section D. requires the copermittees to monitor the discharge of stormwater from MS4 outfalls in addition to the receiving water monitoring (which is still required by the test claim permit).[524] As stated in the Fact Sheet, the copermittees were not required to monitor MS4 outfalls under the prior permit:

> Currently the Copermittees do not monitor the discharge of storm water from the MS4 outfalls. As a result, a substantial amount of information regarding the quality of MS4 effluent is unknown, and in-stream stations monitored under R9-2004-001 have not accurately characterized MS4 effluent data during the permit term. [Fn. omitted.] The collection of wet-weather MS4 effluent data will enable the Copermittees to assess the effectiveness of existing storm water BMP measures, estimate cumulative annual pollutant loads from MS4 storm water discharges, and estimate seasonal pollutant loads from individual major outfalls. This data can be used to more effectively target storm water management program efforts. The MRP also requires compliance with Section D. of the Order for Storm Water Action Levels.

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[519] Exhibit A, Test Claim, filed November 10, 2011, page 205 (test claim permit, Section D.1.).

[520] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[521] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.3.).

[522] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.4.).

[523] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.4.).

[524] Exhibit A, Test Claim, filed November 10, 2011, pages 90, 121 (test claim permit, Section N., Monitoring and Reporting Program).

> The monitoring of outfalls is expected to be used to identify storm drains that are discharging pollutants in concentrations that may pose a threat to receiving waters. Source investigations are expected to be conducted as a response to the data. The Copermittees are required to monitor for those pollutants in 40 CFR 122.26(d)(2)(iii)(B); for 303(d) listed pollutants for the Santa Margarita Hydrologic Unit; and for pollutants with Storm Water Action Levels.[525]

The Fact Sheet also explains that "[t]he MRP provides the Copermittees great flexibility in assigning stations and sampling frequency for wet-weather monitoring" in that "Copermittees are to propose the number and frequency of monitoring stations, thus proposing the overall cost of their program."[526] The Regional Board will review the proposed program "to ensure that it will comply with Federal regulations and section D of the Order for Storm Water Action Levels."[527]

ii. Section D. mandates a new program or higher level of service to develop and submit a wet weather MS4 discharge monitoring plan to sample a representative percentage of major outfalls, but does not mandate a new program or higher level of service for the remaining activities since the activities to monitor discharges of stormwater, determine if the discharges are meeting existing water quality standards identified in the SALs and if not, implement or modify best management practices (BMPs) to meet water quality standards and report that information to the Regional Board were required by the prior permit and are mandated by federal law.

The claimants contend that Section D. imposes a reimbursable state-mandated program. The claimants argue that the prior permit did not include any SAL-related requirements, and that the following requirements are new:

> Implementation of Section D required Claimants to undertake a new program and provide a higher level of service. The DPD itself acknowledges that permittees "were not required to monitor MS4 outfalls under the prior permit." [FN. omitted.] Nor were permittees required under the 2004 Permit to develop a year-round watershed-based wet weather MS4 discharge monitoring program; to present a draft plan with the rationale, locations, frequency and analyses identified; to conduct monitoring at a "representative percentage" of the major outfalls within each hydrologic subarea; to conduct source identification monitoring to

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[525] Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report).

[526] Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report).

[527] Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report).

> identify sources of pollutants causing the priority water quality problems within each hydrologic subarea; to respond to SAL exceedances by taking them into consideration when adjusting and executing annual work plans; to sample for a broader suite of constituents obtained from monitoring; and, if a SAL exceedance was believed to be from natural causes, to demonstrate that the "likely and expected" cause of the exceedance was not "anthropogenic in nature."[528]

Further, they contend that there is no federal requirement that municipal NPDES permits include monitoring, reporting or compliance obligations that are triggered by an exceedance of a SAL, as follows:

> Contrary to any requirement to include a SAL-related mandate within an MS4 permit, the plain language of the CWA, as well as controlling case authority interpreting the Act, make clear that no form of SALs or any related mandates are required to be included within a municipal NPDES Permit by federal law. *See Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 **("Industrial discharges must strictly comply with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges.")** (emphasis supplied); *Divers' Environmental, supra*, 145 Cal.App.4th at 256 ("In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."); *BIA, supra*, 124 Cal.App.4th at 874 ("With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards ***without specific numeric effluent limits*** and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'") (emphasis supplied); State Board Order No. 2006-12, p. 17 (**"Federal regulations do not require numeric effluent limitations for discharges of stormwater.")** (emphasis supplied); and State Board Order No. 91-03, pgs. 30-31 ("***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'") (emphasis supplied).[529]

The claimants also contend that, "while not "traditional 'strict' numeric effluent limits," the SALs, like the NALs, are a new program imposed on the claimants "tied to achieving

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[528] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 12-13, see also, Exhibit A, Test Claim, filed November 10, 2011, page 45 (Test Claim narrative).

[529] Exhibit A, Test Claim, filed November 10, 2011 page 45 (Test Claim narrative), emphasis in original.

compliance with specific numeric limits." If the claimants exceed the SALs, they "were subject to additional and costly requirements, regardless of the feasibility or practicability of complying with the SALs."[530] The claimants therefore contend that "the SAL mandates went beyond what is required to be imposed in an MS4 permit, and the RWQCB had a 'true choice' in deciding to impose the SAL mandates."[531]

The Water Boards disagree and contend that Section D., does not impose a state-mandated new program or higher level of service as follows:

> As in prior permits, Copermittees are required to comply with water quality standards and to control pollutants in storm water discharges to the MEP. They remain required "through timely implementation of control measures and other actions to reduce pollutants in storm water discharges." [Footnote omitted.] Contrary to Claimants' assertions, SALs, like NALs, do not exceed the requirements of federal law, but instead are required in this case to encourage the Copermittees to take appropriate measures to control of pollutants in storm water to the maximum extent practicable standard.[532]

a) The requirements in Section D.2. to develop and submit a wet weather MS4 discharge monitoring plan to sample a representative percentage of major outfalls mandates a new program or higher level of service.

As indicated above, Section D.2. of the test claim permit requires the copermittees to develop and submit to the Regional Board a wet weather MS4 discharge monitoring program to sample a representative percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[533] Attachment E. provides that each copermittee is required to collaborate with the other copermittees to develop the year-round, watershed based, wet weather discharge monitoring program, and that the program is required to:

- Be designed to sample a representative percentage of the major outfalls within each hydrologic subarea.
- Characterize pollutant discharges from MS4 outfalls in each watershed during wet weather.

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[530] Exhibit A, Test Claim, filed November 10, 2011 page 45 (Test Claim narrative).

[531] Exhibit A, Test Claim, filed November 10, 2011, page 45 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, 765.

[532] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 25.

[533] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

- Include the rationale and criteria for selection of outfalls to be monitored.
- At a minimum, include collection of samples for pollutants listed in Table 4 and comply with the SALs.
- Identify sources of pollutants causing the priority water quality problems within each hydrologic subarea.
- Include focused monitoring which moves upstream into each watershed as necessary to identify sources.[534]

The requirements to collaborate to develop and submit the wet weather MS4 discharge monitoring program to ensure compliance with the SALs as required by Section D.2. are new, and were not required by prior law. Federal law requires a monitoring scheme "sufficient to yield data which are representative of the monitored activity," but does not require monitoring of each stormwater source at the precise point of discharge.[535] Thus, the wet weather monitoring required by the prior permit focused on the receiving waters and required a receiving waters monitoring program.[536] The prior permit also required a regional monitoring program to address watershed issues.[537] As indicated in the Fact Sheet for the test claim permit, however, "all monitoring conducted under Order R9-2004-001 [the prior permit] focused on receiving water conditions rather than MS4 effluent discharges."[538] The wet weather MS4 discharge monitoring program required by Section D. of the test claim permit is in addition to the receiving waters monitoring and regional monitoring programs, which are still required by the test claim permit.[539] Thus, the requirements to develop and submit the wet weather MS4 discharge monitoring program to comply with the SALs are new. As indicated above, the Regional Board required the development of a monitoring program at major outfalls because the permittees' ROWD and annual reports showed that that receiving water monitoring stations often failed to meet water quality objectives established in the Basin Plan and in the federal California Toxics Rule (CTR), and that the "MS4 discharges are causing or

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[534] Exhibit A, Test Claim, filed November 10, 2011, pages 206, 307-309 (test claim permit, Section D.2.; Attachment E., Sections II.B., II.B.2., II.B.3.).

[535] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[536] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, pages 2-9.

[537] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.II., page 8.

[538] Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report, Section II.B.2.).

[539] Exhibit A, Test Claim, filed November 10, 2011, page 297 et seq. (test claim permit, Attachment E., table of contents).

contributing to water quality impairments, and are a leading cause of such impairments in Riverside County."[540]

The Commission further finds that the requirement to develop and submit a wet weather MS4 discharge monitoring program imposes a state-mandated new program or higher level of service.

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[541]

Federal law does not specifically require the permittees to develop this additional monitoring program. As stated in the Fact Sheet, federal law provides that "NPDES permits may include any requirements necessary to 'Achieve water quality standards, ... including State narrative criteria for water quality.'"[542] Thus, the requirements to develop and submit the monitoring program is mandated by state.

Moreover, the requirements to develop and submit a wet weather discharge monitoring program imposes a new program or higher level of service. A "new program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[543] These requirements are uniquely imposed on the local government claimants and, thus, they impose a new program or higher level of service.

Thus, the following activities mandated by Section D.2. (and Attachment E., which is incorporated by reference into Section D. of the test claim permit) mandates a new program or higher level of service:

- Collaborate with all permittees to develop a year-round, watershed based, wet weather MS4 discharge monitoring program to sample a representative

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[540] Exhibit A, Test Claim, filed November 10, 2011, page 401 (Fact Sheet/Technical Report, Discussion of Finding C.9.).

[541] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[542] Exhibit A, Test Claim, filed November 10, 2011, page 488 (Fact Sheet/Technical Report, Section D.), citing Code of Federal Regulations, title 40, section 122.44(d).

[543] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[544]

- The principal copermittee shall submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented.[545]

> *b) The remaining requirements in Section D. to implement and conduct the wet weather discharge monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, do not mandate a new program or higher level of service.*

The courts have held that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[546] Rather, all of the requirements of article XIII B, section 6 must be met, including that the requirements imposed by the state mandate a new program or higher level of service.[547]

In this case, the claimants' costs may increase as a result of Section D. They are now required to monitor a representative percentage of the major outfalls within each hydrologic subarea in addition to monitoring receiving waters and, thus, the number of monitoring locations has likely increased. The costs will depend, however, on how the permittees structured their wet weather discharge monitoring program. As explained in the Fact Sheet, "[t]he MRP provides the Copermittees great flexibility in assigning stations and sampling frequency for wet-weather monitoring" in that "Copermittees are to propose the number and frequency of monitoring stations, thus proposing the overall cost of their program."[548]

Although there may be increased costs, the requirements in Section D. to monitor for the pollutants at issue, analyze the monitoring samples to determine if they meet water

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[544] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[545] Exhibit A, Test Claim, filed November 10, 2011, pages 206 and 309 (test claim permit, Section D.2., which incorporates by reference Attachment E., Section II.B.3.).

[546] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

[547] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, emphasis in original; see also, *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[548] Exhibit A, Test Claim, filed November 10, 2011, page 559 (Fact Sheet/Technical Report).

quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not mandate a new program or higher level of service.

First, the SALs, themselves, do not require any activities as suggested by the claimants. The SALs, like the NALs, are simply numbers set at the 90th percentile of the dataset for each constituent, that reflect the existing water quality standards in the Basin Plan, the CTR, and the US EPA Water Quality Criteria for turbidity, nitrate and nitrite, phosphorus, cadmium, copper, lead, and zinc, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to address those exceedances by implementing or modifying BMPs.[549] Section D., therefore imposes an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing federal requirements to monitor, implement BMPs, and report exceedances to the Regional Board.

The CWA requires an NPDES permittee to monitor discharges into the waters of the United States in a manner sufficient to determine whether it is meeting water quality standards.[550]

> First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following ... monitoring requirements ... to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers ... shall include ... monitoring procedures necessary to determine compliance and noncompliance with permit conditions....").[551]

Federal regulations expressly require the permittees to monitor for phosphorus, cadmium, copper, lead, and zinc, for which SALs were identified.[552] Monitoring must be conducted according to approved test procedures, unless otherwise approved.[553]

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[549] Exhibit A, Test Claim, filed November 10, 2011, pages 376, 431-434, 484 (Fact Sheet/Technical Report).

[550] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1).

[551] *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194, 1207.

[552] Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(B).

[553] Code of Federal Regulations, title 40, section 122.41(j).

Approved testing procedures for sampling, sample preservation, and analyses are located in federal regulations.[554]

Monitoring results must be reported, including any instances of noncompliance.[555] In addition, the permittee is required by federal regulations to report any noncompliance that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall state whether the noncompliance has been corrected and the steps taken or planned to reduce or eliminate the noncompliance.[556] The steps taken or planned to reduce or eliminate the noncompliance to achieve water quality standards include BMPs, or "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[557] Federal law also requires that annual monitoring reports identify and evaluate the results of the analysis of the monitoring data.[558]

Similarly, the monitoring program required by the prior permit was conducted in both wet and dry seasons (thus, year round), and also required the claimants to assess compliance with the permit and determine whether the discharges were meeting water quality standards for the pollutants at issue here.[559] The prior permit required that "[w]hen results from the chemistry, toxicity, and bioassessment monitoring described above indicate urban runoff-induced degradation, Permittees shall evaluate the extent and causes of urban runoff pollution in receiving waters and prioritize management actions to eliminate or reduce sources."[560] Toxicity Identification Evaluations (TIEs) were used to determine the cause of toxicity, and Toxicity Reduction Evaluations (TREs) were used to identify the source of the pollutants.[561] If a claimant determined that the MS4 discharges were causing or contributing to an exceedance of an applicable water quality standard, the claimant was required under the prior permit to promptly notify and submit a report to the Regional Board that describes the BMPs that

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[554] Code of Federal Regulations, title 40, Part 136.

[555] Code of Federal Regulations, title 40, sections 122.41(l)(4), (7); 122.22, 122.48; Code of Federal Regulations, title 40, Part 127.

[556] Code of Federal Regulations, title 40, section 122.41(l)(6).

[557] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[558] Code of Federal Regulations, title 40, section 122.41(j)(3).

[559] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.); Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A., pages 2-4.

[560] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.I.4., page 5.

[561] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.I.4., pages 5-7.

are currently implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards.[562] As noted in the prior permit, "[r]educing the discharge of pollutants in urban runoff to the MEP requires Permittees to conduct and document evaluation and assessment of each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP."[563] In addition, the claimants were required to annually evaluate their monitoring and report the findings to the Regional Board.[564] The prior permit also required the permittees to collaborate with all other Permittees to develop and implement a Watershed SWMP for the Upper Santa Margarita Watershed, including an assessment of the water quality of all receiving waters based upon existing water quality data and results from the receiving waters and illicit discharge monitoring programs, and to meet at least once a year to review and assess water quality data and program effectiveness.[565]

Thus, the requirements in Section D. to monitor the pollutants at issue, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL (or water quality standard) exists, have long been required by law and are not new.

The claimants also contend that Section D.4. of the test claim permit requires them to now demonstrate that the likely and expected cause of a SAL exceedance is not anthropogenic in nature.[566] As indicated above, Section D.4. states that "[t]his Order does not regulate natural sources and conveyances into the MS4 of constituents" identified in the section.[567] Thus, to be *relieved* of the requirements to implement stormwater controls, the copermittee "must demonstrate that the likely and expected cause of the SAL exceedance is *not* anthropogenic in nature" (generated from human activity).[568] The plain language of Section D.4. gives the copermittees discretion to seek relief from the requirements to implement stormwater controls where the cause of

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[562] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.); Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.l.4., page 7.

[563] Exhibit A, Test Claim, filed November 10, 2011, page 569 (Order R9-2004-0001, Finding 14.).

[564] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, page 16.

[565] Exhibit A, Test Claim, filed November 10, 2011, pages 595-596 (Order R9-2004-0001, Sections K.2. and K.4.).

[566] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[567] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.4.).

[568] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.4.).

the SAL exceedance is not anthropogenic in nature. If a copermittee seeks relief, then the copermittee has to comply with the requirement to demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature. Downstream requirements triggered by local discretionary decisions are not mandated by the state.[569]

Moreover, the requirements to monitor MS4 outfalls and implement BMPs to ensure that water quality standards are met does not constitute a new program or increased, or higher level of service to the public. A new program or higher level of service must "increase the actual level or quality of governmental services provided," or be imposed on local government uniquely.[570]

In this case, federal law has long required that NPDES permits include conditions to achieve water quality standards and objectives, including monitoring requirements to ensure that water quality standards are met.[571] As stated above, the SALs were developed to reflect the water quality standards in the Basin Plan, the federal California Toxics Rule (CTR), and the US EPA Water Quality Criteria.[572] "[I]t is the goal of the SALs, through the iterative and MEP process, to have MS4 storm water discharges meet all applicable water quality standards,"[573] and that any exceedance of a SAL indicates BMPs being implemented are insufficient to protect the beneficial uses of waters.[574]

The requirement imposed by the test claim permit to monitor MS4 outfalls and implement BMPs if an exceedance occurs at those monitoring stations simply makes the claimants comply with existing federal law imposed on *all* dischargers to comply with water quality standards.[575]

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[569] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[570] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877; *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287.

[571] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(d)(1) and (i)(1).

[572] Exhibit A, Test Claim, filed November 10, 2011, pages 376, 431-434, 484 (Fact Sheet/Technical Report).

[573] Exhibit A, Test Claim, filed November 10, 2011, page 490 (Fact Sheet/Technical Report).

[574] Exhibit A, Test Claim, filed November 10, 2011, page 433 (Fact Sheet/Technical Report).

[575] Code of Federal Regulations, title 40, section 122.44(d)(1).

Moreover, the prior permit expressly prohibited discharges from MS4s that cause or contribute to the violation of water quality standards.[576] The prior permit also prohibited discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater.[577] The prior permit further stated that "nothing in this Order shall be construed to relieve the permittee from civil or criminal penalties for noncompliance."[578] As indicated in the findings, the claimants were not meeting water quality standards.[579] Based on these facts, the plain language of the prior permit, and the cases described below, the claimants could have been held liable for violating the CWA under the prior permit.

In *Building Industry Association of San Diego County v. State Water Resources Control Board*,[580] the Building Industry Association (BIA) challenged a 2001 NPDES stormwater permit issued by Regional Board that expressly prohibited the discharge of pollutants that "cause or contribute to exceedances of receiving water quality objectives," and that "cause or contribute to the violation of water quality standards."[581] The permit contained an enforcement provision that required a municipality to report any violations or exceedances of an applicable water quality standard and describe a process for improvement and prevention of further violations.[582] The permit also contained a provision that "Nothing in this section shall prevent the Regional Water Board from enforcing any provision of this Order while the municipality prepares and implements the above report."[583] BIA, concerned that the permit provisions were too stringent, impossible to satisfy, and would result in all affected municipalities being in immediate violation of the permit and subject to substantial civil penalties because they were not then complying with applicable water quality standards, contended that under federal law, the "maximum extent practicable" standard is the exclusive measure that may be applied to municipal storm sewer discharges. BIA asserted that the Regional Board

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[576] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.1.).

[577] Exhibit A, Test Claim, filed November 10, 2011, pages 573, 581-582 (Order R9-2004-0001, Sections C.1., F.2.b.8.).

[578] Exhibit A, Test Claim, filed November 10, 2011, page 606 (Order R9-2004-0001, Attachment B., Standard Provisions).

[579] Exhibit A, Test Claim, filed November 10, 2011, pages 374, 401 (Fact Sheet/Technical Report, Finding C.9. and Discussion of Finding C.9.).

[580] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866.

[581] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 876-877.

[582] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[583] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

may not require a municipality to comply with a state water quality standard if the required controls exceed a maximum extent practicable standard.[584] The court, however, rejected BIA's interpretation, and held that the permit provisions requiring compliance with water quality standards are proper under federal law.[585]

Similarly, in *Natural Resources Defense Council, Inc. v. County of Los Angeles*,[586] the permit prohibited discharges from the MS4 that cause or contribute to the violation of water quality standards and objectives contained in the Basin Plan, the California Toxics Rule, the National Toxics Rule, and other state or federal approved surface water quality plans. The permit further provided that the permittees comply with the discharge prohibitions with monitoring and timely implementation of control measures and other actions to reduce pollutants in their discharges.[587] Between 2002 and 2008, annual monitoring reports were published, and identified 140 separate exceedances of the water quality standards for aluminum, copper, cyanide, zinc, and fecal coliform bacteria in the Los Angeles and San Gabriel Rivers.[588] NRDC filed a lawsuit alleging that the permittees violated the CWA and its causes of actions were based on the following assertions: that the permit incorporated the water quality limits for each receiving water body; that the monitoring stations had recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; that an exceedance constitutes non-compliance with the permit and, thereby, the CWA; and that the permittees were liable for these exceedances under the CWA.[589] The permittees argued they could not be held liable for violating the permit and, thus, the CWA, based solely on monitoring data because the monitoring was not designed or intended to measure compliance of any permittee, which the court disagreed with based on the plain language of the permit; and the monitoring data cannot parse out precisely whose discharge contributed to any given exceedance because the monitoring stations

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[584] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 880, 890.

[585] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880; see also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167, which also held that the US EPA or the state administrator has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

[586] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194.

[587] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[588] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1200.

[589] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1201.

manage samples downstream and not at the discharge points.[590] The court disagreed with the permittees, finding that:

> . . . . the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrates that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.[591]

The court also found that "the Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit."[592] The court stated that Congress recognized that MS4s often cover many square miles and comprise numerous, geographically scattered sources of pollution including streets, catch basins, gutters, man-made channels, and storm drains, and that for large urban areas, MS4 permitting could not be accomplished on a source-by-source basis. Thus, Congress delegated to the US EPA and the state administrators discretion to issue permits on a jurisdiction-wide basis, instead of requiring separate permits for individual discharge points. Nothing in the MS4 permitting scheme of federal law, however, relieves permittees of the obligation to monitor their compliance with the permit and the CWA.[593] "Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law."[594] The court remanded the case to the lower courts to determine the appropriate remedy for the county's violations.[595]

Therefore, Section D. does not increase the level or quality of service to the public; it simply helps the claimants comply with existing law imposed on all dischargers to meet

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[590] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1204-1205.

[591] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1206-1207.

[592] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1207, citing to United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.44(i)(1); Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F).

[593] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1209.

[594] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210, emphasis in original.

[595] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210.

water quality standards, *without* being held strictly liable if a pollutant exceeds a numeric effluent limit. Unlike industrial dischargers, who are required to meet applicable effluent limitations with the "best practicable control technology currently available," the test claim permit, in Section D.1., simply requires the claimants to "affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s) to the MEP standard."[596] As the test claim permit states, "[f]ailure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard."[597] The Fact Sheet also makes clear that:

> SALs are not numeric effluent limitations, which is reflected in language which clarifies an excursion above a SAL does not create a presumption that MEP is not being met. Instead, a SAL exceedance is to be used by the Copermittee as an indication that the MS4 storm water discharge point is a definitive "bad actor," and the result from the monitoring needs to be considered as part of the iterative process for reducing pollutants in storm water to the MEP.[598]

Thus, claimants' argument that the numeric SALs are similar to numeric effluent limits in that they are new programs imposed on the copermittees that are tied to achieving compliance with specific numeric limits is not supported by the plain language of the test claim permit. Accordingly, the Commission finds that other than the requirements other than the requirements in D.2. and Attachment E. Section II.B. to develop a wet weather discharge monitoring program and submit it to the Regional Board, Section D. of the test claim permit does not mandate a new program or higher level of service.

4. Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. of the Test Claim Permit, Addressing Low Impact Development (LID), Hydromodification Plans, Best Management Practices (BMPs) for Priority Development Projects, and a Retrofitting Program to Reduce Impacts from Hydromodification and Promote Low Impact Development Best Management Practices (LID BMPs), Impose Some State-Mandated New Programs or Higher Levels of Service When Local Agencies Regulate Land Use and Development.

On pages 21 and 22 of the Test Claim, the claimants state they are pleading "Requirements relating to the Priority Development Projects, [low] impact development (LID) and hydromodification, contained in Section F.1." and the "Requirements relating

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[596] United States Code, title 33, section 1311(b)(1)(C). See also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1166; Exhibit A, Test Claim, filed November 10, 2011, page 205 (test claim permit, Section D.1.).

[597] Exhibit A, Test Claim, filed November 10, 2011, page 205 (test claim permit, Section D.1.).

[598] Exhibit A, Test Claim, filed November 10, 2011, pages 266, 432 (test claim permit; Fact Sheet/Technical Report, Discussion of Finding D.1.h.).

to the retrofitting of existing development, contained in Section F.3.d."[599] On pages 46-52 of the Test Claim, the claimants discuss only Section F.1.d.1., 2., 4., and 7. relating to LID, and no other provisions of Section F.1.d, and cite Section F.1.h, which addresses the hydromodification requirements.[600] On pages 65-66 of the Test Claim, the claimants discuss Section F.3.d.1.-5., and do not discuss the remaining provisions of Section F.3.d.[601]

Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate *and* a detailed description of the new activities mandated by the state. Thus, this Decision will address the specific sections properly pled; namely Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5., of the test claim permit as they relate to the activities relating to the retrofitting of existing development, contained in Section F.3.d., LID in Section F.1.d.1., 2., 4., and 7., and hydromodification in Section F.1.h. These sections are part of the Standard Stormwater Mitigation Plan (SSMP) that requires, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of water quality standards, an updated plan for review of priority development projects proposed by residential, commercial, industrial, mixed-use, and public project proponents and the implementation of LID site design BMPs at new development and redevelopment projects; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.

The claimants seek reimbursement when regulating priority development projects *and* implementing LID and hydromodification requirements for their own municipal priority development projects and identify the following LID and hydromodification "mandated" activities for municipal projects:[602]

- Applying Standard Stormwater Mitigation Plan ("SSMP") requirements to an increased range of municipal projects implemented by the Claimants, which meet the requirements of to [sic] F.1.d.(1) and F.1.d.(2).
- Requiring implementation of LID practices and development and implementation of an LID Waiver program, as described in F.1.d.(4) and F.1.d.(7), on municipal PDPs implemented by the Claimants. This will require creating a formalized review process for all PDPs, developing protocols for assessing each PDP for various required types of LID, training staff on the new protocols, assessing potential on- or off-site collection and reuse of storm water, amending local ordinances to remove

[599] Exhibit A, Test Claim, filed November 10, 2011, pages 21-22.

[600] Exhibit A, Test Claim, filed November 10, 2011, pages 46-52.

[601] Exhibit A, Test Claim, filed November 10, 2011, pages 65-66.

[602] Exhibit A, Test Claim, filed November 10, 2011, page 56 (Test Claim narrative).

barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces. Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements, and any other municipal projects meeting the permit-specified thresholds or geographical criteria.

- Requiring development of an HMP [hydromodification plan], and implementation of those HMP requirements on municipal PDPs implemented by the Claimants pursuant to Part F.1.h. To comply with part F.1.h, the Copermittees must invest significant resources to hold public hearings, hold collaborative meetings, perform studies and develop an HMP, train staff and the public, and adopt the local SSMP. In addition, as noted above, Claimants are prohibited from using non-natural materials in reinforcing stream channels, a prohibition which is not practicable. Continued compliance with these sections will also require Copermittees to add requirements to municipal projects and will significantly increase the costs of design and construction.[603]

The claimants also allege that the following activities related to the retrofitting program addressed in Section F.3.d.1.-5. of the test claim permit are newly mandated as follows:

- Section F.3.d. imposed at least five new requirements on Claimants, requirements which were not required by federal law and represented state mandates for which Claimants are entitled to reimbursement. The costs of developing and implementing the retrofitting program for existing development for which Permittees should be reimbursed arise from the extensive list of requirements in the 2010 Permit. These requirements include:
    - Identifying potential retrofitting candidates by researching and locating developments that contribute to a TMDL or ESA, that are channelized or hardened, that are tributary to receiving waters which are an ASBS, SWQPA, or are significantly eroded;
    - Evaluating the feasibility, cost effectiveness, pollutant removal effectiveness, tributary area, maintenance requirements, landowner cooperation, neighborhood acceptance, aesthetic qualities, efficacy at addressing concern, and potential for improvement in public health and safety for each potential retrofitting candidate and then ranking each candidate accordingly;
    - Prioritizing retrofit projects in the following year's municipal work plan and designing retrofit projects according to the SSMP requirements and hydromodification where feasible;

[603] Exhibit A, Test Claim, filed November 10, 2011, page 56 (Test Claim narrative).

- Cooperating with and encouraging private landowners to undertake site-specific retrofit projects; and
- Tracking and inspecting retrofit BMPs.[604]

As described below, the Commission finds that:

- All LID and hydromodification costs required by Sections F.1.d.1., 2., 4., 7., and F.1.h. of the test claim permit and incurred and triggered by a project proponent of a *municipal* priority development or redevelopment project are not mandated by the state because the costs are incurred at the discretion of the local agency. In addition, the costs to implement the LID BMPs and hydromodification requirements on municipal development or redevelopment projects do not impose a new program or higher level of service because such costs are not unique to government, and do not provide a peculiarly governmental service to the public. Moreover, the permit in Section F.3.d.1.-5., does not require the copermittees to retrofit existing public properties. Thus, all retrofitted BMP inspection and tracking activities that flow from the discretionary decision of a copermittee to retrofit existing public developments are likewise not required or mandated by the test claim permit.[605]
- The remaining new LID, hydromodification, and retrofitting administrative, planning, and regulatory activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.-5. are mandated by the state and impose a new program or higher level of service.

a. Background

i. Federal law requires an NPDES applicant to propose structural and source control measures to reduce pollutants from runoff from all construction sites and all new development and redevelopment of commercial, residential, and industrial areas to the maximum extent practicable (MEP), and the US EPA encourages green infrastructure as an integral part of stormwater management.

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[606] Federal regulations define "best management practices" as:

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[604] Exhibit A, Test Claim, filed November 10, 2011, page 67 (Test Claim narrative).

[605] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727; *City of Merced v. State* (1984) 153 Cal.App.3d 777; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[606] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

> . . . schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[607]

Federal regulations require that the application for an NPDES permit for large and medium MS4 dischargers to describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. As relevant here, the proposed management programs shall include the following information:

- A description of structural and source control measures to reduce pollutants from runoff from *commercial and residential areas* that are discharged from the MS4 and that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include, as relevant here:
    - A description of planning procedures including a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from MS4s that receive discharges from areas of *new development and significant redevelopment*. The plan shall address controls to reduce pollutants in discharges from MS4s after construction is completed.
    - A description of practices for operating and maintaining *public streets, roads, and highways*, and procedures for reducing the impact on receiving waters of discharges from MS4s.
- A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from *industrial facilities* that the municipal permit applicant determines is contributing a substantial pollutant loading to the MS4. The description shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges.
- A description of a program to *implement and maintain structural and non-structural BMPs* to reduce pollutants in stormwater runoff *from construction sites* to the MS4. The description shall include procedures for site planning, which incorporates consideration of potential water quality impacts; requirements for nonstructural and structural BMPs; procedures for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving

[607] Code of Federal Regulations, title 40, section 122.2.

water quality; and appropriate educational and training measures for construction site owners.[608]

The application shall also include estimated reductions in loadings of pollutants from discharges of runoff from MS4s expected as a result of the water quality management programs and the identification of known impacts of stormwater controls on ground water.[609]

In 2006, the US EPA requested the National Research Council of the National Academy of Sciences (NRC) to conduct a review of the existing stormwater regulatory program.[610] NRC issued its report in 2008, and found that "the rapid conversion of land to urban and suburban areas has profoundly altered how water flows during and following storm events, putting higher volumes of water and more pollutants into the nation's rivers, lakes, and estuaries. These changes have degraded water quality and habitat in virtually every urban stream system."[611] The NRC report recommended "a number of actions, including conserving natural areas, reducing hard surface cover (e.g., roads and parking lots — impervious surface areas), and retrofitting urban areas with features that hold and treat stormwater."[612] The report also recommended that the US EPA adopt a watershed-based permitting system encompassing all discharges that could affect waterways in a particular drainage basin. Under this watershed approach, responsibility to implement watershed-based permits and control all types of municipal, industrial, and construction stormwater discharges would reside with MS4 permittees. The report criticized the US EPA's current approach, "which leaves much discretion to regulated entities to set their own standards through stormwater management plans and to self-monitor."[613]

After the NRC report was issued in 2008, the US EPA, in 2009, initiated information-gathering and public dialogue activities for possible regulatory changes that would respond to the NRC report and embrace the report's recommendations. As part of this project, the US EPA was considering establishing specific requirements and standards to control stormwater discharges from new development and redevelopment that

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[608] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv), emphasis added.

[609] Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

[610] Exhibit J (6), Congressional Research Service, "Stormwater Permits: Status of EPA's Regulatory Program," (November 28, 2016), page 12; Exhibit J (22), Excerpt from 74 Federal Register 68617 (December 28, 2009), page 6.

[611] Exhibit J (22), Excerpt from 74 Federal Register 68617 (December 28, 2009), page 6.

[612] Exhibit J (22), Excerpt from 74 Federal Register 68617 (December 28, 2009), page 6.

[613] Exhibit J (6), Congressional Research Service, "Stormwater Permits: Status of EPA's Regulatory Program," (November 28, 2016), page 12.

promote sustainable practices that mimic natural processes to infiltrate and recharge, evapotranspire, and harvest and reuse precipitation as follows:

> For example, there could be a national requirement for on-site stormwater controls such that post development hydrology mimics predevelopment hydrology on a site-specific basis. EPA could establish a suite of specific options of standards for meeting such a requirement, for example, on-site retention of a specific size storm event in an area, limits on the amount of effective impervious surfaces (defines as impervious surfaces with direct hydraulic connection to the downstream drainage (or stream) system, also referred to as directly connected impervious area), use of site-specific calculations to determine predevelopment hydrology, and/or use of regional specific standards to reflect local circumstances.[614]

US EPA was also seeking input to require MS4s to address stormwater discharges in areas of existing development through retrofitting of the sewer system, drainage area, or individual structures with improved stormwater control measures.[615]

In March 2014, however, the US EPA announced that it would defer action on the rule and, instead, would provide incentives and technical assistance to address stormwater runoff. "In particular, the agency said that it will leverage existing requirements to strengthen municipal stormwater permits and will continue to promote green infrastructure as an integral part of stormwater management."[616]

ii. The prior permit required each copermittee to submit a storm water management plan (SWMP) to reduce pollutants in urban runoff to the maximum extent practicable (MEP), which included source control and treatment control best management practices (BMPs) for all priority development projects, and implementation of pollution prevention methods for construction and industrial sites.

The prior permit recognized that with urban development, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots. While natural vegetated soil can both absorb rainwater and remove pollutants providing an effective natural purification process, pavement and concrete cannot.[617] The prior permit also recognized that urban runoff contains waste and pollutants that can threaten human health and toxic pollutants can impact the

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[614] Exhibit J (22), Excerpt from 74 Federal Register 68617 (December 28, 2009), pages 7-8.

[615] Exhibit J (22), Excerpt from 74 Federal Register 68617 (December 28, 2009), page 8.

[616] Exhibit J (6), Congressional Research Service, "Stormwater Permits: Status of EPA's Regulatory Program," (November 28, 2016), page 14.

[617] Exhibit A, Test Claim, filed November 10, 2011, page 568 (Order R9-2004-0001, Finding 12).

overall quality of aquatic systems and beneficial uses of receiving waters.[618] As a result, the runoff leaving the developed urban area is significantly greater in volume, velocity, and pollutant load than the pre-development runoff in the same area.[619]

The prior permit also recognized that pollutants can be effectively reduced in urban runoff by the application of pollution prevention, source control, and treatment control BMPs. Source control BMPs (both structural and non-structural) minimize the contact between the pollutants and flows (for example, re-routing pollutant sources). Treatment control (or structural) BMPs remove pollutants from urban runoff.[620]

Thus, Section F., of the prior permit required each permittee, as a component of their SWMP, to address land use planning by minimizing the short and long-term impacts on receiving water quality from *new development and redevelopment*. In order to reduce pollutants in urban runoff from new development and redevelopment to the MEP, each permittee was required to include in its General Plan water quality and watershed protection principles and policies to direct land use decisions and require implementation of consistent water quality protection measures of their choosing for development projects. Examples of water quality and watershed protection principles and policies to be considered for inclusion in the General Plan included the following: (1) minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment, where feasible, to slow runoff and maximize its on-site infiltration; (2) implement pollution prevention methods supplemented by pollutant source controls and treatment; (3) preserve, create, or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones; (4) limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges; (5) prior to making land use decisions, utilize methods to estimate increases in pollutant loads and flows resulting from projected future development and require appropriate BMPs to mitigate the projected increases in pollutant loads and flows; (6) avoid development of areas that are susceptible to erosion and sediment loss or develop guidance that identifies these areas and protects them from erosion and sediment loss; (7) reduce pollutants associated with vehicles and increasing traffic resulting from development; and (8) post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.[621]

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[618] Exhibit A, Test Claim, filed November 10, 2011, page 567 (Order R9-2004-0001, Findings 6 and 7).

[619] Exhibit A, Test Claim, filed November 10, 2011, page 568 (Order R9-2004-0001, Finding 12).

[620] Exhibit A, Test Claim, filed November 10, 2011, page 568 (Order R9-2004-0001, Finding 15).

[621] Exhibit A, Test Claim, filed November 10, 2011, pages 575-576 (Order R9-2004-0001, Section F.1.).

Before the issuance of a local building permit, the prior permit required the permittees to require each proposed project proponent to implement BMPs to ensure that pollutants and runoff from the development will be reduced to the MEP. The project proponent was required to ensure that receiving water quality objectives were not violated throughout the life of the project. All development was required to be in compliance with stormwater ordinances and the following requirements, which were required to be included in local permits:

- Require project proponent to implement pollution prevention and source control BMPs.
- Require project proponent to implement site design/landscape characteristics that maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage for all development projects.
- Require project proponent to implement buffer zones for natural water bodies. Where buffer zones are not feasible, require project proponent to implement other buffers such as trees, lighting restrictions, access restrictions, etc.
- Require industrial applicants to provide evidence of coverage under the General Industrial Permit.
- Require project proponent to ensure its grading or other construction activities meet the requirements of the Standard Urban Storm Water Mitigation Plan (SUSMP), which is described below.
- Require project proponent to provide proof of a mechanism which will ensure ongoing long-term maintenance of all structural post-construction BMPs.[622]

In addition, the prior permit required the permittees to develop, adopt, and implement a SUSMP to reduce pollutants and to maintain or reduce downstream erosion and stream habitat from all *priority development projects*, which included all new development and redevelopment projects[623] that create, add, or replace at least 5,000 square feet of impervious surfaces on an already existing developed site. The permittees were required to ensure that the following priority development projects meet SUSMP requirements:[624]

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[622] Exhibit A, Test Claim, filed November 10, 2011, pages 576-577 (Order R9-2004-0001, Section F.2.).

[623] Redevelopment includes, but is not limited to, the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces. Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.b.).

[624] Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.b.).

- Home subdivisions of 10 or more housing units.
- Commercial developments greater than 100,000 square feet defined as any development on private land that is not for heavy industrial or residential uses and includes hospitals, laboratories, and other medical facilities; educational institutions; recreational facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; commercial airfields; and other light industrial facilities.
- Automotive repair shops.
- Restaurants, where the land area for development is greater than 5,000 square feet. If the land development is less than 5,000 square feet, the restaurant shall meet all SUSMP requirements, except for structural treatment BMP, numeric sizing criteria, and peak flow requirements.
- All hillside development greater than 5,000 square feet defined as any development which creates 5,000 square feet of impervious surface that is located in an area with known erosive soil conditions and where the development will grade on any natural slope that is 25 percent or greater.
- Environmentally sensitive areas (ESAs).[625] All development and redevelopment located within or directly adjacent to (within 200 feet of an environmentally sensitive area) or discharging directly (outflow from a drainage conveyance system that is composed entirely of flows from the development or redevelopment site) to an environmentally sensitive area (where discharges from the development or redevelopment will enter receiving waters within the environmentally sensitive area), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to ten percent or more of its naturally occurring condition.
- Parking lots 5,000 square feet or more.

[625] Environmentally Sensitive Areas are defined as areas "in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would easily be disturbed or degraded by human activities and developments." ESAs subject to urban runoff requirements include but are not limited to all CWA section 303(d) impaired water bodies, areas designated as Areas of Special Biological Significance by the State Resources Water Control Board Basin Plan; water bodies designated with the RARE beneficial use by the State Resources Water Control Board Basin Plan; areas within the Western Riverside County Multi-Species Habitat Conservation Plan (MSHCP) plan area that contain rare or especially valuable plant or animal life or their habitat; and any other equivalent environmentally sensitive areas which the copermittees have identified. Exhibit A, Test Claim, filed November 10, 2011, page 610 (Order R9-2004-0001, Attachment C), quoting Public Resources Code section 30107.5.

- Street, roads, highways, and freeways. This includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles
- Retail Gasoline Outlets that are 5,000 square feet or more or have a projected average daily traffic of 100 or more vehicles per day.[626]

The SUSMP was also required to include a list of recommended source control and treatment control BMPs and had to require that all priority development projects implement a combination of on-site source control and on-site/shared treatment control BMPs selected from the recommended BMP list. The BMPs shall, at a minimum:

- Control the post-development peak stormwater runoff discharge rates and velocities to maintain or reduce pre-development downstream erosion and to protect stream habitat.
- Conserve natural areas where feasible.
- Minimize stormwater pollutants of concern in urban runoff from the priority development projects through implementation of source control BMPs. Identification of pollutants of concern should include, at a minimum, all pollutants for which water bodies receiving the development's runoff are listed as impaired under CWA section 303(d), all pollutants associated with the land use type of the development, and all pollutants commonly associated with urban runoff.
- Be effective at removing or treating the pollutants of concern associated with the project.
- Minimize directly connected impervious areas where feasible.
- Protect slopes and channels from eroding.
- Include storm drain stenciling and signage.
- Include properly designed outdoor material storage areas.
- Include properly designed trash storage areas.
- Include proof of a mechanism, to be provided by the project proponent or copermittee, which will ensure ongoing long-term structural BMP maintenance.
- Include additional water quality provisions applicable to individual priority development project categories.
- Be correctly designed so as to remove pollutants to the MEP.
- Be implemented close to pollutant sources, when feasible, and prior to discharging into receiving waters.

[626] Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.b.).

- Ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives and which have not been reduced to the MEP.[627]

The prior permit required that the SUSMP require priority development projects to implement treatment control BMPs, which had to be located to infiltrate, filter, or treat the required runoff volume or flow prior to its discharge to any receiving water. Treatment control BMPs could be shared by multiple priority development projects as long as construction of any shared treatment control BMPs is completed prior to the use of any development project from which the treatment control BMP will receive runoff, and prior to discharge to a receiving water. In addition, all treatment control BMPs for a single priority development project had to be collectively sized to comply with the following specified numeric criteria for volume or flow:

- Volume-based BMPs shall be designed to infiltrate, filter, or treat the volume of runoff produced from a 24-hour 85th percentile storm event, as specified.
- Flow based BMPs shall be designed to infiltrate, filter, or treat either the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour; or the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity; or the maximum flow rate of runoff that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor to two.
- Alternatively, the copermittees could develop an equivalent method for calculating the numeric sizing criteria for volume or flow.[628]

The prior permit also required that the SUSMP, require the permittees to develop a procedure for pollutants of concern to be identified for each priority development project. The procedure had to address receiving water quality (including pollutants for which receiving waters are listed as impaired under section 303(d)); pollutants associated with land use type of the development project; pollutants expected to be present on site; changes in stormwater discharge flow rates, velocities, durations, and volumes resulting from the development project; and sensitivity of receiving waters to changes in stormwater discharges flow rates, velocities, durations, and volumes.[629]

In addition, under the prior permit, the permittees were required to develop a process by which the SUSMP requirements would be implemented and at what point of the planning process development projects would be required to meet all SUSMP

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[627] Exhibit A, Test Claim, filed November 10, 2011, pages 577-578 (Order R9-2004-0001, Section F.2.b.1.).

[628] Exhibit A, Test Claim, filed November 10, 2011, pages 578-580 (Order R9-2004-0001, Section F.2.b.2.-4.).

[629] Exhibit A, Test Claim, filed November 10, 2011, page 581 (Order R9-2004-0001, Section F.2.b.5.).

requirements. The process had to "also include identification of the roles and responsibilities of various municipal departments in implementing the SUSMP requirements, as well as any other measures necessary for the implementation of SUSMP requirements."[630]

The prior permit further required that the SUSMP contain a waiver provision that allows a permittee to waive the requirement of implementing all treatment control BMPs for a project if infeasibility can be established. A waiver of infeasibility shall only be granted when all available treatment control BMPs have been considered and rejected as infeasible. In addition, the prior permit gave the permittees authority to require project proponents that received waivers to transfer the cost savings, as determined by the permittee, to a stormwater mitigation fund to be used on projects to improve urban runoff quality within the watershed of the waived project.[631]

To protect groundwater quality, the prior permit required permittees to apply restrictions to the use of treatment control BMPs that are designed to function primarily as infiltration devices (such as infiltration trenches and infiltration basins) to ensure that their use shall not cause or contribute to an exceedance of groundwater quality objectives. The use of treatment control BMPs designed to function primarily as infiltration devices shall meet the following conditions:

- Urban runoff shall undergo pretreatment such as sedimentation or filtration prior to infiltration.
- All dry weather flows shall be diverted from infiltration devices.
- Pollution prevention and source control BMPs shall be implemented to protect groundwater quality at sites where infiltration treatment control BMPs are to be used.
- Infiltration treatment control BMPs shall be adequately maintained so that they remove pollutants to the MEP.
- The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark shall be at least 10 feet unless the groundwater basins do not support beneficial uses.
- The soil through which infiltration is to occur shall have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) for proper infiltration durations and treatment of urban runoff.
- Infiltration treatment control BMPs shall not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater

[630] Exhibit A, Test Claim, filed November 10, 2011, page 581 (Order R9-2004-0001, Section F.2.b.6.).

[631] Exhibit A, Test Claim, filed November 10, 2011, page 581 (Order R9-2004-0001, Section F.2.b.7.).

average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each permittee.

- Infiltration treatment control BMPs shall be located a minimum of 100 feet horizontally from any water supply wells.

As part of the SUSMPs, the permittees were granted the authority to develop alternative restrictions on the use of treatment control BMPs that are designed to function primarily as infiltration devices.[632]

In addition, the prior permit required the permittees to develop and propose numeric criteria to control urban runoff discharge velocities, volumes, durations, and peak rates to ensure that discharges from priority development projects maintain or reduce pre-development downstream erosion and protect stream habitat.[633] The permittees were required to revise their current environmental review processes as necessary to include requirements for evaluation of water quality effects and identification of appropriate mitigation measures for all development projects.[634] The permittees were also required to implement education programs to include an annual training for planning and development review staffs, planning boards, and elected officials, as well as training for project applicants, developers, contractors, property owners, and community planning groups.[635]

Section G. of the prior permit contained SWMP provisions relating to construction sites and inspection of those sites. Each permittee was required to implement pollution prevention methods and to require construction site owners, developers, contractors, and other responsible parties to use the prevention methods. Each permittee had to also review and update its grading ordinances to require implementation of BMPs that addressed erosion prevention, slope stabilization, phased grading, revegetation, preservation of natural hydrologic features, preservation of riparian buffers and corridors, maintenance of all source control and treatment control BMPs, and retention and proper management of sediment and other construction pollutants on site. BMP implementation was year round, but requirements could vary during the wet and dry seasons. Each permittee was required to implement, or require implementation of, additional controls for construction sites tributary to CWA section 303(d) water bodies impaired for sediment as well as additional controls for construction sites within or

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[632] Exhibit A, Test Claim, filed November 10, 2011, pages 581-582 (Order R9-2004-0001, Section F.2.b.8.).

[633] Exhibit A, Test Claim, filed November 10, 2011, pages 582-583 (Order R9-2004-0001, Section F.2.b.9.).

[634] Exhibit A, Test Claim, filed November 10, 2011, page 583 (Order R9-2004-0001, Section F.3.).

[635] Exhibit A, Test Claim, filed November 10, 2011, pages 583-584 (Order R9-2004-0001, Section F.4.).

adjacent to or discharging directly to receiving waters within ESAs. The permittees were required to conduct construction site inspections, as specified, for compliance with its local ordinances, permits, and the test claim permit. Based upon site inspection findings, follow-up actions were required including sanctions to ensure compliance with the prior permit, ordinances, and the building permit. Each permittee was also required to implement an education program that included annual training for its construction, building, and grading review staff and inspectors and a program for project applicants, contractors, developers, property owners, and other responsible parties.[636]

Finally, Section H. of the prior permit required each permittee to develop and implement programs to prevent or reduce pollutants in runoff to the MEP from all existing developments within its jurisdiction (municipal, industrial and commercial, and residential developments). Generally, each permittee had to require the use of pollution prevention methods; designate BMPs for implementation; identify pollution sources through developing and updating an inventory of existing development sites; conduct inspections of municipal and industrial and commercial sites and enforce its ordinances to ensure compliance with the prior permit and local ordinances. For industrial and commercial sites, each permittee was required to prioritize the inventory by threat to water quality standards and schedule inspections accordingly; use enforcement actions, including sanctions, to ensure compliance; and provide training to permittee staff and development site owners, operators and employers. In addition, each permittee was required to implement a schedule of maintenance for its MS4 BMPs.[637]

b. Except for costs incurred by a project proponent of a municipal project (which are not eligible for reimbursement), Sections F.1.d.1., 2., 4., 7., F.1.h., and F.3.d.1.-5. of the test claim permit mandate a new program or higher level of service.

i. New LID, hydromodification plan, and retrofitting requirements imposed by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5.

The test claim permit explains that while the copermittees have generally been implementing the jurisdictional urban runoff programs required by the prior permit, MS4 discharges continue to cause or contribute to violations of water quality standards as evidenced by the copermittees' monitoring results.[638]

The Fact Sheet further explains that when the prior permit was adopted, studies showed that the level of imperviousness in an area strongly correlated with the quality of nearby receiving waters and stream degradation occurred at levels of imperviousness as low as 10 to 20 percent resulting in a decline in the biological integrity and physical habitat

[636] Exhibit A, Test Claim, filed November 10, 2011, pages 584-587 (Order R9-2004-0001, Section G.).

[637] Exhibit A, Test Claim, filed November 10, 2011, pages 587-593 (Order R9-2004-0001, Section H.).

[638] Exhibit A, Test Claim, filed November 10, 2011, page 188 (test claim permit, Section D., Finding 1.b.).

conditions necessary to support natural biological diversity. More recently, however, a study and report by the Southern California Coastal Water Research Program on the effects of imperviousness in southern California streams found that local ephemeral and intermittent streams are even more sensitive to such effects than streams in other parts of the country, with a threshold of response at a two or three percent change of impervious cover. Urban stream flows have greater peaks and volumes, and shorter retention times, than natural stream flows. This results in stream degradation and less time for sediment and other pollutants to settle before being carried out to the ocean, which then accelerates the erosion of the beds and banks within downstream receiving waters. The sediment and pollutants can be a significant cause of water quality degradation.[639] Thus, the test claim permit "contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards."[640]

The claimants pled Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.-5. of the test claim permit.[641] These sections require an updated plan for review of priority development projects and implementation of Low-Impact Development (LID) site design BMPs at new development and redevelopment projects in Section F.1.d.1., 2., 4., 7.;[642] the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects in Section F.1.h.;[643] and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs in Section F.3.d.1.-5.[644]

The goal of the LID and hydromodification management requirements is to restore and preserve the natural hydrologic cycles typically impacted by urbanization and development by requiring appropriate site design and source control BMPs in the approval of development and redevelopment projects: "…[i]ncreased storm water runoff;

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[639] Exhibit A, Test Claim, filed November 10, 2011, pages 403-404 (Fact Sheet/Technical Report).

[640] Exhibit A, Test Claim, filed November 10, 2011, page 188 (test claim permit, Section D., Finding 1.c.).

[641] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 46-52, 65-66 (Test Claim narrative).

[642] Exhibit A, Test Claim, filed November 10, 2011, pages 212-221 (test claim permit, Section F.1.d.).

[643] Exhibit A, Test Claim, filed November 10, 2011, pages 223-228 (test claim permit, Section F.1.h.).

[644] Exhibit A, Test Claim, filed November 10, 2011, pages 247-249 (test claim permit, Section F.3.d.1.-5.).

decreased groundwater recharge; and flow constriction….can often be avoided or minimized by implementing LID and hydromodification BMPs."[645]

"Low Impact Development (LID)" is defined in the test claim permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."[646]

"Hydromodification" is defined as "[t]he change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[647] The test claim permit finds that hydromodification measures for discharges to hardened channels is necessary to restore the channels and the beneficial uses of local receiving waters to their natural state, as follows:

> The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.[648]

The new requirements are addressed below.

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[645] Exhibit A, Test Claim, filed November 10, 2011, page 403 (Fact Sheet/Technical Report).

[646] Exhibit A, Test Claim, filed November 10, 2011, page 287 (test claim permit, Attachment C.).

[647] Exhibit A, Test Claim, filed November 10, 2011, page 287 (test claim permit, Attachment C.).

[648] Exhibit A, Test Claim, filed November 10, 2011, page 187 (test claim permit, Finding 12).

c) *Section F.1.d.1., 2., 4., 7., of the test claim permit imposes new requirements to update the Model Standard Stormwater Mitigation Plans (SSMPs) for review of priority development projects and implementation of LID BMPs.*

Priority development projects (Section F.1.d.1. and F.1.d.2.)

Priority development project categories are defined in Section F.1.d.1. of the test claim permit as follows:

> (a) All new development projects that fall under the project categories or locations listed in Section F.1.d.(2), and
>
> (b) Those redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site and the existing development and/or the redevelopment project falls under the project categories or locations listed in Section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in Section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to the entire development.
>
> (c) One acre threshold: In addition to the priority development project categories identified in Section F.1.d.(2), priority development projects must also include all other post-construction pollutant-generating new development projects that result in the disturbance of one acre or more of land by July 1, 2012.[649]

"Pollutant generating Development Projects" are defined as "those projects that generate pollutants at levels greater than natural background levels."[650]

Section F.1.d.2. defines the priority development project categories as follows:

> Where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.
>
> (a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This

[649] Exhibit A, Test Claim, filed November 10, 2011, pages 212-213 (test claim permit, Section F.1.d.1.).

[650] Exhibit A, Test Claim, filed November 10, 2011, page 213, footnote 11 (test claim permit).

category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.

(b) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(c) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet must meet all SSMP requirements *except for* structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.

(d) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(e) Environmentally Sensitive Areas (ESAs). All development located within, or directly adjacent to, or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10 percent or more of its naturally occurring condition. “Directly adjacent” means situated within 200 feet of the ESA. “Discharging directly to” means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(f) Impervious parking lots 5,000 square feet or more and potentially exposed to runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(g) Street, roads, highways, and freeways. This category includes any paved impervious surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. To the extent that the Copermittees develop revised standard roadway design and post-construction BMP guidance that comply with the provisions of Section F.1. of the Order, then public works projects that implement the revised standard roadway sections do not have to develop a project specific SSMP. The standard roadway design and post-construction BMP guidance must be submitted with the Copermittee’s updated SSMP.

> (h) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.[651]

The categories of priority development projects are generally the same as the prior permit (new development projects and redevelopment projects, as identified, and automotive repair shops, restaurants, hillside developments greater than 5,000 square feet, environmentally sensitive areas, parking lots, and streets, roads, highways, and freeways). The test claim permit, however, expands the new development category. For example, the prior permit defined a priority development project to include all new development projects, and listed housing subdivisions of ten or more dwelling units of single-family homes, multi-family homes, condominiums, and apartments (i.e., residential) and commercial projects greater than 100,000 square feet.[652] Section F.1.d.2. of the test claim permit now defines "new development projects" as those "that create 10,000 square feet or more of impervious surfaces, including commercial, industrial, residential, mixed-use, and public projects," which is smaller and likely to include more projects as priority development projects.[653] Thus, multi-use developments, residential, commercial developments (that create between 10,000 square feet and 99,999 square feet, rather than 100,000 square feet under the prior permit), mixed use projects, public projects (except for public streets, roads, highways, and freeways, and those considered hillside developments or municipal projects built in environmentally sensitive areas), and industrial projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site), are new categories of new priority development projects. Finding D.2.e. of the test claim permit confirms that industrial projects are a new category of new priority development projects.

> Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design, source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with

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[651] Exhibit A, Test Claim, filed November 10, 2011, pages 213-214 (test claim permit, Section F.1.d.2.), emphasis added.

[652] Exhibit A, Test Claim, filed November 10, 2011, pages 577-578 (Order R9-2004-0001, Section F.2.b.1.).

[653] Exhibit A, Test Claim, filed November 10, 2011, page 213 (test claim permit, Section F.1.d.2.a.).

requirements in other Phase I NPDES storm water regulations throughout California.[654]

The Fact Sheet further states the following:

> Industrial sites can be a significant source of pollutants in storm water runoff. In an extensive review of storm water literature, the Los Angeles Water Board found widespread support for the finding that "industrial and commercial activities can also be considered hot spots as sources of pollutants." It also found that "industrial and commercial areas were likely to be the most significant pollutant source areas" of heavy metals. Likewise, storm water runoff from heavy industry in the Santa Clara Valley has been found to be extremely toxic. These findings are corroborated by USEPA, which states in the preamble to the 1990 Phase I NPDES storm water regulations that "Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program." Since heavy industrial sites can be a significant source of pollutants in runoff in a manner similar to other SSMP project categories such as commercial development or automotive repair shops, it is appropriate to include heavy industrial sites as a SSMP category in the Order.[655]

Section F.1.d.1.c. of the test claim permit also added as a priority development project all other post-construction pollutant-generating new development projects that result in the disturbance of one acre or more of land.[656] The Fact Sheet explains that the one acre pollutant-generating development projects were added to be consistent with Phase II NPDES regulations for small municipalities and the State Water Board's Construction General Permit to ensure all development projects subject to the post-construction BMP requirements of the Construction General Permit will implement SSMP post-construction BMP requirements.[657]

The test claim permit, in Section F.1.d.2., also states that where a new development project feature, such as a parking lot, falls into a priority development project category,

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[654] Exhibit A, Test Claim, filed November 10, 2011, pages 190-191 (test claim permit, Finding D.2.e.).

[655] Exhibit A, Test Claim, filed November 10, 2011, page 438-439 (Fact Sheet/Technical Report), footnotes omitted.

[656] Exhibit A, Test Claim, filed November 10, 2011, page 213 (test claim permit, Section F.1.d.1.c.).

[657] Exhibit A, Test Claim, filed November 10, 2011, page 494 (Fact Sheet/Technical Report).

the entire project footprint is subject to the stormwater mitigation plan requirements.[658] The Fact Sheet explains that this criterion is new and was not included in the prior permit as follows:

> One of the most significant changes is that where a Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements. This criterion was not included in Order No. R9-2004-0001. It is included, however, in the Model San Diego SSMP that was approved by the Regional Board in 2002. It is included in this Order because existing development inspections by Riverside County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partly treated storm water runoff from redevelopment sites. This approach to improving storm water runoff from existing developments is practicable because municipalities have a better ability to regulate new developments than existing developments.[659]

As described below, the copermittees have to ensure that these priority development projects comply with the activities in Sections F.1.d. and F.1.h.

LID BMP Requirements for Priority Development Projects (Section F.1.d.4.)

Section F.1.d.4. of the test claim permit states that each copermittee "must require each priority development project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss."[660] To ensure compliance with the LID BMPs, each copermittee must require LID BMPs or make a finding of infeasibility in accordance with the LID waiver program; incorporate formalized consideration, such as thorough checklists, ordinances, or other means of LID BMPs into the plan review process for priority development projects; and, within two years after adoption of the permit, review its local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[661]

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[658] Exhibit A, Test Claim, filed November 10, 2011, pages 213-214 (test claim permit, Section F.1.d.2.).

[659] Exhibit A, Test Claim, filed November 10, 2011, page 495 (Fact Sheet/Technical Report).

[660] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.).

[661] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.).

The Fact Sheet explains that the LID BMP plan review process "is expected to include an assessment of LID BMP techniques to infiltrate, filter, store, evaporate, and/or retain runoff close to the source of the runoff. The review process is also expected to include an assessment of the potential collection of storm water for on site and off site reuse opportunities."[662]

Section F.1.d.4.b. identifies the following LID BMPs that are required to be implemented at all priority development projects where technically feasible:

- Maintain or restore natural storage reservoirs and drainage corridors.
- Projects with landscaped or other pervious areas must properly design and construct the pervious areas to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas must be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.
- Projects with low traffic areas and appropriate soil conditions must be constructed with permeable surfaces.[663]

The LID BMPs shall be "sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event" calculated using pertinent local rain data or extrapolated from isopluvial maps, unless technically infeasible, and shall be "designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP."[664] In addition, the LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.[665]

Under the prior permit, the copermittees were required to review and ensure that all priority development projects met SUSMP requirements to reduce pollutants to the MEP and to maintain or reduce downstream erosion and protect stream habitat. The requirements included that all priority development projects implement a combination of on-site source control and on-site/shared treatment control BMPs.[666] As relevant here, the BMPs under the prior permit, at a minimum, had to control the post-development urban runoff discharge velocities, volumes, durations, and peak rates to maintain or

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[662] Exhibit A, Test Claim, filed November 10, 2011, page 496 (Fact Sheet/Technical Report).

[663] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.b.).

[664] Exhibit A, Test Claim, filed November 10, 2011, page 216 (test claim permit, Section F.1.d.4.c.), footnote omitted.

[665] Exhibit A, Test Claim, filed November 10, 2011, page 216 (test claim permit, Section F.1.d.4.e.).

[666] Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.b.).

reduce pre-development downstream erosion, and to protect stream habitat; conserve natural areas where feasible; minimize directly connected impervious areas where feasible; protect slopes and channels from eroding; be correctly designed to remove pollutants to the MEP; and be implemented close to pollutant sources and prior to discharge into receiving waters supporting beneficial uses.[667] In addition, the prior permit required that each copermittee protect groundwater quality by applying restrictions to the use of structural treatment BMPs that are designed to primarily function as infiltration devices (such as infiltration trenches and basins).[668] Therefore, LID site design BMPs and protection of groundwater quality have always been required and had to be reviewed by the copermittee for existing categories of priority development projects. But under the prior permit, the project proponent could select the BMPs from a list of recommended BMPs contained in a copermittee's local SUSMP.[669]

The test claim permit now directs the copermittees to:

> ". . . . require new development projects to employ certain classes of LID site design BMPs. The required LID site design BMPs take advantage of features that are incorporated into the Priority Development Project, such as landscaping or walkways. It also requires that projects seek to maintain natural water drainage features rather than instinctively convey water in buried pipes and engineered ditches that eliminate natural water quality treatment functions."[670]

For example, and as stated in Section F.1.d.4.b.ii. of the permit, "projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharge to the MS4."[671] Thus, the test claim permit establishes and requires specific site design BMP criteria to be used by the priority development projects.

The Fact Sheet also explains that the test claim permit now requires that LID BMPs be sized and designed to ensure onsite retention without runoff of the volume of runoff

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[667] Exhibit A, Test Claim, filed November 10, 2011, pages 578-579 (Order R9-2004-0001, Section F.2.b.2.).

[668] Exhibit A, Test Claim, filed November 10, 2011, page 581 (Order R9-2004-0001, Section F.2.b.8.).

[669] Exhibit A, Test Claim, filed November 10, 2011, page 578 (Order R9-2004-0001, Section F.2.b.2.).

[670] Exhibit A, Test Claim, filed November 10, 2011, page 496 (Fact Sheet/Technical Report).

[671] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.b.ii.).

produced from a 24-hour 85th percentile storm event.[672] Under the prior permit, these sizing requirements applied only to structural treatment BMPs.[673] The change is consistent with other municipal stormwater NPDES permits adopted by the Los Angeles and Santa Ana Regional Boards, and the permit recently adopted by the San Diego Water Board for Orange County.[674]

Finally, the requirement in Section F.1.d.4.a. to review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers within two years of the adoption of the permit is a new requirement when compared to the prior permit.

Therefore, Section F.1.d.4. imposes the following new requirements on all new development and redevelopment priority development projects identified in Sections F.1.d.1. and F.1.d.2.:

- Require each priority development project to implement LID BMPs as described in Sections F.1.d.4.b., c., and e., which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.
- Take the following measures to ensure that LID BMPs are implemented at priority development projects:

  (i) Each copermittee must require LID BMPs or make a finding of technical infeasibility for each priority development project in accordance with the LID waiver program in Section F.1.d.7.;

  (ii) Each copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for priority development projects; and

  (iii) On or before July 1, 2012, each copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the copermittee must take, by the end of the permit cycle,

[672] Exhibit A, Test Claim, filed November 10, 2011, page 496 (Fact Sheet/Technical Report).

[673] Exhibit A, Test Claim, filed November 10, 2011, pages 579-580, 496 (Order No. R9-2004-0001, Section F.1.b.3.b.).

[674] Exhibit A, Test Claim, filed November 10, 2011, page 496 (Fact Sheet/Technical Report).

appropriate actions to remove such barriers. The copermittees must include this review with the updated JRMP.[675]

LID Waiver Program Requirements (Section F.1.d.7.)

Pursuant to Section F.1.d.7. of the test claim permit, the copermittees are required to develop (collectively or individually) a LID waiver program to incorporate into the SSMP, which would allow a priority development project to substitute implementation of all or some of the required LID BMPs with implementation of treatment control BMPs and a mitigation project. The LID BMP waiver program must meet the following requirements:

- Prior to implementation, the LID waiver program must clearly exhibit that it will not allow priority development projects to result in a net impact (after consideration of any mitigation) from pollutant loadings over and above the impact caused by projects meeting the onsite LID retention requirements.
- For each participating priority development project, a feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs. The copermittees are required to develop criteria for the technical feasibility of implementing LID BMPs. Each priority development project must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Technical infeasibility may result from the following conditions: locations cannot meet the infiltration and groundwater protection requirements; insufficient demand for stormwater reuse; smart growth and infill or redevelopment locations where the density or nature of the project would create significant difficulty for compliance with the LID BMP requirements; or other site, geologic, soil, or implementation constraints identified in the updated SSMP document.
- Each participating priority development project must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in Section F.1.d.4.[676]

A copermittee may choose to implement additional mitigation programs (e.g., pollutant credit system, mitigation fund) as part of the waiver program provided that the mitigation program clearly exhibits that it will not allow priority development projects to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements.[677] However, additional mitigation programs are within the copermittee's discretion and are not required by the test claim permit.

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[675] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.).

[676] Exhibit A, Test Claim, filed November 10, 2011, pages 218-219 (test claim permit, Section F.1.d.7.).

[677] Exhibit A, Test Claim, filed November 10, 2011, pages 218-219 (test claim permit, Section F.1.d.7.).

The requirement to develop a LID BMP waiver program pursuant to Section F.1.d.7.c. is new for all priority development projects. Under the prior permit, a copermittee was authorized to waive a project from implementing *treatment control* BMPs, but was not required to develop a LID BMP waiver program.[678] The Fact Sheet explains the new requirement as follows:

> . . . the Regional Board has added to the Order a requirement for the Copermittees to develop such a [LID BMP waiver] program. The LID BMP waiver program would provide the opportunity for development projects to avoid partial or full LID BMP implementation in exchange for implementation of treatment control BMPs and mitigation. The program would maintain equal water quality benefits as properly implemented LID BMPs when partial LID BMPs are coupled with some form of mitigation.
>
> LID BMPs are not limited to infiltration BMPs, and may also include storage, evaporation, evapotranspiration, filtration, and/or on site reuse BMPs. Thus, the San Diego Water Board expects that every site will be able to implement some form of LID BMPs to some extent.[679]

b) Section F.1.h. imposes new requirements to develop and implement hydromodification plans and controls for priority development projects to ensure that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.

Section F.1.h. of the test claim permit requires each copermittee to collaborate with other copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects. This requirement does not apply to small restaurants, however. Pursuant to Section F.1.d.2. of the test claim permit, "Restaurants where land development is less than 5,000 square feet must meet all SSMP requirements except for . . . hydromodification requirement F.1.h." The HMP shall be incorporated into the SSMP and implemented by each copermittee so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.

Section F.1.h.1. states that the HMP is required to:

- Identify a method for assessing susceptibility and geomorphic stability of channel segments which receive runoff discharges from priority development projects. A performance standard shall be established that ensures that the geomorphic stability within the channel not be comprised as a result of receiving runoff discharges from priority development projects.

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[678] Exhibit A, Test Claim, filed November 10, 2011, page 581 (Order R9-2004-0001, Section F.2.b.7.).

[679] Exhibit A, Test Claim, filed November 10, 2011, page 500 (Fact Sheet/Technical Report).

- Utilize continuous simulation of the entire rainfall record (or other method acceptable to the Regional Board) to identify a range of runoff flows for which priority development projects post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than ten percent, and which will result in increased potential for erosion or other significant adverse impacts to beneficial uses.
- Identify a method to assess and compensate for the loss of sediment supply to streams due to development. The copermittees must create a performance and/or design standard to ensure that the loss of sediment supply does not cause or contribute to increased erosion within channel segments downstream from priority development project discharge points.
- Require priority development projects to implement control measures so that post-development runoff flow rates and duration (1) do not exceed pre-project runoff flow and duration rates by more than ten percent; (2) do not result in channel conditions that do not meet channel standards for segments downstream of priority development project discharge points; and (3) compensate for the loss of sediment supply due to development.
- Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from priority development projects.
- Include other performance criteria (numeric or otherwise) for priority development projects that are necessary to prevent runoff from the projects from increasing or contributing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.
- Include a review of pertinent literature.
- Identify areas within the Santa Margarita Hydrologic Unit for potential opportunities to restore or rehabilitate stream channels where historic hydromodification of receiving waters that are tributary to documented low or very low Index of Biotic Integrity (IBI) scores.
- Include a protocol to evaluate potential hydrograph changes impacts to downstream watercourses from priority development projects.
- Include a description of how the copermittees will incorporate the HMP requirements into their local approval process.
- Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations, and address potential hydromodification impacts.
- Include technical information supporting any standards and criteria proposed.
- Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

- Include a description of pre and post project monitoring and program evaluations, including physical and biological conditions of receiving water channels, to be conducted to assess the effectiveness of implementation of the HMP.
- Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.[680]

Section F.1.h.2. states that the HMP must also include management measures to be used on priority development projects to mitigate hydromodification impacts, protect and restore downstream beneficial uses, and to prevent adverse physical changes to downstream channels. The measures must be prioritized based on consideration of: site design control measures, on-site management measures, regional controls located upstream of receiving waters, and in-stream management and control measures. The management measures must include stream restoration as an option. In-stream controls cannot include the use of nonnaturally occurring hardscape materials to reinforce stream channels. Where stream channels are adjacent to or are to be modified by the priority development project, management measures must include buffer zones and setbacks.[681]

Sections F.1.h.3. and F.1.h.4. authorize the copermittee to establish a hydromodification waiver program for redevelopment priority development projects and provide the copermittees discretion to not impose the HMP requirements for certain projects.[682] These sections do not impose any requirements on the claimants.

Section F.1.h.5. requires the copermittees to submit a draft HMP that has been reviewed by the public to the Regional Board within three years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, the copermittees shall submit a final HMP that addresses the comments. Within 90 days of receiving a finding of adequacy from the Regional Board, each copermittee shall incorporate and implement the HMP for all priority development projects. Prior to the adequacy finding by the Regional Board, the copermittees must encourage early implementation of those measures likely to be included in the HMP.[683]

Section F.1.h.6. requires each copermittee, from the time of adoption of the Order until the adequacy finding of the HMP by the Regional Board, to ensure that all priority development projects are implementing the interim hydromodification criteria (the requirements in the 2006 Riverside County WQMP, updated in 2009), unless the following four conditions are met: the runoff discharges directly to a concrete lined

[680] Exhibit A, Test Claim, filed November 10, 2011, pages 223-225 (test claim permit, Section F.1.h.1.).

[681] Exhibit A, Test Claim, filed November 10, 2011, page 226 (test claim permit, Section F.1.h.2.).

[682] Exhibit A, Test Claim, filed November 10, 2011, pages 226-227 (test claim permit, Section F.1.h.3., 4.)

[683] Exhibit A, Test Claim, filed November 10, 2011, page 227 (test claim permit, Section F.1.h.5.).

channel or storm drain, the discharge complies with copermittee's requirements for connections and discharges to the MS4, the discharge will not cause increased upstream or downstream erosion or adversely impact downstream habitat, and the discharge is authorized by the copermittee. Other exceptions are that the project disturbs less than one acre or the runoff flow rate, volume, velocity, and duration for the post-development condition do not exceed the pre-development (naturally occurring) condition for the 2-year, 24-hour and 10-year, 24-hour rainfall events.[684]

The requirement in Section F.1.h.6. for each copermittee, from the time of adoption of the test claim permit until the adequacy finding of the HMP by the Regional Board, to ensure that all priority development projects are implementing the interim hydromodification criteria is not new for priority development projects as defined under the prior permit (new commercial developments greater 100,000 square feet, automotive repair shops, restaurants, hillside developments greater than 5,000 square feet, environmentally sensitive areas, parking lots, and streets, roads, highways, and freeways). Under the prior permit, the claimants had to require that all priority development projects implement BMPs that control post-development stormwater runoff discharge velocities, volumes, durations, and peak rates to maintain or reduce pre-development downstream erosion and to protect stream habitat and ensure that post-development runoff does not contain pollutant loads that cause or contribute to an exceedance of water quality objectives.[685] The Fact Sheet further explains that

> Section F.1.h (6) describes interim hydromodification criteria that must be implemented by the Copermittees until the final HMP is found to be adequate by the San Diego Water Board Executive Officer. The Copermittees currently have hydromodification requirements in the SSMP (section 4.4 of the Riverside County WQMP). Until the final HMP is required to be implemented, the Copermittees must continue implementing their existing hydromodification requirements.[686]

However, the requirement to ensure implementation of the interim hydromodification criteria until the adoption of the HMP is new for the following newly added priority development projects under the test claim permit:

- Multi-use developments, residential developments, commercial developments (that create between 10,000 square feet and 99,999 square feet, mixed use projects, public projects (except for public streets, roads, highways, and freeways, and those considered hillside developments or municipal projects built in environmentally sensitive areas), and industrial projects, which create 10,000

[684] Exhibit A, Test Claim, filed November 10, 2011, pages 227-228 (test claim permit, Section F.1.h.6.).

[685] Exhibit A, Test Claim, filed November 10, 2011, pages 578-579 (Order R9-2004-0001, Sections F.2.b.2.a. and n.).

[686] Exhibit A, Test Claim, filed November 10, 2011, page 508 (Fact Sheet/Technical Report).

square feet or more of impervious surfaces (collectively over the entire project site).[687]

- All other post-construction pollutant-generating new development projects that result in the disturbance of one acre or more of land.[688]
- Where a new development project feature, such as a parking lot, falls into a priority development project category, the entire project footprint is subject to these stormwater mitigation plan requirements.[689]

In addition, the requirements to develop a draft HMP, make the draft available for public review and comment, submit the draft to the Regional Board, prepare a final HMP, and encourage early implementation of those measures likely to be included in the HMP are new.[690]

Moreover, the test claim permit provides greater specificity and detail with respect to the requirement to implement the requirements of the HMP for all priority development projects. As explained in the Fact Sheet,

> Hydromodification expands and clarifies current requirements for control of MS4 discharges to limit hydromodification effects caused by changes in runoff resulting from development and urbanization. The requirements are based on findings and recommendations of the Riverside County Storm Water Program, the Stormwater Monitoring Coalition (SMC), and the Storm Water Panel on Numeric Effluent Limits (Numeric Effluent Panel). Added specificity is needed due to the current lack of a clear standard for controlling hydromodification resulting from development. More specific requirements are also warranted because hydromodification is increasingly recognized as a major factor affecting water quality and beneficial uses.
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> . . .
>
> The Copermittees recognize the need to improve management of hydromodification. The ROWD proposes to revise the SSMP to

[687] Exhibit A, Test Claim, filed November 10, 2011, page 213 (test claim permit, Section F.1.d.2.a.).

[688] Exhibit A, Test Claim, filed November 10, 2011, page 213 (test claim permit, Section F.1.d.1.c.).

[689] Exhibit A, Test Claim, filed November 10, 2011, pages 213-214 (test claim permit, Section F.1.d.2.).

[690] Exhibit A, Test Claim, filed November 10, 2011, pages 223, 227 (test claim permit, Sections F.1.h., F.1.h.5.).

incorporate additional information from ongoing hydromodification studies conducted by the SMC.[691]

Accordingly, the requirement in Section F.1.h.5. to develop and implement the HMP in accordance with Sections F.1.h.1. and F.1.h.2. is new for all priority development projects, except that pursuant to Section F.1.d.2., restaurants where land development is less than 5,000 square feet are not required to meet the hydromodification requirements. The requirement in Section F.1.h.6. to ensure that priority development projects are implementing the interim hydromodification criteria until the adoption of the HMP is new only for the new priority development projects listed above.

c) Section F.3.d.1.-5. imposes new requirements to develop a retrofitting program for existing development, encourage owners to retrofit existing developments, and inspect and track completed retrofitted BMPs.

The claimants pled Section F.3.d.1.-5. of the test claim permit, which requires each copermittee to develop and implement a retrofitting program for existing development. The goals of the program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of stormwater pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. The retrofitting program may be coordinated with flood control projects and infrastructure improvement programs.

The retrofitting program is required to meet the following provisions:

- Identify and inventory existing developments (municipal, industrial, commercial, and residential) as candidates for retrofitting. Potential candidates for retrofitting include development that contributes to pollutants of concern to a TMDL or environmentally sensitive area; receiving waters that are channelized or otherwise hardened; development tributary to receiving waters that are channelized or otherwise hardened; development tributary to receiving waters that are significantly eroded; and developments tributary to Areas of Special Biological Significance or State Water Quality Protected Areas.[692]
- Evaluate and rank the inventoried existing developments to prioritize retrofitting based on the following criteria: feasibility, cost effectiveness, pollutant removal effectiveness, tributary area potentially treated, maintenance requirements,

[691] Exhibit A, Test Claim, filed November 10, 2011, pages 504-506 (Fact Sheet/Technical Report), footnotes omitted.

[692] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Section F.3.d.1.).

landowner cooperation, neighborhood acceptance, aesthetic qualities, efficacy at addressing concern, and potential improvements on public health and safety.[693]

- Consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. The retrofit projects should be designed in accordance with the SSMP requirements within Sections F.1.d.3.-8. and the hydromodification requirements in Section F.1.h., where feasible.[694]
- To encourage retrofitting projects, the copermittees must cooperate with private landowners and must consider the following practices in cooperating and encouraging private landowners to retrofit their existing development: demonstration retrofit projects, retrofits on public land and easements, education and outreach, subsidies for retrofit projects, requiring retrofit as mitigation or ordinance compliance, public and private partnerships, and fees for existing discharges to the MS4 and reduction of fees for retrofit implementation.[695]
- The completed retrofit BMPs shall be tracked and inspected. Public properties shall be inspected in accordance with Section F.1.f. and private properties, as needed.[696]

Based on the plain language of Section F.3.d.1.-4., claimants are required to develop a retrofitting program by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements in Sections F.1.d.3.-9. and F.1.h.[697] These requirements are new as the prior permit included no activities regarding retrofitting. In addition, the Fact Sheet confirms that Section F.3.d. was added to the permit to impose specific requirements for the retrofit program and when appropriately applied, retrofitting existing development meets the MEP.[698] The Fact Sheet further states the following:

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[693] Exhibit A, Test Claim, filed November 10, 2011, page 248 (test claim permit, Section F.3.d.2.).

[694] Exhibit A, Test Claim, filed November 10, 2011, page 248 (test claim permit, Section F.3.d.3.).

[695] Exhibit A, Test Claim, filed November 10, 2011, page 248 (test claim permit, Section F.3.d.4.).

[696] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Section F.3.d.5.).

[697] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Section F.3.d.1.-4.).

[698] Exhibit A, Test Claim, filed November 10, 2011, page 523 (Fact Sheet/Technical Report).

> Existing BMPs are not sufficient, as evidenced by 303(d) listings and exceedances of Water Quality Objectives from the Copermittees monitoring reports. More advanced BMPs, including the retrofitting of existing development with LID, are part of the iterative process. Previous permits limited the requirement of treatment control BMPs to new development and redevelopment. Based on the current rate of redevelopment compared to existing BMPs, the use of LID only on new and redevelopment will not adequately address current water quality problems, including downstream hydromodification. Retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners.[699]

However, the permit does *not* require the claimant to require an existing development to be retrofitted for LID and hydromodification. Nor does the permit require the copermittees to retrofit existing public properties. Thus, all retrofitted BMP inspection and tracking activities that flow from the discretionary decision of a copermittee to retrofit existing public developments are likewise not required by the test claim permit.[700]

Moreover, even if a property owner of an existing development decides to retrofit and seeks a permit to do so, then the copermittee is required by Section F.1.c., prior to approval and issuance of the permit, to prescribe the necessary requirements so that the project's discharges of stormwater pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with all requirements of the test claim permit and ordinances adopted by the copermittee, including those in compliance with Sections F.1.d.3.-9. and F.1.h.[701] The claimants, however, did not plead Section F.1.c. of the test claim permit and, thus, the activities and the process to approve permits for retrofit projects are not eligible for reimbursement.

Section F.3.d.5., however, does require that once a property owner of an existing development decides to retrofit, the completed retrofit BMPs shall be tracked and

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[699] Exhibit A, Test Claim, filed November 10, 2011, page 523 (Fact Sheet/Technical Report).

[700] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727; *City of Merced v. State* (1984) 153 Cal.App.3d 777; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[701] Exhibit A, Test Claim, filed November 10, 2011, pages 209-210 (test claim permit, Section F.1.c.).

inspected in accordance with Section F.1.f. of the test claim permit and that requirement is new.[702]

d) Summary of new LID, Hydromodification Plan, Treatment Control, LID Waiver, and Retrofitting requirements imposed by Sections F.1.d.1., 2., 4., 7., F.1.h., and F.3.d.1.-5. of the test claim permit.

Sections F.1.d.1., 2., 4., 7., F.1.h., and F.3.d.1.-5. of the test claim permit impose the following new requirements:

1. Administrative and Planning Activities

   a. Incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for priority development projects.[703]

   b. Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[704]

   c. Develop a LID BMP waiver program to incorporate into the SSMP.[705]

   d. Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) in accordance with Section F.1.h.1. and 2. of the test claim permit to manage increases in runoff discharge rates and durations from all priority development projects. Submit a draft HMP that has been available to public review and comment, to the Regional Board within three years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the Regional Water Board, incorporate the HMP into the SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.[706]

   e. Develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those

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[702] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Section F.3.d.5.).

[703] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.ii.).

[704] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.iii.).

[705] Exhibit A, Test Claim, filed November 10, 2011, page 218 (test claim permit, Section F.1.d.7.c.).

[706] Exhibit A, Test Claim, filed November 10, 2011, pages 223, 227 (test claim permit, Section F.1.h. and F.1.h.5.).

projects for retrofit, prioritizing work plans, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements.[707] (Section F.3.d.1.-4.)

2. Ensure Priority Development Projects Comply With LID, Treatment Control, LID Waiver and Hydromodification Requirements

   Each of the sections below require the claimants, in their regulatory capacity, to ensure that proponents of new development or significant redevelopment priority development projects, as specified, perform the following activities.[708] In addition, since priority development projects are defined in Section F.1.d.2. to include "public" projects, the claimant is seeking reimbursement to implement these activities when any new municipal development or significant redevelopment projects is proposed by a copermittee.

   - Require each priority development project listed in Section F.1.d.1. and 2. to implement LID BMPs as described in Section F.1.d.4.b., c., and e., which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss, or make a finding of technical infeasibility for each priority development project in accordance with the LID waiver program in Section F.1.d.7.[709]
   - Require all priority development projects, except for smaller restaurants where land development is less than 5,000 square feet, to implement the approved Hydromodification Plan (HMP).[710]

3. Track and Inspect Retrofitted Existing Development

   a. Once a property owner of an existing development decides to retrofit, the completed retrofit BMPs shall be tracked and inspected in accordance with

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[707] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Section F.3.d.1.-4.).

[708] Section F.1.c. of the test claim permit states the following: "For all proposed Development Projects, each Copermittee, during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with the Copermittee's ordinances, permits, plans, and requirements, and with this Order. Exhibit A, Test Claim filed November 10, 2011, pages 209-210 (test claim permit, Section F.1.c.).

[709] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.).

[710] Exhibit A, Test Claim, filed November 10, 2011, pages 213, 223 (test claim permit, Sections F.1.d.2.c., F.1.h.).

Section F.1.f. of the test claim permit.[711] (Section F.3.d.5.) Reimbursement is *not* required to track and inspect retrofitted BMPs of an existing *public or municipal* development.

ii. All costs incurred to comply with and implement the LID, hydromodification, and retrofitting requirements of Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.-5. of the test claim permit on municipal priority development projects or significant redevelopment projects are not mandated by the state because the costs are incurred at the discretion of the local agency. In addition, the costs to implement the LID BMPs and hydromodification requirements on municipal development or redevelopment projects do not impose a new program or higher level of service because such costs are not unique to government, and do not provide a governmental service to the public.

As indicated above, priority development projects are defined to include "public" projects.[712] The claimants contend that the above activities are eligible for reimbursement under article XIII B, section 6 of the California Constitution when they propose new public or "municipal development or redevelopment projects" and incur costs related to LID and hydromodification for recreational facilities, parking lots, streets, roads, highways, and other projects large enough to exceed specified thresholds. The claimants also seek reimbursement to implement the LID and hydromodification requirements on municipal priority development or significant redevelopment projects as follows:

- Applying Standard Stormwater Mitigation Plan (SSMP) requirements to an increased range of municipal projects implemented by the claimants, which meet the requirements of Sections F.1.d.1. and F.1.d.2.
- Requiring implementation of LID practices and development and implementation of an LID Waiver program, as described in Sections F.1.d.4. and F.1.d.7., on municipal priority development projects implemented by the claimants. This will require creating a formalized review process for all priority development projects, developing protocols for assessing each priority development project for various required types of LID, training staff on the new protocols, assessing potential on- or off-site collection and reuse of stormwater, amending local ordinances to remove barriers to LID implementation, maintaining or restoring natural storage reservoirs and drainage corridors, draining a portion of impervious areas into pervious areas, and constructing low-traffic areas with permeable surfaces. Projects that are subject to these requirements include municipal yards, recreation centers, civic centers, and road improvements, and any other

[711] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Section F.3.d.5.).

[712] Exhibit A, Test Claim, filed November 10, 2011, pages 212-214 (test claim permit, Section F.1.d.1. and 2.).

municipal projects meeting the permit-specified thresholds or geographical criteria.

- Requiring development of an HMP, and implementation of those HMP requirements on municipal priority development projects implemented by the claimants pursuant to Section F.1.h. To comply with Section F.1.h., the claimants must invest significant resources to hold public hearings, hold collaborative meetings, perform studies and develop an HMP, train staff and the public, and adopt the local SSMP. In addition, as noted above, the claimants are prohibited from using non-natural materials in reinforcing stream channels, a prohibition which is not practicable. Continued compliance with these sections will also require the claimants to add requirements to municipal projects and will significantly increase the costs of design and construction.[713]

The claimants assert that development and upkeep of these municipal land uses is not optional, but is an integral part of the claimants' function as municipal entities and that local governments have no option to adjust the size of a project to avoid having to comply with priority development project requirements because they must build the project in the public interest. The claimants further assert that the failure to make necessary repairs, upgrades, and extensions can expose them to liability. Thus, the claimants assert, they are practically compelled to build projects because local governments "must either build such projects to fulfill their civic obligations or they or their constituents could face 'certain and severe penalties or consequences' for not providing necessary public services."[714]

In addition, Sections F.3.d.1.-5. require the permittees to identify and inventory all existing development, including municipal development, evaluate and rank them, and as mentioned earlier, inspect and track any retrofitted BMPs on municipal development. The claimants assert that these requirements are mandatory and not based on discretionary decisions because they require evaluation of existing municipal projects, unlike the LID and hydromodification requirements which address future development.[715]

The Commission finds that the costs incurred by a local agency as a project proponent of a new municipal development or redevelopment project under the test claim permit are not mandated by the state but are the result of a local discretionary decision, and therefore are not eligible for reimbursement.

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[713] Exhibit A, Test Claim, filed November 10, 2011, page 56 (Test Claim narrative).

[714] Exhibit A, Test Claim, filed November 10, 2011, pages 53-55 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 13-14 citing *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

[715] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 15-16.

a) *Costs incurred by a municipality to comply with and implement LID BMPs, hydromodification, and retrofitting activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. of the test claim permit, as a project proponent of a municipal priority development project, are not mandated by the state.*

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[716] When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.[717]

Thus, the issue is whether the underlying decision of the claimants to develop or redevelop priority the municipal projects at issue is mandated by the state, or is a discretionary decision of local government. Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[718]

The courts have identified two distinct theories for determining whether a program is compelled, or mandated by the state: legal compulsion and practical compulsion.[719] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.

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[716] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731.

[717] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 743.

[718] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

[719] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[720]
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> * * *
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> "[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.[721]

Thus, in the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[722]

In this case, all costs incurred by a municipality as a project proponent under the LID, hydromodification, and retrofitting sections of the test claim permit can be analogized to *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727. In *City of Merced*, the statute at issue required a local government, when exercising the power of eminent domain, to compensate a business owner for the loss of business goodwill as part of compensating for the property subject to the taking.[723] The court found that nothing *required* the local entity to exercise the power of eminent domain, and thus any costs experienced as a result of the requirement to compensate for business goodwill was the result of an initial discretionary act.[724]

In *Kern High School Dist.*, the statute at issue required certain local school committees to comply with notice and agenda requirements in conducting their public meetings.[725] There, the court rejected the claimants' assertion that they had been legally compelled to incur notice and agenda costs, and hence were entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have

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[720] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

[721] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[722] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[723] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

[724] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

[725] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 732.

participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled.[726] The court held that the underlying school site councils and advisory committees were part of several separate voluntary grant funded programs, and therefore any notice and agenda costs were an incidental impact of participating or continuing to participate in those programs.[727] The court acknowledged that the district was already participating in the underlying programs, and "as a practical matter, they feel they must participate in the programs, accept program funds, and…incur expenses necessary to comply with the procedural conditions imposed on program participants."[728] However, the court held that "[c]ontrary to the situation that we described in *City of Sacramento* [*v. State* (1990)] 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face 'certain and severe…penalties' such as 'double…taxation' or other 'draconian' consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."[729]

The claimants specifically dispute the application of *City of Merced* and *Kern High School Dist.*, stating the test claim permit is not a voluntary program.[730] Furthermore, the claimants argue that since issuing the *Kern High School Dist*. decision, the California Supreme Court has rejected the application of *City of Merced* in circumstances beyond those strictly present in *Kern High School Dist.*[731] The claimants cite *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859, 887-888, in which the court stated "there is reason to question an extension of the holding of *City of*

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[726] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731.

[727] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 744-745.

[728] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 753.

[729] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74 (The "certain and severe…penalties" and "double…taxation" referred to the situation in *City of Sacramento* in which the state was compelled, by the potential loss of *both* federal tax credits *and* subsidies provided to businesses statewide, to impose mandatory unemployment insurance coverage on public agencies consistent with a change in federal law.).

[730] Exhibit A, Test Claim, filed November 10, 2011, pages 53-54 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 13-14.

[731] Exhibit A, Test Claim, filed November 10, 2011, pages 54-55 (Test Claim narrative).

Merced so as to preclude reimbursement…whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[732]

The claimants misinterpret *San Diego Unified*, and place too much emphasis on dicta. In *San Diego Unified,* the court discussed the example of *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, in which an executive order requiring that county firefighters be provided with protective clothing and safety equipment was held to impose a reimbursable state mandate for the costs of the clothing and equipment.[733] The *San Diego Unified* court reasoned that under a strict application of the rule of *City of Merced* "such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc."[734] However, the court did not decide *San Diego Unified* on that ground, finding instead that hearing costs incurred relating to so-called discretionary expulsion proceedings under the Education Code were adopted to implement a federal due process mandate, and were, in context, de minimis, and were therefore nonreimbursable.[735] Therefore, the language cited by the claimants is merely dicta and the case does not reach a *conclusion* with respect to the prospective application of the *City of Merced* and *Kern High School Dist.* rules.

After these cases, the Third District Court of Appeal decided *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, which addressed the Peace Officers Procedural Bill of Rights Act (POBRA) that imposed requirements on all law enforcement agencies. The court held that the POBRA legislation did not constitute a state-mandated program on school districts because school districts are authorized, but not required, by state law to hire peace officers, and thus there was no legal compulsion to comply with POBRA.[736] In considering whether the districts were practically compelled to hire peace officers, the court found that it was "not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is

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[732] Exhibit A, Test Claim, filed November 10, 2011, pages 54-55, (Test Claim narrative) citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

[733] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

[734] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

[735] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 888 ("As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that all hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6…").

[736] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

embedded, is the only way as a practical matter to comply."[737] The court emphasized that practical compulsion requires a *concrete* showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving the districts no choice but to comply.[738] Thus, the court denied reimbursement for school districts to comply with the POBRA statutes.[739]

Finally, In *Coast Community College Dist.* (2022)*,* the Supreme Court reaffirmed the viability of practical compulsion as a theory of state mandate when it specifically directed the Court of Appeal to consider on remand whether community college districts were practically compelled to comply with the funding entitlement regulations at issue.[740] The Commission had denied reimbursement, finding that the regulations were not mandated by the state, and the trial court agreed. However, the Court of Appeal concluded that the districts were legally compelled to comply with the regulations on the basis that they applied to the districts' underlying core functions, which state law compelled the districts to perform.[741] The Supreme Court reversed, holding that the standards set forth in the regulations were insufficient to legally compel the districts to adopt them.[742] The court explained that because the districts were not legally required to adopt the standards described in the regulations, and instead faced the risk of "potentially severe financial consequences" if they elected not to do so, legal compulsion was inapplicable. The court characterized the appellate court's ruling as

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[737] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[738] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367 ("The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts "employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences."…That cannot be established in this case without a *concrete showing* that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences"). Emphasis added.

[739] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1358.

[740] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 822 ("Having now rejected the Court of Appeal's conclusion regarding legal compulsion, we find it 'appropriate to remand for the [court] to resolve ... in the first instance' whether the districts may be entitled to reimbursement under a theory of nonlegal compulsion").

[741] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

[742] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

premised upon a determination that the districts had no "true choice" but to comply with the regulations at issue, which the court explained "sound in *practical*, rather than *legal*, compulsion."[743] In drawing this distinction and remanding the case to the Court of Appeal to consider in the first instance whether the districts established practical compulsion, the court relied upon *City of Sacramento* for the proposition that practical compulsion exists where ""[t]he alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards".[744]

In *City of Sacramento v. State of California* (1990), the Supreme Court addressed practical compulsion in the context of a 1976 federal law requiring states, for the first time, to provide unemployment insurance to public employees, characterized as employing "a 'carrot and stick' to induce state compliance."[745] The state could comply with federal law and obtain a federal tax credit and administrative subsidy — a carrot — or not comply and allow its businesses to face double unemployment taxation by both state and federal governments — a stick.[746] California passed a law conforming to the requirements of the federal law. The City of Sacramento and the County of Los Angeles challenged the state law asserting that it was a reimbursable state mandate.[747] The state opposed the request for reimbursement on the ground that the legislation imposed a federal mandate and, thus, reimbursement was not required.[748] The state argued that strict legal compulsion was not required to find a federal mandate and that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic discretion to refuse.[749] The court agreed and found that the immediate and automatic penalty of double taxation for not complying with the federal law was "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses," and that "[t]he alternatives were "so far beyond the realm of practical reality[,] that they left the state 'without discretion' to depart from federal standards."[750]

> As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint

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[743] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, emphasis in original.

[744] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

[745] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 72.

[746] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[747] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58.

[748] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 65-66, 71.

[749] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 71.

[750] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

> federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.
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> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[751]

Thus, the court concluded that the state acted in response to a federal mandate for purposes of article XIII B, section 6, and reimbursement was not required.

The court further explained that the practical compulsion determination "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal."[752]

Therefore, based on *Kern*, *POBRA*, and *Coast Community College Dist.* where statutory or regulatory requirements result from an apparently or facially *discretionary* decision, and are therefore not *legally* compelled, they may be *practically* compelled if the failure to act would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences, such as those identified in the *City of Sacramento* case, leaving local government no choice but to comply with the

[751] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 73-74.

[752] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76.

conditions established by the state.[753] Substantial evidence in the record is required to make a finding of practical compulsion.[754]

Here, the claimants assert, without support, that certain municipal projects, including roads and streets "are not optional."[755] Rather, "[t]hey are integral to the Permittee's function as municipal entities [*sic*], and the failure to make necessary repairs, upgrades, and extensions can expose the Permittees to liability."[756]

In their comments on the Draft Proposed Decision, the claimants further assert that the retrofitting requirements are mandatory and not based on discretionary decisions because they require evaluation of *existing* municipal projects, unlike the LID and hydromodification requirements which address future development.[757]

The claimants contend that they have no option to adjust the size of a project to avoid having to comply with priority development project requirements because they must build the project in the public interest. Moreover, they do not choose to build projects in the same sense as the choices exercised by local governments in *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. Thus, the claimants assert, they are practically compelled to build projects because local governments "must either build such projects to fulfill their civic obligations or they or their constituents could face 'certain and severe penalties or consequences' for not providing necessary public services."[758] The claimants also note that the court in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 rejected the argument that cities and counties choose to obtain an NPDES permit to discharge stormwater on the ground that they are without discretion to do otherwise and, thus, are practically compelled to obtain and comply with the permit.[759]

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[753] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[754] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368-1369 (*POBRA*); Government Code section 17559; California Code of Regulations, title 2, section 1187.5.

[755] Exhibit A, Test Claim, filed November 10, 2011, page 54 (Test Claim narrative).

[756] Exhibit A, Test Claim, filed November 10, 2011, page 54-55 (Test Claim narrative).

[757] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 15-16.

[758] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 13-14.

[759] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 14.

The claimants' position is not supported by the law or any evidence in the record. First, the requirements detailed in the test claim permit do not apply to regular maintenance activities, based on the plain language of the order. Section F.1.d.1.b. defines significant redevelopment projects triggering the planning requirements as those that include the *addition or replacement* of 5,000 square feet or more of impervious surface on a developed site.[760]

Second, the claimants focus on the size of the construction project contending that they have no option to adjust the size to avoid compliance with priority development project requirements because they must build the project in the public interest. The claimants' argument misses the mark - the option is the choice to develop or redevelop priority municipal projects. There is nothing in state law that imposes a legal obligation on local agencies to construct, expand, or improve municipal projects.[761] Third, the claimants' argument that the retrofitting requirements are mandatory and not based on discretionary decisions because they require evaluation of *existing* municipal projects, unlike the LID and hydromodification requirements which address future development, is not supported by the law. The courts have held that when local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required, regardless of when the initial decision to participate in the program began.[762] This was true in the *Kern High School Dist.*, where school districts made the discretionary decision to create school site councils as authorized under the law to do,

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[760] Exhibit A, Test Claim, filed November 10, 2011, page 212 (test claim permit, Section F.1.d.1.b.).

[761] For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code section 1800 ("The legislative body of any city may do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."); and Streets and Highways Code section 1801 ("The legislative body of any city may close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or may make provision for carrying such street or highway over, under, or to a connection with the freeway, and may do any and all necessary work on such street or highway.").

[762] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731, 743.

well before the state imposed additional notice and agenda requirements on those programs.[763]

Moreover, the claimants assert that they are compelled to develop municipal projects to fulfill their core civic functions. However, the Supreme Court in *Coast Community College Dist.* rejected the lower court's holding of legal compulsion on the basis of the local entity's core functions.[764]

Although the claimants have made the assertion, there is no evidence in the record that local agencies are practically compelled to develop or redevelop priority municipal projects, and that if they fail to develop or redevelop priority municipal projects, they would be subject to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[765] The Commission's regulations require that all written representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief.[766]

Therefore, since the decision to develop or redevelop priority municipal projects is solely within the discretion of the claimants and is not mandated by the state, the downstream LID, hydromodification, and retrofitting requirements imposed by the test claim permit relating to the priority municipal projects are not mandated by the state.[767]

Finally, the claimants' reliance on *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, where the court rejected the state's argument that local government can choose to obtain an NPDES permit to discharge pollutants, is misplaced.[768] The voluntary act on the part of the claimants is not that they chose to

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[763] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 732, 753.

[764] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807 ("Contrary to the Court of Appeal's interpretation, the fact that the standards set forth in the regulations relate to the districts' core functions (matriculation, hiring of faculty and selecting curriculum, etc.) does not in itself establish that the districts have a mandatory legal obligation to adopt those standards."), and 816 (""[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of *severe* consequences that leave the local entity no reasonable alternative but to comply.").

[765] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[766] California Code of Regulations, title 2, sections 1183.1(e), 1187.5(b).

[767] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 743.

[768] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 14.

obtain an NPDES permit to discharge stormwater, but rather, that they chose to develop or redevelop priority municipal projects.

Therefore, the Commission finds that the new requirements of the test claim permit, in Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.-5., listed above, as applied to municipal project proponents, including the claimants' request for reimbursement to implement LID BMPs and hydromodification prevention requirements at municipal priority development and significant redevelopment projects, are not mandated by the state.

> b) *The implementation of LID BMPs and hydromodification prevention requirements at municipal priority development or significant redevelopment projects do not impose a new program or higher level of service because the requirements are not unique to government and do not provide a governmental service to the public.*

As indicated above, the claimants seek reimbursement to implement the LID and hydromodification prevention activities on their own municipal priority projects.[769]

These LID and hydromodification activities do not impose a new program or higher level of service. Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[770] Here, the new LID and hydromodification requirements imposed on new development and significant redevelopment applies to both public and private project proponents, is not unique to government, and does not provide a governmental service to the public.

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, explained that "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[771] The law at issue in the *County of Los Angeles* case addressed increased workers' compensation benefits for government employees, and the court concluded that:

> …section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker's compensation benefits that employees of private individuals or organizations receive. Workers'

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[769] Exhibit A, Test Claim, filed November 10, 2011, page 56 (Test Claim narrative).

[770] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[771] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57, emphasis added.

> compensation is *not* a program administered by local agencies to *provide service to the public*.[772]

The court also concluded that the statute did not impose unique requirements on local government:

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[773]

In *City of Sacramento*, the court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[774] The court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[775] Rather, the court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[776]

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the state argued that private sector firefighters were also subject to the

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[772] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58, emphasis added.

[773] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

[774] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[775] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[776] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 (Finding that statute eliminating local government exemption from liability for worker's compensation death benefits for public safety employees "simply puts local government employers on the same footing as all other nonexempt employers").

regulations, and thus the regulations were not unique to government.[777] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[778] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[779] Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.[780]

Later, in *County of Los Angeles*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly-owned.[781] The court found that the regulations were plainly not unique to government.[782] The court also found that the regulations did not carry out the *governmental* function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[783] The court held that the regulations did not constitute an increased or

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

[778] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537, quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107.

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

[780] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

[781] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[782] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[783] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[784] The court continued:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[785]

Here, the claimants have alleged that reimbursement is required to implement LID and hydromodification requirements *on their own municipal projects.*[786]

However, the LID and hydromodification prevention requirements applicable to all priority development projects are not uniquely imposed on government. Many of the categories of "priority development projects" in the test claim permit, especially automotive repair shops, restaurants, and gas stations, contemplate a private person or entity as the project proponent, rather than a municipal entity. The LID and hydromodification prevention requirements are triggered based on the size and impact of a development project, not whether its proponent is a private or government entity.[787] In this respect, the requirements of the test claim permit are not unique to government, but apply only *incidentally* to the copermittees when they are the proponent of a project that meets the criteria of a priority development project. This is no different from the situation addressed in the *County of Los Angeles* and *City of Sacramento* cases; in each of those cases the alleged mandate applied to the local government as an employer, and applied in substantially the same manner as to all other employers, and for that reason the law at issue was not considered a peculiarly governmental "program" uniquely imposed on local government within the meaning of article XIII B.[788] An even closer analogy is seen in *County of Los Angeles v. Department of Industrial Relations*, in which the regulations complained of applied to publicly- and privately-owned elevators alike, and the court found that this did not constitute a unique requirement

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[784] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546.

[785] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, footnote 5.

[786] Exhibit A, Test Claim, filed November 10, 2011, page 56 (Test Claim narrative).

[787] Exhibit A, Test Claim, filed November 10, 2011, pages 212-214 (test claim permit, Sections F.1.d.1. and 2.).

[788] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58.

imposed on local government and did not carry out the *governmental* function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[789]. The LID and hydromodification requirements apply to both municipal and private development projects. A public library is no different under the test claim permit than a restaurant or gas station, as long as the development meets the size criteria.

The claimants admit that these requirements are not unique to government, but contend that the LID and hydromodification requirements provide a service to the public by reducing runoff carrying potential pollutants and high flows that cause erosion and thus, the implementation of LID and hydromodification requirements constitute a new program or higher level of service.[790] The claimants rely on *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 558, where the court found that the installation and maintenance of trash receptacles at transit stops carried out the governmental function of providing a service to the public by reducing pollution entering stormwater drainage systems and receiving waters. The *Department of Finance* case, however, is distinguishable. The requirement to install and maintain trash receptacles was imposed uniquely on the government permittees in that case, and the court found that trash collection is itself a governmental function that provides a service to the public.[791] Here, on the other hand, the implementation of the LID and hydromodification requirements on all developers is not uniquely governmental, is triggered by the developer's decision to build and, thus, does not provide a peculiarly governmental service to the public. "[T]he intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[792]

Accordingly, the Commission finds that the implementation of LID BMPs and hydromodification prevention requirements on local agency municipal priority development or significant redevelopment projects are *not* mandated by the state and do not impose a new program or higher level of service.

iii. The remaining new administrative, planning, and regulatory activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. are

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[789] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[790] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 14-15.

[791] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 558-559.

[792] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57, emphasis added.

mandated by the state, and impose a new program or higher level of service.

The remaining activities are regulatory in nature and apply uniquely to the claimants as local agencies. The Water Boards contend, however, that the priority development project and hydromodification requirements are based exclusively on federal law, are necessary to meet MEP and water quality problems, and are consistent with US EPA guidance. The Water Boards assert that "U.S. EPA's views on what federal law requires is entitled to considerable deference."[793] The Water Boards further contend that the challenged provisions do not impose a new program or higher level of service.[794]

The Commission finds that the regulatory activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. are mandated by the state and impose a new program or higher level of service.

a) The regulatory activities required by Sections F.1.d.1., 2., 4., 7., and F.1.h. and F.3.d.1.-5. are mandated by the state.

Federal law requires that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[795]

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court reviewed that federal law and identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[796]

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[793] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 26-29.

[794] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 29-30.

[795] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[796] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765. This case addressed a challenge by the State to the Commission's decision in *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, adopted July 31, 2009.

The court also held that if the state, in opposition, contends its requirements are federal mandates, the state has the burden to establish the requirements are in fact mandated by federal law.[797]

Applying that test to the permit issued by the Los Angeles Regional Water Board in the *Department of Finance* case, the court found that the Water Board was not required by federal law to impose any specific permit conditions, including the requirements to install and maintain trash, and inspect commercial, industrial, and construction sites. The court explained that the CWA broadly directs the Water Board to issue permits with conditions designed to reduce pollutant discharges to the MEP, and the federal regulations give broad discretion to the Water Boards to determine which specific controls are necessary to meet the MEP standard.[798] The court also found that the Commission did not have to defer to the Regional Board's conclusion that the challenged requirements were federally mandated since the determination is largely a question of law. However, "[h]ad the Regional Board found, when imposing the disputed permit conditions, that those conditions were the *only means* by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate."[799]

In 2017, the Third District Court of Appeal applied the Supreme Court's test to an NPDES permit issued by the San Diego Regional Board, which contained LID and hydromodification plan requirements similar to the test claim permit at issue in this case.[800] The court held that there is no dispute that CWA and its regulations grant the San Diego Regional Board discretion to meet the MEP standard. "The CWA requires NPDES permits for MS4's to 'require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants."[801] The US EPA regulations also describe the discretion the State will exercise to meet the MEP standard. The regulations require a permit application by an MS4 to propose a management program, as specified, which "*will be considered by the Director when*

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[797] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[798] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-768, citing to Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[799] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769-770, emphasis added.

[800] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, which challenged the Commission's Decision in *Discharge of Stormwater Runoff-Order No. R9-2007-0001*, 07-TC-09, adopted March 26, 2010, San Diego Regional Board Order No. R9-0007-0001.

[801] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681, citing to United States Code, title 33, section 1342(p)(3)(B)(iii), emphasis in original.

developing permit conditions to reduce pollutants in discharges to the maximum extent practicable."[802]

Despite this language, the state argued in that case that the Regional Board "really did not exercise discretion" in imposing the challenged requirements since the Regional Board made a finding that its requirements were "necessary" to reduce pollutant discharges to the MEP. The state also contended that it did not make a true choice because the requirements were based on proposals in the application, which were modified by the Regional Board to achieve the federal standard.[803]

The court disagreed with the state's arguments. The court held that the state misconstrued the Supreme Court's decision in the 2016 case, where the Supreme Court made it clear that "except where a regional board finds the conditions are the *only means* by which the 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[804] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[805]

With respect to the hydromodification plan requirements in the permit, the state claimed the requirement arises from US EPA regulations (40 C.F.R. 122.26(d)(2)(iv)(A)(2)) requiring the permit applicant to include in its application a description of planning procedures to develop and enforce controls to reduce the discharge of pollutants from MS4s that receive discharges from areas of new development and significant redevelopment. The court held, however, that the federal regulation does not require a hydromodification plan, nor does it restrict the Regional Board from exercising its discretion to require a specific type of plan to address the impacts of new development. The hydromodification plan requirements were held to be mandated by the state.[806]

The LID provisions in that case required the permittees to implement specified LID BMPs at most new development and redevelopment projects, and required the permittees to develop a model SUSMP to establish LID BMPs that meet or exceed the requirements. The state, relying on the same federal regulation cited in the paragraph

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[802] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681, citing to Code of Federal Regulations, title 40, section 122.26(d)(2)(iv), emphasis in original.

[803] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681-682.

[804] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[805] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[806] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 684.

above, argued that the requirements were necessary to achieve federal law. The court held that "nothing in the application regulation required the San Diego Regional Board to impose these specific requirements. As a result, they are state mandates subject to [article XIII B] section 6."[807]

The same analysis and findings apply to the planning and verification activities relating to the LID, hydromodification, and retrofit provisions required by the test claim permit. Like the 2017 case, the test claim permit here also states that it "contains new or modified requirements that are *necessary* to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards."[808] The Water Boards rely on this language and also cite to comments made by a representative from the US EPA that he could not "really overemphasize the importance of incorporating these L.I.D. provisions in the permit" to contend that the requirements are mandated by federal law.[809]

Although, as stated in the background, the US EPA was considering the adoption of LID and hydromodification regulations, those regulations were never adopted. As a result, the federal government continues to encourage such provisions, but does not require these activities. As determined by the Third District Court of Appeal, the Regional Board exercised the discretion provided by federal law to impose these conditions. Moreover, there is no evidence in the record that these conditions were the "only means by which the MEP standard could be met."

Accordingly, the remaining new activities related to the claimants' regulatory activities for the LID, hydromodification, and retrofit provisions for non-municipal projects are mandated by the state.

b) The new mandated activities constitute a new program or higher level of service.

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[810]

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[807] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 685.

[808] Exhibit A, Test Claim, filed November 10, 2011 page 188 (test claim permit, Finding D.1.b.).

[809] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 28, quoting testimony from John Kemmerer at the November 18, 2009 Regional Board Hearing.

[810] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

Only one of these alternatives is required to establish a new program or higher level of service.[811]

Here, the new mandated activities cited above are expressly directed toward the local agency claimants under their regulatory authority, and thus are unique to local government. The requirements ensure that priority development projects incorporate LID and hydromodification prevention principles in the planning process at an early stage, and are intended to promote water quality and reduce the discharge of pollutants from new development and significant redevelopment activities.[812] "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[813] Thus, the new mandated activities also provide a governmental service to the public.

Accordingly, the following new activities related to the claimants' requirement to plan and regulate development *other than their own municipal developments* for the LID, hydromodification, and retrofit provisions required by Sections F.1.d.1., 2., 4., 7., and F.1.h., and F.3.d.1.-5. of the test claim permit mandate a new program or higher level of service:

1. Administrative and Planning Activities
    a. Incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for priority development projects.[814]
    b. Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[815]
    c. Develop a LID BMP waiver program to incorporate into the SSMP.[816]

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[811] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[812] Exhibit A, Test Claim, filed November 10, 2011, pages 212-216 (test claim permit, Section F.1.d.).

[813] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[814] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.ii.).

[815] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.iii.).

[816] Exhibit A, Test Claim, filed November 10, 2011, page 219 (test claim permit, Section F.1.d.7.c.).

d. Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) in accordance with Sections F.1.h.1. and F.1.h.2. of the test claim permit to manage increases in runoff discharge rates and durations from all priority development projects. Submit a draft HMP that has been available to public review and comment, to the Regional Board within three years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the Regional Water Board, incorporate the HMP into the SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.[817]

e. *Except as applicable to a claimant's own municipal development*, develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, prioritizing work plans, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements.[818]

2. *Except for a Claimant's Own Municipal Priority Development Projects*, Ensure Priority Development Projects Comply With LID, Treatment Control, LID Waiver and Hydromodification Requirements, and Track and Inspect BMPS for Retrofitted Projects[819]

   a. Require each priority development project listed in Section F.1.d.1. and F.1.d.2., *except a claimant's own municipal projects*, to implement LID BMPs as described in Section F.1.d.4.b., c., and e., which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss, or make a finding of technical infeasibility for each

[817] Exhibit A, Test Claim, filed November 10, 2011, pages 223, 227 (test claim permit, Sections F.1.h., F.1.h.5.).

[818] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Sections F.3.d.1.-4.).

[819] Exhibit A, Test Claim, filed November 10, 2011, pages 209-210 (test claim permit), Section F.1.c. requires the following: "For all proposed Development Projects, each Copermittee, during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with the Copermittee's ordinances, permits, plans, and requirements, and with this Order."

priority development project in accordance with the LID waiver program in Section F.1.d.7.[820]

b. Require all priority development projects, *except for a claimant's own municipal projects and smaller restaurants where land development is less than 5,000 square feet*, to implement the approved Hydromodification Plan (HMP)[821]

c. Track and inspect any completed retrofitted BMPs in accordance with Section F.1.f. of the test claim permit. *This does not include tracking and inspecting retrofitted BMPs of a claimant's own existing municipal development, which is not eligible for reimbursement*.[822]

5. Except as Applicable to a Claimant's Own Municipal Development, Section F.1.f, Addressing BMP Maintenance Tracking at Priority Development Projects, Imposes Some State-Mandated New Programs or Higher Levels of Service.

The claimants pled Section F.1.f. of the test claim permit, which requires each copermittee, as part of their Jurisdictional Runoff Management Program (JRMP) to develop and maintain a watershed-based database.[823] The database shall track and inventory all approved structural post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential priority development projects within its jurisdiction since July 2005; conduct inspections of the projects as specified; and verify that approved post-construction BMPs are operating effectively and have been adequately maintained as specified in the permit.[824]

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[820] Exhibit A, Test Claim, filed November 10, 2011, pages 215-216 (test claim permit, Section F.1.d.4.).

[821] Exhibit A, Test Claim, filed November 10, 2011, page 227 (test claim permit, Section F.1.h.5.c.).

[822] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Sections F.3.d.5.).

[823] Exhibit A, Test Claim, filed November 10, 2011, page 21, 57-58 (Test Claim narrative).

[824] Exhibit A, Test Claim, filed November 10, 2011, pages 221-222 (test claim permit, Section F.1.f.). The Fact Sheet describes this activity as follows:

> To facilitate the tracking of BMP maintenance, each Copermittee must develop and maintain a database of Priority Development Projects subject to SSMP requirements (SSMP projects) and the post-construction BMPs implemented for each SSMP project. The inventory is not expected or required to include LID BMPs that are implemented on a lot by lot basis at single family residential houses. The inventory, however, must include the post-construction BMPs for all other development or redevelopment SSMP project sites.

The Commission finds that, *except* as applicable to a claimant's own municipal development (which is not mandated by the state), the following activities are newly required by Section F.1.f., of the test claim permit and constitute state-mandated new programs or higher levels of service:

- Develop and maintain a watershed-based database to track and inventory all projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[825]
- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[826]
- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[827]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[828]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are

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> The Order requires BMPs at all high priority SSMP project sites as well as all Copermittee project sites with BMPs to be inspected by the Copermittees annually. Other measures, verification methods, and inspection frequencies may be used for BMPs at lower priority SSMP project sites. SSMP project sites with the highest potential for causing or contributing to a threat to water quality or an existing impairment of water quality are required to be inspected by the Copermittees on an annual basis.

Exhibit A, Test Claim, filed November 10, 2011, page 503 (Fact Sheet/Technical Report.).

[825] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[826] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[827] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[828] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

contributing to mosquito production, the copermittee is required to notify the local vector control agency.[829]

All other activities required by Section F.1.f. are not new and, thus, do not impose a new program or higher level of service.

a. Background

i. Federal law requires an NPDES applicant to propose a management program that includes a maintenance schedule to reduce pollutants in discharges from the MS4 to the maximum extent practicable (MEP), after construction projects are completed.

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[830]

Federal regulations require applicants for an NPDES permit for large and medium MS4 discharges to describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. The management program is required to include a maintenance schedule for structural controls to reduce pollutants in discharges from the MS4.[831] The management program is also required to include a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from the MS4s that receive discharges from areas of new development and significant redevelopment. Additionally, the plan shall "address controls to reduce pollutants in discharges from municipal separate storm sewers *after construction is completed*."[832] The plan shall also include inspections to implement and enforce ordinances, orders, or similar means to prevent illicit discharges to the MS4.[833] Federal regulations further state that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."[834]

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[829] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[830] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[831] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(1).

[832] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(2), emphasis added.

[833] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[834] Code of Federal Regulations, title 40, section 122.44(d)(1).

ii. The prior permit required each permittee to develop and implement programs for existing development, including post-construction BMPs, to prevent or reduce pollutants in runoff to the MEP, and to maintain and enforce adequate legal authority (through ordinances, permits, and inspections) to control pollutant discharges into and from the MS4.

Section H. of the prior permit required the permittees, as part of their JRMP, to develop and implement programs to prevent or reduce pollutants in runoff to the MEP from existing development, specifically, municipal facilities and activities, industrial and commercial facilities, and residential activities. To comply, the prior permit required the permittees to do the following activities:

For municipal facilities and activities:

- Require the use of pollution prevention methods.[835]
- Develop, and annually update, an inventory of facilities and activities that generate pollutants.[836]
- Implement or require implementation of BMPs to reduce pollutants in runoff to the MEP.[837] For municipal facilities and activities tributary to 303(d) impaired water bodies that generate pollutants for which the water body is impaired, implement or require implementation of additional BMPs to target that pollutant was required.[838]
- Implement a schedule of maintenance activities for structural source and treatment control BMPs designed to reduce pollutant discharges to or from its MS4s and related drainage structures.[839]
- Implement BMPs to reduce the contribution of pollutants to the MEP associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers to the MS4.[840]

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[835] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.a.).

[836] Exhibit A, Test Claim, filed November 10, 2011, pages 587-588 (Order R9-2004-0001, Section H.1.b.).

[837] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.1.).

[838] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.2.).

[839] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.d.).

[840] Exhibit A, Test Claim, filed November 10, 2011, pages 588-589 (Order R9-2004-0001, Section H.1.e.).

- Conduct inspections annually and implement all follow-up actions necessary to comply with the Order.[841]
- Enforce the stormwater ordinance as necessary to maintain compliance with the Order.[842]

For industrial and commercial facilities:

- Require the use of pollution prevention methods.[843]
- Develop, and regularly update, an inventory of facilities that could contribute to a significant pollutant load to the MS4.[844]
- Designate a set of minimum BMP requirements to reduce the discharge of pollutants in runoff to the MEP and require the implementation of the designated minimum BMPs at each inventoried facility.[845]
- Prioritize each inventoried facility by threat to water quality and inspect: high priority facilities annually, medium priority facilities biannually, low priority facilities once during the 5-year term of the permit, and mobile operations as needed.[846]
- Enforce the stormwater ordinance, including sanctions, as necessary to maintain compliance with the Order.[847]
- Report, in the annual report, a list of industrial facilities that may require coverage under the General Industrial Permit but no notice of intent was filed.[848]

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[841] Exhibit A, Test Claim, filed November 10, 2011, page 589 (Order R9-2004-0001, Section H.1.f.).

[842] Exhibit A, Test Claim, filed November 10, 2011, page 589 (Order R9-2004-0001, Section H.1.g.).

[843] Exhibit A, Test Claim, filed November 10, 2011, page 589 (Order R9-2004-0001, Section H.2.a.).

[844] Exhibit A, Test Claim, filed November 10, 2011, pages 589-590 (Order R9-2004-0001, Section H.2.b.).

[845] Exhibit A, Test Claim, filed November 10, 2011, page 590 (Order R9-2004-0001, Section H.2.c.).

[846] Exhibit A, Test Claim, filed November 10, 2011, pages 590-592 (Order R9-2004-0001, Section H.2.d.).

[847] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.e.).

[848] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.f.).

- Train staff responsible for conducting inspections of industrial/commercial facilities at least once a year.[849]

For existing residential developments:

- Encourage the use of pollution prevention methods.[850]
- Identify high priority residential activities that may contribute a significant pollutant load to the MS4 including those high threat activities specified in the permit (i.e. automobile repair, washing, and parking; home and garden activities and product use like fertilizer; disposal of hazardous waste, pet waste, and green waste).[851]
- Designate a set of minimum BMPs for high priority residential activities and require the implementation of the designated minimum BMPs.[852]
- Enforce the stormwater ordinance for all residential activities necessary to maintain compliance with the Order.[853]

Finding 30 of the prior permit recognized that certain BMPs for urban runoff management may create a habitat for vectors if not properly designed or maintained, stating that:

> If not properly designed or maintained, certain BMPs implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). However, proper BMP design to avoid standing water can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the SWMP.[854]

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[849] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.g.).

[850] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.3.a.).

[851] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.3.b.).

[852] Exhibit A, Test Claim, filed November 10, 2011, page 592-593 (Order R9-2004-0001, Section H.3.c.).

[853] Exhibit A, Test Claim, filed November 10, 2011, page 593 (Order R9-2004-0001, Section H.3.d.).

[854] Exhibit A, Test Claim, filed November 10, 2011, page 571 (Order R9-2004-0001, Finding 30).

Section D. of the prior permit required each copermittee to establish, maintain, and enforce adequate legal authority (through ordinances and permits) to control pollutant discharges into and from the MS4. Legal authority had to:

- Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to the MS4 and from the industrial and construction sites.
- Prohibit all illicit discharges, including those from sewage; wash water from automotive service facilities; discharges from cleaning, repair, or maintenance of equipment, machinery, motor vehicles, cement-related equipment, and port-a-potty servicing; wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning; wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, etc; runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials; pool or fountain water containing chlorine, biocides, or other chemicals; sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and food-related wastes.
- Prohibit and eliminate all illicit connections.
- Control the discharge of spills, dumping, and disposal of materials other than stormwater.
- Require compliance with conditions in the ordinances, permits, contracts, and orders.
- Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s to the MEP.
- Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances, permits, and the Order, including the prohibition on illicit discharges to the MS4. This means the copermittee must have the authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities and construction sites that discharge into MS4.
- Utilize enforcement mechanisms to require compliance.
- Control the contribution of pollutants from one portion to another portion of the shared MS4 through interagency agreements among the copermittees.[855]

[855] Exhibit A, Test Claim, filed November 10, 2011, pages 574-575 (Order R9-2004-0001, Section D.1.).

b. Section F.1.f. of the test claim permit imposes new requirements that are mandated by the state and constitute a new program or higher level of service.

i. Section F.1.f. of the test claim permit adds new requirements, including the requirement to develop and maintain a watershed-based database to track and inventory all priority development projects, to ensure that structural post-construction BMPs are operating effectively and have been adequately maintained.

Findings D.1.b. and D.1.c. of the test claim permit indicate that the copermittees have generally been implementing their JRMPs since the prior permit, but the runoff discharges continue to cause or contribute to violations of water quality standards as evidenced by the copermittees' monitoring results. According to the Fact Sheet, Section F. was included in the test claim permit to ensure the continued effectiveness of the post-construction BMP requirements at priority development projects.[856]

Accordingly, Section F.1.f.1. of the test claim permit requires, as part of the JRMP, that each copermittee perform the following:

- Develop and maintain a watershed-based database to track and inventory all projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rain barrels, are not required to be tracked or inventoried. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[857]

The requirement in Section F.1.f.1. is new. Under the prior permit, claimants had to develop an inventory of municipal facilities and activities that generate pollutants, and develop and inventory or database of industrial and commercial facilities that could contribute a significant pollutant load to the MS4.[858] The inventory for industrial and commercial facilities had to include the facility name, address, a description of the principal products or services provided, and SIC code for industrial facilities.[859] However, the claimants were not required to develop and maintain a watershed-based database to track and inventory the approved structural post-construction BMPs and

[856] Exhibit A, Test Claim, filed November 10, 2011, pages 503-504 (Fact Sheet/Technical Report).

[857] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[858] Exhibit A, Test Claim, filed November 10, 2011, pages 587-589 (Order R9-2004-0001, Section H.1.).

[859] Exhibit A, Test Claim, filed November 10, 2011, page 590 (Order R9-2004-0001, Section H.2.b.4.).

verification of BMP maintenance for existing developments. Thus, the requirement in Section F.1.f.1. is new.

Section F.1.f.2. of the test claim permit requires each copermittee to verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

- Designate high priority SSMP projects through consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, compliance record, land use, and other relevant factors. At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of and within the same hydrologic subarea as a 303(d) listed water body impaired for that pollutant and those projects generating pollutants within the tributary area for and within the same hydrologic subarea as an observed action level exceedance of that pollutant.[860]
- Beginning on July 1, 2012, verify implementation, operation, and maintenance of structural post-construction BMPs on inventoried SSMP projects by inspection, self-certification, survey, or other equally effective approaches, by complying with the following requirements:
    1. The implementation, operation, and maintenance of all approved and inventoried final project public and private SSMPs must be verified every five years.[861]
    2. All projects with BMPs that are high priority shall be inspected annually before each rainy season.[862]
    3. All copermittee's projects with BMPs must be inspected annually.[863]
    4. For verifications performed by means other than copermittee inspection, adequate documentation that the required maintenance has been completed must be submitted to the copermittee.[864]
    5. Appropriate follow-up measures, including re-inspections, enforcement, and maintenance, must be conducted to ensure the

[860] Exhibit A, Test Claim, filed November 10, 2011, pages 221-222 (test claim permit, Section F.1.f.2.a.).

[861] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[862] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[863] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.iii.).

[864] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

treatment BMPs continue to reduce stormwater pollutants as originally designed.[865]

6. Inspections must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[866]

Section F.1.f.2.b.iv. does not impose any requirements on the claimants, but states that "At the discretion of the Copermittee, its inspections may be coordinated with the facility inspections implemented pursuant to section F.3. of this Order."[867]

Some of the requirements of Section F.1.f.2. are new, and some are not.

The requirement in F.1.f.2.a. to designate high priority SSMP projects, which at a minimum include those projects that generate pollutants (prior to treatment) within the tributary area of and within the same hydrologic subarea as a 303(d) listed water body impaired for that pollutant and those projects generating pollutants within the tributary area for and within the same hydrologic subarea as an observed action level exceedance of that pollutant, is *not* new. The prior permit, in Sections H.2.b. and H.2.d., required the claimants to develop an inventory or database of all industrial and commercial facilities within its jurisdiction and establish priorities for inspections and oversight of those facilities based on threat to water quality.[868] Thus, the requirement to designate high priority industrial and commercial projects is not new and does not impose a new program or higher level of service. The prior permit, in Section H.3., also required the claimants to identify high priority residential activities that may contribute a significant pollutant load to the MS4, designate BMPs for those activities, and additional controls for high priority residential activities within or directly adjacent to or discharging directly to 303(d) impaired receiving waters.[869] Thus, the requirement to designate high priority residential activities is also not new and does not impose a new program or higher level of service. And the requirement to designate high priority municipal projects is not new and does not impose a new program or higher level of service. The prior permit, in Section H.1., required the claimants to inventory all municipal facilities and activities that generate pollutants, and for those municipal facilities and activities tributary to 303(d) impaired water bodies that generate pollutants for which the water

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[865] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vi.).

[866] Exhibit A, Test Claim, filed November 10, 2011, pages 222 (test claim permit, Section F.1.f.2.b.vii.).

[867] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.iv.).

[868] Exhibit A, Test Claim, filed November 10, 2011, pages 589-591 (Order R9-2004-0001, Section H.2.).

[869] Exhibit A, Test Claim, filed November 10, 2011, page 587-589 (Order R9-2004-0001, Section H.3.).

body is impaired, the implementation of additional BMPs to target that pollutant was required.[870]

The Commission further finds that the requirement in Section F.1.f.2.b. of the test claim permit to inspect and verify implementation, operation, and maintenance of structural post-construction BMPs on inventoried SSMP projects as specified is *partially new*. The requirement imposed by Section F.1.f.2.b.vii. of the test claim permit, that inspections for all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency, is new. The prior permit recognized that certain BMPs for urban runoff management may create a habitat for vectors if not properly designed or maintained, creating potential nuisance and public health issues. The prior permit further recognized that "[n]uisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the SWMP."[871] These findings are also contained in Finding D.2.f.[872] and a similar finding appears in Section F.1.d.6.[873] which states "treatment control BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies."[874] However, the prior permit did not impose any specific requirements with respect to vector control, and the inspections required by the prior permit of existing development were focused on water quality and not public health.

The requirement imposed by Section F.1.f.2.b.v. of the test claim permit, that "[f]or verifications performed by means other than copermittee inspection, adequate documentation that the required maintenance has been completed must be submitted to the copermittee," is new for all existing development. The prior permit did not require the submittal of BMP maintenance documentation.

In addition, the requirements in Section F.1.f.2.b.i. and ii., to verify every five years the implementation, operation, and maintenance of structural post-construction BMPs on inventoried *residential* projects, and to annually inspect the required structural post-construction BMPs at high priority *residential* projects is new. Under the prior permit,

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[870] Exhibit A, Test Claim, filed November 10, 2011, pages 587-589 (Order R9-2004-0001, Section H.1.).

[871] Exhibit A, Test Claim, filed November 10, 2011, page 571 (Order R9-2004-0001, Finding 30).

[872] Exhibit A, Test Claim, filed November 10, 2011, page 119 (test claim permit, Finding D.2.f.).

[873] Exhibit A, Test Claim, filed November 10, 2011, page 218 (test claim permit, Section F.1.d.6.f.).

[874] See Exhibit A, Test Claim, filed November 10, 2011, pages 439, 500 (Fact Sheet/Technical Report).

the claimants had to encourage the use of pollution prevention methods,[875] designate a set of minimum BMPs for high priority residential activities and require the implementation of the designated minimum BMPs,[876] and enforce the stormwater ordinance for all residential activities necessary to maintain compliance with the Order.[877] However, there was no requirement to inspect residential projects or verify the operation and maintenance of structural post-construction BMPs every five years.

The remaining requirements imposed by Section F.1.f.2.b. with respect to municipal, industrial, and commercial facilities are *not new* and do not impose a new program or higher level of service. Section H.1.f. of the prior permit required the claimants to conduct annual inspections of all municipal facilities and activities.[878] Section H.2.d. required claimants to inspect industrial and commercial facilities according to priority: high priority annually, medium priority biannually, low priority once during the 5-year term of the permit, and mobile operations as needed.[879] The inspection of municipal, industrial, and commercial facilities had to include the assessment of BMP implementation and effectiveness and, thus, any structural post-construction BMPs would have been verified at the time of inspection.[880] The prior permit also required the claimants to enforce the stormwater ordinance in order to achieve water quality standards for municipal, industrial, and commercial facilities necessary to maintain compliance with the prior permit (including the requirements to use BMPs to prevent or reduce the discharge of pollutants to the MEP; use pollution prevention methods; and carry out all inspections and monitoring of industrial and commercial facilities necessary to determine compliance and noncompliance with local ordinances and permits).[881] The prior permit also required the claimants to implement all follow-up actions necessary to comply with the Order.[882]

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[875] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.3.a.).

[876] Exhibit A, Test Claim, filed November 10, 2011, pages 592-593 (Order R9-2004-0001, Section H.3.c.).

[877] Exhibit A, Test Claim, filed November 10, 2011, page 593 (Order R9-2004-0001, Section H.3.d.).

[878] Exhibit A, Test Claim, filed November 10, 2011, page 589 (Order R9-2004-0001, Section H.1.f.).

[879] Exhibit A, Test Claim, filed November 10, 2011, pages 590-592 (Order R9-2004-0001, Section H.2.d.).

[880] Exhibit A, Test Claim, filed November 10, 2011, page 589, 591 (Order R9-2004-0001, Sections H.1.f., H.2.d.2. and 3.).

[881] Exhibit A, Test Claim, filed November 10, 2011, pages 587-593 (Order R9-2004-0001, Sections H.1.a., H.1.c., H.1.f., H.1.g., H.2.a., H.2.c.-e., H.3.a., H.3.c., H.3.d.).

[882] Exhibit A, Test Claim, filed November 10, 2011, pages 589, 592, (Order R9-2004-0001, Sections H.1.f., H.2.d.6.).

Thus, with respect to all municipal facilities and activities and high priority industrial and commercial facilities, the requirements of the test claim permit to annually inspect; verify effective operation and maintenance of the post construction BMPs, as well as compliance with all ordinances, permits, and the Order; and conduct follow-up measures to ensure that BMPs continue to reduce stormwater pollutants, are not new and do not impose a new program or higher level of service.

With respect to all medium or low threat industrial and commercial facilities, the requirements of the test claim permit to inspect every five years; verify effective operation and maintenance of the structural post-construction BMPs, as well as compliance with all ordinances, permits, and the Order; and follow-up measures to ensure that post-construction BMPs continue to reduce stormwater pollutants, are not new and do not impose a new program or higher level of service. In fact, for medium industrial and commercial facilities, fewer inspections are required: every five years rather than every two years.

With regard to mobile facilities, which were inspected as needed under the prior permit,[883] the test claim permit imposes the following time requirements: "The inspection, verification, and follow-up activities for all approved and inventoried final project public and private SSMP are required every five years." The time requirements, however, do not impose any new activities on the claimants or increase the actual level or quality of governmental services required; they simply ensure that BMPs continue to be maintained and stormwater pollutants are reduced to the MEP as required under existing law. Thus, the requirement to inspect, verify, and conduct follow-up activities for mobile facilities is not new and does not impose a new program or higher level of service.

Thus, Section F.1.f. imposes the following new requirements:

- Develop and maintain a watershed-based database to track and inventory all priority development projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[884]
- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating

[883] Exhibit A, Test Claim, filed November 10, 2011, page 591 (Order R9-2004-0001, Section H.2.d.2.d.).

[884] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[885]

- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[886]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[887]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[888]

ii. Except as applicable to a claimant's own municipal development, the new requirements imposed by Section F.1.f. mandate a new program or higher level of service.

The claimants contend that the activities required by Section F.1.f. of the test claim permit are mandated by the state and not required by federal law, "Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retroactive BMP maintenance tracking database and inspection program."[889] The claimants contend that the Water Boards exercised their "true choice" in requiring these activities and are thus mandated by the state.[890] The claimants also contend that they are legally compelled, not practically compelled, to create the database.[891]

The Water Boards contend that the requirements in Section F.1.f. are not mandated by the state since the requirements implement and are necessary to meet federal law. "The BMP maintenance tracking requirement is integral to the successful implementation of runoff management programs that must be continually assessed,

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[885] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[886] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[887] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[888] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[889] Exhibit A, Test Claim, filed November 10, 2011, page 58 (Test Claim narrative).

[890] Exhibit A, Test Claim, filed November 10, 2011, page 58 (Test Claim narrative) citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.

[891] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 16, emphasis in original.

modified and improved upon, in order to achieve the evolving federal MEP standard."[892] The Water Boards further contend that tracking inspections of BMPs is consistent with US EPA guidance, which states the following:

> Creating an inventory of post-construction structural stormwater control measures, including tracking of specific information, will first enable Permittees to know what control measures they are responsible for. Without this information, the permittee will not be protecting water quality to their full potential since inspections, maintenance, and follow-up changes cannot be performed. Tracking information such as latitude/longitude, maintenance and inspection requirements and follow-up will allow the permittee to be able to better allocate their resources for those activities that are immediately necessary. . . ."[893]

The Water Boards further rely on the following recommendation by the US EPA:

> Permit writers should clearly specify requirements for inspections. Inspecting and properly maintaining structural stormwater controls to ensure they are working as designed is just as important as installing them in the first place. By having specific requirements, Permittees will be reminded that they must allocate resources to ensure control measures are properly maintained and functioning.[894]

The Water Boards also contend that the requirements do not impose a new program or higher level of service since the claimants' 2009 Report of Waste Discharge (ROWD) already included an approach for inspecting and/or verifying maintenance of treatment control BMPs implemented for priority development projects to ensure effectiveness, among other things.[895]

The Commission finds that some of the new activities required by Section F.1.f. apply to all development, and as those activities apply to a claimant's own *municipal* development, they are not mandated by the state. However, the remaining new activities constitute a state-mandated new program or higher level of service.

The following activities required by Section F.1.f. apply to all development, including municipal development:

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[892] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 30.

[893] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 31; see also, Exhibit J (12), EPA, MS4 Permit Improvement Guide, April 14, 2010, page 66.

[894] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 30-32; see also, Exhibit J (12), EPA, MS4 Permit Improvement Guide April 14, 2010, page 68.

[895] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 32.

- Develop and maintain a watershed-based database to track and inventory all projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[896]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[897]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[898]

When determining whether a test claim statute or order compels compliance and, thus, creates a state-mandated program for purposes of reimbursement under article XIII B, section 6, the courts look at whether the claimants' participation in the underlying program is voluntary or compelled, and have identified two distinct theories of compulsion: legal compulsion and practical compulsion.[899] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[900] The California Supreme Court has described legal compulsion as follows:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a

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[896] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[897] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[898] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[899] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[900] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

> traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[901]

In the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[902] Substantial evidence in the record is required to make a finding of practical compulsion.[903]

Nothing in state statute or case law imposes a legal obligation on local agencies to construct, expand, or improve municipal projects.[904] Nor is there evidence in the record that the claimants would suffer certain and severe penalties such as "double…taxation"

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[901] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

[902] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[903] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368-1369 (*POBRA*); Government Code section 17559; California Code of Regulations, title 2, section 1187.5.

[904] For example, see Government Code section 23004 (counties *may* purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it *may* adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code, sections 1800 ("The legislative body of any city *may* do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."); 1801 ("The legislative body of any city *may* close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or *ma*y make provision for carrying such street or highway over, under, or to a connection with the freeway, and *may* do any and all necessary work on such street or highway.").

or other "draconian" consequences" if they fail to comply with the permit's annual reporting requirements for municipal projects.[905]

The claimants nevertheless assert that they are legally compelled to create the database: "It was the *creation of the database and the other Section F.1.f. requirements* that constituted the legal compulsion on Claimants, not the allegedly discretionary decision to construct a municipal project in the first place."[906]

> Here, the BMP tracking database requirements were unconnected to the original decision to build a municipal project that required those BMPs. The projects were built and the BMPs were installed. Section F.l.f. made the tracking of those BMPs mandatory, not discretionary. Having exercised their alleged discretion to build the project, Claimants had no discretion as to whether to include their completed municipal projects in the database and otherwise follow the requirements of Section F.l.f. Extension of the *City of Merced* rule to such requirements is not appropriate.[907]

The claimants further assert that the downstream effect of any discretionary decision was limited by the California Supreme Court in *San Diego Unified School Dist. v. Commission on State Mandates,* which questioned an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 whenever an entity makes an initial discretionary decision, such as the number of employees to hire, which in turn triggers mandated costs.[908]

As explained above, the courts have held that when local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required, regardless of when the initial decision to participate in the program began.[909] This was true in *Kern High School Dist.*, where school districts made the discretionary decision to participate in the school site council programs, well before the state imposed additional notice and agenda requirements on those programs.[910] The

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[905] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[906] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 16, emphasis in original.

[907] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 17.

[908] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 16, citing *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859, 887-888.

[909] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731, 743.

[910] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 732, 753.

claimants rely on dicta from *San Diego Unified School Dist.* where the court mused about the application of *City of Merced* to and the denial of reimbursement based simply on the decision by a local entity on how many employees to hire. The court, however, never addressed the state-mandate issue to resolve the case: "In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis." The issue here is not how many employees to hire to comply with the permit, but the local discretionary decision to construct, expand, or improve municipal projects. The claimants cite no authority for any limitation on the application of *City of Merced* and *Kern High School Dist*. cases, nor on the downstream effects of a discretionary decision. Without such authority, the holdings of *City of Merced* and *Kern High School Dist*. cases must be applied as set forth in those decisions.

Accordingly, the new activities as they apply to municipal developments are not mandated by the state.

However, *except as applicable to a claimant's own municipal development*, the remaining requirements mandate a new program or higher level of service:

- Develop and maintain a watershed-based database to track and inventory all priority development projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[911]
- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[912]
- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[913]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the

[911] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[912] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[913] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

copermittee to provide assurance that the required maintenance has been completed.[914]

- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[915]

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[916]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the state exercises a true choice by determining what controls are necessary to meet the standard."[917] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[918]

In this case, the Water Boards argue that the requirements in Section F.1.f. are necessary to meet the MEP standard under federal law and that the US EPA recommended the copermittees create an inventory of post-construction structural stormwater control measures and specific inspection requirements to meet the MEP requirements. Federal law requires that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines

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[914] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[915] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[916] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[917] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[918] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

appropriate for the control of such pollutants."[919] Federal law also requires the claimants to propose a management program that includes a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from the MS4s that receive discharges from areas of new development and significant redevelopment. The plan is required to "address controls to reduce pollutants in discharges from municipal separate storm sewers *after construction is completed*."[920] And the program is required to include inspections to prevent illicit discharges from entering the MS4.[921] Federal law, however, gives the Water Boards discretion to determine what controls and inspections are necessary to meet the MEP standard, and does not require any specific activities. Moreover, there is no evidence in the record that the new required activities are the only means by which the federal MEP standard can be met.

Accordingly, the Commission finds that *except as applicable to a claimant's own municipal development* the new activities required by Section F.1.f. are mandated by the state.

Moreover, these activities constitute a new program or higher level of service. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[922]

The new requirements cited above are expressly directed toward the local agency permittees under their regulatory authority and, thus, are unique to government, and, except as applicable to their own municipal development, detail their responsibilities to:

- Develop and maintain a watershed-based database to track and inventory all priority development projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[923]
- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating

[919] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[920] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(2), emphasis added.

[921] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[922] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[923] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[924]

- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[925]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[926]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[927]

"The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce the discharge of pollutants in stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[928] Therefore, the new requirements also carry out the governmental function of providing services to the public.

Accordingly, the new state-mandated activities required by Sections F.1.f. of the test claim permit impose a new program or higher level of service.

6. Section F.2.d.3. Imposes a State-Mandated New Program or Higher Level of Service to Require Implementation of Active/Passive Sediment Treatment at Construction Sites (Other Than the Claimants' Own Municipal Construction Site), But the Requirements in Section F.2.e.(6)(e) Are Not New and Do Not Impose a New Program or Higher Level of Service.

The claimants pled the requirements in Sections F.2.d.3. and F.2.e.6.e. of the test claim permit, which require the copermittees to require the implementation of Active/Passive

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[924] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[925] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[926] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[927] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[928] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560; Exhibit A, Test Claim filed November 10, 2011, pages 188, 212, 503 (test claim permit; Fact Sheet/Technical Report).

Sediment Treatment (AST)[929] at construction sites that are determined by the copermittee to be an exceptional threat to water quality, and to review site monitoring data, if the site monitors its runoff, as part of construction site inspections.[930]

The Commission finds that Section F.2.d.3. imposes a state-mandated new program or higher level of service only when the claimant is acting in its regulatory capacity and is performing the following activity for construction sites other than its own:

- Require implementation of AST for sediment at construction sites other than its own (or portions thereof) that are determined to be an exceptional threat to water quality.[931]

However, with respect to a local agency's own *municipal* construction sites, the requirement to implement AST is not mandated by the state, but is triggered by a local discretionary decision to construct new municipal projects. Moreover, implementing AST at a local agency's own municipal construction site does not impose a new program or higher level of service because such costs are not unique to government and do not provide a governmental service to the public.

Finally, the Commission finds that Section F.2.e.6.e. of the test claim permit, which requires that inspections of construction sites must include a review of facility monitoring data results if the site monitors its runoff, is not new, and does not impose a new program or higher level of service.

a. Background

i. Federal law requires an NPDES applicant to propose structural and source control measures to reduce pollutants from runoff from all construction sites to the maximum extent practicable (MEP).

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[932]

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[929] Active/Passive Sediment Treatment is defined as "[u]sing mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge. Exhibit A, Test Claim, filed November 10, 2011, page 283 (test claim permit, Attachment C).

[930] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 59-60. The claimants have not alleged any other activities in Section F.2.d., and, thus, only Sections F.2.d.3. and F.2.e.6.e. of the test claim permit are analyzed in this Decision.

[931] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

[932] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

Federal regulations require that the application for an NPDES permit for large and medium MS4 dischargers must describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. The proposed management program shall include a comprehensive planning process which involves public participation and where necessary, intergovernmental coordination, to reduce the discharge of pollutants to the MEP using management practices, control techniques and system, design and engineering methods, and other appropriate conditions.[933] Further, the application must demonstrate adequate legal authority, through ordinance, permit, or other means, to control pollutants to the MS4 from stormwater discharges associated with industrial activity and to carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions.[934] Stormwater discharges associated with industrial activity are defined to include construction activity.[935] The legal authority shall also prohibit illicit discharges to the MS4.[936]

As relevant here, the proposed management program shall include a description of a program to implement and maintain structural and non-structural BMPs to reduce pollutants in stormwater runoff from construction sites to the MS4, including:

- Procedures for site planning, which incorporates consideration of potential water quality impacts.
- Requirements for nonstructural and structural BMPs.
- Procedures for identifying priorities for inspecting sites and enforcing control measures, which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.
- Appropriate educational and training measures for construction site owners.[937]

ii. The prior permit required each permittee to implement a program, which included inspections, to reduce pollutants in construction site runoff to the MEP.

The prior permit identifies the following general prohibitions and receiving water limitations with which the permittees are required to comply:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in the waters of the state are prohibited.

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[933] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[934] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(A), (F).

[935] Code of Federal Regulations, title 40, section 122.26(b)(14)(x).

[936] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[937] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(D).

- Discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water and ground water are prohibited.
- Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.
- Discharges from MS4s that are subject to all Basin Plan prohibitions (cited in Attachment A to the order) are prohibited.
- All types of non-stormwater discharges into the MS4, unless authorized by an NPDES permit, are prohibited.
- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses of receiving waters) are prohibited.[938]

The prior permit also requires the permittees to have adequate legal authority to control pollutant discharges into and from the MS4 through ordinance, statute, permit, contract, or other similar means. The legal authority, at a minimum, must authorize the permittee to do the following:

- Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies to both industrial and construction sites that have coverage under the General Industrial Permit and the General Construction Permit, as well as to those sites that do not.
- Prohibit all illicit discharges and connections to the MS4.
- Control the discharge of spills, dumping or disposal of materials other than stormwater to its MS4.
- Require compliance with the copermittee's ordinances, permits, contracts, or orders by holding dischargers accountable for the contributions to pollutants and flows.
- Require the use of BMPs to reduce or prevent the discharge of pollutants into the MS4 to the MEP.
- Carry out all inspections and monitoring necessary to determine compliance and noncompliance with local ordinances and orders, and the prior permit.[939]

To comply with the prohibitions and receiving water limitations, the prior permit required each permittee to implement a program to reduce pollutants in runoff to the MEP during

[938] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573, 597 (Order R9-2004-0001, Sections A., B.1., C.1.).

[939] Exhibit A, Test Claim, filed November 10, 2011, pages 574-575 (Order R9-2004-0001).

all construction phases. The permittees were required to include the following in their programs:

- Implement and require implementation of pollution prevention methods.[940]
- Review and update grading ordinances as necessary for compliance with stormwater ordinances and the prior permit.[941]
- Develop and implement a process to ensure that BMPs to reduce the discharge of pollutants to the MEP are applicable to construction and grading permits and plans prior to their approval.[942]
- Develop and annually update an inventory of all construction sites within its jurisdiction.[943]
- Designate a set of minimum BMPs and implement or require their implementation to ensure erosion prevention, slope stabilization, phased grading, revegetation, preservation of natural hydraulic features and riparian buffers and corridors, maintenance of all source and treatment control BMPs, and retention and proper management of sediment and other construction-related pollutants.[944]
- Enforce its ordinances (grading, stormwater, etc.) and permits (building, grading, etc.) at all construction sites as necessary to maintain compliance with the prior permit.[945]

In addition, the permittees were required to conduct inspections of construction sites for compliance with their local ordinances (grading, stormwater, etc.), permits (construction, grading, etc.), and the prior permit.[946] During the wet season, the frequencies of the

[940] Exhibit A, Test Claim, filed November 10, 2011, page 584 (Order R9-2004-0001, Section G.1.).

[941] Exhibit A, Test Claim, filed November 10, 2011, page 584 (Order R9-2004-0001, Section G.2.).

[942] Exhibit A, Test Claim, filed November 10, 2011, pages 584-585 (Order R9-2004-0001, Section G.3.).

[943] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.4.).

[944] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.5.).

[945] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Section G.7.).

[946] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Section G.6.).

inspections depended on the size of the site and the threat to water quality.[947] The following sites had to be inspected every two weeks during the wet season:

- All sites 5 acres or more, and tributary to a CWA section 303(d) water body impaired for sediment or within or directly adjacent to or discharging directly to a receiving water within ESA.
- Other sites determined by the permittees or the SDRWQCB as a significant threat to water quality. In evaluating threat to water quality, the following factors shall be considered: (1) soil erosion potential; (2) site slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-stormwater discharges; and (7) any other relevant factors.[948]

During the dry season, the permittees were required to inspect all construction sites as needed.[949]

Finally, based upon site inspection findings, each permittee was required to implement all follow-up actions necessary to comply with the prior permit.[950] In this respect, the prior permit required additional controls for construction sites tributary to 303(d) waterbodies impaired for sediment as necessary to comply with this Order. "Each Permittee shall implement, or require implementation of, additional controls for construction sites within or adjacent to or discharging directly to receiving waters within ESAs as necessary to comply with this Order."[951]

The Findings of the prior permit explain the rationale for these requirements as follows:

> As operators of the MS4s, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or exceedances of water quality objectives.[952]

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[947] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Sections G.6.b.-d.).

[948] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Sections G.6.b.).

[949] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Section G.6.e.).

[950] Exhibit A, Test Claim, filed November 10, 2011, page 586 (Order R9-2004-0001, Section G.6.f.).

[951] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Sections G.5.d.).

[952] Exhibit A, Test Claim, filed November 10, 2011, page 569 (Order R9-2004-0001, Finding 20).

The Findings also state the following:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of . . . construction site discharges, discharges of runoff from . . . construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the SDRWQCB is responsible for enforcing the General Construction Activities Storm Water Permit . . . , and each municipal Permittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.[953]

b. Section F.2.d.3. of the test claim permit imposes a state-mandated new program or higher level of service.

i. Section F.2.d.3. of the test claim permit adds a new requirement for the implementation of active/passive sediment treatment at construction sites determined to be an exceptional threat to water quality.

The requirement to have a construction program is set forth in the test claim permit in Section F.2., and, like the prior permit, the program must include an ordinance update, an updated inventory of construction sites, a process to review BMPs before issuing a permit, BMP designation and implementation, inspections, and enforcement.[954] The goals of the program are to prevent illicit discharges into the MS4, implement structural and non-structural BMPs to reduce pollutants in stormwater runoff from construction sites to the MEP, reduce construction site discharges of stormwater pollutants to the MEP, and prevent construction site discharges from causing or contributing to a violation of water quality standards.[955] As stated in Finding 1.f.: "Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters."[956] The importance of focusing on construction sites is further explained in the Fact Sheet:

> Management of storm water runoff during the construction phase is also essential. USEPA explains in the preamble to the Phase II regulations that storm water discharges generated during construction activities can cause an array of physical, chemical, and biological water quality impacts. Specifically, the biological, chemical and physical integrity of the waters may become severely compromised due to runoff from construction sites.

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[953] Exhibit A, Test Claim, filed November 10, 2011, page 570 (Order R9-2004-0001, Finding 21).

[954] Exhibit A, Test Claim, filed November 10, 2011, pages 229-234 (test claim permit, Section F.2.).

[955] Exhibit A, Test Claim, filed November 10, 2011, page 229 (test claim permit, Section F.2.).

[956] Exhibit A, Test Claim, filed November 10, 2011, page 189 (test claim permit, Finding 1.f.).

> Fine sediment from construction sites can adversely affect aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within the streambed, and reducing intergravel dissolved oxygen by reducing the permeability of the bed material. Water quality impairment also results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients, metals, and organic compounds into aquatic systems.[957]

Accordingly, Section F.2.d.3. of the test claim permit requires each copermittee to require implementation of Active/Passive Sediment Treatment (AST) at construction sites, or portions of sites, that the copermittee determines to be an exceptional threat to water quality.[958] AST requires the use of "mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge."[959]

The copermittees must consider the following in making their determination of whether a site is an exceptional threat to water quality: soil erosion potential or soil type, the site's slopes, project size and type, sensitivity of receiving water bodies, proximity to receiving water bodies, non-stormwater discharges, ineffectiveness of other BMPs, proximity and sensitivity of aquatic threatened and endangered species of concern, known effects of AST chemicals, and any other relevant factors.[960] As the Fact Sheet explains:

> For sites that are identified as exceptional threat to water quality, active/passive sediment treatment (AST) is required to be implemented *in addition* to the minimum set and/or enhanced sediment control BMPs. AST is required at construction sites that are identified by the Copermittee as an exceptional threat to water quality due to high turbidity or suspended sediment levels in the site's effluent even when other sediment control BMPs have been implemented. In cases where the Copermittee's designated minimum set of BMPs and/or enhanced BMPs are not able or expected to be able to reduce turbidity or suspended sediment levels to a

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[957] Exhibit A, Test Claim, filed November 10, 2011, page 430 (Fact Sheet/Technical Report) citing 64 Federal Register 68728.

[958] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

[959] Exhibit A, Test Claim, filed November 10, 2011, page 283 (test claim permit, Attachment C).

[960] Exhibit A, Test Claim, filed November 10, 2011, pages 230-231 (test claim permit, Section F.2.d.3.a.-j.).

level that will be protective of water quality, AST is *necessary* and is considered MEP for the discharges from these sites.[961]

Although the prior permit required additional controls necessary to comply with water quality standards for construction sites tributary to 303(d) waterbodies impaired for sediment and those within or adjacent to or discharging directly to receiving waters within ESAs,[962] it did not specifically require the implementation of AST at those sites and instead left the decision about which additional controls to use to the local agency permittees. The Water Boards acknowledge that this requirement was not in the prior permit.[963]

Therefore, Section F.2.d.3. imposes the following new requirement:

- Require implementation of AST for sediment at construction sites (or portions thereof) that are determined to be an exceptional threat to water quality.[964]

    ii. The activity to require implementation of active/passive sediment treatment (AST) at a copermittee's own municipal construction site is not mandated by the state, but is triggered by a local discretionary decision to construct new municipal projects, and does not impose a new program or higher level of service because such costs are not unique to government and do not provide a governmental service to the public.

As set forth above, the implementation of AST for any construction site where the copermittee has determined that the site is an exceptional threat to water quality is required by the test claim permit. The claimants contend that this activity is eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, any costs related to implementation of AST that are incurred by a local agency permittee as a project proponent of new municipal projects are not mandated by the state, are the result of a local discretionary decision, and are, therefore, not eligible for reimbursement.

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[961] Exhibit A, Test Claim, filed November 10, 2011, page 512 (Fact Sheet/Technical), emphasis added.

[962] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.5.d.).

[963] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 34 ("*Although the specific challenged provisions were not contained in the prior permit*, it contained numerous requirements directing Claimants to control pollutants in discharges of runoff associated with industrial and construction activity and to require construction sites to comply with construction and grading ordinances and permits." Emphasis added.).

[964] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

In *City of Merced*, the statute at issue required a local government, when exercising the power of eminent domain, to compensate a business owner for the loss of business goodwill, as part of the compensation paid for the property subject to the taking.[965] The court found that no state law *required* the local entity to exercise the power of eminent domain, and thus any costs experienced as a result of the requirement to compensate for business goodwill was the result of an initial discretionary act.[966]

In *Kern High School Dist.*, the statute at issue required certain local school site councils and advisory committees to comply with notice and agenda requirements in conducting their public meetings.[967] The court held that the claimant's participation in the underlying school site councils and advisory committees was voluntary, and therefore any notice and agenda costs were an incidental impact of participating or continuing to participate in those programs and were not legally compelled by state law.[968] The court left open the possibility that a state mandate could be based on practical compulsion if the failure to comply resulted in "'certain and severe…penalties' such as 'double…taxation' or other 'draconian' consequences."[969] The court acknowledged that the district was already participating in the underlying programs, and "as a practical matter, they feel they must participate in the programs, accept program funds, and…incur expenses necessary to comply with the procedural conditions imposed on program participants."[970] However, the court held that "[c]ontrary to the situation that we described in *City of Sacramento* [*v. State* (1990)] 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face 'certain and severe…penalties' such as 'double…taxation' or other 'draconian' consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."[971]

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[965] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

[966] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

[967] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 732.

[968] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 744-745.

[969] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754, citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74 (The "certain and severe…penalties" and "double…taxation" referred to the situation in *City of Sacramento* in which the state was compelled, by the potential loss of *both* federal tax credits *and* subsidies provided to businesses statewide, to impose mandatory unemployment insurance coverage on public agencies consistent with a change in federal law.).

[970] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 753.

[971] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74.

In *Department of Finance v. Commission* (2009) 170 Cal.App.4th 1355 (*POBRA*), the alleged mandate pertained to due process protections required to be extended to all peace officers in the state, and the question was whether those costs constituted a reimbursable state mandate with respect to school districts, which were authorized, but not required, to employ peace officers. The court reiterated that "the proper focus of a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs, not that costs incurred in complying with program conditions have been legally compelled."[972] The court held there was no showing in the record why the districts could not rely on county and city peace officers to provide police protection services or that they would face certain and severe penalties' such as 'double taxation' or other draconian consequences for not hiring their own peace officers, and therefore the underlying decision to employ peace officers entitled to the protections of POBRA was a discretionary act that led the district to incur the costs alleged.[973]

The claimants contend that local government does not choose to build projects in the same sense as the choices exercised by local governments in *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. Thus, the claimants assert that they are practically compelled to build projects because local governments "must either build such projects to fulfill their civic obligations or they or their constituents could face 'certain and severe penalties or consequences' for not providing necessary public services."[974] The claimants also note that the court in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 rejected the argument that cities and counties choose to obtain an NPDES permit to discharge stormwater on the ground that they are without discretion to do otherwise and, thus, are practically compelled to obtain and comply with the permit.[975]

Here the statutes do not legally compel local agencies to construct new municipal sites.[976] They have the discretion to do so.[977] Thus, the state has not legally compelled

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[972] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1366 (*POBRA*).

[973] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[974] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 17, 13-14.

[975] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 17, 14.

[976] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[977] For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law;

them to implement AST for sediment at their own municipal construction sites that are determined to be an exceptional threat to water quality.

Further, although the claimants have made the assertion, there is no evidence in the record that a failure to construct new municipal sites would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[978] Substantial evidence in the record is required to make a finding of practical compulsion.[979]

Finally, the claimants' reliance on the rejected argument in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, where the state made the argument that the claimants can choose to obtain an NPDES permit to discharge stormwater, is misplaced.[980] The voluntary act on the part of the claimants is not that they chose to obtain an NPDES permit to discharge stormwater, but rather that they chose to construct municipal projects.

Therefore, the Commission finds that Section F.2.d.3. of the test claim permit, as applied to the local agency permittee's own municipal construction sites, are not mandated by the state.

Moreover, the activity to implement AST at the agency's own municipal construction sites determined to be an exceptional threat to water quality does not impose a new program or higher level of service. Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing

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and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real property, and control and dispose of it for the comment benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use").

[978] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754, citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[979] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368-1369 (*POBRA*); Government Code section 17559; California Code of Regulations, title 2, section 1187.5.

[980] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 14.

services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[981] Here, the AST requirement is imposed on *all* construction sites that are an exceptional threat to water quality. As the Fact Sheet explains: "AST is required at construction sites that are identified by the Copermittee as an exceptional threat to water quality due to high turbidity or suspended sediment levels in the site's effluent even when other sediment control BMPs have been implemented."[982] Thus, AST implementation applies without regard to whether the construction project is public or private. Further, implementing AST at all sites that are determined to be an exceptional threat to water quality is not unique to government and does not provide a *peculiarly governmental* service to the public.

Accordingly, the Commission finds that Section F.2.d.3., as applied to a local agency permittee's own municipal construction sites, does not impose a state-mandated new program or higher level of service.

iii. The requirement imposed on claimants by Section F.2.d.3. to require the implementation of active/passive sediment treatment (AST) at construction sites (or portions thereof) that are determined to be an exceptional threat to water quality, which is performed by the claimants in their capacity to regulate construction sites other than their own, is mandated by the state and imposes a new program or higher level of service.

The requirement imposed on the claimants by Section F.2.d.3. to require the implementation of AST at construction sites (or portions thereof) that are determined to be an exceptional threat to water quality, is also imposed on the claimants in their regulatory capacity. In this respect, the required activity mandates a new program or higher level of service.

Federal law requires that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[983]

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state and or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if

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[981] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[982] Exhibit A, Test Claim, filed November 10, 2011, page 512 (Fact Sheet/Technical Report).

[983] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

> federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[984]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[985] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[986]

In this case, the Water Boards argue that the requirement in Section F.2.d.3. is necessary to meet the federal MEP standard. This is supported by the Fact Sheet, which states that, "AST is *necessary* and is considered MEP for the discharges from [construction] sites."[987] Federal law, however, gives the Water Boards discretion to determine what controls are necessary to meet the MEP standard, and does not require any specific activities.[988] Moreover, there is no evidence in the record that the new required activities are the only means by which the federal MEP standard can be met.

Accordingly, the new requirement imposed on the claimants by Section F.2.d.3. to require, in their regulatory capacity, the implementation of AST for sediment at construction sites other than their own (or portions thereof) that are determined to be an exceptional threat to water quality, is mandated by the state.

The Commission also finds that the activity constitutes a new program or higher level of service. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not

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[984] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765. This case addressed a challenge by the State to the Commission's Decision in *Municipal Stormwater and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, adopted July 31, 2009.

[985] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[986] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[987] Exhibit A, Test Claim, filed November 10, 2011, page 512 (Fact Sheet/Technical Report), emphasis added.

[988] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-769.

apply generally to all residents and entities in the state."[989] Only one of these alternatives is required to establish a new program or higher level of service.[990]

Here, the new mandated activity is expressly directed toward the local agency permittees under their regulatory authority, and thus is unique to local government. The mandate to require that AST is implemented at construction sites that are determined to be an exceptional threat to water quality is intended to promote water quality and reduce the discharge of pollutants from construction activity.[991] "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[992] Thus, the new mandated activity also provides a governmental service to the public.

Accordingly, the Commission finds that Section F.2.d.3. mandates a new program or higher level of service when performed by the claimants in their regulatory capacity:

- Require implementation of AST for sediment at construction sites other than their own (or portions thereof), that are determined to be an exceptional threat to water quality.[993]

    c. Section F.2.e.6.e. of the test claim permit, which requires that inspections of construction sites must include a review of facility monitoring data results if the site monitors its runoff, does not impose a new program or higher level of service.

        i. Section F.2.e.6.e. of the test claim permit provides that inspections of construction sites must include a review of facility monitoring data results, if the site monitors its runoff.

Section F.2.e. of the test claim permit, like the prior permit, requires each copermittee to conduct construction site inspections for compliance with its ordinances (grading, stormwater, etc.), permits (construction, grading, etc.), and this Order.[994] Section F.2.e.6.e. adds the following language to these provisions: "[i]nspections must

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[989] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[990] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[991] Exhibit A, Test Claim, filed November 10, 2011, pages 230-231, 233 (test claim permit, Section F.2.d.3.).

[992] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[993] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

[994] Exhibit A, Test Claim, filed November 10, 2011, page 232 (test claim permit, Section F.2.e.).

include . . . a review of the site monitoring data results, if the site monitors its runoff."[995] According to the Water Boards, this means that the claimants are now also required to review the monitoring results if a construction site it is inspecting has monitored its runoff.[996]

The claimants seek reimbursement only for the costs to review the monitoring data results if the construction site monitors its runoff, and the associated costs to train inspectors, and not for the full inspection.[997]

> Claimants were required, when they inspected construction sites, to review any collected monitoring data. This required Claimants to ensure that their inspection staff were trained at the same level as state inspectors, such as those from the RWQCB. It should be noted that Claimants cannot collect fees to cover the increased costs to train on and review this data, as the State already collects fees for such a service as part of the General Construction Permit.
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> To address these requirements, the District, through the cost-sharing mechanism in the Implementation Agreement, conducted training of Claimant staff and updated the JRMP template.[998]

As described below, the requirement to review the monitoring results if a construction site it is inspecting has monitored its runoff is not new and, therefore, does not impose a new program or higher level of service. In addition, Section F.2.e.6.e. does not require the claimants to provide training to their employees.

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[995] Exhibit A, Test Claim, filed November 10, 2011, page 233 (test claim permit, Section F.2.e.6.e.).

[996] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 32.

[997] Exhibit A, Test Claim, filed November 10, 2011, pages 63-65 (Test Claim narrative).

[998] Exhibit A, Test Claim, filed November 10, 2011, pages 61, 96 (Test Claim narrative; Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017).

ii. Section F.2.e.6.e. of the test claim permit clarifies the duties under existing law, but does not impose a new requirement on the claimants to review the monitoring results if a construction site it is inspecting has monitored its runoff and, thus, Section F.2.e.6.e. does not impose a new program or higher level of service. In addition, Section F.2.e.6.e. does not require the claimants to provide training to their employees.

Section F.2.e.6. lists the items that need review on inspection of construction sites. Section F.2.e.6.e. states that "[i]nspections must include . . . a review of the site monitoring data results, if the site monitors its runoff."[999]

The claimants argue that the requirement to review monitoring data results of construction sites is a new state-mandated activity that has been shifted by the state to local governments.[1000] The claimants rely on the Supreme Court's decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749. That case addressed the Commission's Decision in *Municipal Stormwater and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, where the Commission found that the NPDES permit issued by the Los Angeles Regional Water Control Board imposed *new* state-mandated requirements on the local agency permittees to inspect restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships.[1001] The Supreme Court agreed, finding that the Regional Board had primary responsibility for inspecting industrial and commercial facilities under state and federal law and shifted that responsibility to the permittees as follows:

> Neither the CWA's "maximum extent practicable" provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites. The CWA makes no mention of inspections. (33 U.S.C. § 1342(p)(3)(B)(iii).) The regulations required the Operators to include in their permit application a description of priorities and procedures for inspecting certain industrial facilities and construction sites, but suggested that the Operators would have discretion in selecting which facilities to inspect. (See C.F.R. §

[999] Exhibit A, Test Claim, filed November 10, 2011, page 233 (test claim permit, Section F.2.e.6.e.).

[1000] Exhibit A, Test Claim, filed November 10, 2011, page 60 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 18.

[1001] The Commission ultimately denied reimbursement for the inspection activities because the claimants had adequate fee authority to pay for such costs pursuant to Government Code section 17556(d) and, therefore, there were no costs mandated by the state. The Second District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565, upheld the Commission's Decision.

122.26(d)(2)(iv)(C)(1).) The regulations do not mention commercial facility inspections at all.

Further, as the Operators explained, state law made the *Regional Board* responsible for regulating discharges of waste within its jurisdiction. (Wat. Code, §§ 13260, 13263.) This regulatory authority included the power to "inspect the facilities of any person to ascertain whether ... waste discharge requirements are being complied with." (Wat. Code, § 13267, subd. (c).) Thus, state law imposed an overarching mandate that the Regional Board inspect the facilities and sites.

In addition, federal law and practice required the Regional Board to inspect all industrial facilities and construction sites. Under the CWA, the State Board, as an issuer of NPDES permits, was required to issue permits for storm water discharges "associated with industrial activity." (33 U.S.C. § 1342(p)(3)(A).) The term "industrial activity" includes "construction activity." (40 C.F.R. § 122.26(b)(14)(x).) The Operators submitted evidence that the State Board had satisfied its obligation by issuing a general industrial activity stormwater permit and a general construction activity stormwater permit. Those statewide permits imposed controls designed to reduce pollutant discharges from industrial facilities and construction sites. Under the CWA, those facilities and sites could operate under the statewide permits rather than obtaining site-specific pollutant discharge permits.

The Operators showed that, in those statewide permits, the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board*. The Operators submitted letters from the EPA indicating the State and regional boards were responsible for enforcing the terms of the statewide permits. The Operators also noted the State Board was authorized to charge a fee to facilities and sites that subscribed to the statewide permits (Wat. Code, § 13260, subd. (d)), and that a portion of that fee was earmarked to pay the Regional Board for "inspection and regulatory compliance issues." (Wat. Code, § 13260, subd. (d)(2)(B)(iii).) Finally, there was evidence the Regional Board offered to pay the County to inspect industrial facilities. There would have been little reason to make that offer if federal law required the County to inspect those facilities.

This record demonstrates that the Regional Board had primary responsibility for inspecting these facilities and sites. It shifted that responsibility to the Operators by imposing these Permit conditions. The reasoning of *Hayes, supra,* 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, provides guidance. There, the EHA required the state to provide certain services to special education students, but gave the state discretion in implementing the federal law. (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547.) The state exercised its "true discretion" by selecting the specific requirements it imposed on local governments. As a result, the *Hayes* court held the costs incurred by the local governments were state-

> mandated costs. (*Ibid*.) Here, state and federal law required the Regional Board to conduct inspections. The Regional Board exercised its discretion under the CWA, and shifted that obligation to the Operators. That the Regional Board did so while exercising its permitting authority under the CWA does not change the nature of the Regional Board's action under section 6. Under the reasoning of *Hayes*, the inspection requirements were not federal mandates.[1002]

Unlike the facts in the *Department of Finance* case, however, inspection of construction sites in this case, including all activities necessary to assess compliance with ordinances and water quality standards, is *not* new, but was imposed by the prior permit.

Reimbursement under article XIII B, section 6 requires that all elements be met, including that any increased costs result from a new program or higher level of service mandated by the state on the local agency.[1003] To determine whether a test claim statute imposes a new program or higher level of service, the required activities imposed by the state must be *new.*[1004] Alternatively, a new program or higher level of service can occur if the state transfers to local agencies complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[1005] To determine if a mandated activity or shift in costs from the state is new, the courts have used the ordinary meaning of the word "new" and have found that if local government was not required to perform the activity or incur the cost shifted from the state at the time the test claim statute or regulation became effective (which, in effect, requires a comparison of the law immediately before the effective date of the test claim statute or regulation), the mandated activity or shifted cost is new.

For example, in *Lucia Mar Unified School Dist.*, the 1981 test claim statute required local school districts to pay the cost of educating pupils in state schools for the severely handicapped — costs that the state had previously paid in full until the 1981 statute became effective.[1006] The court held that the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the education of

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[1002] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 770-771.

[1003] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[1004] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[1005] California Constitution, article XIII B, section 6(c).

[1006] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

students from their districts at such schools."[1007] The same analysis was applied in *County of San Diego*, where the court found that the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[1008] In *City of San Jose*, the court addressed the 1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[1009] The court denied the city's claim for reimbursement, finding that the costs were not shifted by the state since "*at the time [the 1990 test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[1010] In *San Diego Unified School District*, the court determined that the required activities imposed by 1993 test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of [the 1993 test claim statutes]."[1011] And in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546 (on remand from the California Supreme Court), the court found that installing and maintaining trash receptacles at transit stops and performing inspections of industrial and commercial facilities were *new duties* that local governments were required to perform, when compared to prior law.[1012] The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures that are counted against the local government's annual spending limit.[1013]

[1007] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

[1008] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[1009] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

[1010] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

[1011] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; see also page 869, footnotes 6 and 7, and page 870, footnote 9 (where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes).

[1012] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558. As indicated earlier, however, the court also found there were no costs mandated by the state because the permittees had fee authority sufficient to pay for the costs of the inspections pursuant to Government Code section 17556(d). *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 562-565.

[1013] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11

In this case, although the prior permit did not expressly state that reviewing construction site monitoring data results if the site monitors its runoff was required as part of the inspection, it did expressly require the claimants to conduct inspections for compliance with local stormwater ordinances on construction sites and to enforce its ordinances "as necessary to maintain compliance with this Order," including the permit's receiving water limitations and prohibitions banning any discharge of pollutant and non-stormwater discharges into the MS4 that would cause or contribute to the violation of water quality standards.[1014]

If anything, the requirement to review monitoring data results if the site monitors its runoff simply clarifies the existing legal requirement to assess a site's compliance with local ordinances and water quality standards. The courts have recognized that changes in statutory or regulatory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning.[1015]

In addition, there has been no shift of costs from the state to the local agencies. As indicated in the test claim permit, the State Water Board has issued a statewide General Construction Permit (State Water Board Order 2009-0009-DWQ, NPDES No. CAS000002), which is intended to cover any construction or demolition activity and regulates stormwater runoff from construction sites and prohibits non-stormwater discharges.[1016] To be authorized to discharge stormwater under the General Permit, the legally responsible person is required to file a notice of intent, storm water pollution prevention plan, and other documents with the State Water Board.[1017] The statewide

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Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[1014] Exhibit A, Test Claim, filed November 10, 2011, pages 574-575, 584 (Order R9-2004-0001, Prohibitions and Receiving Water Limitations; Industrial/Commercial Inspections, Section G.).

[1015] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[1016] Exhibit A, Test Claim, filed November 10, 2011, page 191 (test claim permit, Finding D.3.); Exhibit J (41), State Water Resources Control Board, Construction General Permit, Order 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ, pages 3, 9, 14, https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf (accessed on January 10, 2022).

[1017] Exhibit J (41), State Water Resources Control Board, Construction General Permit, Order 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ, page 14,

General Construction Permit does *not*, however, "preempt or supersede the authority of local storm water management agencies to prohibit, restrict, or control storm water discharges to municipal separate storm sewer systems or other watercourses within their jurisdictions."[1018] Thus, as indicated in the Fact Sheet for the test claim permit, discharges of runoff from construction sites are subject to stormwater regulation under both state and local systems to ensure the most effective oversight. The copermittees enforce their local permits, plans, and ordinances, and the State Water Boards enforce the General Construction Permit.[1019]

Thus, reviewing monitoring data results if the site monitors its runoff is not a new requirement imposed or shifted by the state, and does not constitute a new program or higher level of service.

Moreover, Section F.2.e.6.e. does not require the claimants to train their employees to review monitoring data results if the site monitors runoff.

Accordingly, Section F.2.e.6.e. does not mandate a new program or higher level of service.

7. Sections F.1.i. and F.3.a.10. of the Test Claim Permit, Addressing Erosion and Sediment Control Best Management Practices (BMPs) After Construction and During Maintenance of Unpaved Roads, Do Not Mandate a New Program or Higher Level of Service Because the Activities Are Not New and Any Downstream Costs Incurred for Municipal Unpaved Roads Are at the Discretion of the Local Agency.

The claimants have pled Sections F.1.i. and F.3.a.10. of the test claim permit.[1020] These sections are part of the Jurisdictional Runoff Management Program (JRMP) that requires the development and implementation of erosion and sediment control BMPs after construction of new unpaved roads and during maintenance activities on unpaved roads.

As described below, the Commission finds that Sections F.1.i. and F.3.a.10. of the test claim permit are not mandated by the state and do not impose a new program or higher level of service because the activities are not new and any costs incurred for municipal unpaved roads are at the discretion of the local agency.

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https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf (accessed on January 10, 2022).

[1018] Exhibit J (41), State Water Resources Control Board, Construction General Permit, Order 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ, page 56, https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf (accessed on January 10, 2022).

[1019] Exhibit A, Test Claim, filed November 10, 2011, page 441 (Fact Sheet/Technical Report, Finding D.3.a.).

[1020] Exhibit A, Test Claim, filed November 10, 2011, pages 21, 61-62 (Test Claim narrative).

a. Background

i. Federal law requires permittees to implement control measures to reduce pollutants from operating and maintaining public streets, roads, and highways.

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[1021] A permittee's proposed management program shall include a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas, including "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems."[1022]

ii. The prior permit required each permittee to develop and implement programs to prevent or reduce pollutants in runoff to the maximum extent practicable (MEP) during all phases of construction and from all existing development including municipal roads.

Section A. of the 2004 prior permit contained the following general prohibitions:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.
- Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.[1023]

Section F. of the prior permit addressed development planning and required that "[e]ach Permittee's General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) shall include water quality and watershed protection principles and policies to direct land-use decisions and require implementation of consistent water quality protection measures for development projects," including the following:

- Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways; and bridges.
- Establish development guidance that protects areas from erosion and sediment loss.

[1021] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[1022] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(3) (71 FR 33639, June 12, 2006).

[1023] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section A.1., 3.).

- Post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.[1024]

Section G. of the prior permit required each permittee to implement a program to reduce pollutants in runoff to the MEP during all construction phases, including the requirement to designate and implement BMPs for the retention and proper management of sediment and other construction pollutants on site.[1025]

Section H. of the prior permit also contained provisions on existing development including municipal facilities and activities.[1026] Municipal facilities and activities "included, but were not limited to," roads, streets, highways, and parking facilities and drainage facilities.[1027] The term "road" was not defined beyond the fact that roads are municipal facilities. Under existing law, the permittees are only responsible for maintaining roads that are accepted into either the county road system or the city street system.[1028] A road is accepted into the system only through an action by the governing body or its designee.[1029] Thus, the term "roads" included whatever paved or unpaved roads had been accepted into the permittees' road system. As relevant here, the municipal program required the following:

- Develop and update annually an inventory of all of the permittee's municipal facilities and activities that generate pollutants, including not limited to, roads, streets, and highways.[1030]
- Implement or require the implementation of BMPs to reduce pollutants in urban runoff to the MEP from all the permittee's municipal facilities and activities.[1031]

[1024] Exhibit A, Test Claim, filed November 10, 2011, page 576 (Order R9-2004-0001, Section F.1.).

[1025] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.5.a.8.).

[1026] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.).

[1027] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.b.).

[1028] Streets and Highways Code sections 941(b) and 1806(a); *Kern County v. Edgemont Development Corp.* (1963) 222 Cal.App.2d 874, 878.

[1029] Streets and Highways Code sections 941(b) and 1806(a).

[1030] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.b.).

[1031] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.1.).

- Implement, or require implementation of, additional controls for municipal facilities and activities tributary to section 303(d) impaired water bodies or within or directly adjacent to or discharging directly to receiving waters within ESAs.[1032]
- Implement a schedule of maintenance activities for structural source and treatment control BMPs designed to reduce pollutant discharges to or from its MS4s and related drainage structures.[1033]
- Inspect all municipal facilities and activities annually and implement all follow-up actions necessary to comply with the prior permit.[1034]

The Findings of the prior permit explain the rationale for these requirements as follows:

> Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d) impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particular sensitive environment. Therefore, additional control to reduce pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.[1035]

As explained in the 2004 Fact Sheet, the Report of Waste Discharge (ROWD) filed on May 30, 2003, set forth the permittees' municipal facilities strategy pursuant to the permit issued in 1998 listing the municipal facilities and activities that have the potential to contribute pollutants to stormwater runoff. While roads were not included as a facility of concern, the permittees asserted that they could not control pollutants from brake pad and tire wear and internal combustion engines.[1036] The Regional Board disagreed with this assertion quoting the US EPA's Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems (Guidance Manual):

> proposed management programs must include a description of practices for operation and maintenance of public streets, roads, and highways, and procedures for reducing the impact of runoff from these areas on receiving

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[1032] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.2.).

[1033] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.d.1.).

[1034] Exhibit A, Test Claim, filed November 10, 2011, page 589 (Order R9-2004-0001, Section H.1.f.).

[1035] Exhibit A, Test Claim, filed November 10, 2011, page 568 (Order R9-2004-0001, Finding 8).

[1036] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, page 58.

> waters. [...] Pollutants from traffic can be minimized by using nonstructural controls (e.g., traffic reduction and improved traffic management), structural controls (e.g., traditional and innovative BMPs), and changing maintenance activities.[1037]

The Guidance Manual also states that road maintenance activities can contribute pollutants due to erosion because of the removal of vegetation from the shoulders and roadside ditches.[1038]

b. Sections F.1.i. and F.3.a.10. of the test claim permit do not mandate a new program or higher level of service.

i. Sections F.1.i. and F.3.a.10. of the test claim permit include specific requirements for the development and implementation of erosion and sediment control best management practices (BMPs) after construction of new unpaved roads and during maintenance activities by copermittees on unpaved roads.

The test claim permit specifically addresses unpaved roads and includes specific requirements for erosion and sediment controls to reduce and minimize the impacts of sediment discharged during storm events to the MS4s and receiving waters.[1039] Unpaved roads are defined as "a long, narrow stretch without pavement used for traveling by motor passenger vehicle between two or more points. Unpaved roads are generally constructed of dirt, gravel, aggregate or macadam and may be improved or unimproved."[1040]

The Fact Sheet explains the need to focus on unpaved roads as source of sediment and its impacts on water quality:

> During the previous permit period, the San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the Riverside County portion of the San Diego Region. Enforcement and inspection

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[1037] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, page 58, quoting Exhibit J (11), EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems, November 1992, pages 77-78, https://www3.epa.gov/npdes/pubs/owm0246.pdf (accessed on January 25, 2022).

[1038] Exhibit J (11), EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems, November 1992, page 78, https://www3.epa.gov/npdes/pubs/owm0246.pdf (accessed on January 25, 2022).

[1039] Exhibit A, Test Claim, filed November 10, 2011, page 424 (Fact Sheet/Technical Report, Discussion of Finding D.1.c.).

[1040] Exhibit A, Test Claim, filed November 10, 2011, page 293 (test claim permit, Attachment C).

activities conducted by the San Diego Water Board during the previous permit term have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees. Unpaved roads are a source of sediment that can be discharged in runoff to receiving waters, especially during storm events. Erosion of unpaved roadways occurs when soil particles are loosened and carried away from the roadway base, ditch, or road bank by water, wind, traffic, or other transport means. Exposed soils, high runoff velocities and volumes, sandy or silty soil types, and poor compaction increase the potential for erosion.

Road construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. Poorly designed roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other public works activities along unpaved roads have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways.[1041]

Accordingly, Section F.1.i., which is part of the development planning component of the JRMP, requires the following activities for unpaved road development:

- Develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include the following, or alternative BMPs that are equally effective:

  (1) Practices to minimize road related erosion and sediment transport.

  (2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards.

  (3) Installation of water bars as appropriate.

  (4) Unpaved roads and culvert[1042] designs that do not impact creek functions and where applicable, that maintain migratory fish passage.[1043]

[1041] Exhibit A, Test Claim, filed November 10, 2011, pages 423-424 (Fact Sheet/Technical Report, Discussion of Finding D.1.c.).

[1042] A culvert is "a transverse drain" or, more specifically, "a drain or pipe that allows water to flow under a road." Exhibit J (31), Merriam-Webster Dictionary, culvert, https://www.merriam-webster.com/dictionary/culvert (accessed on February 10, 2022).

[1043] Exhibit A, Test Claim, filed November 10, 2011, page 228 (test claim permit, Section F.1.i.).

The Fact Sheet explains that guidance documents by several government agencies[1044] that include design, construction specifications, and source control BMPs that can be implemented by private and public entities are available to the copermittees.[1045]

Section F.3.a.10 of the test claim permit addresses the maintenance work on "copermittee-maintained unpaved roads," which are those unpaved roads that the copermittees maintain in their road system.[1046] Maintenance of copermittee-maintained unpaved roads requires implementation of BMPs for erosion and sediment control during and after maintenance activities, particularly in or adjacent to stream channels or wetlands. This requirement is necessary to ensure the discharge of sediment during maintenance activities is minimized.[1047] Accordingly, Section F.3.a.10. requires the following:

- Develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control measures during their maintenance activities on copermittee-maintained unpaved roads, particularly in or adjacent to receiving waters.[1048]
- Develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during their unpaved road maintenance activities.[1049]
- Maintain as necessary their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport.[1050]
- Slope outward the re-grading of unpaved roads during maintenance where consistent with road engineering safety standards or alternative equally effective

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[1044] The agencies include US EPA, the US Forest Service, and the University of California.

[1045] Exhibit A, Test Claim, filed November 10, 2011, page 424 (Fact Sheet/Technical Report).

[1046] Exhibit A, Test Claim, filed November 10, 2011, pages 841, 843-844 (Riverside County's Comments on Tentative Order R9-2010-0016, Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit, Section F.3.c.5. (privately owned unpaved road maintenance was deleted and not included in the final version of the test claim permit)).

[1047] Exhibit A, Test Claim, filed November 10, 2011, page 518 (Fact Sheet/Technical Report).

[1048] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.a.).

[1049] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.b.).

[1050] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.c.).

BMPs must be implemented to minimize erosion and sedimentation from unpaved roads.[1051]

- Examine, through unpaved road maintenance, the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.[1052]

The claimants contend that the unpaved roads requirements in the test claim permit are newly required and go beyond the federal regulations, which require the claimants to address discharges from the MS4, and instead require the claimants address all discharges from any unpaved roads.[1053] The claimants also contend that there were no requirements applicable to roads in the prior permit and the presence of any underlying obligations in the prior permit does not mean that the more specific requirements in the test claim permit are not new. Under the prior permit, the claimants were free to design and implement BMPs that met a general standard, whereas under the test claim permit, they were directed to use types of BMPs.[1054] The claimants rely on language in the test claim permit, itself, which states that it includes "new or modified" requirements because of the identification of water quality problems during the prior permit period.[1055] The claimants conclude that the requirements are a new program or higher level of service and are not a federal mandate but the "true choice" of the Water Boards to impose such requirements.[1056]

Finally, the claimants assert that they are practically compelled to comply with the unpaved road requirements because construction and maintenance of roads, including unpaved roads, is an essential and a core mandatory function of local government.[1057]

The Water Boards contend that the requirements addressing unpaved roads are not new requirements and do not impose a new program or higher level of service. The prior permit required implementation of BMPs to reduce pollutants in runoff to the MEP

[1051] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.d.).

[1052] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.e.).

[1053] Exhibit A, Test Claim, filed November 10, 2011, page 62 (Test Claim narrative).

[1054] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 20-21.

[1055] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 22, quoting Finding D.1.c.

[1056] Exhibit A, Test Claim, filed November 10, 2011, pages 62-63 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, 765; Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 22.

[1057] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 19-20.

during the construction and maintenance of unpaved roads, although the prior permit did not explicitly specify unpaved roads by name.[1058]

ii. A copermittee's construction of new municipal unpaved roads and maintenance work on copermittee-maintained unpaved roads are not mandated by the state because such costs are incurred at the discretion of the local agency.

The claimants contend that the activities to comply with Sections F.1.i. and F.3.a.10. of the test claim permit are eligible for reimbursement under article XIII B, section 6 of the California Constitution because maintenance of roads, including unpaved roads, is an essential and a core mandatory function of local government.[1059] The claimants further allege that the failure to maintain unpaved roads would place any person driving on unmaintained roads, including the claimants' residents, in jeopardy for potential harm to themselves or to others. Local governments have no option to not maintain roads and will face legal liability for their failure to do so.[1060] Thus, the claimants assert that they are practically compelled to comply with the unpaved road requirements. The claimants also assert that the decision to build or accept unpaved roads is different from the discretionary acts described in *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.[1061]

The Commission finds, however, that when the claimants engage in construction of new unpaved roads or maintenance of copermittee-maintained unpaved roads, the costs incurred by a local agency are not mandated by the state, but are the result of a local discretionary decision, and therefore, the costs are not eligible for reimbursement.

The California Supreme Court recently rejected the conclusion that local government is legally compelled to comply with a test claim statute or executive order when the statute or executive order applies to the agency's underlying core functions.[1062] Instead, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey.[1063] When statutory or regulatory requirements result from an apparently or

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[1058] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 35-37.

[1059] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 19.

[1060] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 19-20.

[1061] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 19-20.

[1062] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

[1063] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

facially *discretionary* decision, and are therefore not *legally* compelled by the state, they may be *practically* compelled if the failure to act would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[1064] Substantial evidence in the record is required to make a finding of practical compulsion.[1065]

Here, the construction and maintenance of roads accepted into the municipal system is entirely voluntary. The claimants have provided no law or evidence to support that they have a legal or practical compulsion to construct or maintain unpaved roads. Moreover, as explained above, even if there were some type of compulsion to construct or repair roads, the claimants are only responsible for roads that are accepted into either their road system which can only be accomplished by the voluntary action of the governing body.[1066]

Therefore, the Commission finds that the requirements in Sections F.1.i. and F.3.a.10. of the test claim permit, as applied to local agency municipal construction of new unpaved roads and maintenance of copermittee-maintained unpaved roads are not mandated by the state.

iii. Sections F.1.i. and F.3.a.10. of the test claim permit clarify the duties under the prior permit, but do not impose new requirements on the claimants and, thus, Sections F.1.i. and F.3.a.10. do not constitute a new program or higher level of service.

Reimbursement under article XIII B, section 6 requires that all elements be met, including that any increased costs result from a new program or higher level of service mandated by the state on the local agency.[1067] To determine whether a test claim statute imposes a new program or higher level of service, the required activities imposed by the state must be *new.*[1068] Alternatively, a new program or higher level of service can occur if the state transfers to local agencies complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[1069] To determine if a mandated activity or shift in costs from the state is new, the courts have used the ordinary meaning of the word "new" and

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[1064] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74.

[1065] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368-1369 (*POBRA*); Government Code section 17559; California Code of Regulations, title 2, section 1187.5.

[1066] Streets and Highways Code sections 941(b) and 1806(a).

[1067] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[1068] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[1069] California Constitution, article XIII B, section 6(c).

have found that if local government was not required to perform the activity or incur the cost shifted from the state at the time the test claim statute or regulation became effective (which, in effect, requires a comparison of the law immediately before the effective date of the test claim statute or regulation), the mandated activity or shifted cost is new.[1070]

Section F.1.i. of the test claim permit requires implementation of erosion and sediment control BMPs after construction of new unpaved roads. Although Section F.1.i. identifies BMPs for unpaved roads, the section also permits the copermittees to implement equally effective alternative BMPs of their choosing; "At a minimum, the BMPs must include the following, *or alternative BMPs that are equally effective*. . . ."[1071] Thus the requirement under Section F.1.i., like the requirement under the prior permit, is to implement effective BMPs after construction. The prior permit specifically required the claimants to amend their General Plans to require that post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.[1072] The prior permit also required the claimants to implement a program to reduce pollutants in runoff to the MEP during all construction phases, including the requirement to designate and implement BMPs for the retention and proper management of sediment and other construction pollutants on site.[1073] In addition, the prior permit required the claimants to implement or require the implementation of BMPs to reduce pollutants in urban runoff to the MEP from all municipal facilities and activities, which was defined to include roads, and to implement or require implementation of additional BMPs for roads tributary to section 303(d) impaired water bodies.[1074] Thus, Section F.1.i. of the test claim permit does not impose any new requirements.

Similarly, the requirements in Section F.3.a.10. of the test claim permit, which specifically addresses maintenance work on copermittee-maintained unpaved roads,

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[1070] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91; *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; see also page 869, footnotes 6 and 7, and page 870, footnote 9 (where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes); and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[1071] Exhibit A, Test Claim, filed November 10, 2011, page 228 (test claim permit, Section F.1.i.), emphasis added.

[1072] Exhibit A, Test Claim, filed November 10, 2011, page 576 (Order R9-2004-0001, Section F.1.).

[1073] Exhibit A, Test Claim, filed November 10, 2011, page 585 (Order R9-2004-0001, Section G.5.a.8.).

[1074] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.1.).

does not impose any new activities; the Section simply requires the claimants to continue to maintain and use BMPs that the claimants develop for erosion and sediment when maintaining unpaved roads to ensure that those pollutants are reduced to the MEP particularly around receiving waters, and that water quality standards for the receiving waters are met. Section F.3.a.10. requires claimants to: (a) develop, *where they do not already exist*, and implement or require implementation of BMPs for erosion and sediment control measures during their maintenance activities on copermittee-maintained unpaved roads, particularly in or adjacent to receiving waters; (b) develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during their unpaved road maintenance activities; (c) maintain as necessary their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport; (d) slope outward re-grading of unpaved roads during maintenance where consistent with road engineering safety standards or alternative equally effective BMPs must be implemented to minimize erosion and sedimentation from unpaved roads; (e) examine, through unpaved road maintenance, the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.[1075]

Although the prior permit did not expressly identify the BMPs necessary to address runoff when maintaining municipal unpaved roads, it did require the claimants to inventory and implement BMPs to reduce pollutants in urban runoff to the MEP from all their municipal facilities and activities.[1076] Municipal facilities "included, but were not limited to," roads, streets, highways, and parking facilities.[1077] The prior permit also required the claimants to implement additional controls for municipal facilities and activities tributary to section 303(d) impaired water bodies or within or directly adjacent to or discharging directly to receiving waters within ESAs.[1078] Finally, the prior permit required the claimants to inspect all municipal facilities and activities annually and implement all follow-up actions necessary to comply with the prior permit, which including the order that discharges into and from the MS4 in a manner causing or threatening to cause a condition of pollution in the waters of the state are prohibited.[1079] Thus, under the prior permit, the claimants were required to implement BMPs to reduce pollutants in runoff to the MEP from unpaved roads, and to inspect unpaved roads and implement all follow-up actions necessary to comply with the permit to ensure that water

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[1075] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.a.10.).

[1076] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.1.).

[1077] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.b.).

[1078] Exhibit A, Test Claim, filed November 10, 2011, page 588 (Order R9-2004-0001, Section H.1.c.2.).

[1079] Exhibit A, Test Claim, filed November 10, 2011, pages 572, 589 (Order R9-2004-0001, Sections A., H.1.f.).

quality standards are met.[1080] If anything, the requirements in the test claim permit regarding unpaved roads simply clarify the existing legal requirement to assess a site's compliance with local ordinances and water quality standards. The courts have recognized that changes in statutory or regulatory language can be intended to clarify the law, rather than change it.[1081]

Accordingly, the Commission finds that the development and implementation of erosion and sediment control BMPs after construction of new unpaved roads and during maintenance activities on unpaved roads pursuant to Sections F.1.i. and F.3.a.10. are not a new requirements imposed or shifted by the state, and do not constitute a new program or higher level of service.

8. Section F.3.b.4.a.ii. of the Test Claim Permit, Which Addresses Industrial and Commercial Site Inspections, Does Not Require the Claimants to Perform Any New Activities and, Thus, Does Not Impose a New Program or Higher Level of Service.

The claimants pled Section F.3.b.4.a.ii. of the test claim permit, which is part of the Existing Development Component of the Jurisdictional Runoff Management Program (JRMP). The claimants specifically allege that Section F.3.b.4.a.ii. of the test claim permit imposes new state-mandated requirements to inspect industrial and commercial sites, including a review of site monitoring data if the site monitors its runoff.[1082]

As described below, the Commission finds that the requirement imposed by Section F.3.b.4.a.ii., to review as part of industrial and commercial site inspections industrial or commercial site monitoring data, if the site monitors its runoff, clarifies the existing legal requirement to assess a site's compliance with local ordinances and water quality standards, but is not a new requirement and does not impose a new program or higher level of service.

a. Background

i. Federal law requires an NPDES applicant to adopt ordinances to control pollutants to the MS4 from stormwater discharges associated with industrial activities and to prevent illicit non-stormwater discharges, and to monitor and inspect these sites to ensure compliance with the permit and water quality standards.

NPDES permits must include conditions to achieve water quality standards and objectives.[1083] As relevant to this section, federal regulations require that the

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[1080] Exhibit A, Test Claim, filed November 10, 2011, pages 587-588 (Order R9-2004-0001, Sections H.1.b., c.).

[1081] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[1082] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 63-64. No other provision in section F.3.b. was discussed in the Test Claim and, thus, the analysis in this Decision is limited to the activity required by section F.3.b.4.a.ii.

[1083] Code of Federal Regulations, title 40, section 122.44(d)(1).

application for an NPDES permit for large and medium MS4 dischargers must demonstrate adequate legal authority, through ordinance, permit, or other means, to control pollutants *to* the MS4 from stormwater discharges associated with *industrial activity* and to carry out *inspections*, surveillance, and monitoring to ensure compliance with the permit conditions.[1084] The legal authority shall also prohibit illicit discharges to the MS4.[1085]

In addition, the proposed management program shall include structural and source control measures to reduce pollutants from runoff from *commercial* areas, and inspections to implement and enforce ordinances that prevent illicit discharges to the MS4.[1086] The program is also required to monitor and control pollutants from runoff from industrial facilities that the permit applicant determines are contributing substantial pollutant loading to the MS4 and in such cases, the program shall "identify priorities and procedures for inspections and establishing and implementing control measures for such discharges" and a monitoring program.[1087]

> *ii. The prior permit required each permittee to inspect and assess industrial and commercial facilities to ensure compliance with local ordinances, effective best management practice (BMP) implementation, and for potential illicit discharges and connections, and to implement all follow-up actions necessary to comply with the receiving water limitations and prohibitions identified in the prior permit.*

The prior permit identifies the following general prohibitions and receiving water limitations for which the permittees are required to comply:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in Water Code section 13050), in the waters of the state are prohibited.
- Discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water and ground water are prohibited.
- Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.
- Discharges from MS4s that are subject to all Basin Plan prohibitions (cited in Attachment A to the order) are prohibited.
- All types of non-stormwater discharges into the MS4, unless authorized by an NPDES permit, are prohibited.

[1084] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(A), (F).

[1085] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[1086] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A), (B).

[1087] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(C).

- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses of receiving waters) are prohibited.[1088]

The prior permit also requires the permittees to have adequate legal authority to control pollutant discharges into and from the MS4 through ordinance, statute, permit, contract, or other similar means. The legal authority, at a minimum, must authorize the permittee to do the following:

- Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies to both industrial and construction sites that have coverage under the General Industrial Permit and the General Construction Permit, as well as to those sites that do not.
- Prohibit all illicit discharges and connections to the MS4.
- Control the discharge of spills, dumping or disposal of materials other than stormwater to its MS4.
- Require compliance with the permittee's ordinances, permits, contracts, or orders by holding dischargers accountable for the contributions to pollutants and flows.
- Require the use of BMPs to reduce or prevent the discharge of pollutants into the MS4 to the MEP.
- Carry out all inspections and monitoring necessary to determine compliance and noncompliance with local ordinances and orders, and the prior permit.[1089]

In order to comply with the above requirements, the prior permit included an industrial/commercial facilities program that, among other things, required inspections of all industrial and commercial facilities under the permittee's jurisdiction that could contribute a significant pollutant load to the MS4. At a minimum, the following commercial and industrial facilities were required to be inspected:

1. Commercial facilities:
    - Automobile repair, maintenance, fueling, or cleaning
    - Airplane repair, maintenance, fueling, or cleaning
    - Boat repair, maintenance, fueling, or cleaning
    - Equipment repair, maintenance, fueling, or cleaning

[1088] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573 (Order R9-2004-0001, Sections A., B.1., C.1.).

[1089] Exhibit A, Test Claim, filed November 10, 2011, pages 575-576 (Order R9-2004-0001, Section D.1.).

- Automobile and other vehicle body repair or painting
- Mobile automobile or other vehicle washing (base of operations)
- Automobile (or other vehicle) parking lots and storage facilities
- Retail or wholesale fueling
- Pest control services (base of operations)
- Eating or drinking establishments
- Mobile carpet, drape or furniture cleaning (base of operations)
- Cement mixing or cutting (base of operations)
- Masonry (base of operations)
- Painting and coating (base of operations)
- Landscaping (base of operations)
- Nurseries and greenhouses
- Golf courses, parks and other recreational areas/facilities
- Cemeteries
- Pool and fountain cleaning (base of operations)
- Port-a-potty servicing (base of operations)

- Industrial Sites/Sources:
  - Industrial Facilities, as defined at 40 Code of Federal Regulations section 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
  - Operating and closed landfills;
  - Facilities subject to Superfund Amendments and Reauthorization Act (SARA) Title III, also known as the Emergency Planning and Community Right-to-Know Act (EPCRA); and
  - Hazardous waste treatment, disposal, storage and recovery facilities.
- All other facilities tributary to a CWA section 303(d) impaired water body, where a facility generates pollutants for which the water body segment is impaired.
- All other facilities that the permittee determines may contribute a significant pollutant load to the MS4.[1090]

Each permittee was required to designate a set of minimum BMP requirements for the commercial and industrial facilities in its jurisdiction to reduce the discharge of pollutants

[1090] Exhibit A, Test Claim, filed November 10, 2011, pages 589-590 (Order R9-2004-0001, Section H.2.a., b.).

in runoff to the MEP.[1091] In addition, based on the threat to water quality, the permittees were required to establish priorities for inspections of industrial and commercial facilities and to inspect the facilities according to the permit's schedule with high priority facilities being inspected annually, and low priority facilities inspected once during the five-year term of the permit.[1092] In addition to ensuring implementation of minimum BMPs, inspections "shall include, but not be limited to" the following:

- Assessment of compliance with local ordinances and permits related to stormwater runoff, including the implementation and maintenance of designated minimum BMPs.
- Assessment of BMP effectiveness.
- Visual observations for non-stormwater discharges, potential illicit connections, and potential discharge of pollutants in stormwater runoff.
- Education and outreach on stormwater pollution prevention.[1093]

Inspections of industrial facilities also required the permittees to check for coverage under the General Industrial Permit.[1094] If the Regional Board conducted an inspection of an industrial facility during a particular year, however, the requirement for the responsible permittee to inspect the site during that same year was deemed satisfied.[1095]

Based upon facility inspection findings, each permittee was required to implement all follow-up actions necessary to comply with the prior permit, and enforce local ordinances as necessary to comply with the prior permit.[1096]

The Findings of the prior permit explain the rationale for these requirements as follows:

> As operators of the MS4s, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does

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[1091] Exhibit A, Test Claim, filed November 10, 2011, page 590 (Order R9-2004-0001, Section H.2.c.).

[1092] Exhibit A, Test Claim, filed November 10, 2011, pages 590-591 (Order R9-2004-0001, Section H.2.d.1., 2.).

[1093] Exhibit A, Test Claim, filed November 10, 2011, page 591 (Order R9-2004-0001, Sections H.2.d.3., 4.).

[1094] Exhibit A, Test Claim, filed November 10, 2011, page 591 (Order R9-2004-0001, Section H.2.d.3.).

[1095] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.d.5.).

[1096] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Sections H.2.d.6., e.).

not prohibit or control. These discharges may cause or contribute to a condition of contamination or exceedances of water quality objectives.[1097]

The Findings also state the following:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial . . . site discharges, discharges of runoff from industrial . . . sites are subject to dual (state and local) storm water regulation. Under this dual system, the SDRWQCB is responsible for enforcing the . . . General Industrial Activities Storm Water Permit, . . . , and each municipal Permittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.[1098]

b. Section F.3.b.4.a.ii. of the test claim permit does not impose a new program or higher level of service.

i. Section F.3.b.4.a.ii. of the test claim permit requires that inspections of industrial and commercial sites include a review of facility monitoring data results, if the site monitors its runoff.

The claimants pled Section F.3.b.4.a.ii. of the test claim permit, which requires as part of the industrial and commercial site inspection program, that such "[i]nspections must include . . . a review of facility monitoring data results, if the site monitors its runoff."[1099] The Fact Sheet explains that "monitoring data can provide the inspector pertinent information that can be used during the visual inspection of the facility (e.g., BMPs implemented, maintenance records for BMPs, pollutants in storm water runoff). The Copermittees' inspectors have the discretion to determine the depth and detail of the review and use of the information in conducting the inspection."[1100]

The test claim permit refers to the same types of commercial and industrial facilities listed in the prior permit that require inspection. However, the test claim permit adds botanical and zoological gardens and exhibits, marinas, building material retailers and storage, animal boarding facilities and kennels, mobile pet services, power washing services, and plumbing services, to the list of sites requiring inspection and a review of their monitoring data results. The Fact Sheet explains that "[t]hese commercial or industrial sites and sources have been identified by the Copermittees and/or the San Diego Water Board as facilities that may contribute a significant pollutant load to the

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[1097] Exhibit A, Test Claim, filed November 10, 2011, page 569 (Order R9-2004-0001, Finding 20).

[1098] Exhibit A, Test Claim, filed November 10, 2011, page 570 (Order R9-2004-0001, Finding 21).

[1099] Exhibit A, Test Claim, filed November 10, 2011, page 243 (test claim permit, Section F.3.b.4.a.ii.).

[1100] Exhibit A, Test Claim, filed November 10, 2011, page 521 (Fact Sheet/Technical Report).

MS4."[1101] In addition, the mobile businesses and service industries, where the business travels to the customer to perform the service rather than the customer traveling to the business to receive the service (i.e. mobile pet services, power washing services, and plumbing services) "produce waste streams that could potentially impact water quality if appropriate BMPs are not implemented."[1102]

The test claim permit also clarifies that "eating or drinking establishments" includes retail establishments with food markets, and that all other commercial or industrial sites within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas or that generate pollutants tributary to and within the same hydrologic subarea as an observed exceedance of an action level require inspection and review of the monitoring data results if the site monitors its runoff.[1103]

Like the prior permit, the inspections, "at a minimum" must be inspected each year if the site is determined to pose a high threat to water quality, or at least once during a five year period.[1104] In addition, like the prior permit, if the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible permittee to inspect this facility during the same year is deemed satisfied.[1105]

The claimants do not seek reimbursement for the total cost of inspecting the newly identified facilities, but only for the costs to review the monitoring data results if the industrial or commercial site monitors its runoff, and the associated costs to train inspectors.[1106]

ii. Section F.3.b.4.a.ii. of the test claim permit clarifies the duties under existing law, but does not impose a new requirement on the claimants and, thus, section F.3.b.4.a.ii. does not constitute a new program or higher level of service.

The claimants argue that the requirement to review monitoring data results of industrial and commercial facilities is a new state-mandated activity that has been shifted by the

[1101] Exhibit A, Test Claim, filed November 10, 2011, page 519 (Fact Sheet/Technical Report).

[1102] Exhibit A, Test Claim, filed November 10, 2011, page 520 (Fact Sheet/Technical Report).

[1103] Exhibit A, Test Claim, filed November 10, 2011, pages 239-241 (test claim permit, Section F.3.b.1.).

[1104] Exhibit A, Test Claim, filed November 10, 2011, page 243 (test claim permit, Section F.3.b.4.b.).

[1105] Exhibit A, Test Claim, filed November 10, 2011, page 244 (test claim permit, Section F.3.b.4.e.).

[1106] Exhibit A, Test Claim, filed November 10, 2011, pages 63-65 (Test Claim narrative).

state to local governments.[1107] The claimants rely on the Supreme Court's decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749. That case addressed the Commission's decision in *Municipal Stormwater and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, where the Commission found that the NPDES permit issued by the Los Angeles Regional Water Control Board imposed *new* state-mandated requirements on the local agency permittees to inspect restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships.[1108] The Supreme Court agreed, finding that the Regional Board had primary responsibility for inspecting industrial and commercial facilities under state and federal law and shifted that responsibility to the permittees.[1109]

However, unlike the facts in the *Department of Finance* case, inspection of the industrial and commercial facilities in this case, including all activities necessary to assess compliance with ordinances and water quality standards, is *not* new, but was imposed by the prior permit.

Reimbursement under article XIII B, section 6 requires that all elements be met, including that any increased costs result from a new program or higher level of service mandated by the state on the local agency.[1110] To determine whether a test claim statute imposes a new program or higher level of service, the required activities imposed by the state must be *new.*[1111] Alternatively, a new program or higher level of service can occur if the state transfers to local agencies complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[1112] To determine if a mandated activity or shift in costs from the state is new, the courts have used the ordinary meaning of the word "new" and have found that if local government was not required to perform the activity or incur the cost shifted from the state at the time the test claim statute or regulation became

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[1107] Exhibit A, Test Claim, filed November 10, 2011, page 64 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 22-23.

[1108] The Commission ultimately denied reimbursement for the inspection activities because the claimants had adequate fee authority to pay for such costs pursuant to Government Code section 17556(d) and, therefore, there were no costs mandated by the state. The Second District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565, upheld the Commission's Decision.

[1109] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 770-771.

[1110] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[1111] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[1112] California Constitution, article XIII B, section 6(c).

effective (which, in effect, requires a comparison of the law immediately before the effective date of the test claim statute or regulation), the mandated activity or shifted cost is new.[1113]

Although the prior permit did not expressly state that reviewing facility monitoring data results if the site monitors its runoff was required as part of the inspection, it did expressly require the claimants to inspect all industrial and commercial sites, including all other facilities not expressly identified that are tributary to a section 303(d) impaired water body, where a facility generates pollutants for which the water body segment is impaired, and all other facilities that the permittee determines may contribute a significant pollutant load to the MS4.[1114] "All other facilities" would include botanical and zoological gardens and exhibits, marinas, building material retailers and storage, animal boarding facilities and kennels, mobile pet services, power washing services, and plumbing services, which were identified as contributing a significant pollutant load to the MS4,"[1115] and "produce waste streams that could potentially impact water quality if appropriate BMPs are not implemented."[1116] Moreover, the inspections under the prior permit had to *include "but not be limited to"* an assessment of the site's compliance with local ordinances and permits related to stormwater runoff, including the implementation and maintenance of designated minimum BMPs, and visual observations for non-stormwater discharges, potential illicit connections, and potential discharge of pollutants in stormwater runoff.[1117] The claimants assert that reliance on the "but not limited to" language represents "an unstated, inherent mandate" because a mandated requirement must be express.[1118] The claimants overlook the express requirement in the prior permit requiring the permittee to carry out all inspections and monitoring, and to enforce

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[1113] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91; *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; see also page 869, footnotes 6 and 7, and page 870, footnote 9 (where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes); and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[1114] Exhibit A, Test Claim, filed November 10, 2011, pages 589-590 (Order R9-2004-0001, Section H.2.a., b.).

[1115] Exhibit A, Test Claim, filed November 10, 2011, page 519 (Fact Sheet/Technical Report).

[1116] Exhibit A, Test Claim, filed November 10, 2011, page 520 (Fact Sheet/Technical Report).

[1117] Exhibit A, Test Claim, filed November 10, 2011, pages 589-591 (Order R9-2004-0001, Sections H.2.a., b., d.).

[1118] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 23, citing *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173.

local stormwater ordinances on industrial and commercial facilities "as necessary to maintain compliance with this Order," including the permit's receiving water limitations and prohibitions banning any discharge of pollutant and non-stormwater discharges into the MS4 that would cause or contribute to the violation of water quality standards.[1119]

It is a general rule of statutory construction that "use of the language 'including, but not limited to' in the statutory definition is a phrase of enlargement rather than limitation."[1120] In this respect, the claimants' inspections required by the prior permit were not limited to visual observations of the site, but had to include whatever was necessary to ensure that discharges into the MS4 were complying with the claimants' local ordinances enforcing the prohibitions and receiving water limitations of the permit, and ensuring water quality standards were met. Otherwise follow-up action was necessary to ensure that the facility met water quality standards.[1121]

If anything, the requirement to review monitoring data results if the site monitors its runoff simply clarifies the existing legal requirement to assess a site's compliance with local ordinances and water quality standards, but does not impose a new requirement on the claimants.

The courts have recognized that changes in statutory or regulatory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning.[1122]

Moreover, there has been no shift of costs from the state to the claimants. As indicated in both the prior permit and the test claim permit, the claimants are required to also inspect industrial facilities that are subject to the State's General Industrial Permit.[1123] The State Water Board has issued a statewide General Industrial Permit (State Water Board Order 97-03 DWQ, NPDES No. CAS000001), which is intended to cover all new or existing stormwater discharges and authorized non-stormwater discharges from

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[1119] Exhibit A, Test Claim, filed November 10, 2011, pages 574-575, 592 (Order R9-2004-0001, Prohibitions and Receiving Water Limitations; Industrial/Commercial Inspections, Section H.2.e.).

[1120] *People v. Arias* (2008) 45 Cal.4th 169, 176.

[1121] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.d.6. and e.).

[1122] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[1123] Exhibit A, Test Claim, filed November 10, 2011, pages 589-590 (Order R9-2004-0001, Section H.2.a., b.); pages 243-244, (test claim permit, Section F.3.b.4.).

industrial facilities required by federal regulations to obtain a permit.[1124] To be authorized to discharge stormwater under the General Permit, industrial facilities are required to file a Notice of Intent with the State Water Board.[1125] The statewide General Industrial Permit does *not*, however, "preempt or supersede the authority of local agencies to prohibit, restrict, or control storm water discharges and non-storm water discharges to storm drain systems or other water-courses within their jurisdictions as allowed by State and Federal law."[1126] Thus, as indicated in the Fact Sheet for the test claim permit, discharges of runoff from industrial sites are subject to stormwater regulation under both state and local systems to ensure the most effective oversight. The claimants enforce their local permits, plans, and ordinances, and the Water Boards enforce the General Industrial Permit.[1127] In addition, the permit states that if the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible claimant to inspect this facility during the same year is deemed satisfied.[1128] [1129]

[1124] Exhibit A, Test Claim, filed November 10, 2011, page 191 (test claim permit, Finding D.3.); Exhibit J (42), State Water Resources Control Board, General Industrial Permit, Order 97-03-DWQ, page 4, https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf (accessed on January 26, 2022).

[1125] Exhibit J (42), State Water Resources Control Board, General Industrial Permit, Order 97-03-DWQ, pages 1, 4, 36-39, https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf (accessed on January 26, 2022).

[1126] Exhibit J (42), State Water Resources Control Board, General Industrial Permit, Order 97-03-DWQ, page 17, https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf (accessed on January 26, 2022).

[1127] Exhibit A, Test Claim, filed November 10, 2011, page 441 (Fact Sheet/Technical Report, Finding D.3.a.).

[1128] Exhibit A, Test Claim, filed November 10, 2011, page 244 (test claim permit, Section F.3.b.4.e.).

[1129] The claimants also contend the following: "Requiring permittees to review monitoring data collected as an enforceable requirement in the IGP [Industrial General Permit] and charging a fee for such review duplicated the fees assessed by the state for the same service, thus exceeding the reasonable cost of providing services for which the fee is charged and not bear a fair or reasonable relationship to the pertinent burdens or benefits. Similarly, the local fee for investigating [IGP] monitoring data would duplicate state law, rendering it invalid under the doctrine of preemption. (Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 23-24.) Similar arguments were raised in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 563-564, and were rejected by the court.

Accordingly, the Commission finds that reviewing monitoring data results if the site monitors its runoff is not a new requirement imposed or shifted by the state, and does not constitute a new program or higher level of service.

9. Sections G.1.-5. of the Test Claim Permit, Addressing the Watershed Workplan, Impose Some State-Mandated New Programs or Higher Level of Service.

The claimants pled Section G.1.-5. of the test claim permit regarding the development and implementation of the Watershed Water Quality Workplan to identify, prioritize, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed.[1130] The claimants specifically allege that Sections G.1.-5. of the test claim permit impose a reimbursable state-mandated program.[1131]

These sections comprise the majority of the Watershed Water Quality Workplan (watershed workplan), a collaborative effort that requires copermittees in a watershed management area to develop a workplan to assess and prioritize the water quality problems within the watershed's receiving waters, identify sources of the highest priority water quality problems, develop a watershed-wide BMP implementation strategy to abate the highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the watershed management area.[1132] A watershed workplan is not new. Under the prior permit, the claimants were required to collaborate with other watershed permittees to develop and implement a watershed stormwater management plan (watershed SWMP).[1133]

As described below, the Commission finds that Sections G.1.d, G.3., G.4., and G.5. of the test claim permit mandate a new program or higher level of service for the following activities:

- The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[1134]
- The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as

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[1130] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 68-70 (Test Claim narrative).

[1131] Exhibit A, Test Claim, filed November 10, 2011, pages 68-72 (Test Claim narrative), 255-257 (test claim permit, Sections G.1.-G.5.). The claimants did not plead Section G.6., regarding the pyrethroid pollutant reduction program and, thus, this Decision does not address Section G.6.

[1132] Exhibit A, Test Claim, filed November 10, 2011, pages 255-257 (test claim permit, Sections G.1.-G.5.).

[1133] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Sections K.1., 2.).

[1134] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d.).

Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[1135]

- The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[1136]
- The annual watershed review meetings shall be open to the public and adequately noticed.[1137]
- Each permittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[1138]

All other activities required by Sections G.1. through G.5. are not new and, thus, do not impose a new program or higher level of service.

a. Background

i. Federal law requires permittees to propose a management program to reduce pollutants in discharges to the maximum extent practicable (MEP), which must involve public participation, and may impose controls on a systemwide basis, a watershed basis, or a jurisdiction basis necessary to meet water quality standards.

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[1139]

Federal regulations require that the application for an NPDES permit for large and medium MS4 dischargers must describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. The proposed management program shall include a comprehensive planning process which involves public participation and where necessary, intergovernmental coordination, to reduce the

[1135] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

[1136] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[1137] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1138] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1139] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

discharge of pollutants to the MEP using management practices, control techniques and system, design and engineering methods, and other appropriate conditions. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls.[1140]

ii. The prior permit required the permittees to mitigate highest priority water quality issues; develop and implement a watershed Storm Water Management Plan; participate in watershed management efforts; and meet annually to review the watershed Storm Water Management Plan.

Section E. of the prior permit required a watershed Storm Water Management Plan (SWMP) for the Upper Santa Margarita Watershed.[1141] The watershed SWMP had to consist of a written account of all area-wide and watershed-based programs and activities conducted by the permittees including the programs and items required in Sections K.l.-K.4. of the prior permit.[1142]

Sections K.l.-K.4. of the prior permit required each permittee to do the following:

1. Collaborate with the other permittees to identify, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed.[1143]
2. Collaborate with the other permittees to develop and implement a watershed SWMP.[1144]
3. Participate in watershed management efforts to address stormwater quality issues within the entire watershed, including efforts conducted by other entities in the watershed, such as San Diego County, U.S. Marine Corps Base Camp Pendleton, Native American tribes, and other state, federal, and local agencies.[1145]

[1140] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[1141] Exhibit A, Test Claim, filed November 10, 2011, page 575 (Order R9-2004-0001, Section E.).

[1142] Exhibit A, Test Claim, filed November 10, 2011, page 575 (Order R9-2004-0001, Section E.).

[1143] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.1.).

[1144] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.).

[1145] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.3.).

4. Meet with all permittees, at least once a year, to review and assess available water quality data, from the MRP and other reliable sources, to assess program effectiveness, and to review and update the watershed SWMP.[1146]

The watershed SWMP described in Section K.2. of the prior permit had to contain the following:

- An accurate map of the Upper Santa Margarita Watershed that identifies all receiving waters, all CWA section 303(d) impaired receiving waters, existing and planned land uses, MS4s, major highways, jurisdictional boundaries, industrial and commercial facilities, municipal sites, and residential areas.[1147]
- A description of any interagency agreement, or other efforts, with non-permittee owners of the MS4, such as Caltrans, Native American tribes, and school districts, to control the contribution of pollutants from one portion of the shared MS4 to another portion.[1148]
- An assessment of the water quality of all receiving waters based upon existing water quality data and results from the receiving waters and illicit discharge monitoring programs in the MRP.[1149]
- An identification and prioritization of major water quality problems caused or contributed to by MS4 discharges and the likely sources of the problems.[1150]
- A time schedule for implementation of short and long-term recommended activities needed to address the highest priority water quality problem(s).[1151]
- A watershed-based education program focusing on water quality issues specific to the Santa Margarita watershed.[1152]

[1146] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.4.).

[1147] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.a.).

[1148] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.b.).

[1149] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.c.).

[1150] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

[1151] Exhibit A, Test Claim, filed November 10, 2011, pages 595-596 (Order R9-2004-0001, Section K.2.e.).

[1152] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.f.).

- A mechanism to facilitate collaborative watershed-based land use planning with neighboring local governments.[1153]
- A description of any other urban runoff management programs or activities being conducted to address water quality issues.[1154]
- A description of the permittees' responsibilities for implementing the watershed SWMP.[1155]
- The expenditures and funding sources for the area-wide and watershed-based activities and programs.[1156]
- Standardized reporting formats developed by the permittees.[1157]
- Short-term strategy (completed during the life of the 2004 permit) for assessing the effectiveness of the activities and programs implemented as part of the watershed SWMP. The short-term strategy shall also discuss the role of monitoring data collected by the permittees in substantiating or refining the assessment. [1158]
- Long-term strategy (completed beyond the life of the 2004 permit) for assessing the effectiveness of the watershed SWMP in achieving improvements in receiving water quality impacted by urban runoff discharges. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, receiving water quality monitoring, and achievement of measurable goals. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.[1159]

In addition, the 2004 MRP required the permittees to participate and coordinate with federal, state, and local agencies and other dischargers in the Santa Margarita

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[1153] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.g.).

[1154] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.h.).

[1155] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.i.).

[1156] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.j.).

[1157] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.k.).

[1158] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.l.).

[1159] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Section K.2.m.).

Watershed in development and implementation of a regional watershed monitoring program.[1160]

The 2004 Fact Sheet explains the watershed SWMP as follows:

> The requirements in Section K of the Order are necessary for the Permittees to identify and mitigate sources of pollutants in urban runoff from the entire watershed that impact common downstream receiving waters. This is the key to addressing the impacts from areas and activities within the Permittees' jurisdiction on downstream receiving waters and their beneficial uses (i.e. Camp Pendleton's drinking water supply) as well as addressing pollutant sources in the watershed which are outside the Permittees' jurisdiction. **Finding No. 20** emphasizes the need for watershed-based activities and collaboration among dischargers in a common watershed. It states, "As operators of the MS4s, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or exceedances of receiving water quality objectives." Permittees could be held responsible for discharges of pollutants from sources outside of their jurisdiction if they cause or contribute to exceedances of water quality objectives, therefore, it is necessary for Permittees to make efforts to address all sources of pollutants in the watershed.[1161]

b. Sections G.1.d., G.3., G.4., and G.5. of the test claim permit mandate a new program of higher level of service by requiring the claimants to perform additional watershed activities.

i. Sections G.1.-5. of the test claim permit impose some new requirements on the claimants.

The approach under the prior permit, however, did not result in improvements to water quality. The Fact Sheet to the test claim permit states the following:

> **Section G** requires Copermittees to continue implementation of their watershed runoff management program (WRMP), however the implementation approach has changed. Order No. R9-2004-001 required a Watershed SWMP that included a collaborative strategy to abate the sources and reduce the discharges causing high priority water quality problems. This strategy was to guide each watershed Copermittee's selection and implementation of Watershed Activities, so that the activities

[1160] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section A.II., page 8.

[1161] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, page 70, emphasis in original.

> selected and implemented would remove that pollutant contribution responsible for the identified high priority water quality problem. Outcomes of these requirements were not able to demonstrate improvements to water quality.
>
> Revised language in Order No. R9-2010-0016 attempts to focus each watershed Copermittee's efforts and resources on addressing the highest water quality problems in the watershed by focusing attention on the health of the receiving water body and the most efficient use of the watershed Copermittee's time and resources. Order No. R9-2010-0016 requires the watershed Copermittees to develop and follow a workplan approach towards assessing receiving water body conditions, prioritizing the highest priority water quality problems, implementing effective BMPs, and measuring water quality improvement in the receiving water.[1162]

The claimants assert that the requirements in the test claim permit are new. The prior permit had "required 'selection and implementation of watershed activities,' but the Water Board found that program to be unsatisfactory."[1163] The test claim permit revised those provisions requiring the claimants to develop a workplan to "assess receiving waterbody conditions, prioritize the highest water quality problems, implement effective BMPs and measure water quality improvement."[1164] Thus, the claimants argue, the Regional Board "acknowledged that the 'implementation approach has changed'" and that the Regional Board had intended to change prior permit's program.[1165]

The Water Boards assert that the entirety of the Watershed Workplan, Section G.1.-5., should be denied on the ground that the requirements are not new or, if not denied, the costs of implementation should be found to be de minimis.[1166]

As discussed below in detail, Sections G.1.-5. of the test claim permit impose a few new requirements on the claimants.

Sections G.1.-5. of the test claim permit, like the prior permit, require a watershed SWMP, now renamed a watershed water quality workplan (watershed workplan).[1167]

[1162] Exhibit A, Test Claim, filed November 10, 2011, pages 531-532 (Fact Sheet/Technical Report).

[1163] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 24, citing Fact Sheet/Technical Report, page 166.

[1164] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 24.

[1165] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 24, citing Fact Sheet/Technical Report, page 166.

[1166] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 2-4.

[1167] Exhibit A, Test Claim, filed November 10, 2011, page 424 (Fact Sheet/Technical Report, Finding D.1.d.).

Section G. requires that each copermittee to "collaborate with other copermittees to develop and implement a watershed water quality workplan (watershed workplan) to identify, prioritize, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed."[1168]

The watershed workplan must include, at a minimum, the following components identified in Section G.1.:

- Characterize the receiving water quality in the watershed including an assessment and analysis of regularly collected water quality data, reports, monitoring, and analysis generated by the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations.[1169]
- An updated watershed map.[1170]
- Identify and prioritize water quality problem(s) in the watershed's receiving waters in terms of constituents by location giving consideration to TMDLs; CWA section 303(d) listed receiving waters; waters with persistent violations of water quality standards, toxicity, or other impacts to beneficial uses, and other pertinent conditions.[1171]
- Identify the likely sources, pollutant discharges and/or other factors causing the highest water quality problem(s) within the watershed. Determining the sources must include, but not be limited to: information from the construction, industrial/commercial, municipal, and residential source identification programs within the Jurisdictional Runoff Management Program (JRMP); water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program; and additional focused water quality monitoring to identify specific sources within the watershed.[1172]
- Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s) and locations, which must include a schedule for implementation of the BMPs to abate specific receiving water quality problems, a list of criteria to be used to

[1168] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.).

[1169] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.1.a.).

[1170] Exhibit A, Test Claim, filed November 10, 2011 page 439 (test claim permit, Section G.1.a.).

[1171] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.1.b.).

[1172] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.1.c.).

evaluate BMP effectiveness, and a map of any implemented and/or proposed BMPs.[1173]

- Develop a strategy to monitor improvements in receiving water quality directly resulting from implementation of the BMPs described in the watershed workplan including reviewing the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. The monitoring must, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.[1174]
- Establish a schedule for development and implementation of the watershed strategy outlined in the workplan. The schedule must, at a minimum, include forecasted dates of planned actions to address the watershed workplan components listed above[1175] and dates for watershed review meetings through the remaining portion of this permit cycle.[1176]

Section G.2. requires that the watershed workplan be implemented within 90 days of submittal unless otherwise directed by the Regional Board.[1177]

Most of these requirements are *not* new. For example, Sections G. and G.1.a. require the claimants to collaborate with other copermittees to develop and implement a watershed workplan to identify, prioritize, address, and mitigate the highest priority water quality issues/pollutants in the watershed. The workplan must characterize the receiving water quality in the watershed including an assessment and analysis of regularly collected water quality data, reports, monitoring, and analysis generated by the receiving waters monitoring and reporting program, as well as applicable information available from other public and private organizations, and must include an updated map. The prior permit, in Sections K.1. and K.2., required the same activities. The

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[1173] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.1.d.).

[1174] Exhibit A, Test Claim, filed November 10, 2011, pages 439-440 (test claim permit, Section G.1.e.).

[1175] The language in Section G.1.f. states, "The schedule must, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle." The phrase "Provisions E.2(a) through E.2(e)" must be an error as section E. includes only subdivisions a. through c. and addresses local ordinances and section G.2. has no subdivisions. Thus, the only reading that makes sense and must have been the intended language is "Provisions G.1.a. through G.1.e.", which includes all the watershed workplan components listed before Section G.1.f.

[1176] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.1.f.).

[1177] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.2.).

claimants were required to collaborate with the other copermittees to identify, address, and mitigate the highest priority water quality issues/pollutants in the in the Upper Santa Margarita Watershed and implement a watershed workplan.[1178] Section K.2.c. required the workplan to include an assessment of the water quality of all receiving waters based upon "existing water quality data" and "results from the Receiving Waters and Illicit Discharge Monitoring Programs described in the MRP."[1179] The claimants contend that the requirement in Section G.1.a. "to not only review monitoring data collected under the permit, but also data from 'applicable information available from other public and private organizations'" is a new, different, and more demanding requirement.[1180] However, the phrase "existing water quality data" does not have any limiting language and thus, includes relevant data from any source, including public or private organizations. The addition of "public and private organizations" provides additional detail to the requirement, but it does not make it new nor a higher level of service. In addition, the prior permit in Section K.2.a. required the workplan to contain "an *accurate* map of the Upper Santa Margarita Watershed that identifies all receiving waters, all CWA section 303(d) impaired receiving waters, existing and planned land uses, MS4s, major highways, jurisdictional boundaries, industrial and commercial facilities, municipal sites, and residential areas.[1181] The test claim permit simply requires an "updated" watershed map, but since a map must be *updated* to be *accurate,* the requirement in Section G.1.a. for the map has not changed. Therefore, the requirements in Sections G. and G.1.a. are not new and do not impose a new program or higher level of service.

The claimants also contend that the requirement in Section G.1.b. to "identify and prioritize water quality problem(s) in terms of constituents by locations, in the watershed's receiving waters" is a new, different, and more demanding requirement.[1182] The prior permit required "[a]n identification and prioritization of major water quality problems in the watershed caused or contributed to by MS4 discharges . . ."[1183] As set forth above, the 2004 Fact Sheet explained that the requirements "are necessary for the

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[1178] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Sections K.1., and K.2.).

[1179] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

[1180] Exhibit A, Test Claim, filed November 10, 2011, page 70 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 25.

[1181] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.a.).

[1182] Exhibit A, Test Claim, filed November 10, 2011, page 70 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 25.

[1183] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

Permittees to *identify and mitigate* sources of pollutants in urban runoff from the entire watershed that impact common downstream *receiving waters*."[1184] The 2010 Fact Sheet emphasizes the importance of a watershed workplan that implements "a collective watershed strategy to assess and prioritize the water quality problems, and *identify, address, and mitigate* the highest priority water quality issues/pollutants within the Upper Santa Margarita watershed's *receiving waters*."[1185] Thus, the requirement to identify and prioritize water quality problems has not changed and nor has its purpose changed. The change in the requirement is the addition of the phrase "in terms of constituents by locations" which is how the claimants are to identify the water quality problems. However, this requirement is not new and does not impose a new program or higher level of service. The prior permit MRP required the claimants to implement the MRP to achieve certain objectives including:

> 3. Assess the chemical, physical, and biological impacts of receiving waters resulting from urban runoff;
>
> 4. Characterize urban runoff discharges;
>
> 5. Identify sources of specific pollutants . . .[1186]

Specifically, receiving waters monitoring under the prior permit required the claimants "to address on-going, site-specific needs" through water sampling at stations for pollutants and toxicity with follow-up analyses using Toxicity Identification Evaluations (TIEs) to determine the cause of toxicity and Toxicity Reduction Evaluations (TREs) to identify sources and implement management actions.[1187] The claimants were also required to implement tributary monitoring through station sampling to help identify sources of pollutants.[1188] Each of these samplings would yield a quantified water quality problem in terms of constituent by location.

The objectives stated in the prior permit's MRP were echoed in the test claim permit's MRP.[1189] In addition, the MRP requires the claimants to design receiving waters monitoring to meet the stated goals.[1190] The test claim permit's MRP, like the prior MRP, requires water sampling at stations for pollutants and toxicity and also requires

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[1184] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, page 70, emphasis in original.

[1185] Exhibit A, Test Claim, filed November 10, 2011, page 532 (Fact Sheet/Technical Report, Section G.1), emphasis added.

[1186] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, page 2.

[1187] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, pages 2-7.

[1188] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, pages 7-8.

[1189] Exhibit A, Test Claim, filed November 10, 2011, page 298 (test claim permit, Attachment E.).

[1190] Exhibit A, Test Claim, filed November 10, 2011, page 299 (test claim permit, Attachment E.).

stream assessment monitoring. Both require follow-up analyses using TIEs to determine the cause of toxicity and TREs to identify the sources.[1191] Again, these analyses will yield quantified results by constituent and location. Thus, the requirement in Section G.1.b. to identify and prioritize water quality problem(s) in terms of constituents by locations is *not* a new requirement or a higher level of service.

The claimants further contend that the requirement in Section G.1.c. that the workplan "identify likely sources, pollutant discharges and/or other factors causing the highest water quality problem(s) within the watershed" where identification efforts must include "additional focused water quality monitoring to identify specific sources within the watershed" is also a new, different, and more demanding requirement.[1192] However, the prior permit required "[a]n identification and prioritization of major water quality problems in the watershed caused or contributed to by MS4 discharges and the likely source(s) of the problem(s)."[1193] Thus, the requirement to identify likely sources of the water quality problems has not changed. While the prior permit provided no additional language on the steps to be taken to fulfill the requirement, the test claim permit adds that the efforts must include "additional focused water quality monitoring to identify specific sources within the watershed." The prior permit, however, prohibited discharges from MS4s that cause or contribute to the violation of water quality standards.[1194] As part of Receiving Water Limitations, the claimants were required to assure compliance with the prohibition by providing notice and a report regarding BMPs to the Regional Board upon a determination by either the claimants or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard.[1195] Such a determination would require sufficiently focused water quality monitoring to identify the specific source of the exceedance. The test claim permit includes the same prohibition and the same procedure upon the

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[1191] Exhibit A, Test Claim, filed November 10, 2011, pages 299- 305 (test claim permit, Attachment E.).

[1192] Exhibit A, Test Claim, filed November 10, 2011, page 70 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 25-26.

[1193] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.d.).

[1194] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.1.); see also, Basin Plan Prohibitions ("The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited."), page 598 (Order R9-2004-0001, Attachment A., Section 5.).

[1195] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.a.)

determination of an exceedance.[1196] The requirement to perform additional focused water quality monitoring to identify specific sources within the watershed is part of a pre-existing duty of the claimants to comply with the prohibition against discharges from MS4s that cause or contribute to the violation of water quality standards and is not a new requirement or a higher level of service. Thus, the requirement in Section G.1.c. is *not* new and does not impose a new program or higher level of service.

The test claim permit in Sections G.1.d., G.1.e., and G.1.f. also require the claimants to develop a watershed BMP implementation strategy as part of the workplan to attain receiving water quality objectives and to include a schedule for implementation of the BMPs and a list of criteria to be used to evaluate BMP effectiveness;[1197] develop a strategy to monitor improvements in receiving water quality directly resulting from implementation of the BMPs including reviewing the necessary data to report on the measured pollutant reduction;[1198] and establish a schedule for development and implementation of the watershed strategy outlined in the workplan.[1199] The claimants assert that the specific additional requirements in the test claim permit to implement the CWA and its regulations are new and not merely clarifications.[1200] However, these requirements are *not* new and do not impose a new program or higher level of service. The prior permit, in Sections K.2.l. and m., required the claimants to include and implement short and long-term strategies to assess the effectiveness of activities, programs, and the Watershed SWMP in improving receiving water quality, including the use of monitoring data collected by the permittees in substantiating or refining the assessment.[1201] And the prior permit's MRP required the claimants to participate and coordinate with federal, state, and local agencies and other dischargers in the Santa Margarita Watershed in development and implementation of a regional watershed monitoring program.[1202] While the test claim permit clarified that the implementation strategies include the development of BMPs, that requirement is not new. The

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[1196] Exhibit A, Test Claim, filed November 10, 2011, pages 199-200 (test claim permit, Section A.3.).

[1197] Exhibit A, Test Claim, filed November 10, 2011, page 439 (test claim permit, Section G.1.d.).

[1198] Exhibit A, Test Claim, filed November 10, 2011, pages 439-440 (test claim permit, Section G.1.e.).

[1199] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.1.f.).

[1200] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 26, citing *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.

[1201] Exhibit A, Test Claim, filed November 10, 2011, page 596 (Order R9-2004-0001, Sections K.2.l. and m.).

[1202] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section A.II., page 8.

claimants have long been required "to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[1203] Federal regulations define "best management practices" as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[1204] And that is exactly what the prior permit required: implementation of strategies to assess the effectiveness of activities and programs. Section K.2.e. of the prior permit also required the claimants to have a time schedule for implementation of short and long-term recommended activities needed to address the highest priority water quality problem(s).[1205] Thus, these requirements in Sections G.1.d., G.1.e., and G.1.f. are *not* new and do not impose a new program or higher level of service.

However, the following requirement imposed in Section G.1.d., was not required by the prior permit and is new:

- The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[1206]

Section G.2. requires that the watershed workplan be implemented within 90 days of submittal unless otherwise directed by the Regional Board.[1207] The prior permit did not include deadline to start implementation, however, the claimants were still required to implement a watershed SWMP.[1208] Imposing a deadline on the claimants does not result in any newly required activities.

Section G.3. requires the watershed copermittees to hold frequent regularly scheduled meetings; pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4; and, as appropriate, participate in watershed management efforts to address water quality issues within the entire Santa

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[1203] United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

[1204] Code of Federal Regulations, title 40, section 122.2.

[1205] Exhibit A, Test Claim, filed November 10, 2011, pages 595-596 (Order R9-2004-0001, Section K.2.e.).

[1206] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d).

[1207] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.2.).

[1208] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.).

Margarita Watershed (such as the County of San Diego and U.S. Marine Corps Camp Pendleton).[1209]

Even though the prior permit did not expressly state that the watershed permittees are required to hold frequent regularly scheduled meetings, this activity is *not* new. The requirement to meet frequently encourages the claimants to continue to collaborate on watershed issues. However, under the prior permit, in Sections K.1. and K.2., the claimants were required to collaborate with other permittees to identify, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed, and to develop and implement a Watershed SWMP for the Upper Santa Margarita Watershed. The SWMP had to include "a mechanism to facilitate collaborative "watershed-based" (i.e. natural resource-based) land use planning with neighboring local governments in the watershed" pursuant to Section K.2.g.[1210] Thus, the collaboration requirements under the prior permit mean that the claimants had to meet frequently on these issues.

The requirement in Section G.3. to pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4 is new. The prior permit, in Section K.2.b. required that the SWMP include "A description of any interagency agreement, or other efforts, with non-Permittee owners of the MS4 (such as Caltrans, Native American Tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4."[1211] However, it did not require the claimants to pursue such agreements. Thus, Section G.3. imposes the following new requirement:

- The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[1212]

The last requirement in Section G.3., to participate in watershed management efforts to address water quality issues within the entire Santa Margarita Watershed (such as the County of San Diego and U.S. Marine Corps Camp Pendleton) is *not* new and does not impose a new program or higher level of service. Section K.3. of the prior permit,

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[1209] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.3.).

[1210] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Sections K.1., K.2.).

[1211] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section K.2.b.).

[1212] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

required the claimants to "participate in watershed management efforts to address storm water quality issues within the entire Santa Margarita Watershed, including efforts conducted by other entities in the watershed, such as San Diego County, U.S. Marine Corps Base Camp Pendleton, Native American tribes, and other state, federal, and local agencies."

Section G.4. requires the watershed copermittees to implement a watershed-specific public participation mechanism within each watershed, which must include a minimum 30-day public review of and opportunity to comment on the watershed workplan prior to submittal to the Regional Board. The workplan must include a description of the public participation mechanisms to be used and identification of the persons or entities anticipated to be involved during the development and implementation of the watershed workplan.[1213] The Water Boards' comments suggest the public participation requirements in Section G.4. are new as follows:

> To the extent the requirement to allow public participation prior to submittal of a draft Watershed workplan is new to the 2010 Permit, for purposes of responding to Claimant's challenge, it is important to note that the 2010 Permit does not *mandate* that Copermittees actually consider or respond to comments on the draft Watershed Workplan, [fn. omitted.] nor does it mandate holding a public meeting at that stage. By its term, it simply mandates that Copermittees make a draft available for public review and comment. To the extent allowing public comment on the draft Watershed Workplan is determined to be a new requirement, any costs associated with making a draft available for public comment, with no additional associated mandated requirements to respond to any public comments or modify the draft, would be *de minimis*.[1214]

The claimants assert that the test claim permit provides new requirements in Section G.4. Specifically, the watershed-specific public participation, 30-day public review and comment period, and a description in the workplan of the public participation mechanisms were not in the prior permit which only required that the claimants incorporate public participation during development and implementation of the SWMP. Thus, they allege that the requirements are new and provide a higher level of service.[1215]

However, Section E.3. of prior permit (which addresses both the individual and watershed SWMP) required that "[e]ach Permittee shall incorporate a mechanism for public participation during the development and implementation of its SWMP," and thus

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[1213] Exhibit A, Test Claim, filed November 10, 2011, page 440 (test claim permit, Section G.4.).

[1214] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 48.

[1215] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 27.

the public participation requirement for the watershed workplan is *not* new.[1216] Public participation was not defined in the prior permit, but as stated in the background, federal regulations require proposed management programs to "include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable . . . ."[1217], and the US EPA's MS4 Program Evaluation Guidance describes the public participation activities as requiring, at a minimum, notice and an opportunity to comment.[1218] [1219] Thus, these requirements are not new.

The requirement in Section G.4., that the workplan must include the identification the persons or entities anticipated to be involved during the development and implementation of the watershed workplan, however, was not required by prior law and is new. Thus, Section G.4. of the test claim permit imposes the following new requirement:

- The Watershed Workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[1220]

Section G.5. requires the claimants to review and update the watershed workplan annually to identify needed changes to the prioritized water quality problems identified in the plan and present all updates to the watershed workplan during an annual watershed review meeting. The watershed review meeting must be open to the public and adequately noticed.[1221] Section K.4. of the prior permit required the claimants to annually "meet to review and assess available water quality data (from the MRP and other reliable sources), assess program effectiveness, and to review and update the Watershed SWMP." Thus, the annual meeting is not new, and the costs to review and

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[1216] Exhibit A, Test Claim, filed November 10, 2011, page 575 (Order R9-2004-0001, Section E.3.).

[1217] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[1218] Exhibit J (13), EPA, MS4 Program Evaluation Guidance, January 2007, page 38.

[1219] The claimants assert that neither the cited federal regulations "nor the non-mandatory EPA MS4 Program Evaluation Guidance specify how public participation is to be incorporated into the Watershed Workplan. Under governing caselaw, they do not represent a federal mandate on Claimants." Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 27, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 756; *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 683. The claimants overlook the fact that there is no finding of a federal mandate here, but rather that the requirements are not new.

[1220] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[1221] Exhibit A, Test Claim, filed November 10, 2011, page 441 (test claim permit, Section G.5.).

update the plan are likewise not new. However, the requirement in Section G.5. that the "annual watershed review meeting must be open to the public and adequately noticed" is new and is not required by the prior permit. The Water Boards suggest that the claimants were already subject to open meeting act requirements and thus, the test claim permit requirements of providing notice and opening the annual meeting to the public are not new.[1222] The Ralph M. Brown Act, which applies to cities, counties and other local governmental bodies, is not applicable to the watershed copermittees as they are not the body of a local agency created by the governing body of a local agency or any other statutorily-created local body.[1223] The Bagley-Keene Open Meeting Act, which applies to state bodies, is also not applicable to the watershed copermittees. The Regional Board is subject to the Bagley-Keene Open Meeting Act but the watershed copermittees are not delegated the authority of the Regional Board, are not advisory to the Regional Board, and no member of the Regional Board is a watershed copermittee.[1224] Therefore, there is no pre-existing duty for the watershed copermittees to comply with open meeting act requirements. Accordingly, Section G.5. imposes the following new requirement:

- The annual watershed review meetings shall be open to the public and adequately noticed.[1225]

Finally, Section G.5. requires each claimant to also review and modify their jurisdictional programs and JRMP annual reports, as necessary, so that they are consistent with the updated watershed workplan.[1226] This was not required by the prior permit. Therefore, Section G.5. imposes the following new requirement:

- Each copermittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[1227]

ii. The new requirements imposed by Sections G.1.d., G.3., G.4., and G.5. are mandated by the state.

As indicated above, Section G. imposes the following new requirements:

[1222] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 47.

[1223] Government Code section 54952.

[1224] Government Code section 11121.

[1225] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1226] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1227] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

- The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[1228]
- The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[1229]
- The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[1230]
- The annual watershed review meetings shall be open to the public and adequately noticed.[1231]
- Each copermittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[1232]

The Commission finds that that these activities are mandated by the state.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[1233]

[1228] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d).

[1229] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

[1230] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[1231] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1232] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1233] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

The court recognized that the "federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the US EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)"[1234] "[E]xcept where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[1235] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[1236]

Here, the federal regulations require the proposed management program to include "a comprehensive planning process which involves public participation and where necessary, intergovernmental coordination, to reduce the discharge of pollutants to the MEP using management practices, control techniques and system, design and engineering methods, and other appropriate conditions."[1237] But the decision on whether to require controls on a jurisdictional or watershed basis, and to determine which controls to require, is left to the discretion of the Regional Board. Federal law simply provides that "[p]roposed management programs *may* impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls, but does not require watershed planning.[1238] In 2017, the Third District Court of Appeal agreed with this conclusion, finding that permit requirements to develop and implement regional watershed management programs was mandated by the state as follows:

> The regulation relied upon by the State [40 C.F.R. § 122.26(d)(2)(iv), which states that "Proposed programs *may* impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls."] does not mandate any of these watershed and regional management requirements. It clearly leaves to the San Diego Regional Board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. The State exercised that discretion in imposing the controls it imposed. They thus are state mandates subject to section 6.[1239]

[1234] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-768.

[1235] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[1236] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[1237] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[1238] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[1239] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 687.

The new activities are not required by federal law and there is no evidence in the record that these activities are the *only means* by which the federal MEP standard can be met. The Regional Board, therefore, exercised true discretion when requiring the claimants to perform the new activities bulleted above. Thus, the new activities required by Sections G.1.d., G.3., G.4., and G.5. are mandated by the state.

iii. The new activities mandated by Sections G.1.d., G.3., G.4., and G.5. of the test claim permit constitute a new program or higher level of service.

The Commission also finds that the new state-mandated activities constitute a new program or higher level of service within the meaning of article XIII B, section 6. A new program or higher level of service is defined as one that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[1240] Only one of these alternatives is required to establish a new program or higher level of service.[1241]

Here, the new requirements mandated by Sections G.1.d., G.3., G.4., and G.5. are expressly directed toward the local agency copermittees and are therefore uniquely imposed on local government. In addition, the new requirements provide a governmental service to the public by protecting the beneficial uses of receiving waters, and ensuring notice and public participation when assessing the water quality problems.

Accordingly, the new requirements in Sections G.1.d., G.3., G.4., and G.5. of the test claim permit mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

10. Section K.3.a.-c. of the Test Claim Permit Imposes Some New Annual Reporting Requirements That Are Mandated by the State and Impose a New Program or Higher Level of Service.

The claimants pled Section K.3.a.-c.of the test claim permit requiring that certain information be included in the annual Jurisdictional Runoff Management Program (JRMP) report.[1242] Section K.3.a.-c. of the test claim permit requires that each claimant prepare an individual JRMP annual report that covers implementation of its jurisdictional activities during the past annual reporting period, and specifies the contents of the annual report, which claimants contend includes a new reporting requirements that constitute a reimbursable state-mandated program.[1243]

[1240] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[1241] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1242] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 72-75.

[1243] Exhibit A, Test Claim, filed November 10, 2011, pages 262-267 (test claim permit, Section K.3.).

The Commission finds that Sections K.3.a. and K.3.b. do not impose any new activities. Sections K.3.c.1., 2., 3., and 4. impose some new requirements, and except for reporting on the claimant's own municipal projects (which is not mandated by the state), the new requirements are mandated by the state and impose a new program or higher level of service.

a. Background

i. Federal law requires that permittees submit an annual report to the Regional Board covering program status and proposed changes, data, budget, enforcement actions, inspections, public education programs and water quality improvements or degradation.

Federal law requires that an annual report be filed by the permittees by the anniversary date of the issuance of the permit and include the following information:

- The status of implementing the components of the stormwater management program that are established as permit conditions.
- Proposed changes to the stormwater management programs that are established as permit conditions. Such proposed changes shall be consistent with Code of Federal Regulations, title 40, 122.26(d)(2)(iii) [which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application].
- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.
- A summary of data, including monitoring data, that is accumulated throughout the reporting year.
- Annual expenditures and budget for the year following each annual report.
- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.[1244]

Federal law also requires the retention of monitoring records, copies of required reports, and records of all data used to complete the permit application for a period of at least three years.[1245]

ii. The prior permit required the submission of an annual report to the Regional Board containing descriptions of the activities and data for each of the components of the permit.

To assess compliance with the prior permit, measure the effectiveness of the stormwater plans, and to assess the overall health of the receiving waters, the prior permit's MRP required each permittee to submit an individual SWMP Annual Report

[1244] Code of Federal Regulations, title 40, section 122.42(c).

[1245] Code of Federal Regulations, title 40, section 122.41(j)(2).

documenting the permit activities performed by the permittee during the prior year with a signed certified statement under penalty of perjury.[1246] The report would be combined with the other permittees' SWMP reports and the watershed SWMP before being submitted to the Regional Board. Each individual report was required to contain, at a minimum, data addressing the following components:

- A comprehensive description of all activities conducted by the permittee to meet the permit requirements, described more fully below.[1247]
- An assessment of program effectiveness, requiring that "each Permittee shall include an assessment of the effectiveness of its Individual SWMP using the measurable goals and direct and indirect assessment measurements developed in the SWMP in accordance with Attachment D of Order No. R9-2004-001."[1248]
- An annual fiscal analysis that evaluates the expenditures (such as capital, operation and maintenance, education, and administrative expenditures) necessary to accomplish the activities of the permittee's individual SWMP. The analysis had to include a report of the previous reporting period's budget and source of funds, and a budget and identification of source of funds for the upcoming budget year, broken down by program components (program management, construction inspections, development plan review and SUSMP implementation, industrial and commercial inspections, illicit discharge and connection response and elimination, municipal activities, education, monitoring, and other).
- Non-Storm Water Discharges. Permittees shall report on any discharge category listed in Requirement B.2 of Order No. R9-2004-001 that was identified as a source of pollutants during the reporting period. For each identified category, the permittee had to report whether it elected to prohibit the discharge or to require BMPs to reduce pollutants in the discharge to the MEP. If the discharge is not prohibited, the BMPs that will be implemented, or required to be implemented, had to be described in each permittee's annual report.
- Receiving Water Limitations. The report required pursuant to Requirement C.2.a. of the prior permit, if applicable.
- A summary of all urban runoff related data not included in the annual monitoring report (e.g., special investigations).

[1246] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Sections I., III.C., pages 2, 17.

[1247] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1., page 12.

[1248] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.b., page 14.

- Proposed revisions to the Individual SWMP, including areas in need of improvement based on the assessment of effectiveness of each program component.[1249]

The prior permit then identifies specific reporting requirements for the first bullet above, the "comprehensive description of all activities conducted by the Permittee to meet all requirements of Order No. R9-2004-001," which included, "but [was] not limited to, the following information" (which includes for each component an assessment of the program's effectiveness based on the measurable goals and direct and indirect assessment measurements developed in the SWMP in accordance with Attachment D.):[1250]

- Development Planning (Section F.): (i) Description of any amendments to the General Plan or the development project approval process; (ii) Number of grading permits issued; (iii) Number of developments conditioned to meet SUSMP requirements; (iv) Attach one example of a development project that was conditioned to meet SUSMP requirements and a description of the required BMPs; (v) Description of any updates to the environmental review process; (vi) Description and number of training efforts conducted during the reporting period (for staff, developers, contractors, etc.), including the number of staff trained; and (vii) An assessment of program effectiveness based on the measurable goals established in the copermittee's SWMP.[1251]
- Construction (Section G.): (i) Number of inspections conducted; (ii) Number and type of enforcement actions related to construction sites; (iii) Description of modifications made to the construction and grading approval process; (iv) Description and number of training efforts conducted during the reporting period (for staff inspectors, contractors, and construction site operators); and (v) An assessment of program effectiveness based on the measurable goals established in the permittee's SWMP.[1252]
- Municipal (Section H.1.): (i) Number of municipal inspections conducted; (ii) Number and types of enforcement actions taken; (iii) Number of catch basins and inlets that were inspected and the number that were cleaned; (iv) Assessment of the amount and type of debris removed from catch basins, streets, and open channels, including an identification of problem areas that generate the most pollutants; (v) Assessment of effectiveness of BMPs that have been implemented

[1249] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1., pages 12-14.

[1250] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a., page 12.

[1251] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

[1252] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.2., page 12.

for municipal facilities and activities; (vi) Description and number of training efforts conducted over the last year (for municipal facility operators and inspectors); and (vii) An assessment of program effectiveness based on the measurable goals established in the permittee's SWMP.[1253]

- Industrial/Commercial (Section H.2.): (i) Number of inspections conducted; (ii) Number and type of enforcement actions taken; and (iii) An assessment of overall program effectiveness based on the measurable goals established in the permittee's SWMP.[1254]
- Residential (Section H.3.): (i) A description of residential areas that were focused on during the past year; (ii) Number and types of enforcement actions taken; and (iii) Assessment of overall program effectiveness based on the measurable goals established in the permittee's SWMP.[1255]
- Education (Section I.): (i) Description of education efforts conducted by the permittee (not collectively with other permittees) during the previous year; (ii) Assessment of overall program effectiveness based on the measurable goals established in the permittee's SWMP.[1256]
- Illicit Discharge Detection and Elimination (Section J.): (i) Number of illicit discharges, connections and spills reported and/or identified during the reporting period; (ii) Number of illicit discharges or connections investigated during the reporting period and the outcome of the investigations; (iii) Number and types of enforcement actions taken for illicit discharges or connections during the reporting period; (iv) Number of times the permittee's hotline was called during the reporting period, as compared to previous reporting periods; (v) Number and location of dry weather monitoring sites that were monitored during the reporting period; (vi) Summary of Illicit Discharge Monitoring Program results, including: 1) All inspection, field screening, and analytical monitoring results; 2) All follow-up and elimination activities; and 3) Any proposed changes to station locations and/or sampling frequencies; and (vii) An assessment of overall program effectiveness based on the measurable goals established in the permittee's SWMP.[1257]

[1253] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3., pages 12-13.

[1254] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.4., page 13.

[1255] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.5., page 13.

[1256] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.6., page 13.

[1257] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

- Public Participation: a description of efforts to include the public in urban runoff management programs during the reporting period.[1258]

b. Sections K.3.a. and K.3.b. do not impose any new requirements, but Section K.3.c.1., 2., 3., and 4. of the test claim permit mandate a new program or higher level of service.

The findings in the test claim permit indicate that the "[a]nnual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs."[1259] The Fact Sheet for Section K. cites to the federal regulation requiring annual reports, Code of Federal Regulations, title 40, section 122.42(c), and Water Code section 13267 (which provides that "the Regional Board may require that any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires") as the legal authority for this section.[1260] The Fact Sheet further explains that the reporting requirements include less activity-based reporting and instead focuses on results and responses to effectiveness assessments using the data collected under the prior permit as a baseline to determine whether the programs are successful.[1261]

The claimants have pled only the reporting requirements in Section K.3.a.-c., which addresses the individual annual report, now called the JRMP Annual Report. As indicated above, the copermittees are required to review and modify their JRMP and JRMP annual reports after the annual watershed review meeting to ensure their individual plans are consistent with the updated watershed workplan.[1262] Thus, given the potential for modifications of the JRMP annual report based on the updates to the watershed workplan, Section K. begins by stating that "the Copermittees *may propose* alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance."[1263]

[1258] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.8., page 14.

[1259] Exhibit A, Test Claim, filed November 10, 2011, page 189 (test claim permit, Finding D.1.g.).

[1260] Exhibit A, Test Claim, filed November 10, 2011, page 539 (Fact Sheet/Technical Report).

[1261] Exhibit A, Test Claim, filed November 10, 2011, pages 540-541 (Fact Sheet/Technical Report).

[1262] Exhibit A, Test Claim, filed November 10, 2011, pages 257, 267 (test claim permit, Sections G.5., Section L.).

[1263] Exhibit A, Test Claim, filed November 10, 2011, page 260 (test claim permit, Section K.). The test claim permit states, "The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC §13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order

Each part of Section K.3.a.-c. is addressed below.

i. Section K.3.a. and b.

Section K.3.a. and b. of the test claim permit require each copermittee to generate and submit an individual JRMP annual report, by October 31 of each year, which covers activities during the prior reporting period. Section K.3.a. further requires each copermittee to retain records of all monitoring information and copies of reports for at least three years in accordance with the Standard Provisions in Attachment B.[1264] These requirements are not new. The requirement in Section K.3.b. to submit the annual report by October 31 does not impose any new activities on the claimants. Annual reports were required by the prior permit to be submitted by October 31 and are required by existing federal law.[1265] In addition, although a retention period was not included in the prior permit, federal law requires the retention of monitoring records, copies of required reports, and records of all data used to complete the permit application for a period of at least three years.[1266] Thus, the retention of records required by Section K.3.b. of the test claim permit is not new, but is required by existing federal law.

ii. Section K.3.c.1.

Section K.3.c. provides that each annual report "must contain, at a minimum, the following information, as applicable to the Copermittee:

> (1) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;
>
> (2) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
>
> (3) The completed Reporting Checklist found in Attachment D; and
>
> (4) Information for each program component as described in the following Table 5."[1267]

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unless such delegation is unlawful under CWC §13223 or this Order explicitly states otherwise." Exhibit A, Test Claim, filed November 10, 2011, page 199, footnote 4 (test claim permit, Section A.).

[1264] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 275 (test claim permit, Section K.3.a.-b.; Attachment B, Section 4).

[1265] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.C., pages 12, 17; Code of Federal Regulations, title 40, section 122.42(c).

[1266] Code of Federal Regulations, title 40, section 122.41(j)(2).

[1267] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.).

The first provision in Section K.3.c.1 states that each JRMP annual report contain information required to be reported annually in Section H. (Fiscal Analysis),[1268] which requires an annual fiscal analysis of the capital and operation and maintenance expenditures necessary to accomplish the requirements of the test claim permit and estimated expenditures for the current reporting period, the preceding period, and the next period. The analysis must include a description of the source of funds that are proposed to meet the necessary expenditures and a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.[1269] The copermittees are required to submit their annual fiscal analysis containing this information with the annual JRMP report.[1270]

The claimants did not plead Section H. and, thus, this Decision does not address whether preparing the annual fiscal analysis is eligible for reimbursement under article XIII B, section 6. The claimants pled only the reporting requirement in Section K.3.c.1.

Federal law requires reporting on annual expenditures and the budget for the year following each annual report, and any necessary revisions to the fiscal analysis.[1271] In addition, the prior permit required the claimants to analyze capital, operational, and maintenance expenditures and describe the source of funding for the next year in their annual report.[1272] Thus, these requirements in Section K.3.c.1. are not new and do not mandate a new program or higher level of service.

However, the requirement to provide a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items was not expressly required by prior law. Thus Section K.3.c.1. imposes the following new requirement:

- Include in the annual fiscal analysis a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.[1273]

[1268] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.1.).

[1269] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section H.2.).

[1270] Exhibit A, Test Claim, filed November 10, 2011, page 258 (test claim permit, Section H.3.).

[1271] Code of Federal Regulations, title 40, section 122.42(c).

[1272] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.c., page 14.

[1273] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.1.).

iii. Section K.3.c.2.

Section K.3.c.2. requires that each JRMP annual report contain information required to be reported annually in Section J. (Program Effectiveness).[1274] Generally, Section J. requires an annual assessment of the implementation of JRMP components (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Education, and Illicit Discharge Detection and Elimination Programs) to ensure that they "(1) reduce the discharge of storm water pollutants from its MS4 to the MEP; (2) prohibit non-stormwater discharges; and (3) prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards."[1275]

The assessment shall be based on the assessment measures or methods for each of the six outcome levels described by the California Stormwater Quality Association (CASQA), and a determination of whether the desired outcome has been met.[1276] Where the assessments indicate that the outcome level has not been achieved within the projected timeframe, each copermittee is required to review its activities and BMPs to identify any needed modifications and improvements and develop and implement a work plan and schedule to address any program modifications and improvements.[1277]

[1274] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.2.).

[1275] Exhibit A, Test Claim, filed November 10, 2011, page 258 (test claim permit, Section J.1.).

[1276] Exhibit A, Test Claim, filed November 10, 2011, pages 258-259 (test claim permit, Section J.1.). The six effective assessment outcome levels are: Level 1 Compliance with Activity-based Permit Requirements: Level 1 outcomes are those directly related to the implementation of specific activities prescribed by the test claim permit or established pursuant to it. Level 2 Changes in Attitudes, Knowledge, and Awareness: Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, businesses, and municipal employees. Level 3 Behavioral Change and BMP Implementation: Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Level 4 Load Reductions: Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Level 5 Changes in Runoff and Discharge Quality: Level 5 outcomes measures changes in one or more specific constituents or stressors in discharges into or from MS4s. Level 6 Changes in Receiving Water Quality: Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity, or beneficial use attainment. Exhibit A, Test Claim filed November 10, 2011, page 285 (test claim permit, Attachment C).

[1277] Exhibit A, Test Claim, filed November 10, 2011, page 259 (test claim permit, Section J.2.b.). The work plan must include, at a minimum, the following: (1) The problems and priorities identified during the assessment; (2) A list of priority pollutants

The claimants did not plead Section J. and, thus, this Decision does not address whether conducting the assessments and developing and implementing work plans are eligible for reimbursement under article XIII B, section 6. However, Section K.3.c.2. (which was pled) incorporates the reporting requirements in Section J., which requires that the following information be included in the annual report:

- Provide the following information in the summary of its effectiveness assessments in the annual report:
  a. The results of each of the effectiveness assessments performed pursuant to Section J.1.b, including the demonstrated CASQA effectiveness level(s).
  b. Responses to effectiveness assessments: A description of any program modifications planned in accordance with Section J.2., including the work plan and identified schedule for implementation. The description must include the basis for determining that each modified activity and/or BMP represents an improvement expected to result in improved water quality.
  c. A description of any steps to be implemented to improve the copermittee's ability to assess program effectiveness.[1278]
- Provide an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended.[1279]
- Provide the updated work plan and schedule to address any program modifications and improvements in response to the findings of its assessment.[1280]

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and known or suspected sources; (3) A brief description of the strategy employed to reduce, eliminate, or mitigate the negative impacts; (4) A description and schedule for new and/or modified BMPs with dates for significant milestones; (5) A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs; (6) A description of implementation effectiveness metrics; (7) A description of how efficacy results will be used to modify priorities and implementation; and (8) A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

[1278] Exhibit A, Test Claim, filed November 10, 2011, page 260 (test claim permit, Section J.3.).

[1279] Exhibit A, Test Claim, filed November 10, 2011, page 259 (test claim permit, Section J.2.a.).

[1280] Exhibit A, Test Claim, filed November 10, 2011, page 259 (test claim permit, Section J.2.b.).

Federal law requires that the annual report identify the status of implementing the components of the stormwater program, any proposed changes to the stormwater management programs, and any necessary revisions to the assessment of controls.[1281] The prior permit required the annual report to include an assessment of the effectiveness of its Individual SWMP (which included an assessment of the Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Education, and Illicit Discharge Detection and Elimination Programs), using measurable goals and direct and indirect assessment measurements developed in the SWMP, and proposed revisions to the Individual SWMP including areas in need of improvement based on the assessment of effectiveness of each program component.[1282] Therefore, the requirements in the first bullet — to provide the results of the effectiveness assessments, responses to those assessments, proposed program modifications expected to result in improved water quality, and a description of steps to improve the ability to assess program effectiveness — are not new, but fall within these existing requirements.

In addition, the last bullet — to provide an updated work plan and schedule to address any program modifications and improvements in response to the findings of the assessment — is not new. The prior permit required that the annual report include proposed revisions to the Individual SWMP including areas in need of improvement based on the assessment of effectiveness of each program component.[1283] The prior permit also required that the individual SWMPs be designed to achieve compliance with the receiving water limitations and prohibitions to ensure that water quality standards are met, and that the claimant's individual SWMPs be timely implemented using control measures and other actions to reduce pollutants in urban runoff discharges. If an exceedance of water quality standards persisted notwithstanding implementation of the SWMP, the claimants had to assure compliance with the receiving water limitations and prohibitions by reporting to the Regional Board the BMPs that were currently being implemented and additional BMPs that will be implemented (if approved by the Regional Board) to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. This report was expressly allowed to be incorporated into the SWMP annual report, and had to include an implementation schedule.[1284]

However, the second bullet above was not expressly stated in prior law. The second bullet requires the claimant to provide in the annual report an updated timeframe to attain a desired outcome level when the desired outcome has not yet been achieved,

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[1281] Code of Federal Regulations, title 40, section 122.42(c).

[1282] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.b., page 14.

[1283] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.b., page 14.

[1284] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.).

but the claimant believes that the existing controls and BMPs are adequate and need more time. Federal law does require the permittee to report on the status of the program, but does not expressly require the reporting of an updated timeframe to attain a desired outcome level when the permittee believes that BMP modifications are not necessary. Thus, the following activity is new:

- Provide in the annual report an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended.[1285]

iv. Section K.3.c.3.

Section K.3.c.3. requires that each JRMP annual report contain the reporting checklist in Attachment D,[1286] which must be no longer than two pages, be current as of the first day of the rainy season, include a signed certification statement, and provide the following information:

- Order Requirements: were all requirements of this order met?
- Construction: number of active sites, number of inactive sites, number of sites inspected, number of inspections, number of violations, number of construction enforcement actions taken.
- New Development: number of development plan reviews, number of grading permits issued, number of projects exempted from interim/final hydromodification requirements.
- Post Construction Development: number of priority development projects, number of SUSMP required post-construction BMP inspections, number of SUSMP required post-construction BMP violations, number of SUSMP required post-construction BMP enforcement actions taken.
- Illicit Discharges and Connections: number of inspections, number of detections by staff, number of detections from the public, number of eliminations, number of violations, number of enforcement actions taken.
- MS4 Maintenance: number of inspections conducted, amount of waste removed, total miles of MS4 inspected.

[1285] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.2.).

[1286] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.3.).

- Municipal/Commercial/Industrial: number of facilities, number of inspections conducted, number of facilities inspected, number of violations, number of enforcement actions taken.[1287]

The prior permit did not include a checklist. However, some of the information in the checklist was required to be reported under the prior permit. In addition, federal law requires that the annual report include some of the information described below. Thus, gathering and reporting the following information required by Section K.3.c.3. is *not* new and does not constitute a new program or higher level of service:

- Order Requirements: were all requirements of this order met? Federal law requires a permittee to file reports to ensure compliance with the permit and water quality standards.[1288] Federal law also requires the report to include the status of implementing the components of the storm water management program that are established as permit conditions; a summary of data, including monitoring data, that is accumulated throughout the reporting year; and identification of water quality improvements or degradation.[1289] In addition, the prior permit required that the annual report contain a "comprehensive description of all activities conducted by the copermittee to meet all requirements" of the permit.[1290] Thus, reporting on whether the permittee met the requirements of the order is not new.
- Construction: The number of inspections and number of construction enforcement actions taken are required by federal law.[1291] In addition, these reporting requirements are in the prior permit which required reporting on "(i) Number of inspections conducted; (ii) Number and type of enforcement actions related to construction sites."[1292]
- New Development: The number of grading permits issued is a reporting requirement in the prior permit which required reporting on "(ii) Number of grading permits issued."[1293]

[1287] Exhibit A, Test Claim, filed November 10, 2011, page 296 (test claim permit, Attachment D.).

[1288] United States Code, title 33, section 1342(a)(2) (Public Law 100-4).

[1289] Code of Federal Regulations, title 40, section 122.42(c).

[1290] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1., page 12.

[1291] Code of Federal Regulations, title 40, section 122.42(c).

[1292] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.2., page 12.

[1293] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

- Illicit Discharges and Connections: The number of IC/ID detections by staff, number of IC/ID detections from the public, and number of IC/ID enforcement actions taken are reporting requirements in the prior permit which required reporting on "(i) Number of illicit discharges, connections and spills reported and/or identified during the reporting period; . . . (iii) Number and types of enforcement actions taken for illicit discharges or connections during the reporting period."[1294] The requirement to report the number of IC/ID inspections and number enforcement actions are also required by federal law.[1295]
- MS4 Maintenance: The number of inspections conducted is required to be reported by federal law.[1296] The amount of waste removed was required under the prior permit which included "an assessment of the amount and type of debris removed from catch basins, streets, and open channels."[1297]
- Municipal/Commercial/Industrial: The number of inspections conducted and number of enforcement actions taken are required by federal law.[1298] In addition, these reporting requirements are in the prior permit which required reporting on "(i) Number of inspections conducted; (ii) Number and type of enforcement actions taken."[1299]

The following reporting requirements in Section K.3.c.3. require the reporting of numbers on the checklist, including but not limited to the number of sites, inspections, violations, and enforcement actions, which are not expressly required by federal law or the prior permit. Therefore, gathering and reporting the following specific numbers on the checklist required by Section K.3.c.3. *is new*:

- Construction:

  Number of Active Sites

  Number of Inactive Sites

  Number of Sites Inspected

  Number of Violations

- New Development:

[1294] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

[1295] Code of Federal Regulations, title 40, section 122.42(c).

[1296] Code of Federal Regulations, title 40, section 122.42(c).

[1297] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3., page 13.

[1298] Code of Federal Regulations, title 40, section 122.42(c).

[1299] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3. and 4., pages 12-13.

Number of Development Plan Reviews

Number of Projects Exempted from Interim/Final Hydromodification Requirements

- Post Construction Development:

  Number of Priority Development Projects

  Number of SUSMP Required Post-Construction BMP Inspections

  Number of SUSMP Required Post-Construction BMP Violations

  Number of SUSMP Required Post-Construction BMP Enforcement Actions Taken

- Illicit Discharges and Connections:

  Number of IC/ID Eliminations

  Number of IC/ID Violations

- MS4 Maintenance:

  Total Miles of MS4 Inspected

- Municipal/Commercial/Industrial:

  Number of Facilities

  Number of Violations[1300]

v. Section K.3.c.4.

Section K.3.c.4. requires the following information identified in Table 5 to be included in the annual report:[1301]

a. New Development:

   - All updated relevant sections of the general plan and environmental review process and a description of any planned updates within the next annual reporting period, if applicable;
   - All revisions to the SSMP, including where applicable: (a) identification and summary of where the SSMP fails to meet the requirements of this Order; (b) updated procedures for identifying pollutants of concern for each priority development project; (c) updated treatment BMP ranking matrix; (d) updated site design and treatment control BMP design standards;
   - Number of priority development projects reviewed and approved during the reporting period. Brief description of BMPs required at approved priority

[1300] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 296 (test claim permit, Section K.3.c.3., Attachment D).

[1301] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.4.).

development projects. Verification that site design, source control, and treatment BMPs were required on all applicable priority development projects;

- Name and location of all priority development projects that were granted a waiver from implementing LID BMPs pursuant to Section F.1.d.4. during the reporting period;
- Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority priority development projects; and verification that the requirements of this Order were met during the reporting period;
- Name and brief description of all approved priority development projects required to implement hydrologic control measures in compliance with Section F.1.h., including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels;
- Number and description of all enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities.[1302]

b. Construction:

- All updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable;
- A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality;
- Any changes to the designated minimum and enhanced BMPs;
- Summary of the inspection program, including the following information: (a) total number and date of inspections conducted at each facility; (b) number, date, and types of enforcement actions by facility; (c) brief description of each high-level enforcement actions at construction sites including the effectiveness of the enforcement. Supporting paper (or electronic) files must be maintained and made available upon the Regional Board's request. Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.[1303]

[1302] Exhibit A, Test Claim, filed November 10, 2011, pages 263-264 (test claim permit, Table 5.).

[1303] Exhibit A, Test Claim, filed November 10, 2011, page 264 (test claim permit, Table 5.).

c. Municipal:

- Updated source inventory;
- All changes to the designated municipal BMPs;
- Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies;
- Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) list of projects retrofitted; (b) list and description of structures evaluated for retrofitting; (c) list of structures still needing to be evaluated and the schedule for evaluation;
- Summary of the municipal structural treatment control operations and maintenance activities, including: (a) number of inspections and types of facilities; (b) summary of findings;
- Summary of the MS4 and MS4 facilities operations and maintenance activities, including: (a) number and types of facilities maintained; (b) amount of material removed; (c) list of facilities planned for bi-annual inspections and the justification;
- Summary of the municipal areas/programs inspection activities, including: (a) number and date of inspections conducted at each facility; (b) the BMP violations identified during the inspection by facility; (c) number, date and types of enforcement actions by facility; (d) summary of inspection findings and follow-up activities for each facility;
- Description of activities implemented to address sewage infiltration into the MS4;
- Description of BMPs and their implementation for unpaved roads construction and maintenance.[1304]

d. Commercial/Industrial:

- Updated inventory of commercial/industrial sources;
- Summary of the inspection program, including the following information: (a) number and date of inspections conducted at each facility or mobile business; (b) the BMP violations identified during the inspection by facility; (c) number, date, and types of enforcement actions by facility or mobile business; (d) brief description of each high-level enforcement actions at commercial/industrial sites including the effectiveness of the enforcement and follow-up activities for each facility;
- All changes to designated minimum and enhanced BMPs;

[1304] Exhibit A, Test Claim, filed November 10, 2011, pages 264-265 (test claim permit, Table 5.).

- A list of industrial sites, including each name, address, and Standard Industrial Classification (SIC) code, that the copermittee suspects may require coverage under the General Industrial Permit, but has not submitted a Notice of Intent (NOI).[1305]

e. Residential:

- All updated minimum BMPs required for residential areas and activities;
- Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities;
- Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.[1306]

f. Retrofitting Existing Development:

- Updated inventory and prioritization of existing development identified as candidates for retrofitting;
- Description of efforts to retrofit existing developments during the reporting year;
- Description of efforts taken to encourage private landowners to retrofit existing development;
- A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated;
- Any proposed retrofit or regional mitigation projects and time lines for future implementation;
- Any proposed changes to the copermittee's overall retrofitting program.[1307]

g. Illicit Discharge Detection and Elimination:

- Any changes to the legal authority to implement illicit discharge detection and elimination activities;
- Any changes to the established investigation procedures;
- Any changes to public reporting mechanisms, including phone numbers and web pages;

[1305] Exhibit A, Test Claim, filed November 10, 2011, page 265 (test claim permit, Table 5.).

[1306] Exhibit A, Test Claim, filed November 10, 2011, page 266 (test claim permit, Table 5.).

[1307] Exhibit A, Test Claim, filed November 10, 2011, page 266 (test claim permit, Table 5.).

- Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved;
- A description of instances when field screening and analytical data exceeded action levels, including those instances for which no investigation was conducted;
- A description of follow-up and enforcement actions taken in response to investigations of illicit discharges and a description of the outcome of the investigation/enforcement actions.[1308]

h. Workplans:

- Updated workplans including priorities, strategy, implementation schedule, and effectiveness evaluation.[1309] The test claim permit discusses the following workplans: the watershed water quality workplan (watershed workplan),[1310] special studies workplans,[1311] and monitoring program workplan.[1312]

Both federal law and the prior permit required the copermittees to report on much of the information found in Table 5. Thus, reporting the following information in Table 5, and as required by Section K.3.c.4., is *not* new and does not impose a new program or higher level of service:

a. New Development:

- All updated relevant sections of the general plan and the environmental review process. The prior permit required the permittees to include a description of any amendments to the general plan and a description of any updates to the environmental review process in the annual report.[1313]
- Number of priority development projects reviewed and approved during the reporting period. The prior permit required the copermittees to report on the number of developments conditioned to meet SUSMP

[1308] Exhibit A, Test Claim, filed November 10, 2011, page 266 (test claim permit, Table 5.).

[1309] Exhibit A, Test Claim, filed November 10, 2011, page 266 (test claim permit, Table 5.).

[1310] Exhibit A, Test Claim, filed November 10, 2011, pages 255-257 (test claim permit, Section G.).

[1311] Exhibit A, Test Claim, filed November 10, 2011, pages 314-318 (test claim permit, Monitoring and Reporting Program, Section E.).

[1312] Exhibit A, Test Claim, filed November 10, 2011, page 321 (test claim permit, Monitoring and Reporting Program, Section E.).

[1313] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

requirements.[1314] The SUSMP was a plan to reduce pollutants and to maintain or reduce downstream erosion and stream habitat from all priority development projects.[1315]

- Number and description of all enforcement activities applicable to the new development and redevelopment component. Federal law requires the reporting of a summary describing the number and nature of enforcement actions.[1316]
- A summary of the effectiveness of all enforcement activities applicable to the new development and redevelopment component. The prior permit required each copermittee to review and "ensure" that all priority development projects meet SUSMP requirements[1317] and provide in the annual report, an assessment of entire program's effectiveness based on the measurable goals established in the copermittee's SWMP.[1318]
- All revisions to the SSMP, including where applicable: (a) Identification and summary of where the SSMP fails to meet the requirements of this Order. The prior permit required the annual report to include proposed revisions to the Individual SWMP, including areas in need of improvement based on the assessment of effectiveness of each program component.[1319]

b. Construction:

- All updated relevant ordinances. One of the permit requirements under federal law is to show that the copermittee has adequate legal authority to control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by stormwater discharges associated with industrial activity and "industrial activity" is

[1314] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

[1315] Redevelopment includes, but is not limited to, the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land disturbing activities related with structural or impervious surfaces. Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.b.).

[1316] Code of Federal Regulations, title 40, section 122.42(c).

[1317] Exhibit A, Test Claim, filed November 10, 2011, page 577, (Order R9-2004-0001, Section F.2.b.).

[1318] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

[1319] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.2., page 12.

defined to include construction activities.[1320] Federal law then requires reporting proposed changes to the stormwater management programs that are established as permit conditions.[1321]

- Summary of the inspection program, including the following information: Total number of inspections conducted at each facility; number and types of enforcement actions by facility; brief description of each high-level enforcement actions at construction sites. The prior permit required the number of inspections and number and type of enforcement actions.[1322] The prior permit also required that the SWMP contain a description of enforcement mechanisms and steps that will be used.[1323] And the annual report had to include an assessment of program effectiveness based on the measurable goals established in the copermittee's SWMP.[1324] In addition, federal law requires the reporting of a summary describing the number and nature of enforcement actions and inspections.[1325]
- Supporting paper (or electronic) files must be maintained by the copermittees and made available upon San Diego Water Board's request. Federal law requires the retention of monitoring records, copies of required reports, and records of all data used to complete the permit application for a period of at least three years.[1326]

c. Municipal:

- Include the number of inspections in the summary of the municipal structural treatment control operations and maintenance activities. The prior permit required that the annual report include the number of municipal inspections conducted.[1327] In addition, federal law requires the

[1320] Code of Federal Regulations, title 40, section 122.26(b)(12) and section 122.26(d)(2)(i)(A).

[1321] Code of Federal Regulations, title 40, section 122.42(c).

[1322] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.2., page 12.

[1323] Exhibit A, Test Claim, filed November 10, 2011, page 618 (Order R9-2004-0001, Attachment D, Section 3.j.).

[1324] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.2., page 12.

[1325] Code of Federal Regulations, title 40, section 122.42(c).

[1326] Code of Federal Regulations, title 40, section 122.41(j)(2).

[1327] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3., pages 12-13.

reporting of a summary describing the number and nature of inspections.[1328]

- Include in the summary of the MS4 and MS4 facilities operations and maintenance activities, the (b) amount of material removed. The prior permit also required the permittees to report an assessment of the amount and type of debris removed from catch basins, streets, and open channels.[1329]
- Summary of the municipal areas/programs inspection activities, including: number of inspections conducted at each facility; number and types of enforcement actions by facility; summary of inspection findings and follow-up actions for each facility. The prior permit required the number of municipal inspections conducted.[1330] In addition, federal law requires the reporting of a summary describing the number and nature of enforcement actions and inspections.[1331]

d. Commercial/Industrial:

- Summary of the inspection program, including the following information: Number of inspections conducted at each facility or mobile business;[1332] number and types of enforcement actions by facility or mobile business; brief description of each high-level enforcement action at commercial/industrial sites. The prior permit required the copermittees to report on the number of inspections conducted, and the number and type of enforcement actions taken.[1333] In addition, federal law requires the reporting of a summary describing the number and nature of enforcement actions and inspections.[1334]
- A list of industrial sites, including each name, address, and the Standard Industrial Classification (SIC) code, that the copermittee suspects may require coverage under the General Industrial Permit, but has not submitted a Notice of Intent (NOI) to be covered by the General Industrial

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[1328] Code of Federal Regulations, title 40, section 122.42(c).

[1329] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3., pages 12-13.

[1330] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.3., pages 12-13.

[1331] Code of Federal Regulations, title 40, section 122.42(c).

[1332] Section IV.B.7.b.ii., of this Decision finds that inspection of mobile businesses is not new.

[1333] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.4., page 13.

[1334] Code of Federal Regulations, title 40, section 122.42(c).

Permit. The prior permit required that as part of each annual report, each copermittee shall report a list of industrial facilities, including the name, address, and SIC code, that may require coverage under the General Industrial Permit for which a NOI has not been filed.[1335]

e. Residential:

- Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities. Federal law requires the reporting of a summary describing the number and nature of enforcement actions.[1336]

f. Retrofitting Existing Development:

- Any proposed changes to the copermittee's overall retrofitting program. Federal law requires reporting proposed changes to the stormwater management programs that are established as permit conditions.[1337]

g. Illicit Discharge Detection and Elimination:

- Any changes to the legal authority to implement illicit discharge detection and elimination activities. One of the permit requirements under federal law is to show that the permittee has adequate legal authority to prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer.[1338] In addition, the illicit discharge detection and elimination program is required to contain a description of a program to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4.[1339] Federal law then requires reporting proposed changes to the stormwater management programs that are established as permit conditions.[1340]

- Any changes to the established investigation procedures. Under federal law, the illicit discharge detection and elimination program is required to contain a description of procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[1341] Federal law then requires reporting proposed changes

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[1335] Exhibit A, Test Claim, filed November 10, 2011, page 592 (Order R9-2004-0001, Section H.2.f.).

[1336] Code of Federal Regulations, title 40, section 122.42(c).

[1337] Code of Federal Regulations, title 40, section 122.42(c).

[1338] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[1339] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[1340] Code of Federal Regulations, title 40, section 122.42(c).

[1341] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

to the stormwater management programs that are established as permit conditions.[1342]

- Any changes to public reporting mechanisms, including phone numbers and web pages. Under federal law, the illicit discharge detection and elimination program is required to contain a description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s.[1343] Federal law then requires reporting proposed changes to the stormwater management programs that are established as permit conditions.[1344]
- Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved. The prior permit required a summary of illicit discharge monitoring program results, including: 1) all inspection, field screening, and analytical monitoring results; 2) all follow-up and elimination activities; and 3) any proposed changes to station locations and/or sampling frequencies.[1345]
- A description of instances when field screening and analytical data exceeded action levels, including those instances for which no investigation was conducted. The prior permit required reporting of field screening and analytical data in a summary of illicit discharge monitoring program results, as follows: 1) all inspection, field screening, and analytical monitoring results; 2) all follow-up and elimination activities; and 3) any proposed changes to station locations and/or sampling frequencies.[1346]
- A description of enforcement actions taken in response to investigations of illicit discharges. Federal law requires the reporting of a summary describing the number and nature of enforcement actions.[1347] The prior permit also required the reporting of the number and types of enforcement

[1342] Code of Federal Regulations, title 40, section 122.42(c).

[1343] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[1344] Code of Federal Regulations, title 40, section 122.42(c).

[1345] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

[1346] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

[1347] Code of Federal Regulations, title 40, section 122.42(c).

actions taken for illicit discharges or connections during the reporting period.[1348]

- A description of follow-up actions taken in response to investigations of illicit discharges. The prior permit required that the summary of illicit discharge monitoring program results include "All follow-up and elimination activities."[1349]
- A description of the outcome of the investigation/enforcement actions. The prior permit provided, "All reported incidents, and how each was resolved, shall be summarized in each Permittee's Individual Annual Report."[1350]

The following information contained in Table 5, and required to be reported by Section K.3.c.4., are not specifically required by federal law and are not expressly required by the prior permit. Therefore, reporting the following specific information required by Section K.3.c.4. *is new*:

a. New Development:

- All revisions to the SSMP, including where applicable: (b) updated procedures for identifying pollutants of concern for each priority development project; (c) updated treatment BMP ranking matrix; (d) updated site design and treatment control BMP design standards.[1351]
- Brief description of BMPs required at approved priority development projects. Verification that site design, source control, and treatment BMPs were required on all applicable priority development projects.[1352]

  The prior permit required the copermittees to attach one example of a development project that was conditioned to meet SUSMP requirements and a description of the required BMPs for that example,[1353] but did not require the copermittees to describe the BMPs required at all approved priority development projects or provide verification that BMPs were required. In

[1348] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

[1349] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.7., page 13.

[1350] Exhibit A, Test Claim, filed November 10, 2011, page 595 (Order R9-2004-0001, Section J.8.).

[1351] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 2.).

[1352] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 3.).

[1353] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.1., page 12.

addition, the prior permit required project proponents to provide the copermittee proof of a mechanism which will ensure ongoing long-term maintenance of all structural post-construction BMPs,[1354] but there was no requirement for the copermittee to provide that verification in the annual report to the Regional Board.

- Name and location of all priority development projects that were granted a waiver from implementing LID BMPs pursuant to Section F.1.d.4. during the reporting period.[1355]
- Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority priority development projects; and verification that the requirements of the test claim permit were met during the reporting period.[1356]
- Name and brief description of all approved priority development projects required to implement hydrologic control measures in compliance with Section F.1.h., including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels.[1357]

b. Construction:

- A description of planned ordinance updates within the next annual reporting period, if applicable.[1358]
- A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.[1359]

[1354] Exhibit A, Test Claim, filed November 10, 2011, page 577 (Order R9-2004-0001, Section F.2.a.6.).

[1355] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 4.).

[1356] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 5.).

[1357] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. New Development 6.).

[1358] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 1.).

[1359] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 2.).

- Any changes to the designated minimum and enhanced BMPs.[1360]
- Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility; (b) date of enforcement actions by facility; (c) brief description of the effectiveness of each high-level enforcement action at construction sites.[1361]
- Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.[1362]

c. Municipal:

- Updated source inventory.[1363]
- All changes to the designated municipal BMPs.[1364]
- Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.[1365]
- Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) list of projects retrofitted; (b) list and description of structures evaluated for retrofitting; (c) list of structures still needing to be evaluated and the schedule for evaluation.[1366]
- Include in the summary of the MS4 and MS4 facilities operations and maintenance activities, the (a) number and types of facilities maintained.[1367]

  The prior permit required the copermittees to inventory all municipal facilities and activities, including a description of the facilities and activities, and to

[1360] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 3.).

[1361] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1362] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1363] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 1.).

[1364] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 2.).

[1365] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 3.).

[1366] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 4.).

[1367] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.a.).

report the number of municipal inspections conducted.[1368] But the claimants were not required to report the number of facilities maintained.

- Include (a) types of facilities and (b) summary of the inspection findings in the summary of the municipal structural treatment control operations and maintenance activities.[1369]
- Include a list of facilities planned for bi-annual inspections and the justification in the summary of the MS4 and MS4 facilities operations and maintenance activities.[1370]
- Include in the summary of the municipal areas/programs inspection activities: (a) date of inspections conducted at each facility; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility.[1371]
- Description of activities implemented to address sewage infiltration into the MS4.[1372]
- Description of BMPs and their implementation for unpaved roads construction and maintenance.[1373]

d. Commercial/Industrial:

- Updated inventory of commercial/industrial sources of discharges.[1374]
- Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility or mobile business; (b) the BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility or mobile business; (d) brief description of the

[1368] Exhibit A, Test Claim, filed November 10, 2011, page 587 (Order R9-2004-0001, Section H.1.b., page 22); Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section III.A.1.a.(3).

[1369] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.).

[1370] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 6.c.).

[1371] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 7.a.-c.).

[1372] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 8.).

[1373] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 9.).

[1374] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 1.).

effectiveness each high-level enforcement actions at commercial/industrial sites including the follow-up activities for each facility.[1375]

- All changes to designated minimum and enhanced BMPs.[1376]

e. Residential:

- All updated minimum BMPs required for residential areas and activities.[1377]
- Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.[1378]

f. Retrofitting Existing Development:

- Updated inventory and prioritization of existing development identified as candidates for retrofitting.[1379]
- Description of efforts to retrofit existing developments during the reporting year.[1380]
- Description of efforts taken to encourage private landowners to retrofit existing development.[1381]
- A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated.[1382]

[1375] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 2.).

[1376] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 3.).

[1377] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 1.).

[1378] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 3.).

[1379] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 1.).

[1380] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 2.).

[1381] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 3.).

[1382] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 4.).

- Any proposed retrofit or regional mitigation projects and time lines for future implementation.[1383]

g. Workplans:

- Updated workplans including priorities, strategy, implementation schedule, and effectiveness evaluation.[1384]

c. Except for the reporting on claimants' own municipal projects required by Section K.3.c.3., and K.3.c.4., the new requirements imposed by Section K.3.c.1.-4. are mandated by the state.

i. The arguments raised by the parties

The claimants contend that these requirements are mandated by the state and impose a new program or higher level of service. The claimants state that federal regulations require an annual report, which includes a "summary of data, including monitoring data" and a summary describing the number and nature of enforcement actions, inspections and public educations programs. The test claim permit requires far more.[1385] The claimants further contend that having to include information on municipal projects in their annual reporting is not related to any discretionary decision to embark on a municipal project.[1386] The claimants conclude that the additional requirements imposed are the true choice of the Regional Board and, thus, are mandated by the state and impose new program or higher level of service.[1387]

The Water Boards contend that the information challenged by the claimants is not mandated by the state and does not impose a new program or higher level of service. Rather, the Water Boards contend that the reporting is required under federal law (Code of Federal Regulations, title 40, section 122.42(c)) and is necessary to demonstrate whether the storm water management programs are implementing the most effective controls to reduce the discharge of pollutants to the MEP standard.[1388]

[1383] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 5.).

[1384] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Workplans).

[1385] Exhibit A, Test Claim, filed November 10, 2011, page 73 (Test Claim narrative); Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 27-28.

[1386] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 28-29.

[1387] Exhibit A, Test Claim, filed November 10, 2011, page 74 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 479, 765, 768.

[1388] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 50.

> Unlike in the LA Permit case considered in *Department of Finance* [*v. Commission on State Mandates* (2016) 1 Cal.5th 479, 765]*,* the San Diego Water Board found that the provisions in the 2010 Permit are exclusively based on federal law and found that the underlying substantive provisions to be reported upon were necessary to meet the MEP standard. Consistently, the 2010 Permit found that "[a]nnual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs." [Footnote omitted.] The San Diego Water Board's findings are entitled to deference under *Department of Finance*.[1389]

The Water Boards further contend that the prior permit included annual reporting and the contents of the report was specified in great detail as part of the MRP. The test claim permit reduces the amount of activity-based reporting. Thus, the Water Boards argue that the "extensive level of detailed reporting requirements already in place prior to adoption of the 2010 Permit support the conclusion that no new program or higher level of service was imposed."[1390] Further, the Water Boards state that, for many of the provisions underlying the reporting requirements, the claimants have fee authority. Also, some of the reporting is on municipal projects that are undertaken voluntarily by the claimants and do not result in reimbursable costs. Finally, the inclusion of information generated from programmatic data should only result in de minimis costs.[1391]

For the reasons below, the Commission finds that, *except* for the reporting on claimants' own municipal projects, the new requirements imposed by Section K.3.c.1.-4. are mandated by the state.

ii. Except for the reporting on claimants' own municipal projects, the new requirements imposed by Section K.3.c.1.-4. are mandated by the state.

Both parties rely on the 2016 Supreme Court decision in *Department of Finance v. Commission on State Mandates* to support or distinguish their positions. As stated earlier in this Decision, the California Supreme Court in the 2016 *Department of Finance* case reviewed prior court decisions on the federal mandate issue and identified the

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[1389] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 50, quoting Exhibit A, Test Claim, filed November 10, 2011, page 431 (Fact Sheet/Technical Report, Finding D.1.g.), citing Code of Federal Regulations, title 40, section 122.42(c).

[1390] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 51; Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 3-4.

[1391] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 54; Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 3-4.

following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[1392]

The court recognized that the "federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the US EPA's regulations gave the board discretion to determine which specific controls were necessary to meet the MEP standard. (40 C.F.R. § 122.26(d)(2)(iv).)"[1393] "Except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[1394]

The Supreme Court in *Department of Finance* also addressed the inspection requirements of that permit, finding that federal regulations "required the Operators to include in their permit application a description of priorities and procedures for inspecting certain industrial facilities and construction sites, but suggested that the Operators would have discretion in selecting which facilities to inspect" and agreed with the State that "some kind of operator inspections would be required."[1395] The court found that even though the federal regulations "contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions. As explained, the evidence before the Commission showed the opposite to be true."[1396]

The Supreme Court relied heavily on *Hayes v. Commission on State Mandates* in its determination of the whether a requirement is a state or federal mandate, and in its

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[1392] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[1393] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-768.

[1394] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[1395] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 770, 771.

[1396] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 771.

analysis of the inspection requirements.[1397] *Hayes* addressed state statutes that implemented the federal Education of the Handicapped Act, which required the state to provide certain services to special education students, and the court agreed that the Act imposed a federal mandate on the state.[1398] However, the court's "conclusion that the Education of the Handicapped Act is a federal mandate with respect to the state marks the starting point rather than the end of the consideration which will be required to resolve the Santa Barbara and Riverside test claims."[1399] The state's response to the federal mandate still needs to be viewed to determine if the state exercised "true discretion" in requiring local government to act.

> When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate. [Citation omitted.]
>
> This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. [Citation omitted.] Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[1400]

The court remanded the matter back to the Commission, finding as follows:

> In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new

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[1397] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 771, citing *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564.

[1398] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[1399] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[1400] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.

> programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[1401]

Here, like the program in *Hayes* and the inspection requirement in *Department of Finance*, there is a federal mandate to submit an annual report with the information required to be included in that report, and this Decision denies those reporting activities required by Section K.3. that are already expressly required by federal law.[1402] However, Sections K.3.c.1.-4. of the test claim permit go beyond the federal mandate, impose many new reporting requirements, and define the detailed scope of data the Regional Board requests that cannot be identified as incidental or "de minimis" in context, and thus, the new requirements are not part and parcel of a federal mandate.[1403] The findings in the test claim permit indicate that the "[a]nnual reporting requirements included in this Order are necessary to meet federal requirements *and* to evaluate the effectiveness and compliance of the Copermittees' programs,"[1404] and the Fact Sheet clarifies that the reporting requirements are based on federal law *and* Water Code section 13267 (which provides that "the Regional Board *may* require that any person who has discharged [...] shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires").[1405]

Federal law does not specifically require the information described above and there is no evidence in the record that providing the new required information is the only means by which program effectiveness and compliance can be evaluated. Thus, the new reporting requirements are mandated by the state.

Moreover, the introductory language to Section K. states "the Copermittees *may propose* alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance," which if approved, could conceivably reduce the scope of the reporting requirements.[1406] However, there is no evidence that any

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[1401] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594.

[1402] Code of Federal Regulations, title 40, section 122.42(c).

[1403] Referring to the Supreme Court's holding in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890, which adopted the reasoning in *County of Los Angeles v. Commission on State Mandate*s (1995) 32 Cal.App.4th 805, 815-818 (*County of Los Angeles II*).

[1404] Exhibit A, Test Claim, filed November 10, 2011, page 189 (test claim permit, Finding D.1.g.).

[1405] Exhibit A, Test Claim, filed November 10, 2011, page 439 (Fact Sheet/Technical Report).

[1406] Exhibit A, Test Claim, filed November 10, 2011, page 260 (test claim permit, Section K.). The test claim permit states, "The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC §13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order

proposals were filed or approved or that the reporting requirements in Section K. have been amended or reduced. Thus, the claimants are required to comply with the new reporting activities that are mandated by the test claim permit.

Finally, the Water Boards argue that some of the reporting is on municipal projects that are undertaken voluntarily by the claimants and do not result in reimbursable costs.[1407] For example, Section K.3.c.4. requires the claimants to report on their own municipal projects, including unpaved roads construction and maintenance, and identify a description and implementation of BMPs and inspection activities on those municipal projects. As previously explained in this Decision, state law does not mandate the claimants to develop or redevelop municipal projects or facilities, or to build or maintain unpaved roads. That decision is left to the discretion of the local agency.[1408] The courts have made clear that costs incurred as a downstream result of a local discretionary decision is not legally compelled by state law.[1409]

The claimants argue that *City of Merced* and *Kern High School Dist*. cases should not be read so broadly regarding downstream effects of a discretionary decision. "In those cases, the 'downstream' costs were part and parcel of the package of costs incurred in

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unless such delegation is unlawful under CWC §13223 or this Order explicitly states otherwise." Exhibit A, Test Claim, filed November 10, 2011, page 199, footnote 4 (test claim permit, Section A.).

[1407] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 54.

[1408] For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code section 1800 ("The legislative body of any city may do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."); and Streets and Highways Code section 1801 ("The legislative body of any city may close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or may make provision for carrying such street or highway over, under, or to a connection with the freeway, and may do any and all necessary work on such street or highway.").

[1409] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782-783; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 744-745.

the discretionary activity."[1410] The claimants contend that having to include information on municipal projects in their annual reporting has nothing to do with the imposition of conditions on the construction or operation of those municipal projects. "Whether or not the decision to build them was discretionary on the part of the municipality, the Test Claim Permit's obligation on permittees to report on them was not."[1411]

As explained throughout this Decision, when local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required, regardless of when the initial decision to participate in the program began.[1412] This was true in the *Kern High School Dist.*, where school districts made the discretionary decision to participate in the school site council program, well before the state imposed additional notice and agenda requirements on those programs.[1413] The claimants cite no authority for any limitation on the application of *City of Merced* and *Kern High School Dist*. cases, nor the downstream effects of a discretionary decision. Without such authority, the holdings of *City of Merced* and *Kern High School Dist*. cases must be applied as set forth in those decisions.

Moreover, there is no evidence in the record that a failure to develop or redevelop priority municipal projects would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[1414] The Commission's regulations require that all written representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief.[1415]

Accordingly, *except* for the reporting on claimants' own municipal projects, the new requirements imposed by Section K.3.c.1.-4. are mandated by the state.

iii. The new annual reporting requirements mandated by Section K.3.c.1.-4. constitute a new program or higher level of service.

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. To determine whether a program is new or provides a higher

[1410] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 29.

[1411] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 28-29.

[1412] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731, 743.

[1413] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 732, 753.

[1414] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.)* (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74.

[1415] California Code of Regulations, title 2, sections 1183.1(e), 1187.5(b).

level of service in an existing program, the requirements in the test claim statute or executive order are compared with the legal requirements in effect before the test claim statute or executive order.[1416] If the requirements are new, the analysis continues to determine if the requirements constitute a "program" within the meaning of article XIII B, section 6, which is defined as one that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[1417] Only one of these alternatives is required to establish a new program or higher level of service.[1418]

Here, the new requirements mandated by Section K.3.c.1.-4. are expressly directed toward the local agency permittees in their regulatory capacity and, thus, are unique to government, and detail their responsibilities to provide additional information in the JRMP annual report to the Regional Board to ensure compliance with the JRMP components of the test claim permit and water quality standards. "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[1419]

Accordingly, *except* for the reporting on claimants' own municipal projects required by Section K.3.c.3., 4., the new requirements imposed by Section K.3.c.1.-4. of the test claim permit mandate a new program or higher level of service for the following activities:

1. Include in the annual fiscal analysis a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.[1420]
2. Provide in the annual report an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected

[1416] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1417] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[1418] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1419] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[1420] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.1.).

timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended.[1421]

3. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, providing the following information in the Checklist pursuant to Section K.3.c.3.:
    a. Construction:
        1) Number of Active Sites
        2) Number of Inactive Sites
        3) Number of Sites Inspected
        4) Number of Violations
    b. New Development:
        1) Number of Development Plan Reviews
        2) Number of Projects Exempted from Interim/Final Hydromodification Requirements
    c. Post Construction Development:
        1) Number of Priority Development Projects
        2) Number of SUSMP Required Post-Construction BMP Inspections
        3) Number of SUSMP Required Post-Construction BMP Violations
        4) Number of SUSMP Required Post-Construction BMP Enforcement Actions Taken
    d. Illicit Discharges and Connections:
        1) Number of IC/ID Eliminations
        2) Number of IC/ID Violations
    e. MS4 Maintenance:
        1) Total Miles of MS4 Inspected
    f. Municipal/Commercial/Industrial:
        1) Number of Facilities
        2) Number of Violations[1422]

[1421] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.2.).

[1422] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 296 (test claim permit, Section K.3.c.3., Attachment D.).

4. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, report the following information contained in Table 5 and required to be reported by Section K.3.c.4.:

   a. New Development:

      1) All revisions to the SSMP, including where applicable: (b) updated procedures for identifying pollutants of concern for each priority development project; (c) updated treatment BMP ranking matrix; (d) updated site design and treatment control BMP design standards.[1423]

      2) Brief description of BMPs required at approved priority development projects. Verification that site design, source control, and treatment BMPs were required on all applicable priority development projects.[1424]

      3) Name and location of all priority development projects that were granted a waiver from implementing LID BMPs pursuant to Section F.1.d.4 during the reporting period.[1425]

      4) Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority priority development projects; and verification that the requirements of this Order were met during the reporting period.[1426]

      5) Name and brief description of all approved priority development projects required to implement hydrologic control measures in compliance with Section F.1.h., including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels.[1427]

[1423] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 2.).

[1424] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 3.).

[1425] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 4.).

[1426] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 5.).

[1427] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. New Development 6.).

b. Construction:

1) A description of planned ordinance updates within the next annual reporting period, if applicable.[1428]

2) A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.[1429]

3) Any changes to the designated minimum and enhanced BMPs.[1430]

4) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility; (b) date of enforcement actions by facility; (c) brief description of the effectiveness of each high-level enforcement action at construction sites.[1431]

5) Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.[1432]

c. Municipal:

1) Updated source inventory.[1433]

2) All changes to the designated municipal BMPs.[1434]

3) Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.[1435]

[1428] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 1.).

[1429] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 2.).

[1430] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 3.).

[1431] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1432] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1433] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 1.).

[1434] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 2.).

[1435] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 3.).

4) Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) List of projects retrofitted; (b) List and description of structures evaluated for retrofitting; (c) List of structures still needing to be evaluated and the schedule for evaluation.[1436]

5) Include in the summary of the MS4 and MS4 facilities operations and maintenance activities, the (a) Number and types of facilities maintained.[1437]

6) Include (a) types of facilities and (b) summary of the inspection findings in the summary of the municipal structural treatment control operations and maintenance activities.[1438]

7) Include a list of facilities planned for bi-annual inspections and the justification in the summary of the MS4 and MS4 facilities operations and maintenance activities.[1439]

8) Include in the summary of the municipal areas/programs inspection activities: (a) date of inspections conducted at each facility; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility.[1440]

9) Description of activities implemented to address sewage infiltration into the MS4.[1441]

10) Description of BMPs and their implementation for unpaved roads construction and maintenance.[1442]

[1436] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 4.).

[1437] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.a.).

[1438] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.).

[1439] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 6.c.).

[1440] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 7.a.-c.).

[1441] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 8.).

[1442] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 9.).

d. Commercial/Industrial:

1) Updated inventory of commercial/industrial sources of discharges.[1443]

2) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility or mobile business; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility or mobile business; (d) brief description of the effectiveness each high-level enforcement actions at commercial/industrial sites including the follow-up activities for each facility.[1444]

3) All changes to designated minimum and enhanced BMPs.[1445]

e. Residential:

1) All updated minimum BMPs required for residential areas and activities.[1446]

2) Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.[1447]

f. Retrofitting Existing Development:

1) Updated inventory and prioritization of existing development identified as candidates for retrofitting.[1448]

2) Description of efforts to retrofit existing developments during the reporting year.[1449]

[1443] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 1.).

[1444] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 2.).

[1445] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 3.).

[1446] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 1.).

[1447] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 3.).

[1448] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 1.).

[1449] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 2.).

3) Description of efforts taken to encourage private landowners to retrofit existing development.[1450]

4) A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated.[1451]

5) Any proposed retrofit or regional mitigation projects and time lines for future implementation.[1452]

g. Workplans:

1) Updated workplans including priorities, strategy, implementation schedule, and effectiveness evaluation.[1453]

11. Attachment E. of the Test Claim Permit, Which Addresses Special Studies in Section II.E.2.-5., Mandates a New Program or Higher Level of Service.

The claimants pled Section II.E.2.-5., of Attachment E., which is the Monitoring and Reporting Program (MRP), and contend Section II.E.2.-5. requires the claimants to perform the following four special studies: Sediment Toxicity Study; Trash and Litter Investigation; Agricultural, Federal and Tribal Input Study; and MS4 Receiving Water and Maintenance Study.[1454]

In response to the Draft Proposed Decision, the claimants allege that they pled a fifth special study, the LID Impacts Study, and request reimbursement for that fifth special study as follows:

> There is no discussion in the DPD, however, regarding a fifth special study ordered to be conducted.
>
> As set forth in Claimants' Rebuttal Comments, the Water Board ordered Claimants, in lieu of completing a study into intermittent and ephemeral stream conversion into perennial streams as well as performance of

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[1450] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 3.).

[1451] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 4.).

[1452] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 5.).

[1453] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Workplans).

[1454] Exhibit A, Test Claim, filed November 10, 2011, pages 22, 75-81, 297-324 (Test Claim narrative; Attachment E.) The claimants did not plead the other special studies addressed in Attachment E., Sections II.E.6. and 7. and, thus, this Decision does not address those studies.

> monitoring in an MS4 and receiving waters management study, to perform a study on the impacts of LID protections on downstream flows to Camp Pendleton and potential impacts on downstream beneficial uses ("LID Impacts Study"). See Rebuttal Comments at 52-53 and Exhibits A and B to Declaration of Claudio M. Padres, P.E., attached thereto.
>
> While the LID Study was not required by the Test Claim Permit, it was required by the Water Board, acting under the powers granted by the Test Claim Permit; in fact in a letter from Water Board Assistant Executive Officer James G. Smith (Exhibit B to Padres Declaration), Mr. Smith stated that he would not recommend that the Water Board enforce the requirements in Section II.E.5 and II.E.6 of the Test Claim Permit MRP for Claimants to complete the other two special studies if they conducted the LID Study.[1455]

The claimant's rebuttal comments further admit that the LID Impacts Study was not required by the test claim permit:

> As indicated in the Narrative Statement at 60, the Claimants reached an agreement with the San Diego Water Board to substitute a special study on LID BMP impacts for performance of monitoring in the MS4 and Receiving Waters maintenance special study (the Claimants already incurred some $12,670 in locating monitoring sites and developing a monitoring plan for that study, *see* Letter dated May 29, 2012 to David Gibson of the San Diego Water Board, Exhibit B, attached hereto as Exhibit A to the Declaration of Claudio M. Padres, P.E. (Attachment 2)) and a special study on intermittent and ephemeral streams (as to which no funds were expended and which has been dropped from this Joint Test Claim).
>
> While this LID impacts study was not required by the 2010 Permit, it is clear that its performance was required by the San Diego Water Board.[1456]

Neither the test claim permit, nor Attachment E. to the test claim permit, require the claimant to conduct a LID Impact Study. The claimants suggest that the study was required in a Regional Board letter, but a test claim has not been filed on that letter.[1457] Accordingly, the Commission has no jurisdiction to determine whether a LID Impact Study imposes a reimbursable state mandated program.[1458]

[1455] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 29-30.

[1456] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, page 60.

[1457] Government Code section 17516 defines "executive order" to mean "an order, plan, requirement, rule, or regulation issued" by a state agency.

[1458] Government Code sections 17516, 17521, 17551, and 17553.

The Commission finds that that Attachment E., Sections II.E.2.-5. mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution to conduct the four special studies described below.

a. Background

i. Federal law requires permittees to provide any information the Director requests for determining compliance or whether modifications to the permit are required.

Federal law requires municipalities to apply for a NPDES permit to discharge any pollutant from an MS4.[1459] NPDES permits must include conditions to achieve water quality standards and objectives.[1460] One such condition is the duty to provide information: "The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit."[1461]

ii. The prior permit required the permittees to perform one special study on numeric criteria to control runoff from new developments.

The permittees have been monitoring water quality under a NPDES permit since 1993. The monitoring data indicated several persistent exceedances of water quality objectives for urban runoff-related pollutants. At the time that the prior permit was adopted, the water quality concerns in the Santa Margarita watershed included the Murrieta Creek and the upper Santa Margarita River, which were CWA section 303(d) listed for phosphorus and the estuary listed for eutrophication. Other constituents of concern were sedimentation/siltation, iron, manganese and total dissolved solids (TDS). The County of Riverside's water quality concerns were sediment from construction-related erosion and pollution due to urban storm water runoff. Further down the watershed, the County of San Diego's concerns were eutrophication, nitrogen, phosphorus, diazinon, TDS, other toxic substances, and trash.[1462] However, due to inadequate monitoring and reporting, it was not possible to conduct a detailed analysis to establish the sources of the pollutants.[1463]

Thus, the prior permit required the permittees to conduct special studies as directed by the executive officer, in addition to their monitoring requirements. The prior permit

[1459] Code of Federal Regulations, title 40, section 122.26(a)(3)(2010); *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101-102.

[1460] Code of Federal Regulations, title 40, section 122.44(d)(1).

[1461] Code of Federal Regulations, title 40, section 122.42(h).

[1462] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, Table 1, page 16.

[1463] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, pages 17-18.

explained that "[s]pecial studies are intended to address specific research or management issues that are not addressed by the routine core monitoring program."[1464]

> This monitoring is useful to address unique issues, oftentimes triggered by routine monitoring to help understand results or identify efficient management measures. Special studies are short-term studies with a predefined beginning, middle and end.[1465]

The prior permit included one special study, which required them to develop and implement a study to determine numeric criteria for controlling the volume, velocity, duration, and peak discharge rate of runoff from new developments to minimize erosion of natural stream channels and impacts to instream habitat. As part of the study, the permittees were required to propose numeric criteria and a time-schedule for implementation of the criteria on priority development projects within 365 days of the identification of the criteria and no later than the fourth year annual report or the application for permit renewal. The permittees had the option of using criteria developed in other areas of Southern California if they could demonstrate that such criteria are applicable to and protective of the conditions in the Upper Santa Margarita Watershed. The permittees were required to report the status of the study, implementation, and progress towards the development of numeric criteria in the annual report.[1466]

b. Sections II.E.2.-5., of Attachment E. to the Test Claim Permit, Which Requires the Claimants to Conduct Four New Special Studies, Mandates a New Program or Higher Level of Service.

The claimants have pled Sections II.E.2.-5., of the Attachment E. (the MRP), which requires the copermittees to conduct four special studies. The Fact Sheet explains the basis of the special studies requirements.

Under the prior permit, the copermittees expanded their stormwater programs and were largely in compliance with its requirements.[1467] However, prior to the adoption of the test claim permit, challenges remained:

> Today, storm and nonstorm water discharges from the MS4 continue to be the leading cause of water quality impairment in the San Diego Region. Since 1998, the number of impaired water bodies in the Riverside County portion of the San Diego Region on the CWA section 303(d) List of Water Quality Impaired Segments (303(d) List) has increased with each new list

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[1464] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.III., page 8.

[1465] Exhibit J (34), Order R9-2004-0001, Fact Sheet/Technical Report, pages 72-73.

[1466] Exhibit J (35), Order R9-2004-0001, Monitoring and Reporting Program, Section II.A.III., page 8.

[1467] Exhibit A, Test Claim, filed November 10, 2011, page 374 (Fact Sheet/Technical Report).

> (i.e. new impaired water bodies listed on the 2002, 2006, and 2008 303(d) Lists). The Copermittees' monitoring data exhibits persistent exceedances of water quality objectives in the Santa Margarita watershed. The Santa Margarita watershed also has conditions that are frequently toxic to aquatic life. Bioassessment data from the watersheds further reflects these conditions, finding that macroinvertebrate communities in creeks have widespread Poor to Very Poor Index of Biotic Integrity (IBI) ratings.[1468]

The section 303(d) list included Murrieta Creek listed for phosphorus, nitrogen, iron, and manganese and Upper Santa Margarita River listed for phosphorus. The sources for these constituents had still not been identified. In addition, Temecula Creek was listed for phosphorus, nitrogen, and TDS with no sources identified.[1469] The monitoring annual report for 2006-2007 reported the following constituents of concern: chlorpyrifos, dissolved copper, and dissolved lead which exceeded CTR objectives and fecal coliform, color, iron, manganese, MBAS, nitrogen, pH, phosphorous, total dissolved solids and turbidity which exceeded Basin Plan objectives.[1470]

In addition, trash remains a persistent pollutant which, after leaving the MS4, can accumulate posing a serious threat to the beneficial uses of the receiving waters.[1471] The Basin Plan includes water quality objectives that prohibit both floating materials and suspended and settleable materials. The copermittees documented high volumes of trash coming from the MS4 and in receiving waters. The Regional Board found that high density urban areas are responsible for up to 60 percent of trash entering MS4s. Moreover, trash on or near roadways is not only constantly present, it is mainly comprised of floatable materials which places receiving waters at risk during storm events.[1472]

[1468] Exhibit A, Test Claim, filed November 10, 2011, pages 374, 186 (Fact Sheet/Technical Report), footnotes omitted; see also (test claim permit, Finding C.9.).

[1469] Exhibit J (37), Santa Margarita River Region, Report of Waste Discharge (ROWD), January 15, 2009, Table 5, page 32.

[1470] Exhibit J (23), Excerpt from the Regional Board's Administrative Record, Volume 1, for Order No. R9-2010-0016, Santa Margarita Region Monitoring Annual Report for Fiscal Year 2006-2007, filed September 22, 2017, pages 67, 68, 85, and 86.

[1471] Exhibit A, Test Claim, filed November 10, 2011, page 400 (Fact Sheet/Technical Report, Finding C.8.).

[1472] Exhibit A, Test Claim, filed November 10, 2011, page 400 (Fact Sheet/Technical Report, Discussion of Finding C.8.).

i. Section II.E.2.-5., of Attachment E. of the test claim permit, imposes new requirements to conduct four special studies to monitor the sediment toxicity of streams; trash and litter as pollutants in receiving waters; the water quality of agricultural, federal, and tribal runoff; and the impact of vegetation removal activities on the water quality of receiving waters.

Section II.E.2.-5., of Attachment E. of the test claim permit, requires the copermittees to conduct four new special studies in addition to the monitoring requirements.[1473]

Sediment Toxicity Study

For this study, the copermittees must develop and submit to the Regional Board by April 1, 2012, a workplan to investigate the toxicity of sediment in streams and its potential impact on benthic macroinvertebrate Index of Biotic Integrity (IBI) scores. The study must be implemented in conjunction with the stream assessment monitoring in Attachment E. The study must include the following elements:

- At least four stream assessment locations must be sampled, including one reference site and one mass loading site. The selection of sites must be done with consideration of subjectivity of receiving waters to discharges from residential and agricultural land uses.
- At a minimum, sampling must occur once per year at each site for at least two years.
- At a minimum, sediment toxicity analysis must include the measurement of metals, pyrethroids, and organochlorine pesticides. The analysis must include estimates of bioavailability based upon sediment grain size, organic carbon, and receiving water temperature at the sampling site. Acute and chronic toxicity testing must be done using *Hyalella azteca*.
- Results and a discussion must be included in the monitoring annual report including an assessment of the relationship between observed IBI scores and all variables measured.[1474]

As the Fact Sheet explains:

> This study has been added to the Monitoring and Reporting requirements to assess the quality of stream sediments and possible contamination due to runoff from the MS4. Toxicity tests focusing on aqueous toxicity may not account for the full toxicity of receiving waters if constituents, such as heavy metals or pesticides, are bound to sediments. Southern California studies have shown that stream sediments can exhibit significant levels of toxic metals and pesticides, including pyrethroids. Additionally, the

[1473] Exhibit A, Test Claim, filed November 10, 2011, pages 314-318 (test claim permit, Attachment E., Section II.E.).

[1474] Exhibit A, Test Claim, filed November 10, 2011, page 314 (test claim permit, Attachment E., Section II.E.2.).

> Copermittees have identified the presence of aqueous toxicity at both mass loading stations due to pyrethroid pesticides, but their presence in sediments is unknown.[1475]

Trash and Litter Investigation

For this study, the copermittees must develop and submit to the Regional Board by September 1, 2012, a workplan to assess trash (including litter[1476]) as a pollutant within receiving waters on a watershed based scale. The copermittees must select a lead copermittee. The study must include the following elements:

- The lead copermittee must identify suitable sampling locations within the Santa Margarita HU [Hydrologic Unit].
- Trash at each location must be monitored a minimum of twice during the wet season following a qualified monitoring storm event[1477] and twice during the dry season.
- The lead copermittee must use the "Final Monitoring Workplan for the Assessment of Trash in San Diego County Watersheds" and "A Rapid Trash Assessment Method Applied to Waters of the San Francisco Bay Region" to develop a monitoring protocol.
- Results and discussion must be included in the monitoring annual report and must, at a minimum, include source identification, an evaluation of BMPs for trash reduction and prevention, and a description of any BMPs implemented in response to study results.[1478]

As the Fact Sheet explains:

> The objective of the study is to evaluate the quantity, type, and source(s) of trash and litter in receiving waters (see Finding E.12 and Discussion regarding regional efforts). Although trash can impair beneficial uses, the amount and type of trash discharged into receiving waters from the Copermittee(s) MS4 is unknown. Thus, the Copermittees have largely

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[1475] Exhibit A, Test Claim, filed November 10, 2011, page 561 (Fact Sheet/Technical Report), footnotes omitted.

[1476] Government Code section 68055.1(g) defines litter as "all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing."

[1477] A qualified monitoring storm event is defined as a minimum of 0.1 inches of precipitation preceded by 72 hours of dry weather.

[1478] Exhibit A, Test Claim, filed November 10, 2011, page 315 (test claim permit, Attachment E., Section II.E.3.).

been unable to assess the effectiveness of their BMPs that target trash as a pollutant.[1479]

Agricultural, Federal and Tribal Input Study

For this study, the copermittees must develop and submit to the Regional Board by September 1, 2012, a workplan to investigate the water quality of agricultural, federal, and tribal runoff that is discharged into their MS4. The study must include the following elements:

- The copermittees must identify a representative number of sampling stations within their MS4 that receive discharges of agricultural, federal, and tribal runoff that has not co-mingled with any other source. At least one station from each category must be identified.
- One storm event must be monitored at each sampling location each year for at least two years.
- At a minimum, analysis must include those constituents listed in Table 1[1480] of the MRP. Grab samples may be utilized, though composite samples are preferred. The copermittees must also measure or estimate flow rates and volumes of discharges into the MS4.
- Results and discussion from the study must be included in the monitoring annual report.[1481]

As the Fact Sheet explains:

> The objective of the study is to determine the type, quantity and estimated loading of pollutants in these discharges. In the ROWD, the Copermittees specifically state their concern regarding the quality of storm water which is discharged into their MS4 from such areas, and state that these discharges may affect overall water quality, primarily in the Murrieta and Temecula Creek watersheds. However, no data, information, or analyses

[1479] Exhibit A, Test Claim, filed November 10, 2011, page 561 (Fact Sheet/Technical Report).

[1480] Analytical testing on: Conventionals, Nutrients, Hydrocarbons: Total Dissolved Solids, Total Suspended Solids, Turbidity, Total Hardness, pH, Specific Conductance, Temperature, Dissolved Oxygen, Total Phosphorus, Dissolved Phosphorus, Nitrite, Nitrate, Total Kjeldahl Nitrogen, Ammonia, 5-day Biological Oxygen Demand, Chemical Oxygen Demand, Total Organic Carbon, Dissolved Organic Carbon, Methylene Blue Active Substances, Oil and Grease, Sulfate: Pesticides: Diazinon, Chlorpyrifos, Malathion, Carbamates, Pyrethroids; Metals (Total and Dissolved): Arsenic, Cadmium, Total Chromium, Hexavalent Chromium, Copper, Lead, Iron, Manganese, Nickel, Selenium, Zinc, Mercury, Silver, Thallium; Bacteriological (mass loading): E. coli, Fecal Coliform, Enterococcus.

[1481] Exhibit A, Test Claim, filed November 10, 2011, pages 315-316 (test claim permit, Attachment E., Section II.E.4.).

were presented or identified on the level of pollutants in such flows into their MS4.[1482]

MS4 and Receiving Water Maintenance Study

For this study, the copermittees must develop and submit to the Regional Board by April 1, 2012, a workplan to investigate receiving waters that are considered part of the MS4 and that are subject to continual vegetative clearance activities, for example, mowing. The copermittees must assess the effects of the vegetation removal activities and water quality, including, but not limited to, modification of biogeochemical functions, in-stream temperatures, receiving water bed and bank erosion potential, and sediment transport. The study must include the following elements:

- The copermittees must identify suitable sampling locations, including at least one reference that is not subject to maintenance activities.
- At a minimum, the copermittees must monitor pre- and post-maintenance activities for indicator bacteria, turbidity, temperature, dissolved oxygen and nutrients (nitrite, nitrate, total Kjeldahl nitrogen, ammonia and total phosphorous). The copermittees must also measure or estimate flow rates and volumes.
- Results and discussion from the study must be included in the annual monitoring report including the relevance of findings to CWA section 303(d) listed impaired waters.[1483]

As the Fact Sheet explains:

> The objective of the study is to determine if there are short-term or long-term in-stream water quality impacts from maintenance activities and to assess if the activities exacerbate the impairment of receiving waters 303(d) listed as impaired wholly or partially from MS4 discharges. Receiving waters within the Copermittees jurisdiction have been routinely cleared of vegetation by the Copermittees as part of their MS4 maintenance programs without mitigation efforts. The in-stream modification of vegetation may result in changes in water quality and Beneficial Uses from changes in nutrient cycling, the storage of organic matter, infiltration, flow attenuation, temperature and erosion potential. The relative contribution, if any, of maintenance activities to CWA 303(d) water quality impairments in [sic] unknown. The program is also expected to work in conjunction with other permit requirements of the Order. For

[1482] Exhibit A, Test Claim, filed November 10, 2011, pages 561-562 (Fact Sheet/Technical Report), footnotes omitted.

[1483] Exhibit A, Test Claim, filed November 10, 2011, page 316 (test claim permit, Attachment E., Section II.E.5.).

example, the Copermittees may choose to utilize study results when implementing the HMP, LID, and retrofitting programs.[1484]

While the inclusion of a special study in a permit is not new, the four special studies included in the test claim permit cover completely different subject matters and are required in addition to the monitoring requirements. The Water Boards admit that the test claim permit "contains new or modified requirements . . ."[1485] and that the focus of these studies is directed at different and higher priority water quality issues.[1486]

Therefore, the Commission finds that the activities described above are new requirements imposed on the claimants.

ii. The new activities in Sections II.E.2.-5. of Attachment E. of the test claim permit are mandated by the state because the Regional Board exercised discretion when requiring these activities and there is no evidence that the new required activities are the only means by which the federal MEP standard can be met.

The claimants contend that although federal law requires NPDES permittees to conduct a monitoring program and operators of a large or medium MS4 systems to submit an annual report, there is no authority in federal law for the RWQCB to require the special studies set forth in the test claim permit. The claimants conclude that the studies represent the intent of the Regional Board to shift its investigatory responsibility to the claimants and this shifting of state law-based responsibility creates a state mandate.[1487]

The Water Boards contend that the special studies do not mandate new programs or higher levels of service:

> Instead, the Special Studies requirements were targeted at areas of copermittee program deficiencies and were designed to help ensure Copermittees achieve the required federal standard of controlling pollutants in storm water discharges to the MEP or the separate federal requirement of effectively prohibiting non-storm water discharges into the MS4. They primarily are intended to require the Copermittees to collect monitoring data as part of the federally required monitoring program that can be used either to demonstrate that their jurisdictional runoff

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[1484] Exhibit A, Test Claim, filed November 10, 2011, page 562 (Fact Sheet/Technical Report), footnotes omitted.

[1485] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 56-57, citing Exhibit A, Test Claim, filed November 10, 2011, page 422 (Fact Sheet/Technical Report, Finding D.1.c.).

[1486] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 60.

[1487] Exhibit A, Test Claim, filed November 10, 2011, pages 77-78 (Test Claim narrative), citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, 771.

> management programs are meeting the federal standards or that will inform changes needed to improve their programs so that the standards are met. Although they have different substantive focuses than the 2004 Permit special studies, the[y] do not amount to establishment of new programs or mandates to perform higher levels of service.[1488]

The Water Boards assert that the special studies are necessary for the claimants to reach the MEP standard. The special studies "represent 'prescribed conditions ... on data and information collection' (see 122.26(d)(2))."[1489] Federal law requires the claimants to conduct a comprehensive monitoring program and to report on the identification of water quality improvements or degradation.[1490] The Water Boards assert that the overarching federal basis for the monitoring program, which includes the special studies, is to "assess the condition of receiving waters, monitor pollutants in storm and non-storm water effluent from the MS4, and conduct Special Studies to address conditions of concern."[1491]

The Water Boards further contend that the Regional Board found that the test claim permit "contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. . . . Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other San Diego Water Board compliance assessment activities."[1492] The Regional Board also found, "Each of the components of the MRP is necessary to meet the objectives listed above" which are: assessing compliance with the permit; measuring and improving runoff management programs; assessing the chemical, physical, and biological impacts from MS4 discharges; characterizing storm water discharges; identifying sources of pollutants; prioritizing drainage and sub-drainage areas; detecting and eliminating illicit discharges and illicit connections to the MS4; assessing receiving waters; and providing information to implement BMP improvements.[1493]

[1488] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 54.

[1489] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 55.

[1490] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 55.

[1491] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 56, citing test claim permit, Attachment E., Section II.E.

[1492] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 56-57 citing Exhibit A, Test Claim, filed November 10, 2011, page 422 (Fact Sheet/Technical Report, Finding D.1.c.).

[1493] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 56-57, citing Exhibit A, Test Claim, filed November 10, 2011, page 551 (Fact Sheet/Technical Report).

The Commission finds that the requirement to conduct the four new special studies is mandated by the state.

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court analyzed an NPDES stormwater permit issued by the Los Angeles Regional Water Board to determine whether the conditions (placing trash receptacles at transit stops and inspecting construction and industrial sites) were mandated by the state or by federal law.[1494] The court explained the issue as follows.

> As noted, reimbursement is not required if the statute or executive order imposes "a requirement that is mandated by a federal law or regulation," unless the state mandate imposes costs that exceed the federal mandate. (Gov. Code, § 17556, subd. (c).) The question here is how to apply that exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard. Previous decisions of this court and the Courts of Appeal provide guidance.[1495]

After reviewing the prior court decisions in *City of Sacramento v. State of California*, *Hayes v. Commission on State Mandates*, and *County of Los Angeles v. Commission on State Mandates*,[1496] the court identified the following test to determine whether the conditions imposed by the stormwater permit were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[1497]

The court found that the trash receptacle and inspection requirements at issue in the case were mandated by the state and not by federal law because these requirements were not expressly required by federal law; federal regulations (in 40 C.F.R. § 122.26(d)(2)(iv)) give the Regional Board discretion to determine which specific controls

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[1494] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.

[1495] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763.

[1496] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763-765, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805.

[1497] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

are necessary to meet the MEP standard; and even though the US EPA regulations contemplated some form of inspections "does not mean that federal law required the scope and detail of inspections required by the Permit conditions."[1498] The court also disagreed that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated. That determination is largely a question of law. Had the Regional Board found, when imposing the disputed permit conditions, that those conditions were the *only means* by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate."[1499]

The Third District Court of Appeal has also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[1500] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[1501]

In this case, federal law requires the claimants to have a monitoring program.[1502] The MRP requirements in the test claim permit include a detailed monitoring program for stormwater and non-stormwater discharges with action levels for certain pollutants, as well as the new special studies described above.[1503] Thus, the special studies are required to be conducted in addition to the monitoring. The Water Boards argue that the requirements to conduct the special studies are necessary to meet the federal requirement to reduce the discharge of pollutants in stormwater runoff to the MEP and achieve water quality standards.[1504] Federal law, however, gives the Water Boards discretion to determine what controls are necessary to meet the MEP standard, and does not require any specific activities, and does not require dischargers to conduct

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[1498] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-772.

[1499] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

[1500] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682, citing *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[1501] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[1502] Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(D).

[1503] Exhibit A, Test Claim, filed November 10, 2011, pages 298-311 (test claim permit, Attachment E.).

[1504] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 56-57.

special studies. Moreover, there is no evidence in the record that the new required activities are the *only* means by which the federal MEP standard can be met.

Accordingly, the Commission finds that the new activities required by Sections II.E.2.-5. to conduct the four special studies are mandated by the state.

iii. Sections II.E.2.-5., of Attachment E. of the test claim permit impose a new program or higher level of service because the requirements are uniquely imposed on local government and provide a governmental service to the public.

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. If the requirements are new, the analysis continues to determine if the requirements constitute a "program" within the meaning of article XIII B, section 6, which is defined as one that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[1505] Only one of these alternatives is required to establish a new program or higher level of service.[1506]

Recently, the Second District Court of Appeal found that the trash receptacle and inspection requirements imposed in the NPDES stormwater permit issued by the Los Angeles Regional Water Quality Control Board carried out the governmental function of providing a service to the public by reducing pollution entering stormwater drainage systems and receiving waters and imposed unique requirements on local government and, thus, constituted a new program or higher level of service.[1507]

Similarly here, the new requirements to conduct four special studies are expressly directed toward the local agency copermittees and are therefore uniquely imposed on local government. In addition, the new requirements provide a governmental service to the public by studying specific water quality issues and gathering data on unknown pollutant issues that may be impairing water quality standards.[1508]

[1505] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[1506] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1507] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 556-561.

[1508] The Sediment Toxicity Study assesses "the quality of stream sediments and possible contamination due to runoff from the MS4" because heavy metals and pesticides are not likely to be found by the test claim permit's water monitoring requirements. The Trash and Litter Investigation assesses "the quantity, type, and source(s) of trash and litter in receiving waters" because there is no data on trash and litter which can impair the beneficial uses of receiving waters. The Agricultural, Federal and Tribal Input Study assesses "the type, quantity and estimated loading of pollutants

Accordingly, the requirements in Sections II.E.2.-5. of Attachment E. of the test claim permit mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

12. Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the Test Claim Permit, Which Address Prevention of Discharges, Do Not Impose Any New Requirements and Therefore, Do Not Mandate a New Program or Higher Level of Service.

The claimants pled particular language that appears under several components of Section F. of the test claim permit addressing development, construction, municipal facilities, industrial/commercial facilities, residential areas, retrofitting and education, in Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6, which requires the permittees to ensure that non-storm water discharges are effectively prohibited, and that they "prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards."[1509]

The claimants contend that this language imposes new requirements to develop and implement the components in Section F. "in a manner that guarantees that those programs will prevent the discharge of pollutants at a level that could cause or contribute to a violation of any water quality standard as well as to prevent illicit discharges to the MS4," and that such requirements go beyond the MEP standard of federal law and constitute a new program or higher level of service.[1510] The claimants further allege that the requirements now subject them to sanctions, including civil penalties and injunctive relief, for the failure to achieve water quality standards.[1511]

The Commission finds that the requirements at issue in Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit are not new and do not mandate a new program or higher level of service.

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in these discharges" because there is no data on the impact these non-copermittee discharges on the MS4; and the MS4 and Receiving Water Maintenance Study determines "if there are short-term or long-term in-stream water quality impacts from maintenance activities and to assess if the activities exacerbate the impairment of receiving waters 303(d) listed as impaired wholly or partially from MS4 discharges." Exhibit A, Test Claim, filed November 10, 2011, pages 561, 562 (Fact Sheet/Technical Report).

[1509] For example, see Exhibit A, Test Claim, filed November 10, 2011, page 208 (test claim permit, Section F.).

[1510] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative).

[1511] Exhibit A, Test Claim, filed November 10, 2011, page 81 (Test Claim narrative).

a. Background

i. Federal law requires that permits include conditions to achieve water quality standards and objectives and that permittees effectively prohibit non-stormwater discharges into the MS4.

Under federal law, NPDES permits must include conditions to achieve water quality standards and objectives.[1512] The CWA states, "In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters"[1513] Federal regulations state that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."[1514] Federal law also requires that if a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board must develop permit limits as necessary to meet water quality standards.[1515] In addition, permittees are required to take all reasonable steps to minimize or prevent any discharge or disposal in violation of a permit, which has a reasonable likelihood of adversely affecting human health or the environment.[1516]

Federal law also requires that permits adopted by the Regional Board for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."[1517] To "effectively prohibit" non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges, which under federal law shall contain the following:

- A description of a program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4;[1518]
- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated;[1519]

[1512] Code of Federal Regulations, title 40, section 122.44(d)(1).

[1513] United States Code, title 33, section 1342(o)(3) (Public Law 100-4).

[1514] Code of Federal Regulations, title 40, section 122.44(d)(1).

[1515] Code of Federal Regulations, title 40, section 122.44(d)(1).

[1516] Code of Federal Regulations, title 40, section 122.41(d).

[1517] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

[1518] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[1519] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2).

- A description of procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater pollution.[1520]
- A description of procedures to prevent, contain, and respond to spills that may discharge into the MS4;
- A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;
- A description of educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- A description of controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[1521]

Federal law also requires that a permittee have legal authority established by statute, ordinance, or a series of contracts that enables the permittee to perform the following activities to ensure compliance with water quality standards:

- Control the contribution of pollutants to the MS4 by stormwater discharges associated with industrial activity and the quality of stormwater discharged from sites of industrial activity.
- Prohibit illicit discharges to the MS4.
- Control the discharge to the MS4 of spills, dumping, or disposal of materials other than stormwater.
- Control through interagency agreements the contribution of pollutants from one portion of the MS4 to another portion of the MS4.
- Require compliance with conditions in ordinances, permits, contracts or orders.
- Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions, including the prohibition on illicit discharges to the MS4.[1522]

Finally, if a permittee fails to comply with these federal requirements, or otherwise violates the conditions in an NPDES permit, it may be subject to state and federal enforcement actions and private citizen lawsuits for injunctive relief and civil

[1520] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(3).

[1521] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[1522] Code of Federal Regulations, title 40, section 122.26(d)(2).

penalties.[1523] Federal regulations further state that "Any permit noncompliance constitutes a violation of the CWA and is grounds for enforcement action."[1524]

ii. The prior permit required the permittees to comply with prohibitions and receiving water limitations; and to establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from their MS4s.

The prior permit required the permittees to comply with the following prohibitions and receiving water limitations:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in California Water Code section 13050), in waters of the state are prohibited.
- Discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water or groundwater are prohibited.
- Discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.
- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses of receiving waters) are prohibited.[1525]

Discharges from MS4s are also subject to the Basin Plan prohibitions listed in Attachment A to the prior permit.[1526]

The prior permit also required the permittees to effectively prohibit all types of non-stormwater discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or the discharge category is not prohibited under this permit.[1527]

In addition, upon a finding by a permittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the prior permit required the permittee to provide notice and a report to the Regional Board on the current BMPs and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality

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[1523] United States Code, title 33, sections 1319, 1342(b)(7), 1365(a). See also, Water Code sections 13385 and 13387 (potential criminal penalties).

[1524] Code of Federal Regulations, title 40, section 122.41.

[1525] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573, (Order R9-2004-0001, Section A.1.-3.).

[1526] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section A.1.-3.; Attachment A, Basin Plan Prohibitions).

[1527] Exhibit A, Test Claim, filed November 10, 2011, page 572 (Order R9-2004-0001, Section B.1.).

standards. The permittee was also required to revise its Storm Water Management Plan (SWMP) and monitoring program to incorporate the approved modified BMPs that have been or will be implemented, the implementation schedule, and any additional monitoring required.[1528]

The prior permit further required the permittees to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means."[1529] Specifically, the permittee's legal authority must include the ability to control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4, prohibit all identified illicit discharges not otherwise allowed; prohibit and eliminate illicit connections to the MS4; control discharges of materials other than stormwater to the MS4; require compliance with the permit, contracts, and the permittee's ordinances; require the use of BMPS; carry out inspections, surveillance, and monitoring; use enforcement mechanisms; and control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements.[1530]

The prior permit requires the permittees to reduce pollutants in urban runoff to the maximum extent practicable and to comply with the permit and all relevant ordinances as part of the SWMP generally and under the following components: development planning, Standard Urban Storm Water Mitigation Plans (SUSMPs) regarding priority development projects, construction, municipal, commercial/industrial, residential, and education.[1531]

The Fact Sheet to the prior permit explains that the iterative process (reducing pollutants to the MEP using BMPs) does not shield a permittee from the independent requirement to comply with water quality objectives as follows:

> . . . while implementation of the iterative BMP process is a means to achieve compliance with water quality objectives, it does not shield the discharger from enforcement actions for continued non-compliance with water quality objectives. Consistent with EPA guidance (EPA, 1998a and 1998b) regardless of whether or not an iterative process is being implemented, discharges that cause or contribute to an exceedance of water quality objectives are in violation of Order R9-2004-001.[1532]

[1528] Exhibit A, Test Claim, filed November 10, 2011, page 573 (Order R9-2004-0001, Section C.2.).

[1529] Exhibit A, Test Claim, filed November 10, 2011, page 574 (Order R9-2004-0001, Section D.1.).

[1530] Exhibit A, Test Claim, filed November 10, 2011, page 574-575 (Order R9-2004-0001, Section D.1.).

[1531] Exhibit A, Test Claim, filed November 10, 2011, pages 575, 577-593 (Order R9-2004-0001, Section E.1.).

[1532] Exhibit I (34), Order R9-2004-0001, Fact Sheet/Technical Report, page 34.

iii. Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit require copermittees to prevent non-stormwater discharges and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

The test claim permit, like the prior permit, includes the same prohibitions and receiving water limitations with which the copermittees are required to comply.[1533]

The test claim permit, also like the prior permit, requires the copermittees to effectively prohibit all types of non-stormwater discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or the discharge category is not prohibited under this permit.[1534]

Section A.3., like the prior permit, provides that, upon a finding by a copermittee or the Regional Board that that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the copermittee must provide notice and a report to the Regional Board on the current BMPs and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards and an implementation schedule. The copermittee is also required to revise its Jurisdictional Runoff Management Program (JRMP) and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.[1535] As explained by the Fact Sheet:

> The Copermittees must reduce the discharge of storm water pollutants to the MEP and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermittees have reduced storm water pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, the Order provides a clear and detailed process for the Copermittees to follow. This process is often referred to as the "iterative process" and can be found at section A.3. The language of section A.3 is prescribed by the State Water Board and is included in MS4 permits statewide. Section A.3 essentially requires additional BMPs to be implemented until MS4 storm water discharges no longer cause or contribute to a violation of water quality standards.[1536]

[1533] Exhibit A, Test Claim, filed November 10, 2011, pages 199, 200 (test claim permit, Sections A.1.-3.).

[1534] Exhibit A, Test Claim, filed November 10, 2011, page 200 (test claim permit, Section B.1.).

[1535] Exhibit A, Test Claim, filed November 10, 2011, pages 199-200 (test claim permit, Section A.3.a.).

[1536] Exhibit A, Test Claim, filed November 10, 2011, page 471 (Fact Sheet/Technical Report).

The test claim permit, like the prior permit, requires the copermittees to "establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means."[1537]

The claimants, however, focus on Section F. of test claim permit, which addresses the Jurisdictional Runoff Management Program (JRMP). As expressly stated in Section F., each updated JRMP "must . . . reduce the discharge of storm water pollutants from the MS4 to the MEP, *effectively prohibit non-storm water discharges, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards*" for the following components of the program: development planning, Standard Stormwater Mitigation Plans (SSMP) regarding priority development projects, construction, municipal, commercial/industrial, residential, retrofitting, and education.[1538] The claimants contend that the requirement to effectively prohibit non-storm water discharges, and to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards is new and results in a reimbursable state-mandated program.[1539] These requirements are stated as follows, with the italicized text alleged by the claimant to create new reimbursable state mandates:

- Each updated JRMP must meet the requirements of Section F. of this Order, reduce the discharge of stormwater pollutants from the MS4 to the MEP, *effectively prohibit non-stormwater discharges, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1540]
- Each copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; *(2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4* and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.[1541]

[1537] Exhibit A, Test Claim, filed November 10, 2011, pages 206-207 (test claim permit, Section E.1.).

[1538] Exhibit A, Test Claim, filed November 10, 2011, page 208 (test claim permit, Section F.), emphasis added.

[1539] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative).

[1540] Exhibit A, Test Claim, filed November 10, 2011, page 208 (test claim permit, Section F.).

[1541] Exhibit A, Test Claim, filed November 10, 2011, page 208 (test claim permit, Section F.1.).

- The SSMP must meet the requirements of Section F.1.d. of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and *(2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1542]
- Each copermittee must implement a construction program which meets the requirements of this section, *prevents illicit discharges into the MS4*, implements and maintains structural and non-structural BMPs to reduce pollutants in stormwater runoff from construction sites to the MS4, reduces construction site discharges of stormwater pollutants from the MS4 to the MEP, *and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1543]
- Each copermittee must implement a municipal program for the copermittee's areas and activities that meets the requirements of this section, *prevents illicit discharges into the MS4*, reduces municipal discharges of stormwater pollutants from the MS4 to the MEP, *and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1544]
- Each copermittee must implement a commercial/industrial program that meets the requirements of this section, *prevents illicit discharges into the MS4*, reduces commercial/industrial discharges of stormwater pollutants from the MS4 to the MEP, *and prevents commercial/industrial discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1545]
- Each copermittee must implement a residential program that meets the requirements of this section, *prevents illicit discharges into the MS4*, reduces residential discharges of stormwater pollutants from the MS4 to the MEP, *and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1546]
- Each copermittee must develop and implement a retrofitting program that meets the requirements of this section. The goals of the existing development retrofitting program are to address the impacts of existing development through

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[1542] Exhibit A, Test Claim, filed November 10, 2011, page 212 (test claim permit, Section F.1.d.).

[1543] Exhibit A, Test Claim, filed November 10, 2011, page 229 (test claim permit, Section F.2.).

[1544] Exhibit A, Test Claim, filed November 10, 2011, page 234 (test claim permit, Section F.3.a.).

[1545] Exhibit A, Test Claim, filed November 10, 2011, page 239 (test claim permit, Section F.3.b.).

[1546] Exhibit A, Test Claim, filed November 10, 2011, page 245 (test claim permit, Section F.3.c.).

retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of stormwater pollutants from the MS4 to the MEP, and *prevent discharges from the MS4 from causing or contributing to a violation of water quality standards*.[1547]

- Each copermittee must implement education programs to (1) measurably increase the knowledge regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutants in stormwater discharges and *eliminate prohibited non-stormwater discharges to MS4s and the environment*.[1548]

b. Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the Test Claim Permit Are Not New and, Thus, Do Not Mandate a New Program or Higher Level of Service.

i. The arguments raised by the parties

The claimants contend that the prior permit only required them to reduce the discharge of pollutants in runoff to the MEP.[1549] The italicized language above requires them to develop and implement the components in Section F. "in a manner that guarantees that those programs will prevent the discharge of pollutants at a level that could cause or contribute to a violation of any water quality standard as well as to prevent illicit discharges to the MS4. Such requirements went beyond federal law and regulation, including the MEP standard, and constituted a new and/or higher level of service."[1550] The claimants allege that the requirements now subject them to sanctions, including civil penalties and injunctive relief, for the programs' failure to achieve water quality standards.[1551]

The claimants agree that federal law requires the claimants to ensure that they "effectively prohibit non-stormwater discharges into the storm sewers" and to ensure that discharges of pollutants from MS4s are reduced to the "maximum extent practicable" noting that these are two separate requirements: the prohibition of non-stormwater discharges *into* the MS4 and the reduction of pollutants discharged *from* the

[1547] Exhibit A, Test Claim, filed November 10, 2011, page 247 (test claim permit, Section F.3.d.).

[1548] Exhibit A, Test Claim, filed November 10, 2011, page 252 (test claim permit, Section F.6.).

[1549] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 30.

[1550] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative).

[1551] Exhibit A, Test Claim, filed November 10, 2011, page 81 (Test Claim narrative).

MS4 to the MEP.[1552] However, the claimants contend that the test claim permit requirements exceed federal law in two ways:

> First, by requiring the "prevention" of non-stormwater discharges into the MS4, the Copermittees were required to go beyond merely "effectively prohibiting" such discharges. Second, with respect to ensuring the non-violation of water quality standards without regard to the MEP standard, the RWQCB was requiring a compliance standard not required of municipalities under federal law.[1553]

The claimants further assert that the federal regulatory language "refers to programs that are to be implemented over time, not the immediate 'prevents illicit discharges into the MS4' language found in the cited Section F provisions."[1554] In support of this assertion, the claimants cite federal regulations that require a "schedule" to detect and remove illicit discharges[1555] and the use of the term "ultimately" regarding the removal of non-stormwater discharges from the MS4 in the preamble to the final stormwater regulations.[1556] The claimants also contend that the federal regulations do not require the absolute achievement of water quality standards to comply with a permit, citing federal regulations requiring reduction of the discharge of pollutants from MS4s. The claimants conclude that the "regulatory focus is on reducing pollutants from MS4 discharges, not on ensuring that such discharges do not cause or contribute to a violation of water quality standards."[1557]

In addition, the claimants contend that the Regional Board was not authorized to include such language in the test claim permit stating that the Regional Board relied on Code of Federal Regulations, title 40, section 122.44(d)(1)(i), which requires permits to include limitations which "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State

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[1552] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative, citing United States Code, title 33, section 1342(p)(3)(B)(ii)-(iii)).

[1553] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative), citing *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165.

[1554] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 30-31.

[1555] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 31, citing section 122.26(d)(2)(iv)(B) of the California Code of Regulations, title 40.

[1556] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 31, citing 55 Fed. Reg. 47990, 47995 (November 16, 1990).

[1557] Exhibit A, Test Claim, filed November 10, 2011, pages 83-85 (Test Claim narrative).

narrative criteria for water quality."[1558] The claimants argue that that regulation is inapplicable to MS4 permits relying on the United States Court of Appeals for the Ninth Circuit case *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159:

> Under the holding in *Defenders of Wildlife, supra,* this regulation does not apply to MS4 permits, which operate under the MEP standard and not the requirement for strict compliance with water quality standards. Moreover, 40 CFR § 122.44 provides that the "following requirements" (including § 122.44(d)(1)(i)) apply only "when applicable." Under *Defenders of Wildlife,* the requirements of 40 CFR § 122.44(d)(1)(i) are, as a matter of law, not applicable to an MS4 permit such as the 2010 Permit, and do not provide authority to the RWQCB. *See also* 40 CFR § 122.44(k)(2), which authorizes the use of BMPs to "control or abate the discharge of pollutants when . . . authorized under section 402(p) [the provision relating to MS4 permits] of the CWA for the control of storm water discharges."
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> *See also Tualatin River Keepers, et al. v. Oregon Department of Environmental Quality* (2010) 235 Ore. App. 132*,* where the court considered whether wasteload allocations from adopted TMDLs were required to be enforced as strict numeric effluent limits within a municipal NPDES permit. Petitioners argued that the Oregon Department of Environmental Quality had erred by issuing a permit that did not "specify wasteload allocations in the form of numeric effluent limits." *Id*. at 137. The Oregon court disagreed, finding that under the CWA, best management practices were considered to be a "type of effluent limitation," and that such best management practices were authorized to be used pursuant to the CWA, section 33 U.S.C. § 1342(p) as a means of controlling "storm water discharges." *Id*. at 141-42, citing 33 U.S.C. § 1342(p) and 40 CFR § 122.44(k)(2)-(3). This case demonstrates further that requirements for NPDES permits to meet water quality standards must, in the case of MS4 permits, be addressed through BMPs, not absolute adherence to such standards.[1559]

Moreover, the claimants contend that the requirements are not practicable, as the power to actually reduce the discharge of pollutants in runoff to the level required by the test claim permit is, with the exception of municipal facilities, in the hands of and subject to the actions or inactions of third parties (developers, commercial/industrial site operators or residential homeowners). The claimants acknowledge that they can implement programs to enforce requirements upon those third parties within their jurisdiction, but the claimants cannot guarantee the third parties' compliance as the

[1558] Exhibit A, Test Claim, filed November 10, 2011, pages 85-86 (Test Claim narrative).

[1559] Exhibit A, Test Claim, filed November 10, 2011, pages 85-86 (Test Claim narrative).

variability of stormwater and urban runoff discharges makes it nearly impossible to assure compliance with all water quality standards at all times.[1560]

Finally, the claimants contend that nothing in the prior permit required the claimants to ensure that discharges from construction, municipal, industrial, commercial or residential sources would not cause or contribute to a violation of water quality standards nor did the prior permit require the educational component to so assure.[1561]

The Water Boards contend that these provisions do not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. The Water Boards contend that Sections A.1., A.2., and A.3. in the Prohibitions and Receiving Water Limitations Provisions of the test claim permit implement the same language that the State Water Board directed in a 1999 precedential order[1562] that regional water boards are required to use in all MS4 permits.[1563]

> The precedential "receiving water limitations language" generally requires that municipal storm water discharges shall not cause or contribute to exceedances of water quality objectives in the receiving waters. The language was initially developed by U.S. EPA after it objected to receiving water limitations in two regional water board permits (including the 1998 MS4 Permit issued to Riverside County Copermittees) that effectively provided a safe harbor from enforcement during iterative process implementation. Since 1999, the State Water Board consistently has expected receiving water limitations in MS4 permits to be complied with through the iterative process of employing successively improved BMPs.[1564]

This receiving water limitations language has been included in all permits issued to the claimants since 1999.[1565]

[1560] Exhibit A, Test Claim, filed November 10, 2011, page 86 (Test Claim narrative), citing Tab 5, Uhley Declaration Regarding Additional Factual Issues, Paragraphs 11-12.

[1561] Exhibit A, Test Claim, filed November 10, 2011, pages 86-87 (Test Claim narrative).

[1562] Exhibit J (43), State Water Resources Control Board, Order WQ 99-05, https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1999/wq1999_05.pdf (accessed on March 25, 2022).

[1563] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 61.

[1564] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 61.

[1565] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 62.

The Water Boards further contend that other test claimants[1566] have made parallel arguments relying on the United States Court of Appeals for the Ninth Circuit decision in *National Resources Defense Council (NRDC)* v. *County of* Los *Angeles* (2013) 725 F.3d 1194 "for the (incorrect) proposition that the 2013 opinion created a strict liability scheme where none existed previously. Orange County Claimants in that matter therefore asserted that the receiving water limitations language in the San Diego Regional Permit exceeds federal law by newly requiring 'strict liability.'"[1567] The State Water Board explained the impacts of the *NRDC* case in a 2015 Water Quality order addressing the most recent Los Angeles MS4 Permit as follows:

> The lack of a safe harbor in the iterative process of the 2001 Los Angeles Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the City of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly, the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.[fn] The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002[fn].[1568]

[1566] Commission on State Mandates, Test Claim on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0001, Provisions A.2, A.3.b, A.4, B, E.3.c(2), E.3.d, E.5, E.5.e, E.6., F, and Attachment E; and Order No. R9-2015-0100, Provision B.3.c.,* 15-TC-02*,* https://csm.ca.gov/matters/15-TC-02.shtml (accessed on July 28, 2023).

[1567] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 62.

[1568] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 62, quoting State Water Board Order WQ 2015-0075, page 223, citing *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135; *Building Industry Assn. of San Diego County* (2004) 124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

The decisions of state and federal courts on this issue reflect the Water Boards' long-standing view that the iterative process does not provide a safe harbor to MS4 dischargers. "'When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.'"[1569] The court's conclusion in *NRDC* that receiving water limitations provisions are independent from the provisions establishing the iterative process for purposes of enforcement is not new and is consistent with the Water Boards' historical interpretation.[1570] Also, the receiving water limitations provisions are not a higher level of service as the test claim permit carries forward the language from the prior permit.[1571]

Regarding the requirement to eliminate or prevent unauthorized non-stormwater discharges, the Water Boards contend that this language implements and is required by federal law.

> Under Clean Water Act section 402(p)(3)(B)(ii), permitting agencies must ensure that permits for MS4 discharges include requirements necessary to "effectively prohibit non-stormwater discharges into the storm sewers." While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations define "illicit discharge" as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from firefighting activities)." This definition is the most closely applicable definition of "non-storm water" contained in federal law.[1572]

The implementing federal regulations also address the prevention or elimination of illicit discharges. Specifically, Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B) requires that the proposed management program "shall be based on a description of a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer." Also, Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1) requires "a program, including

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[1569] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 62-63, quoting State Water Board Order WQ 2015-0075, page 222, footnote 44.

[1570] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 63.

[1571] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 64-65.

[1572] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 65 quoting Code of Federal Regulations, title 40, section 122.26(b)(2).

inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal storm sewer system."[1573]

While the Water Boards are not aware of any judicial opinions interpreting "effectively," in general, the requirement to "effectively prohibit" non-stormwater discharges has been interpreted to require either the prohibition of unauthorized non-stormwater flows to the MS4 through detection and removal of illicit discharges or ensuring that operators of non-stormwater systems obtain NPDES permits for those discharges.[1574]

The Water Boards also contend that the requirement to prohibit non-stormwater discharges is neither new nor a higher level of service as similar language was included in the prior two permits. The 1998 permit, as modified in 2000, stated that, with certain listed exceptions, "permittees shall prohibit non-storm water discharges into the MS4." The prior permit, issued in 2004, stated that the claimants "shall effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit; or authorized in accordance with [permit provisions]." The prior permit also required the development and implementation of an illicit discharge detection and elimination program "containing measures to actively seek and eliminate illicit discharges and connections" and that claimants "shall eliminate all illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection;" and "shall implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4."[1575]

ii. Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit are not new and do not mandate a new program or higher level of service.

As indicated above, the claimants' contend that the requirements in Section F. of the test claim permit exceed the requirements under federal law in two ways as follows:

> First, by requiring the "prevention" of non-stormwater discharges into the MS4, the Copermittees were required to go beyond merely "effectively prohibiting" such discharges. Second, with respect to ensuring the non-violation of water quality standards without regard to the MEP standard, the RWQCB was requiring a compliance standard not required of municipalities under federal law.[1576]

[1573] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 66.

[1574] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, page 66.

[1575] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 66-67 citing Order R9-2004-0001, Sections J., J.5., and J.6.

[1576] Exhibit A, Test Claim, filed November 10, 2011, page 83 (Test Claim narrative) citing *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165.

The Commission disagrees and finds that the provisions in Section F. of the test claim permit that require the claimant's JRMP programs to effectively prohibit non-storm water discharges and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards are *not* new and, thus, do not mandate a new program or higher level of service.

Federal law has long required the claimants "to implement and enforce an ordinance, orders or similar means *to prevent illicit discharges to the municipal separate storm sewer system*"[1577] and to "effectively *prohibit non-stormwater discharges into the storm sewers*."[1578] Both of these limitations address discharges coming *into* the MS4. The claimants assert that the verb "prevent" is more stringent that "prohibit." However, this is not the case. Black's Law Dictionary defines prohibit as: "To prevent, preclude, or severely hinder."[1579] Merriam-Webster Dictionary defines prohibit as, "to prevent from doing something."[1580] Thus, prevention is part of, and not more stringent than, prohibition.

To "effectively prohibit" non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges, which under the CWA shall contain the following:

- A description of a program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4;[1581]
- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated;[1582]
- A description of procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater pollution.[1583]
- A description of procedures to prevent, contain, and respond to spills that may discharge into the MS4;

[1577] United States Code, title 33, section 1342(p)(3)(B)(ii), emphasis added.

[1578] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1) (71 FR 33639, June 12, 2006), emphasis added.

[1579] Exhibit J (1), Black's Law Dictionary (11th ed. 2019), prohibit.

[1580] Exhibit J(32), Merriam-Webster Dictionary, prohibit, https://www.merriam-webster.com/dictionary/prohibit?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (accessed on April 4, 2022).

[1581] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[1582] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2).

[1583] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(3).

- A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;
- A description of educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- A description of controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[1584]

As explained by the Fact Sheet, these non-stormwater requirements have been in the claimants' permits for the last 20 years:

> For the last 20 years, Riverside County NPDES permits for discharges of storm water have regulated non-storm water discharges from the MS4. These permits required Copermittees (dischargers) to prohibit non-storm water discharges into (thus through and from) their MS4 systems, implement a program to prevent illicit discharges, and monitor to identify illicit discharges and exempted discharges that are a source of pollution. These measures are considered Best Management Practices (BMPs), are required to be included in NPDES permits issued under section 402(p) of the CWA, and are considered by USEPA to be an interim approach to permitting non-storm water discharges from the MS4 in accordance with section 402 of the CWA and CFR 122.44(k).[1585]

Moreover, the requirement to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards is not new. As explained in the background, federal law requires that NPDES permits include conditions to achieve water quality standards and objectives.[1586] And the following receiving water limitations and discharge prohibitions were in the prior permit, and have been in all permits since 1999 when the State Water Resources Control Board issued precedential order 99-05:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in California Water Code section 13050), in waters of the state are prohibited.
- Discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water or groundwater are prohibited.

[1584] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[1585] Exhibit A, Test Claim, filed November 10, 2011, page 413 (Fact Sheet/Technical Report).

[1586] United States Code, title 33, section 1311(b)(1)(C); United States Code, title 33, section 1342(o)(3) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.41(d), 122.44(d)(1).

- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses of receiving waters) are prohibited.[1587]

The State Water Board explained its ruling in a subsequent order as follows:

> We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters, [fn. omitted] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs. [FN. omitted.] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions. [FN. omitted.] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.
>
> There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process. [FN. omitted.][1588]

The prior permit further explained that "as operators of the MS4, the Permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator

[1587] Exhibit A, Test Claim, filed November 10, 2011, pages 572-573, (Order R9-2004-0001, Section A.1.-3.).

[1588] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, State Water Board Order WQ 2015-0075, pages 221-222.

essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control."[1589]

Furthermore, the position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld. In *Building Industry Association of San Diego County v. State Water Resources Control Board*,[1590] the Building Industry Association (BIA) challenged a 2001 NPDES stormwater permit issued by the San Diego Regional Water Quality Control Board that expressly prohibited the discharge of pollutants that "cause or contribute to exceedances of receiving water quality objectives," and that "cause or contribute to the violation of water quality standards."[1591] The permit also contained an enforcement provision that required a municipality to report any violations or exceedances of an applicable water quality standard, and describe a process for improvement and prevention of further violations.[1592] The permit in BIA then stated, "Nothing in this section shall prevent the Regional Water Board from enforcing any provision of this Order while the municipality prepares and implements the above report."[1593] BIA, concerned that the permit provisions were too stringent, impossible to satisfy, and would result in all affected municipalities being in immediate violation of the permit and subject to substantial civil penalties because they were not then complying with applicable water quality standards — contended that under federal law, the "maximum extent practicable" standard is the exclusive measure that may be applied to municipal storm sewer discharges. BIA asserted that the Regional Board may not require a municipality to comply with a state water quality standard if the required controls exceed a maximum extent practicable standard.[1594] The court, however, rejected BIA's interpretation, and held that the permit provisions requiring compliance with water quality standards are proper under federal law.[1595]

[1589] Exhibit A, Test Claim, filed November 10, 2011, page 569 (Order R9-2004-0001, Finding 20).

[1590] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866.

[1591] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 876-877.

[1592] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[1593] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[1594] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 880, 890.

[1595] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880; see also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167, which also held that the US EPA or the

In *Natural Resources Defense Council, Inc. v. County of Los Angeles*,[1596] the permit prohibited discharges from the MS4 that cause or contribute to the violation of water quality standards and objectives contained in the Basin Plan, the California Toxics Rule, the National Toxics Rule, and other state or federal approved surface water quality plans. The permit further provided that the permittees comply with the discharge prohibitions with monitoring and timely implementation of control measures and other actions to reduce pollutants in their discharges.[1597] Between 2002 and 2008, annual monitoring reports were published, and identified 140 separate exceedances of the water quality standards for aluminum, copper, cyanide, zinc, and fecal coliform bacteria in the Los Angeles and San Gabriel Rivers.[1598] NRDC filed a lawsuit alleging that the permittees violated the CWA, and its causes of actions were based on the following assertions: that the permit incorporated the water quality limits for each receiving water body; that the monitoring stations had recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; that an exceedance constitutes non-compliance with the permit and, thereby, the CWA; and that the permittees were liable for these exceedances under the CWA.[1599] The permittees argued they could not be held liable for violating the permit and, thus, the CWA, based solely on monitoring data because the monitoring was not designed or intended to measure compliance of any permittee, which the court disagreed with based on the plain language of the permit; and the monitoring data cannot parse out precisely whose discharge contributed to any given exceedance because the monitoring stations manage samples downstream and not at the discharge points.[1600] The court disagreed with the permittees, finding that:

> . . . . the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrates that

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state administrator has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

[1596] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194.

[1597] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[1598] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1200.

[1599] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1201.

[1600] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1204-1205.

> the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.[1601]

The court also found that "the Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit."[1602] The court stated that Congress recognized that MS4s often cover many square miles and comprise numerous, geographically scattered sources of pollution including streets, catch basins, gutters, man-made channels, and storm drains, and that for large urban areas, MS4 permitting could not be accomplished on a source-by-source basis. Thus, Congress delegated to the US EPA and the state administrators discretion to issue permits on a jurisdiction-wide basis, instead of requiring separate permits for individual discharge points. Nothing in the MS4 permitting scheme of federal law, however, relieves permittees of the obligation to monitor their compliance with the permit and the CWA.[1603] "Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law."[1604] The court remanded the case to the lower courts to determine the appropriate remedy for the county's violations.[1605]

And in *City of Rancho Cucamonga v. Regional Water Quality Control Bd.,* the court noted the following:

> As it did repeatedly below, Rancho Cucamonga maintains the 2002 permit violates section 402(k) of the Clean Water Act (33 U.S.C. § 1342(k)), because the permit does not include "safe harbor" language, providing that, if a permittee is in full compliance with the terms and conditions of its permit, it cannot be found in violation of the Clean Water Act. (U.S. Public Interest v. Atlantic Salmon (1st Cir. 2003) 339 F.3d 23, 26; EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 205 [48 L.Ed.2d 578, 96 S.Ct. 2022].) The trial court found there was no statutory right to a

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[1601] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1206-1207.

[1602] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1207, citing United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.44(i)(1); and Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F).

[1603] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1209.

[1604] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210, emphasis in original.

[1605] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210.

"safe harbor" provision to be included as the term of the permit. We agree.[1606]

Accordingly, Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6. of the test claim permit do not mandate a new program or higher level of service to ensure that stormwater runoff not cause or contribute to a violation of a water quality standard and "prevent" illicit discharges into the MS4.

C. Pursuant to Government Code Section 17556(d), There Are No Costs Mandated by the State When the Claimants Have Regulatory Authority to Impose Fees (i.e. for LID, Hydromodification, Retrofitting, BMP Maintenance Tracking, and Active/Passive Sediment Treatment). Although the Remaining New State-Mandated Activities Result in Costs Mandated by the State for the County and Cities From November 10, 2010, to December 31, 2017, There Are No Costs Mandated by the State for Riverside County Flood and Water Conservation District Because There Is No Evidence in the Record that the District Was Forced to Spend Their Local "Proceeds of Taxes."

As indicated above, the following activities constitute mandated new programs or higher levels of service:

A. SALs – Development and Submittal of Wet Weather MS4 Discharge Monitoring Program

1. Collaborate with all permittees to develop a year-round, watershed based, wet weather MS4 discharge monitoring program to sample a representative percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[1607]
2. The principal copermittee shall submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented.[1608]

[1606] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1388.

[1607] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[1608] Exhibit A, Test Claim, filed November 10, 2011, pages 206 and 309 (test claim permit, Section D.2., which incorporates by reference Attachment E., Section II.B.3.).

B. LID, Hydromodification, Retrofitting

1. Administrative and planning activities

- Incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for priority development projects.[1609]
- Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[1610]
- Develop a LID BMP waiver program to incorporate into the SSMP.[1611]
- Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) in accordance with Sections F.1.h.1. and 2. of the test claim permit to manage increases in runoff discharge rates and durations from all priority development projects. Submit a draft HMP that has been available to public review and comment, to the Regional Board within three years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the Regional Water Board, incorporate the HMP into the SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.[1612]
- *Except as applicable to a claimant's own municipal development (which is not eligible for reimbursement)*, develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, prioritizing work plans, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements.[1613]

[1609] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.ii.).

[1610] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.iii.).

[1611] Exhibit A, Test Claim, filed November 10, 2011, page 218 (test claim permit, Section F.1.d.7.c.).

[1612] Exhibit A, Test Claim, filed November 10, 2011, pages 223, 227 (test claim permit, Section F.1.h. and F.1.h.5.).

[1613] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Section F.3.d.1.-4.).

2. *Except for a claimant's own municipal priority development projects (which are not eligible for reimbursement,* ensure priority development projects (comply with LID, LID waiver and hydromodification requirements, and track and inspect BMPS for retrofitted projects.[1614]

   - Require each priority development project listed in Sections F.1.d.1. and 2., *except a claimant's own municipal projects*, to implement LID BMPs as described in Sections F.1.d.4.b., c., and e., which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss, or make a finding of technical infeasibility for each priority development project in accordance with the LID waiver program in Section F.1.d.7.[1615]

   - Require all priority development projects, *except for a claimant's own municipal projects and smaller restaurants where land development is less than 5,000 square feet*, to implement the approved Hydromodification Plan (HMP).[1616]

   - *Except for a claimant's own municipal development,* track and inspect any completed retrofitted BMPs in accordance with Section F.1.f. of the test claim permit.[1617]

C. <u>BMP Maintenance Tracking of Priority Development Projects</u>

Except as applicable to a claimant's own municipal development (which is not eligible for reimbursement), the following activities constitute state-mandated new programs or higher levels of service:

1. Develop and maintain a watershed-based database to track and inventory all priority development projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The

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[1614] Exhibit A, Test Claim, filed November 10, 2011, pages 209-210 (test claim permit). Section F.1.c. requires the following: "For all proposed Development Projects, each Copermittee, during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with the Copermittee's ordinances, permits, plans, and requirements, and with this Order."

[1615] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.).

[1616] Exhibit A, Test Claim, filed November 10, 2011, pages 213, 223 (test claim permit, Sections F.1.d.2.c., F.1.h.).

[1617] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Section F.3.d.5.).

database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance verifications, and corrective actions; and whether the site was referred to the local vector control agency.[1618]

2. Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[1619]
3. Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[1620]
4. For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[1621]
5. Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[1622]

D. <u>Active/Passive Sediment Treatment</u>

1. *Except for the claimants' own municipal construction sites (which are not eligible for reimbursement)*, require implementation of AST for sediment at construction sites (or portions thereof) that are determined to be an exceptional threat to water quality.[1623]

[1618] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[1619] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[1620] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[1621] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[1622] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

[1623] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

E. Watershed Workplan

1. The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[1624]
2. The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[1625]
3. The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[1626]
4. The annual watershed review meetings shall be open to the public and adequately noticed.[1627]
5. Each permittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[1628]

F. Annual JRMP Report

1. Include in the annual fiscal analysis a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.[1629]
2. Provide in the annual report an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended.[1630]

[1624] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d.).

[1625] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

[1626] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[1627] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1628] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1629] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.1.).

[1630] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.2.).

3. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, provide the following information in the Checklist pursuant to Section K.3.c.3.:
    a. Construction:
        1) Number of Active Sites
        2) Number of Inactive Sites
        3) Number of Sites Inspected
        4) Number of Violations
    b. New Development:
        1) Number of Development Plan Reviews
        2) Number of Projects Exempted from Interim/Final Hydromodification Requirements
    c. Post Construction Development:
        1) Number of Priority Development Projects
        2) Number of SUSMP Required Post-Construction BMP Inspections
        3) Number of SUSMP Required Post-Construction BMP Violations
        4) Number of SUSMP Required Post-Construction BMP Enforcement Actions Taken
    d. Illicit Discharges and Connections:
        1) Number of IC/ID Eliminations
        2) Number of IC/ID Violations
    e. MS4 Maintenance:
        1) Total Miles of MS4 Inspected
    f. Municipal/Commercial/Industrial:
        1) Number of Facilities
        2) Number of Violations[1631]
4. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, report the following information contained in Table 5 pursuant to Section K.3.c.4.:
    a. New Development:
        1) All revisions to the SSMP, including where applicable: (b) updated procedures for identifying pollutants of concern for each priority

[1631] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 296 (test claim permit, Section K.3.c.3., Attachment D.).

development project; (c) updated treatment BMP ranking matrix; (d) updated site design and treatment control BMP design standards.[1632]

2) Brief description of BMPs required at approved priority development projects. Verification that site design, source control, and treatment BMPs were required on all applicable priority development projects.[1633]

3) Name and location of all priority development projects that were granted a waiver from implementing LID BMPs pursuant to Section F.1.d.4. during the reporting period.[1634]

4) Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority priority development projects; and verification that the requirements of this Order were met during the reporting period.[1635]

5) Name and brief description of all approved priority development projects required to implement hydrologic control measures in compliance with Section F.1.h. including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels.[1636]

b. Construction:

1) A description of planned ordinance updates within the next annual reporting period, if applicable.[1637]

2) A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the

[1632] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 2.).

[1633] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 3.).

[1634] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 4.).

[1635] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 5.).

[1636] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. New Development 6.).

[1637] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 1.).

nature of the construction activity, topography, and the characteristics of soils and receiving water quality.[1638]

3) Any changes to the designated minimum and enhanced BMPs.[1639]

4) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility; (b) date of enforcement actions by facility; (c) brief description of the effectiveness of each high-level enforcement action at construction sites.[1640]

5) Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.[1641]

c. Municipal (*other than a claimant's own development*):

1) Updated source inventory.[1642]

2) All changes to the designated municipal BMPs.[1643]

3) Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.[1644]

4) Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) List of projects retrofitted; (b) List and description of structures evaluated for retrofitting; (c) List of structures still needing to be evaluated and the schedule for evaluation.[1645]

[1638] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 2.).

[1639] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 3.).

[1640] Exhibit A, Test Claim, filed November 10, 2011 , pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1641] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1642] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 1.).

[1643] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 2.).

[1644] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 3.).

[1645] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 4.).

5) Include in the summary of the MS4 and MS4 facilities operations and maintenance activities, the (a) Number and types of facilities maintained.[1646]

6) Include (a) types of facilities and (b) summary of the inspection findings in the summary of the municipal structural treatment control operations and maintenance activities.[1647]

7) Include a list of facilities planned for bi-annual inspections and the justification in the summary of the MS4 and MS4 facilities operations and maintenance activities.[1648]

8) Include in the summary of the municipal areas/programs inspection activities: (a) date of inspections conducted at each facility; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility.[1649]

9) Description of activities implemented to address sewage infiltration into the MS4.[1650]

10) Description of BMPs and their implementation for unpaved roads construction and maintenance.[1651]

d. Commercial/Industrial:

1) Updated inventory of commercial/industrial sources of discharges.[1652]

2) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility or mobile business; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility or mobile business; (d) brief description of the effectiveness each high-level enforcement actions

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[1646] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.a.).

[1647] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.).

[1648] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 6.c.).

[1649] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 7.a.-c.).

[1650] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 8.).

[1651] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 9.).

[1652] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 1.).

at commercial/industrial sites including the follow-up activities for each facility.[1653]

3) All changes to designated minimum and enhanced BMPs.[1654]

e. Residential:

1) All updated minimum BMPs required for residential areas and activities.[1655]

2) Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.[1656]

f. Retrofitting Existing Development:

1) Updated inventory and prioritization of existing development identified as candidates for retrofitting.[1657]

2) Description of efforts to retrofit existing developments during the reporting year.[1658]

3) Description of efforts taken to encourage private landowners to retrofit existing development.[1659]

4) A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated.[1660]

[1653] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 2.).

[1654] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 3.).

[1655] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 1.).

[1656] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 3.).

[1657] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 1.).

[1658] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 2.).

[1659] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 3.).

[1660] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 4.).

5) Any proposed retrofit or regional mitigation projects and time lines for future implementation.[1661]

g. Workplans:

1) Updated workplans including priorities, strategy, implementation schedule, and effectiveness evaluation.[1662]

G. Special Studies

1. Sediment Toxicity Study

a. Develop and submit to the Regional Board by April 1, 2012, a workplan to investigate the toxicity of sediment in streams and its potential impact on benthic macroinvertebrate IBI scores. The study must be implemented in conjunction with the stream assessment monitoring in Attachment E. The study must include the following elements:

1) At least four stream assessment locations must be sampled, including one reference site and one mass loading site. The selection of sites must be done with consideration of subjectivity of receiving waters to discharges from residential and agricultural land uses.

2) At a minimum, sampling must occur once per year at each site for at least two years.

3) At a minimum, sediment toxicity analysis must include the measurement of metals, pyrethroids, and organochlorine pesticides. The analysis must include estimates of bioavailability based upon sediment grain size, organic carbon, and receiving water temperature at the sampling site. Acute and chronic toxicity testing must be done using *Hyalella azteca*.

b. Include the results and a discussion in the monitoring annual report including an assessment of the relationship between observed IBI scores and all variables measured.[1663]

2. Trash and Litter Investigation

a. Develop and submit to the Regional Board by September 1, 2012, a workplan to assess trash (including litter) as a pollutant within receiving waters on a watershed based scale. The copermittees must select a lead copermittee. The study must include the following elements:

[1661] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 5.).

[1662] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Workplans).

[1663] Exhibit A, Test Claim, filed November 10, 2011, page 314 (test claim permit, Attachment E., Section II.E.2.).

1) The lead copermittee must identify suitable sampling locations within the Santa Margarita HU.

2) Trash at each location must be monitored a minimum of twice during the wet season following a qualified monitoring storm event[1664] and twice during the dry season.

3) The lead copermittee must use the "Final Monitoring Workplan for the Assessment of Trash in San Diego County Watersheds" and "A Rapid Trash Assessment Method Applied to Waters of the San Francisco Bay Region" to develop a monitoring protocol.

b. Include the results and a discussion in the monitoring annual report and must, at a minimum, include source identification, an evaluation of BMPs for trash reduction and prevention, and a description of any BMPs implemented in response to study results.[1665]

3. Agricultural, Federal and Tribal Input Study

a. Develop and submit to the Regional Board by September 1, 2012, a workplan to investigate the water quality of agricultural, federal, and tribal runoff that is discharged into their MS4. The study must include the following elements:

1) The copermittees must identify a representative number of sampling stations within their MS4 that receive discharges of agricultural, federal, and tribal runoff that has not co-mingled with any other source. At least one station from each category must be identified.

2) One storm event must be monitored at each sampling location each year for at least two years.

3) At a minimum, analysis must include those constituents listed in Table 1 of the MRP. Grab samples may be utilized, though composite samples are preferred. The copermittees must also measure or estimate flow rates and volumes of discharges into the MS4.

b. Include the results and a discussion from the study in the monitoring annual report.[1666]

4. MS4 and Receiving Water Maintenance Study

a. Develop and submit to the Regional Board by April 1, 2012, a workplan to investigate receiving waters that are considered part of the MS4 and that are

[1664] A qualified monitoring storm event is defined as a minimum of 0.1 inches of precipitation preceded by 72 hours of dry weather.

[1665] Exhibit A, Test Claim, filed November 10, 2011, page 315 (test claim permit, Attachment E., Section II.E.3.).

[1666] Exhibit A, Test Claim, filed November 10, 2011, pages 315-316 (test claim permit, Attachment E., Section II.E.4.).

subject to continual vegetative clearance activities, for example, mowing. The copermittees must assess the effects of the vegetation removal activities and water quality, including, but not limited to, modification of biogeochemical functions, in-stream temperatures, receiving water bed and bank erosion potential, and sediment transport. The study must include the following elements:

1) The copermittees must identify suitable sampling locations, including at least one reference that is not subject to maintenance activities.

2) At a minimum, the copermittees must monitor pre- and post-maintenance activities for indicator bacteria, turbidity, temperature, dissolved oxygen and nutrients (nitrite, nitrate, total Kjeldahl nitrogen, ammonia and total phosphorous). The copermittees must also measure or estimate flow rates and volumes.

b. Include the results and a discussion from the study in the annual monitoring report including the relevance of findings to CWA section 303(d) listed impaired waters.[1667]

The last issue is whether these activities result in increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. Increased costs mandated by the state requires a showing of "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[1668] In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim. As relevant here, Government Code section 17556(d) states that the Commission shall not find costs mandated by the state when:

> The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

The claimants contend that the activities result in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514. They estimate that, for all requirements set forth in the test claim permit, increased

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[1667] Exhibit A, Test Claim, filed November 10, 2011, page 316 (test claim permit, Attachment E., Section II.E.5.).

[1668] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185.

costs of $1,446,317.50 were expended in FY 2010-11 and $2,438,936.90 in FY 2011-12, and an as yet undetermined share of $18,696.29 in FY 2010-11 and $271,720.61 in FY 2011-12. In addition, for the special studies requirement, the statewide estimate of increased costs was $103,789.60 in FY 2012-13.[1669]

The claimants agree that some permittees have access to a Riverside County stormwater fund, to fuel tax and community services revenue, to lighting and maintenance revenues and development and business registration fees, and the Riverside County Flood and Water Conservation District has access to a Benefit Assessment for stormwater costs. However, the claimants contend that these funding sources do not cover the entire cost of compliance with the provisions set forth in this Test Claim. Additionally, the claimants contend Proposition 26 and Proposition 218 limit their ability to recover costs through fees. Therefore, the claimants conclude that Government Code section 17556(d) does not apply to deny this test claim.[1670]

The Water Boards allege that the test claim permit does not result in increased costs mandated by the state since the claimants have fee authority sufficient as a matter of law to cover the costs of the program and, thus, Government Code section 17556(d) applies to deny this Test Claim. They argue that municipalities can and do assess stormwater fees to fund their programs, and point to case law that holds that practical considerations to assessing fees are not relevant to the inquiry of whether the claimants have fee authority sufficient as a matter of law to fund the costs of the program.[1671] The Water Boards further contend that the costs of implementation for the Watershed Workplan, Section G.1.-5., and the Annual JRMP Report, Section K.3.c.1.-4., should be found to be de minimis.[1672]

As explained below, the Commission finds that the new state-mandated activities result in costs mandated by the state for most of the copermittees for some of the activities based on the following findings:

a. The new state-mandated activities do not result in costs mandated by the state for Riverside County Flood and Water Conservation District because there is no evidence in the record that the District was forced to spend its "proceeds of taxes," but instead used assessment revenue and contract funds from the County and cities.

b. The County and cities have regulatory fee authority sufficient as a matter of law to fund the new state-mandated activities required related to LID (Section F.1.d.1., 2., 4., 7.), Hydromodification (Section F.1.h.), Retrofitting (Section

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[1669] Exhibit A, Test Claim, filed November 10, 2011, page 87 (Test Claim narrative).

[1670] Exhibit A, Test Claim, filed November 10, 2011, page 88 (Test Claim narrative).

[1671] Exhibit C, Water Boards' Comments on the Test Claim, filed September 22, 2017, pages 18-19, citing *Connell v. Superior Court* (1997) 50 Cal.App.4th 382, 398 and *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.

[1672] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 2-4.

F.3.d.1-5.), BMP Maintenance Tracking (Section F.1.f.), and Active/Passive Sediment Treatment (Section F.2.d.3.), pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities.

c. The County and cities have constitutional and statutory authority to charge property-related fees for the new state-mandated requirements related to the development and submittal of the SALs Wet Weather MS4 Discharge Monitoring Program (Section D.2.); Watershed Workplan (Sections G.1.-5.); the Annual JRMP Reporting requirements (Sections K.3.c.1.- 4. and Table 5); and Special Studies (Section II.E.2.-5. of Attachment E.). Based on *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, and *Department of Finance v. Commission on State Mandates*,[1673] these fees are subject to the voter approval requirement in article XIII D, section 6(c) from November 10, 2010, the beginning date of the potential period of reimbursement, to December 31, 2017, and, thus, the fee authority is not sufficient as a matter of law during this time period to fund the costs of the mandated activities. Under these limited circumstances, Government Code section 17556(d) does not apply, and there are costs mandated by the state. Any fee revenues received must be identified as offsetting revenue. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, other state funds, and other funds that are not the claimant's proceeds of taxes shall be identified and deducted from this claim.

   Based on *Paradise Irrigation District* case and the Legislature's enactment of Government Code sections 57350 and 57351 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state on or after January 1, 2018, to comply with these activities, because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

1. The New State-Mandated Activities Do Not Result in Costs Mandated by the State for the Riverside County Flood and Water Conservation District Because There Is No Evidence in the Record That the District Was Forced to Spend Their Local "Proceeds Of Taxes."

Although the record shows the County and cities used proceeds of taxes to comply with the test claim permit and incurred $1,000 in costs,[1674] there is no evidence in the record that the District was forced to spend its local "proceeds of taxes." The reimbursement requirement in article XIII B, section 6 was included because of the tax and spend

[1673] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581 (review denied March 1, 2023).

[1674] See, for example, Exhibit A, Test Claim, filed November 10, 2011, pages 106-170 (Declarations from employees of the County of Riverside, and Cities of Murrieta, Temecula, and Wildomar), and the analysis in the next section.

limitations in articles XIII A and XIII B, and is triggered only when the state forces the expenditure of local proceeds of taxes; section 6 was not intended to reach beyond taxation or to protect nontax sources.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A reduced the authority of local government to impose property taxes by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[1675] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[1676]

Article XIII B was adopted by the voters as Proposition 4, less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[1677] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[1678] "Proceeds of taxes," in turn, includes "all tax revenues," as well as proceeds from "regulatory licenses, user charges, and user fees to the extent those proceeds *exceed* the costs reasonably borne by that entity in providing the regulation, product, or service," and proceeds from the investment of tax revenues.[1679] And, with respect to local governments, the section reiterates that "proceeds of taxes" includes state subventions other than mandate reimbursement, and, with respect to the State's spending limit, excludes such state subventions.[1680]

[1675] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[1676] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[1677] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1678] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1679] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990), emphasis added.

[1680] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

Article XIII B does *not* restrict the growth in appropriations financed from nontax sources, such as "user fees based on reasonable costs," and assessments.[1681] And appropriations subject to limitation do not include "[a]ppropriations for debt service." [1682]

Proposition 4 also added article XIII B, section 6, which was specifically "designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues."[1683] The California Supreme Court, in *County of Fresno v. State of California*,[1684] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[1685]

Most recently, the California Supreme Court concluded that articles XIII A and XIII B work "in tandem," for the purpose of precluding "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities *because of the taxing and spending limitations that articles XIII A and XIII B impose*."[1686] Accordingly, reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur "increased actual

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[1681] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; see also, *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451 (finding that revenues from a local special assessment for the construction of public improvements are not "proceeds of taxes" subject to the appropriations limit.).

[1682] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[1683] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[1684] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1685] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

[1686] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

expenditures of limited tax proceeds that are counted against the local government's spending limit."[1687]

Based on the record and documents publicly available,[1688] there is no evidence that the District used its proceeds of taxes to pay for the new state-mandated activities. The District has instead used assessment revenue to pay for NPDES permit costs and funds received from the County and City claimants pursuant to an Implementation Agreement and, thus, the District has not incurred "increased actual expenditures of limited tax proceeds that are counted against [the District's] spending limit."[1689]

The District was established by the Legislature in 1945 to provide for the control of the flood and storm waters of the district and to conserve the waters for beneficial and useful purposes.[1690] The District has the power to acquire and purchase property, to incur indebtedness, to cause taxes and assessments to be levied and collected for the purpose of paying any obligation of the district and to carry out any of the purposes of the act, and to make contracts and employ labor and "to do all acts necessary for the full exercise of all powers vested in the district."[1691] The Board of Supervisors for the County of Riverside is the District's governing body.[1692]

The District was designated as the principal permittee for the region's NPDES permits, including the test claim permit,[1693] and has the primary responsibility under the test claim permit to:

[1687] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

[1688] California Code of Regulations, title 2, section 1187.5(c) ("Official notice may be taken in the manner and of the information described in Government Code Section 11515.").

[1689] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

[1690] Water Code Appendix sections 48-1 (Statutes 1945, chapter 1122), 48-9 (Statutes 1945, chapter 1122, last amended by Statutes 1987, chapter 669).

[1691] Water Code Appendix section 48-9; see also Water Code Appendix section 48-14 (Taxes and Assessments, which authorizes the County Board of Supervisors to levy taxes or assessments on all taxable property for the District).

[1692] Water Code Appendix section 48-10.

[1693] Exhibit J (37), Santa Margarita River Region, Report of Waste Discharge (ROWD), January 15, 2009, page 36; Exhibit J (38), Santa Margarita River Region, Report of Waste Discharge (ROWD), May 10, 2015, page 5; Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 119.

1. Serve as liaison between the Copermittees and the San Diego Water Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the San Diego Water Board.
2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.
3. Coordinate the submittal of the documents and reports required by Section K of the test claim permit and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E. of the test claim permit.[1694]

The District's 2012 JRMP states that the enabling act does not provide the District with land use or police powers. Therefore, the District cannot regulate development of private, industrial, or commercial facilities, and does not perform inspections.[1695] The District alleges, however, that it hired consultants, and developed and provided training with respect to the regulatory activities required under the LID, hydromodification, retrofitting, and active/passive sediment treatment sections of the permit, and updated the JRMP/Annual Report template to incorporate the new requirements "using funds contributed from each copermittee, including the District, through the Implementation Agreement."[1696] For all other new mandated activities relating to the Watershed Workplan, Annual Report, and Special Studies, the District used "funds contributed from each copermittee, including the District, through the Implementation Agreement."[1697] The District's Declaration further states that in 1991, it established the Santa Margarita Watershed Benefit Assessment to fund its MS4 compliance activities, and that the Benefit Assessment paid for "aspects of the District's compliance with the [test claim] Permit."[1698] There is no mention in the District's Declarations that the District used any of its own tax revenues to pay for costs incurred under the test claim permit.[1699]

[1694] Exhibit A, Test Claim, filed November 10, 2011, page 268 (test claim permit, Section M).

[1695] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 13, footnote 1.

[1696] Exhibit A, Test Claim, filed November 10, 2011, pages 94-101 (Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017).

[1697] Exhibit A, Test Claim, filed November 10, 2011, pages 99-101 (Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017).

[1698] Exhibit A, Test Claim, filed November 10, 2011, pages 102-103 (Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017).

[1699] See also, Exhibit A, Test Claim, filed November 10, 2011, pages 104-105, paragraph 5 (Declaration of David Garcia, Project Manager within the Watershed

The Implementation Agreement identified by the District is described in the District's 2012 JRMP, the first report publicly available after the adoption of the test claim permit, as a cooperative agreement with the County of Riverside and the Cities of Murrieta, Temecula, and Wildomar to contribute funds to implement the following shared costs required by the test claim permit:

a. Joint development of compliance documents required by the test claim permit.
b. Funding of the additional responsibilities of the District as Principal Copermittee (described in Section M of the test claim permit).
c. Regional public education activities.
d. Regional training programs for copermittee staff.
e. Water quality monitoring as described in the test claim permit, Attachment E., Sections II.A through II.F, exclusive of source identification efforts that may be required of the District.
f. Joint support for other Regional Programs.[1700]

Individual costs for each copermittee are also incurred for activities, such as implementing BMPs for their own municipal facilities, removing illicit connections and illegal discharges in their jurisdictions, gathering information for the annual JRMP, and for inspections and regulating development.[1701]

The Implementation Agreement for the shared costs is included in the District's 2012 JRMP and states in relevant part the following:

- The District established the Santa Margarita Benefit Assessment Area pursuant to District Ordinance 14 in May 1991 to offset the program and administrative costs associated with the NPDES Program, and the District is willing to use those assessment funds to support the District's role as principal permittee and the

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Protection Division of the Riverside County Flood Control and Water Conservation District dated April 27, 2017, which states, "The District was designated the Principal Permittee under the Permit, and in that role, coordinated joint responses to the Permit requirements set forth in the Test Claim, which responses were paid for as shared costs by the Claimants under the Implementation Agreement entered into by and between the Permittees.")

[1700] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, pages 11-12.

[1701] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 13, footnote 1; Exhibit J (26), Excerpt from Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP) for Fiscal Year 2014-2015, page 8.

regional costs of the test claim permit to the extent that the Benefit Assessment funds are available and can be used.[1702]

- The delegation of responsibilities of the District, as the principal permittee, and the County and cities are defined in the Agreement.[1703]
- The shared costs will be determined by estimating the costs each December for the upcoming fiscal year; estimating the District's internal costs for developing, implementing, and administering the NPDES program; estimating the revenues generated from the Benefit Assessment; determining actual costs of the NPDES program in the prior fiscal year; and determining credits or debits due to the County or Cities based on the difference of actual contributions from the previous fiscal year with the actual contributions for that fiscal year.
    - The District's contribution for the shared costs is calculated as follows:

      District Contribution = Assessment Revenues – internal costs – 20 percent Assessment Revenue (which is kept as a reserve for the NPDES program pursuant to Ordinance 14). If the calculation yields a negative result, then the District shall have no contribution for the upcoming fiscal year, except for internal costs it has incurred.
    - The County and cities' contribution for the shared costs is calculated as follows:

      Combined Contribution (which shall not exceed $2,200,000) = Estimated Costs – District Contribution. The pro rata share of County and City costs is based on equally weighted average of population and Benefit Assessment Units within the region, and then adjusted with credits or debits.[1704]

The Santa Margarita Benefit Assessment, discussed above, was established in 1991 pursuant to Ordinance 14 adopted by the District to offset the administrative and

[1702] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, pages 120-126 (Implementation Agreement).

[1703] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 120 (Implementation Agreement).

[1704] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, pages 127-129 (Implementation Agreement).

program costs associated with the NPDES stormwater program.[1705] The ordinance states in relevant part the following:

> The Board of Supervisors of the District finds that the Benefit Assessment to be annually levied shall be based on the proportional stormwater runoff generated by each lot or parcel within the Benefit Assessment Area. Revenues derived from the Benefit Assessment shall be applied exclusively to pay the District's administrative and program costs associated with the NPDES Permit required for the Benefit Assessment Area and are to be apportioned to the Benefit Assessment Area in which they are collected.[1706]

The assessment appears as a separate item on the county's property tax bill and is collected at the same time and in the same manner as property taxes.[1707] The Benefit Assessment has not increased since 1991.[1708]

The Report of Waste Discharge (ROWD) dated January 15, 2009, which serves as the application for renewal of the next NPDES permit (the test claim permit), indicates that the District's shared and individual costs to comply with the prior permit were fully paid using Benefit Assessment revenues.[1709]

[1705] Exhibit J (9), Engineer's Report to the Board of Supervisors of the Riverside County Flood Control and Water Conservation District on the NPDES Program for the Santa Margarita Benefit Assessment Area, July 2013, pages 4, 24-37 (Ordinance No. 14).

[1706] Exhibit J (9), Engineer's Report to the Board of Supervisors of the Riverside County Flood Control and Water Conservation District on the NPDES Program for the Santa Margarita Benefit Assessment Area, July 2013, page 25 (Ordinance No. 14).

[1707] Exhibit J (9), Engineer's Report to the Board of Supervisors of the Riverside County Flood Control and Water Conservation District on the NPDES Program for the Santa Margarita Benefit Assessment Area, July 2013, page 34 (Ordinance No. 14).

[1708] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 16, Table 3-3 "NPDES Program - Benefit Assessment Ordinance, Last Updated June 4, 1991"; Exhibit A, Test Claim, filed November 10, 2011, page 102 (Declaration of Stuart McKibbin, Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District, dated April 27, 2017, "There was no increase in the fees generated by the Benefit Assessment over the course of the Permit.").

[1709] Exhibit J (37), Santa Margarita River Region, Report of Waste Discharge (ROWD), January 15, 2009, pages 1, 16 ("Currently, the Benefit Assessment revenues fund the District's share of the area-wide MS4 Permit program activities and the District's individual compliance activities as a Permittee. Under the Benefit Assessment each parcel is taxed based on the impervious area of each parcel at a set rate established by District Ordinance 14. This rate has not been increased since 1991 due to Proposition 218.").

The JRMP, dated June 30, 2012, similarly states that the Benefit Assessment revenues are available and will be used for the following costs under the test claim permit: program management and reporting, annual fee for permit, implementation agreement shared costs, retrofit program, and public education and outreach.[1710]

The JRMP/Annual Report dated October 31, 2015, states that the District will use funds received from the Benefit Assessment and Implementation Agreements to fund these costs under the test claim permit in fiscal year 2015-2016.[1711]

Finally, the District's Annual Budget for fiscal year 2011-2012 and its Comprehensive Annual Financial Report for year ending June 30, 2015, identifies the *NPDES Santa Margarita* fund, which is the special revenue fund used to account for revenues and expenditures related to the National Pollutant Discharge Elimination System (NPDES) in the Santa Margarita assessment area. This fund is funded by the benefit assessment and "intergovernmental" (i.e. from the Implementation Agreement), and is not funded by any property tax revenues.[1712]

Thus, these documents show that the District used funds from the Benefit Assessment and the Implementation Agreement to pay for costs incurred to comply with the test claim permit. These funds, however, are not the District's proceeds of taxes and are not counted against the District's appropriations limit.

Assessments are levied for improvements that benefit particular parcels of land, do not raise the general revenues of the District, and are not counted against the District's appropriations limit.[1713] Moreover, the expenditure of assessment revenue is expressly *not* a "cost mandated by the state" under the Government Code.[1714]

[1710] Exhibit J (36), Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP), June 30, 2012, page 13. The other costs identified in the 2012 JRMP include those outside the scope of the new state-mandated activities (elimination of illicit connections and illegal discharges, municipal facilities and activities); costs for development planning, which are paid using development fees; and regulatory activities to inspect private, industrial, and commercial facilities, for which the District has no mandated responsibilities.

[1711] Exhibit J (26), Excerpt from Riverside County Flood Control and Water Conservation District's Jurisdictional Runoff Management Program (JRMP) for Fiscal Year 2014-2015, pages 8-9.

[1712] Exhibit J (24), Excerpt from Riverside County Flood Control and Water Conservation District's Annual Budget, Fiscal Year 2011-2012, pages 5, 6; Exhibit I (25), Excerpt from Riverside County Flood Control and Water Conservation District's Comprehensive Annual Financial Report for Year Ending June 30, 2015, pages 7, 9, 18.

[1713] *County of Placer v. Corin* (1980) 113 Cal.App.3d 444, 447-453.

[1714] Government Code section 17556(d), which provides that the Commission shall not find costs mandated by the state when the local agency "has the authority to levy

In addition, the funds received from the other copermittees under the Implementation Agreement are *not* the District's proceeds of taxes. Although the Implementation Agreement funds may be the proceeds of taxes of the County and cities, the funds are received by the District pursuant to the contract. The Implementation Agreement funds are not levied by or for the District, and are not counted against the District's appropriations limit.[1715] Therefore, reimbursement is not required for the District's expenditure of the Implementation Agreement funds.[1716]

In response to the Draft Proposed Decision, the claimants state the following: "Without agreeing to the correctness of the DPD's conclusions regarding the use of benefit assessment funds and 'proceeds of taxes,' to the extent that the District identifies further evidence relevant to this section of the DPD, it will consider presenting such evidence at the hearing on the Test Claim."[1717]

There is no evidence in the record that the District has been forced to spend its local "proceeds of taxes" for the new mandated activities and, thus, the District has not incurred costs mandated by the state. Reimbursement is therefore denied for the Riverside County Flood Control and Water Conservation District.

2. The New State Mandated Activities Result in Costs Mandated by the State for the County and Cities Except For Those Activities for Which the County and Cities Have Fee Authority Sufficient to Fund the Cost of the Program Pursuant to Government Code Section 17556(d).

The County and cities filed declarations showing they have incurred shared costs and individual direct costs exceeding the $1,000 threshold to comply with the test claim permit.[1718] The Test Claim narrative further states that although some claimants have access to a Riverside County stormwater fund,[1719] to fuel tax and community services

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service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

[1715] California Constitution, article XIII B, section 8; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32.

[1716] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185.

[1717] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 31.

[1718] Exhibit A, Test Claim, filed November 10, 2011, pages 106-170 (Declarations from employees of the County of Riverside, and Cities of Murrieta, Temecula, and Wildomar).

[1719] The Declarations described herein refer to the County Service Area 152 fund as the stormwater fund. According to the Santa Margarita Watershed JRMP and Annual Report for Fiscal Year 2013-2014, the County of Riverside's Economic Development Agency took control of this service area in 2002. "CSAs are an alternative method of providing governmental services by the County within unincorporated areas to provide extended services such as sheriff protection, fire protection, local park maintenance

revenue, to lighting and maintenance revenues and/or development/business registration fees for stormwater costs, these funding sources do not cover the entire cost of the program and the claimants have been forced to use their General Fund revenues.[1720] This statement is consistent with the declarations filed by the County and cities. The County declares that it used gas tax revenues and General Fund revenues, both of which are the County's proceeds of taxes,[1721] to pay for the costs incurred under the test claim permit:

> I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am informed and believe that certain of the programs set forth above are funded in part by the proceeds of fuel taxes collected in the County and by community services association revenue. I am further informed and believe that such proceeds are not sufficient to fund all programs set forth in this declaration. I am not aware of any other fee or tax that the County would have the discretion to impose under California law to recover any portion of the cost of these program and activities. I further am informed and believe that the only other available source to pay for these new programs and activities is the County's general fund.[1722]

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services, water and sewer services, ambulance services, streetlight energy services, landscape services and street sweeping. CSA 152 is designated as the mechanism to *provide limited street-sweeping maintenance for MS4 within the service area*." Exhibit J (39), Santa Margarita Watershed JRMP and Annual Report for Fiscal Year 2013-2014, page 5, emphasis added. The Test Claim does not plead any sections of the permit addressing street sweeping and, thus, it is not clear if the claimants used these funds for the new mandated program here.

[1720] Exhibit A, Test Claim, filed November 10, 2011, page 88 (Test Claim narrative).

[1721] "Gas Tax" revenues, though collected by the state and allocated to the counties by statute, fall within the definition of "proceeds of taxes," since they are a state subvention other than a subvention under section 6. (Streets and Highways Code, section 2101 et seq.; California Constitution, article XIII B, section 8 ["With respect to any local government, 'proceeds of taxes' shall include subventions received from the State, other than pursuant to Section 6…"].)

[1722] Exhibit A, Test Claim, filed November 10, 2011, page 118, paragraph 6 (Declaration of Steven Horn, Principal Management Analyst and NPDES Stormwater Program Administrator for the County of Riverside, dated April 24, 2017.)

Although the County's Budget for fiscal year 2011-2012 identifies "CSA 152 NPDES" and "NPDES Santa Margarita Assmt" in its reporting of the special districts' budgets, it does not show other sources funds for the County's NPDES program. Exhibit J (7), County of Riverside, Adopted Budget, Fiscal Year 2011-2012, pages 224-225, et seq.

The City of Murrieta also declares that it had to use General Fund revenues to pay for the costs incurred under the test claim permit as follows:

> I am informed and believe that there are no dedicated state or federal funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City has access to funding obtained through County Service Area 152, which funds, in part, the obligations of the City under the Permit. The City also can collect some inspection fees during the new development process, but not for existing development. I am informed and believe that neither of these funding sources is sufficient to cover the cost of the programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these program and activities. I further am informed and believe that the only other available source to pay for these new programs and activities is the County's general fund.[1723]

Similar declarations were filed by the cities of Temecula and Wildomar, acknowledging the use of County Service Area funds, Lighting and Landscape Maintenance Funds, and development fees, but also the use of General Fund revenues to pay for the activities identified in the declarations.[1724]

The JRMP reports filed by the County of Riverside and the cities support these declarations and show that the County and cities used general funds to comply with the test claim permit.[1725]

There is no evidence in the record to rebut these documents.[1726]

[1723] Exhibit A, Test Claim, filed November 10, 2011, pages 130-131, paragraph 6 (Declaration of Bob Moehling, City Engineer for the City of Murrieta, dated April 27, 2017).

[1724] Exhibit A, Test Claim, filed November 10, 2011, page 144, paragraph 6; page 157, paragraph 6; and page 170, paragraph 6 (Declaration of Patrick A. Thomas, Director of Public Works/City Engineer for the City of Temecula, dated April 25, 2017; Declaration of Daniel A. York, City Manager, Public Works Director and City Engineer for the City of Wildomar, dated April 26, 2017; Declaration of Tim D'Zmura, City Engineer and Director of Public Works for the City of Wildomar, dated November 30, 2011.)

[1725] Exhibit J (8), County of Riverside Jurisdictional Runoff Management Program (JRMP), June 30, 2014, pages 14-15; Exhibit J (2), City of Murrieta Jurisdictional Runoff Management Program (JRMP), June 27, 2012, pages 13-14; Exhibit J (4), City of Temecula Jurisdictional Runoff Management Program (JRMP), June 30, 2012, pages 12-13; Exhibit J (5), City of Wildomar Jurisdictional Runoff Management Program (JRMP), October 31, 2014, pages 34-35.

[1726] The Water Boards contend that the costs of implementing the Watershed Workplan, Section G.1.-5., and the Annual JRMP Report, Section K.3.c.1.-4., should be found to be de minimis. Exhibit F, Water Boards' Comments on the Draft proposed Decision,

Accordingly, there is substantial evidence in the record that the County and cities used proceeds of taxes to comply with the test claim permit. The analysis must continue, however, to determine whether the exceptions in Government Code section 17556 apply.

3. The Courts Have Held There Are *No* Costs Mandated by the State Pursuant to Government Code Section 17556(d) When Local Government Has the Authority to Charge Regulatory Fees Pursuant to Article XIII C or Property-Related Fees that are Subject Only to the Voter Protest Provisions of Article XIII D, Section 6 of the California Constitution. However, Government Code Section 17556(d) Does Not Apply When Proposition 218 Requires Voter Approval to Impose Property-Related Stormwater Fees and, Thus, Under These Circumstances There Are Costs Mandated by the State.

Government Code section 17556(d) provides that the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds that "the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The claimants argue that "it is clear that the costs associated with developing and implementing many programs called for in the 2010 [test claim] Permit are not recoverable through fees."[1727] The claimants conclude,

> A fee or charge that does not fall within the seven exceptions listed in Article XIII C, section 1(e) is automatically deemed a tax, which must be approved by the voters. Any fee that does not fall within one of the exceptions listed in Article XIII C, section 1(e) and that is imposed for a specific purpose, such as funding all or part of a program designed to comply with a municipality's obligation under an MS4 Permit, would constitute a "special tax." Article XIII A, section 4 and Article XIII C, section 2(d) would thus require it to be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.[1728]

However, there is no question that local agencies have the authority to charge fees for stormwater programs. Cities and counties have authority under the California Constitution to make and enforce ordinances and resolutions to protect and ensure the

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filed May 19, 2023, page 3. However, Government Code section 17514 defines "costs mandated by the state" as *any* increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. As indicated above, there is no evidence in the record to rebut the declarations of costs filed by the County and cities.

[1727] Exhibit A, Test Claim, filed November 10, 2011, page 27 (Test Claim narrative).

[1728] Exhibit A, Test Claim, filed November 10, 2011, page 28 (Test Claim narrative).

general welfare within their jurisdiction, which is commonly referred to as the "police power."[1729] That authority includes the power to impose fees or charges that are directed toward a particular activity or industrial or commercial sector, known as "regulatory fees;" fees or charges based on services or benefits received from government, known as "user fees;" fees or charges imposed as a condition of development of real property, known as "development fees;" and fees or charges (or assessments) levied on all property owners within the jurisdiction, which after Proposition 218 are commonly described as "property-related fees or assessments." In addition, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[1730] fees for development of real property,[1731] and property-based assessments, fees and charges.[1732] Each of these fees or charges is subject to differing limitations pursuant to Propositions 218 and 26.[1733]

The analysis below will address those limitations separately, because only property-related fees and assessments are subject to the notice, hearing, and majority approval or protest provisions of articles XIII D.

"Regulatory," "development," and "user" fees or charges are not subject to voter approval or majority protest. Broadly, these categories of fees are those that are targeted toward certain activities or sectors of industrial or commercial activity, or certain benefits received from the government or burdens created by the activity or the entity, rather than imposed on all property owners as an incident of property ownership.[1734] Such fees may be adopted as an ordinance or resolution in the context of the legislative body's normal business,[1735] subject only to the limitations of article XIII

[1729] California Constitution, article XI, section 7. See also, *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[1730] See, for example, Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[1731] Government Code section 66001 provides for development fees under the Mitigation Fee Act requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed.

[1732] See, for example, Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1733] California Constitution, articles XIII C and XIII D.

[1734] See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[1735] See, for example, *City and County of San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 450 ("If revenue is the primary purpose and regulation is merely incidental the

C, section 1(e), which, largely turn on establishing the relationship between the revenues raised and the uses to which they are put, and the amount charged and the benefits received or burdens created by the payor.[1736]

As explained below, the courts have held that there are no costs mandated by the state pursuant to Government Code section 17556(d) when local government has the authority to charge regulatory fees pursuant to article XIII C or property-related fees that are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution.

a. Case law establishes that the exception to the subvention requirement found in Government Code section 17556(d) is a legal inquiry, not a practical one.

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno.*[1737] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[1738]

Following the logic of *County of Fresno*, the Third District Court of Appeal in *Connell v. Superior Court* held that the Santa Margarita Water District, and other similarly situated districts, had statutory authority to raise rates on water, notwithstanding argument and evidence that the amount by which the district would be forced to raise its rates would render the water unmarketable.[1739] The district acknowledged the existence of fee

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imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax.").

[1736] California Constitution, article XIII C, section 1(e).

[1737] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

[1738] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[1739] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

authority, but argued it was not "sufficient," within the meaning of section 17556(d).[1740] The court held that "[t]he Districts in effect ask us to construe 'authority,' as used in the statute, as a practical ability in light of surrounding economic circumstances. However, this construction cannot be reconciled with the plain language of [section 17556(d)] and would create a vague standard not capable of reasonable adjudication."[1741] The court concluded: "Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry."[1742]

More recently, the Third District Court of Appeal endorsed and followed *Connell* in *Paradise Irrigation District*: "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[1743] Instead, the court held, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[1744] Further, the 2021 decision of the Second District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "[e]ven if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so."[1745] And, the 2022 decision of the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "The sole issue before us is whether permittees have 'the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program' . . . The inquiry is an issue of law, not a question of fact."[1746]

Accordingly, the rule from these cases is that where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical, undesirable, or difficult.[1747]

[1740] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

[1741] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1742] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1743] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1744] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1745] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1746] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[1747] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401-402.

b. The County and Cities have authority to charge regulatory fees sufficient to pay for the new state-mandated requirements related to LID (Section F.1.d.1., 2., 4., 7.), Hydromodification (Section F.1.h.), BMP Maintenance Tracking (Section F.1.f.), Active/Passive Sediment Treatment (Section F.2.d.3.) and Retrofitting (Section F.3.d.1-5.), which are sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities. However, the County and Cities do **not** have regulatory fee authority to pay for the Annual JRMP Reporting Checklist on Construction, New Development, Post Construction Development, Municipal (other than their own)/Commercial/Industrial (Section K.3.c.3.), and the Annual JRMP Reporting Requirements listed in Table 5 on New Development, Construction, Municipal (other than their own), Commercial/Industrial, Residential (Section K.3.c.4.).

i. Article XIII C of the California constitution exempts from the definition of "tax" a number of fees, including regulatory fees, so long as such fees meet a threshold of reasonableness and proportionality, and does not render local government's authority to impose fees insufficient as a matter of law within the meaning of Government Code section 17556(d).

Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[1748] Interpreting this provision, and its predecessor, the courts have held that a local legislative body with police power "has a wide discretion" and its laws or ordinances "are invested with a strong presumption of validity."[1749] The courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[1750] Accordingly, ordinances or laws regulating legitimate businesses or other activities within a city or county, as well as regulating the development and use of real property, have generally been upheld.[1751] In addition, "[t]he services for which a regulatory fee

[1748] California Constitution, article XI, section 7.

[1749] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[1750] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 (in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.).

[1751] See *Ex parte Junqua* (1909) 10 Cal.App. 602 (police power "embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others…."); *Sullivan v. City of Los Angeles Dept. of Building & Safety* (1953) 116 Cal.App.2d 807

may be charged include those that are "'incident to the issuance of [a] license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.'"[1752] The courts also hold that water pollution prevention is a valid exercise of government police power.[1753]

Moreover, as noted above, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[1754] and fees for development of real property,[1755] and property-based assessments, fees and charges.[1756]

Thus, there is no dispute that the claimants have authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[1757] The issue in dispute is only whether Propositions 218 and 26 impose procedural and substantive restrictions that so weaken that authority as to render it insufficient within the meaning of Government Code section 17556(d).

As discussed above, Proposition 13 of 1978 added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase

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(recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

[1752] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, quoting *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1753] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[1754] See, for example, Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[1755] Government Code section 66001 provides for development fees under the Mitigation Fee Act requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed.

[1756] See, for example, Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1757] See also, *Ayers v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31 (Upholding conditions imposed by the City on subdivision development, in the absence of any clear restriction or limitation on the City's police power); *Associated Home Builders etc. Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 (Upholding state statute and local ordinance requiring dedication or in-lieu fees for parks and recreation as a condition of subdividing for residential building).

taxes.[1758] Proposition 13 generally limited the rate of any ad valorem tax on real property to one percent; limited increases in the assessed value of real property to two percent annually absent a change in ownership; and required that any changes in state taxes enacted to increase revenues and special taxes imposed by local government must be approved by a two-thirds vote of the electors.[1759] Proposition 13, however, did not define "special taxes," and a series of judicial decisions tried to define the difference between fees and taxes, and in so doing, diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[1760]

In 1996, Proposition 218 added article XIII C to ensure and reiterate voter approval requirements for general and special taxes, because it was not clear whether Proposition 62, which enacted statutory provisions to ensure that all new local taxes be approved by a vote of the local electorate, bound charter jurisdictions.[1761] As added by Proposition 218, article XIII C defined all taxes as general or special, and provided that special districts have no power to impose general taxes; and for any other local government, general taxes require approval by a majority of local voters, and special taxes require a two-thirds majority voter approval.[1762]

Interpreting the newly-reiterated limitation on local taxes, the California Supreme Court in *Sinclair Paint* held that a statute permitting the Department of Health Services to levy fees on manufacturers and other persons contributing to environmental lead contamination, to support a program of evaluation and screening of children, imposed bona fide *regulatory fees*, and not, as alleged by plaintiffs, a special tax that would require voter approval under articles XIII A and XIII C.[1763] The Court noted with approval *San Diego Gas & Electric*, in which the air district was permitted to recover costs of its operations, which are not reasonably identifiable with specific industrial polluters, against all monitored polluters according to an emissions-based formula, and those fees were not held to constitute a special tax.[1764] The Court cited with approval the court of appeal's finding that "[a] reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-

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[1758] See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1759] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

[1760] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319.

[1761] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

[1762] See Exhibit J (27), Excerpts from Voter Information Guide, November 1996 General Election (Proposition 218, November 5, 1996).

[1763] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

[1764] *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

paying public to the pollution-causing industries themselves…"[1765] The Court thus held: "In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision."[1766]

In 2010, the voters approved Proposition 26, partly in response to *Sinclair Paint*.[1767] Proposition 26 sought to broaden the definition of "tax," and accordingly narrow the courts' construction of permissible non-tax fees. However, Proposition 26 largely *codifies* the analysis of *Sinclair Paint*, in its articulation of the various types of fees and charges that are *not* deemed "taxes."[1768] Thus, while Proposition 13 led a series of increasing restrictions on the imposition of new taxes, after *Sinclair Paint* and Propositions 218 and 26, local governments have the power, subject to varying limitations, to impose or increase (1) general taxes (with voter approval);[1769] (2) special taxes (with *two-thirds* voter approval);[1770] and (3) levies, charges, or exactions that are not "taxes," pursuant to the exceptions stated in article XIII C, section 1(e), which include:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

[1765] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879 quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

[1766] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

[1767] See Exhibit J (28), Excerpts from Voter Information Guide, November 2010 General Election (Proposition 26, Nov. 2, 2010), page 3.

[1768] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

[1769] California Constitution, article XIII C, section 2.

[1770] California Constitution, article XIII C, section 2.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[1771]

The plain language of article XIII C, section 1(e) thus describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[1772] and fees or charges for a government service or product provided to the payor and not others.[1773] Both of these could be described as "user" fees, or otherwise described as fees for a government service or benefit. In addition, section 1(e) provides for regulatory fees (including those for inspections),[1774] development fees,[1775] and assessments or property-related fees or charges adopted in accordance with article XIII D.[1776] In each case, the local government bears the burden to establish that the fee or charge is not a tax, including that "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[1777]

However, while the limitations of article XIII C, section 1(e) may be newly expressed in the Constitution (i.e., added in 2010 by Proposition 26), the concepts that regulatory fees must be reasonably related to a legitimate public purpose, and in some way proportional to the activity being regulated, are not at all new. The California Supreme Court described the history of such fees in *United Water Conservation Dist.*, saying, "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law

[1771] California Constitution, article XIII C, section 1(e).

[1772] California Constitution, article XIII C, section 1(e)(1).

[1773] California Constitution, article XIII C, section 1(e)(2).

[1774] California Constitution, article XIII C, section 1(e)(3).

[1775] California Constitution, article XIII C, section 1(e)(6).

[1776] California Constitution, article XIII C, section 1(e)(7).

[1777] California Constitution, article XIII C, section 1(e).

distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other."[1778] The Court also noted: "*Sinclair Paint*, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis."[1779] Accordingly, the Court upheld the court of appeal's finding that the conservation charges did not exceed the reasonable cost of the regulatory activity in the aggregate,[1780] but presumed "each requirement to have independent effect,"[1781] and remanded the matter for consideration of the latter issue.

Similarly, in *San Diego County Water Authority*, the First District Court of Appeal upheld non-property-related rates charged for conveying water from the Colorado River based on a two-part test.[1782] The rates were held to satisfy both the express requirements of article XIII C, section 1(e)(2): "a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provided to those not charged and which does not exceed the reasonable costs…of providing the service"; and the more general test of *Sinclair Paint*: "[the volumetric rates] bear a fair and reasonable relationship to the benefits it receives from its use of the conveyance system."[1783]

Notably, developer fees have been interpreted somewhat more loosely with respect to this proportionality test. The plain language of article XIII C, section 1(e)(6) conspicuously omits any language relating to the reasonable costs or burdens of development, although the general caveat at the end of section 1(e) presumably still applies: "that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[1784] However, the court in *616 Croft Ave., LLC* suggests that as long as a development fee is "reasonably related to the broad general

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[1778] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262, and footnote 5.

[1779] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

[1780] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[1781] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.

[1782] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[1783] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[1784] California Constitution, article XIII C, section 1(e).

welfare purposes for which the ordinance was enacted,"[1785] the courts will not inquire into the reasonableness of the fee as applied to a particular payor:

> [A]lthough the fee must be reasonable, the inquiry is not about the reasonableness of the individual calculation of fees related to Croft's development's impact on affordable housing. The inquiry is whether the fee schedule *itself* is reasonably related to the overall availability of affordable housing in West Hollywood.[1786]

The court relied in part on article XIII D, section 1, which states that "[n]othing in this article or Article XIII C shall be construed to…[a]ffect exiting laws relating to the imposition of fees as a condition of property development."[1787]

Accordingly, there is no reason to believe that article XIII C imposes any greater limitation on local governments' authority under their police power to impose reasonable regulatory fees and other fees than existed under prior law. Article XIII C makes clear that the burden is on the local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[1788] It is not the burden of the state to make this showing on behalf of local government.

Here, the claimants argue the impossibility of imposing or increasing fees,[1789] even as *Sinclair Paint* and *616 Croft Ave.* show that the reasonableness and proportionality tests to which courts have subjected other proposed fees do not present such a hurdle as to effectively divest them of the authority to impose fees.

In addition, there is ample evidence that the claimants have successfully established development fees, regulatory fees, and other fees as fees, rather than taxes, even after the adoption of Propositions 218 and 26. For example, the cities include fees for inspections and the city of Wildomar also includes fees for business registrations as funding sources to comply with the test claim permit's requirements.[1790] The County's

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[1785] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631.

[1786] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631-632.

[1787] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631 ("Because the City has shown the fees are not special taxes under *Terminal Plaza* [*Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892], articles XIII C and XIII D of the California Constitution do not require the City to demonstrate the reasonableness of Croft's individual fee.").

[1788] California Constitution, article XIII C, section 1(e).

[1789] Exhibit D, Claimants' Rebuttal Comments, filed December 14, 2017, page 64.

[1790] Exhibit A, Test Claim, filed November 10, 2011, page 157 (Declaration of Daniel A. York, Assistant City Manager, Public Works Director, and City Engineer for the City of Wildomar).

adopted budget for fiscal year 2011-2012 includes revenue generated from building permits of $1,643,939.[1791]

Based on the foregoing, the Commission finds that article XIII C of the California Constitution does not render local government's authority to impose fees insufficient as a matter of law within the meaning of Government Code section 17556.

ii. The claimants have regulatory fee authority within the meaning of Government Code section 17556(d) for the new state-mandated requirements related to LID (Section F.1.d.1., 2., 4., 7.), Hydromodification (Section F.1.h.), BMP Maintenance Tracking (Section F.1.f.), Active/Passive Sediment Treatment (Section F.2.d.3.) and Retrofitting (Section F.3.d.1-5.) and, thus, there are no costs mandated by the state for these activities.

As indicated above, the sole issue for determining whether Government Code section 17556(d) applies is whether the claimants have the "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, notwithstanding other factors that may make the exercise of that authority or the collection of those fees impractical or difficult.[1792] And, as explained above, the claimants have the authority under their police powers to impose regulatory fees on development, which must meet the requirements of article XIII C, section 1(e) (Proposition 26).

In 2021, the Second District Court of Appeal in *Department of Finance v. Commission on State Mandates* (*Municipal Stormwater and Urban Runoff Discharges*) addressed NPDES permit requirements issued by the Los Angeles Regional Board to periodically inspect commercial and industrial facilities to ensure compliance with various environmental regulatory requirements.[1793] The court found that the local agencies subject to that permit had the authority under their police powers to charge regulatory fees for the inspection activities:

> We agree with the Commission that, based upon the local governments' constitutional police power and their ability to impose a regulatory fee that (1) does not exceed the reasonable cost of the inspections, (2) is not levied for unrelated revenue purposes, and (3) is fairly allocated among the fee payers, the local governments have such authority.[1794]

[1791] Exhibit J (7), County of Riverside, Adopted Budget, Fiscal Year 2011-2012, page 75.

[1792] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401-402; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[1793] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 552.

[1794] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of*

Even though the imposition of the fee may be difficult, the court held that local governments have the authority to impose the fee and, thus, reimbursement under article XIII B, section 6 was not required:

> The local governments also argue that a fee that must be no more than necessary to cover the reasonable costs of the inspections "would be difficult to accomplish." They refer to problems that would arise from a general business license fee on all businesses, including those not subject to inspection, and to charging fees for inspections in years in which no inspection would take place. Even if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so. (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) As explained above, the police powers provision of the constitution and the judicial authorities we have cited provide that authority.[1795]

In addition, the courts have explained that the scope of a regulatory fee is somewhat flexible and is valid as long as it relates to the overall purpose of the regulatory governmental action.[1796] The Third District Court of Appeal in *California Assn. of Prof. Scientists v. Department of Fish & Game (Professional Scientists)* has identified the following general rules:

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

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Equalization (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

[1795] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565.

[1796] *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438, citing *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[1797]

As indicated by the court in *Professional Scientists,* regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement."[1798] In *United Business Commission v. City of San Diego*, the court explained that regulatory fees include "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed" and that the following incidental costs are properly included in a regulatory fee: "inspection of hazards, travel time, office supplies, telephone expenses, overhead, and clerk's time."[1799]

In the 2022 *Department of Finance* (*Discharge of Stormwater Runoff*) opinion issued by the Third District Court of Appeal, the court found that the permittees had regulatory fee authority under their police powers to pay for the requirements imposed by the San Diego Regional Board to develop and implement a hydromodification management plan and LID requirements for use on priority development projects, as incidental expenses of regulating development.[1800] Like the test claim permit here, the court explained that the priority development projects addressed in the permit are certain new developments that increase pollutants in stormwater and in discharges from MS4s, including certain residential, commercial, and industrial uses along with parking lots and roads that add impervious surfaces or are built on hillsides or in environmentally sensitive areas.[1801] The permit required the claimants to develop and implement a hydromodification management plan to mitigate increases in runoff discharge rates and durations from priority development projects, and add LID requirements to their local Standard Urban Storm Water Mitigation Plans.[1802] The County and cities argued that the costs of creating the plans could not be recovered through regulatory fees, and thus voter approval would be required, since the amount of the fee would exceed the reasonable costs of providing the services for which it is charged, and the amount of the fee would not bear a reasonable relationship to the burdens created by the feepayers' activities or operations, primarily because the costs were incurred before any priority development

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[1797] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1798] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1799] *United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, footnote 2.

[1800] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586-593.

[1801] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586.

[1802] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586.

project was proposed.[1803] The County and cities further argued that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large and, thus, would constitute a tax.[1804] The court disagreed and found that local government has fee authority sufficient as a matter of law to cover the costs of the hydromodification management plan and LID requirements within the meaning of Government Code section 17556(d) and, thus, there were no costs mandated by the state for these activities based on the following findings:

- Creating the hydromodification management plans and the LID requirements constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program. "Setting the fee will not require mathematical precision. Permittees' legislative bodies need only "consider 'probabilities according to the best honest viewpoint of [their] informed officials'" to set the amount of the fee."[1805]
- There was no evidence that the permittees could not levy a fee that would bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors . . . The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." The fee just has to be related to the overall cost of the governmental regulation.[1806]
- The court rejected the claimants' argument that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large, relying *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service provided directly to the payor *that is not provided to those not charged* ...."[1807] However, the court found that the service provided directly to developers of

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[1803] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

[1804] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[1805] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1806] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1807] See, for example, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 569, where the court held that article XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large.

> priority development projects was the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service was not provided to anyone else, and only affected priority project developers charged for the service. The service would not be provided to those not charged.[1808]

In addition, the Mitigation Fee Act, Government Code section 66000 et seq., also authorizes local agencies to impose development fees if certain requirements are met. As defined by the Act, a development fee is:

> . . . a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include . . . fees for processing applications for governmental regulatory actions or approvals[.][1809]

"[A] fee does not become a 'development fee' simply because it is made in connection with a development project. Rather, approval of the development project must be conditioned on payment of the fee."[1810] A development fee under the Act is one that is imposed to "defray[] all or a portion of the cost of public facilities related to the development project."[1811] "'Public facilities' [broadly] includes public improvements, public services, and community amenities," and, thus, is not limited to capital outlay costs.[1812] The local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.[1813] Pollution prevention or abatement provides a public service,[1814] which falls within the Act's definition of a public facility.

Based on this authority, the claimants in this case have regulatory and developer fee authority under their police powers and the Mitigation Fee Act sufficient as a matter of law to cover the costs of the new state-mandated activities related to LID (Section

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[1808] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[1809] Government Code section 66000(b).

[1810] *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 130.

[1811] Government Code section 66000(b).

[1812] Government Code section 66000(d).

[1813] Government Code section 66001.

[1814] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

F.1.d.1., 2., 4., 7.) and Hydromodification Management Plans (Section F.1.h.), pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for the following activities:

- Incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for priority development projects.[1815]
- Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[1816]
- Develop a LID BMP waiver program to incorporate into the SSMP.[1817]
- Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) in accordance with Sections F.1.h.1. and 2. of the test claim permit to manage increases in runoff discharge rates and durations from all priority development projects. Submit a draft HMP that has been available to public review and comment, to the Regional Board within three years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the Regional Water Board, incorporate the HMP into the SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.[1818]
- Require each priority development project listed in Sections F.1.d.1. and 2., *except a claimant's own municipal projects*, to implement LID BMPs as described in Sections F.1.d.4.b., c., and e., which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss, or make a finding of technical infeasibility for each

[1815] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.ii.).

[1816] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.a.iii.).

[1817] Exhibit A, Test Claim, filed November 10, 2011, page 218 (test claim permit, Section F.1.d.7.c.).

[1818] Exhibit A, Test Claim, filed November 10, 2011, pages 223, 227 (test claim permit, Section F.1.h. and F.1.h.5.).

priority development project in accordance with the LID waiver program in Section F.1.d.7.[1819]

- Require all priority development projects, *except for a claimant's own municipal projects and smaller restaurants where land development is less than 5,000 square feet*, to implement the approved Hydromodification Management Plan (HMP).[1820]

The Commission further finds that the claimants have the authority to impose regulatory fees sufficient to cover the costs of all the requirements relating to the BMP maintenance tracking requirements, including the development and maintenance of a watershed-based database of priority development projects approved since July 2005 and the requirements to verify and inspect post-construction structural BMPs on approved projects, pursuant to Sections F.1.f.1. and F.1.f.2.b. of the test claim permit. As indicated in the Fact Sheet, the permittees authorized the development of those priority development projects in the first place and, therefore must ensure that the BMPs are operating effectively and have been adequately maintained.[1821] These administrative, maintenance, and inspection costs are incidental to the development permits issued by the claimants for these projects. As indicated by the court in *Professional Scientists,* regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement."[1822]

In response to the Draft Proposed Decision, the claimants allege they do not have the authority to impose fees to develop and maintain a database of the priority development projects implemented since 2005 since there is no way to capture those costs in permits that were already issued and because the database does not provide a benefit to the owners of those BMPs:

> Section F.1.f.1. of the Test Claim Permit required permittees to maintain a database of all projects with a structural post-construction BMP implemented since 2005. The creation of the database provided permittees with a way to track such BMPs, and did not itself provide a benefit to the owners/operators of those BMPs. Moreover, the requirement to include BMPs implemented starting in 2005, five years before the effective date of the Test Claim Permit, meant that permittees would have

[1819] Exhibit A, Test Claim, filed November 10, 2011, page 215 (test claim permit, Section F.1.d.4.).

[1820] Exhibit A, Test Claim, filed November 10, 2011, pages 213, 223 (test claim permit, Sections F.1.d.2.c., F.1.h.).

[1821] Exhibit A, Test Claim, filed November 10, 2011, page 430 (Fact Sheet, Discussion of Finding D.1.f.).

[1822] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

been unable to recover costs of entering those pre-Permit BMPs on the database through the development process, if that were even possible.[1823]

However, as indicated above, the database falls within those categories of costs that are incidental to the building permits being issued by the claimants on priority development projects and are needed to ensure that the permittees verify and inspect the post-construction structural BMPs on those projects. There is no support in the law or evidence in the record that the claimants could not impose a fee on the owners of priority development projects, which bears a reasonable relationship to the burdens created by those projects, to ensure the BMPs that were approved in the permitting process for those projects are adequately maintained. The fact that the claimants already issued permits on priority development projects going back to 2005 does not defeat their *authority* to impose a fee to develop and maintain a BMP database. A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." [1824] The fee just has to be related to the overall cost of the governmental regulation. This issue is no different than the 2022 *Department of Finance* case, which found that the permittees had regulatory fee authority sufficient to pay the costs of hydromodification and LID planning at a time when there were no developers or property owners to charge.[1825] Moreover, the service is being provided directly to the owners of priority development projects to ensure the BMPs on their properties are operating effectively and are adequately maintained; the service is not provided to those not charged.[1826] Thus, the Commission finds that the claimants have regulatory fee authority under their police powers sufficient as a matter of law to cover the costs of the new state-mandated activities related to BMP Maintenance Tracking pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for the following activities:

- Develop and maintain a watershed-based database to track and inventory all priority development projects, within its jurisdiction, that have a final approved SSMP with structural post-construction BMPs implemented since July 2005. The database must include information on BMP type; location; watershed; date of construction; the party responsible for maintenance, maintenance

[1823] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, page 34.

[1824] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1825] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1826] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

verifications, and corrective actions; and whether the site was referred to the local vector control agency.[1827]

- Verify that the required structural post-construction BMPs on inventoried *residential* projects have been implemented, are maintained, and are operating effectively every five years. Verification can be made through inspections, self-certifications, surveys, or other equally effective approaches.[1828]
- Annually inspect the required structural post-construction BMPs at high priority *residential* projects.[1829]
- For all inventoried projects, verifications performed through a means other than direct copermittee inspection, adequate documentation must be submitted to the copermittee to provide assurance that the required maintenance has been completed.[1830]
- Inspections of the required structural post-construction BMPs at all inventoried projects must note observations of vector conditions and, where conditions are contributing to mosquito production, the copermittee is required to notify the local vector control agency.[1831]

The same analysis applies to the requirements in Section F.3.d.1.-5. of the test claim permit, to develop and implement a retrofitting program for existing developments by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit and prioritizing work plans, encouraging retrofit projects to be designed to use LID and hydromodification requirements, and then tracking and inspecting completed retrofitted BMPs in accordance with Section F.1.f. of the test claim permit. Once a property owner decides to retrofit a project and seeks a permit to do so, the permittee is required by Section F.1.c., prior to approval and issuance of the permit, to prescribe the necessary requirements so that the project's discharges of stormwater pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with the

[1827] Exhibit A, Test Claim, filed November 10, 2011, page 221 (test claim permit, Section F.1.f.1.).

[1828] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.i.).

[1829] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.ii.).

[1830] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.v.).

[1831] Exhibit A, Test Claim, filed November 10, 2011, page 222 (test claim permit, Section F.1.f.2.b.vii.).

requirements of the test claim permit and ordinances adopted by the permittee.[1832] There is no evidence in the law or the record to suggest that the claimants could not impose a fee for these administrative costs and to track and inspect retrofitted BMPs as part of the permitting process.

In comments on the Draft Proposed Decision, however, the claimants assert that the costs required by Sections F.3.d.1.-4. (i.e., the activities to develop and implement a retrofitting program for existing developments by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit and then prioritizing work plans, and encouraging retrofit projects to be designed to use LID and hydromodification requirements), are not recoverable through regulatory fees as follows:

> The DPD concludes, without discussion, that Claimants can assess regulatory fees to pay costs relating to the retrofitting of existing development. But in such a situation, there is no property owner or developer upon which fees can be assessed to pay such costs as identifying and inventorying existing areas of development (Section F.3.d.1.); costs to "evaluate and rank" the inventoried areas to prioritize retrofitting (Section F.3.d.2.); or, costs to consider the results of the evaluation in prioritizing Claimant work plans for the following year.
>
> All of these requirements are unrelated to potential future private development, for which development fees can be obtained, but rather to how Claimants must evaluate existing developments. [Fn., “In this way, the factual situation can be distinguished from that present in San Diego Permit Appeal II, where the question related to how the costs of preparing LID and HMP documentation was to be allocated amongst future development projects. 85 Cal.App.5th at 586-95.”] And, as the Test Claim Permit expressly provided, the work required of Claimants was not intended to benefit or burden any particular parcel but to improve water quality generally by addressing "the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards." Test Claim Permit, Section F.3.d.
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> Fees for requirements which "redound to the benefit of all" are not recoverable as regulatory fees. *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Newhall County held that a charge imposed by a water agency for creating "groundwater management plans" as part of the agency's groundwater management program could not be imposed as a fee. The court reasoned that the

[1832] Exhibit A, Test Claim, filed November 10, 2011, pages 209-210 (test claim permit, Section F.1.c.).

> charge was "not [for] specific services the Agency provides directly to the [payors], and not to other [non-payors] in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin - not just the [payors]." [Fn. omitted.] See also *LA County Permit Appeal II, supra*, holding that placing trash receptacles at transit stops benefitted the "public at large" [fn. omitted] and that associated costs could not be passed on to any particular person or group. [Fn. omitted.][1833]

The Commission disagrees with the claimant's argument. The fact that the claimants already issued the original permits on these projects does not defeat their authority to impose a fee to cover the costs of these activities. This issue is no different than the 2022 *Department of Finance* case, which found that the permittees had regulatory fee authority sufficient to pay the costs of hydromodification and LID planning at a time when there were no developers or property owners to charge.[1834] In addition, a regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." [1835] The fee just has to be related to the overall cost of the governmental regulation.

Moreover, the claimants' reliance on *Newhall* and the 2021 *Department of Finance* case (*Municipal Stormwater and Urban Runoff Discharges*) is misplaced. In *Newhall*, the issue was whether rates that a public water wholesaler of imported water charged to four public retail water purveyors violated Proposition 26.[1836] Part of the wholesaler's rates consisted of a fixed charge based on each retailer's rolling average of demand for the wholesaler's imported water and for groundwater which was not supplied by the wholesaler. Although the wholesaler was required to manage groundwater supplies in the basin, it did not sell groundwater to the retailers.[1837] The court determined the rates did not qualify as fees under Proposition 26. As indicated above, Proposition 26 states a levy is not a tax where it is imposed "for a specific government service provided directly to the payor that is not provided to those not charged . . . ." The only specific government service the wholesaler provided to the retailers was imported water. It did not provide groundwater, and the groundwater management activities it provided were

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[1833] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 33-34.

[1834] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1835] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1836] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430.

[1837] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1434-1440.

not services provided just to the retailers. Instead, those activities "redound[ed] to the benefit of all groundwater extractors in the Basin[.]"[1838] The wholesaler could not base its fee and allocate its costs based on groundwater use because the wholesaler's groundwater management activities were provided to those who were not charged with the fee.[1839]

Similarly, the 2021 *Department of Finance* case (*Municipal Stormwater and Urban Runoff Discharges*) addressed property-related fees under Proposition 218 as they relate to the transit trash requirements. Under Proposition 218, or article XIII D, section 6, the proponent of a property-related fee has to also establish that the fee is not for general governmental services; where the service is available to the public at large in substantially the same manner as it is to property owners. The court found that Proposition 218 prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because the service was made available to the public at large.

> . . . common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)-(4)), the placement of the receptacles at public transit stops makes the "service available to the public at large in substantially the same manner as it is to property owners" (id., art. XIII D, § 6, subd. (b)(3)). The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements.[1840]

The retrofitting program in this case is different. The service provided directly to developers and property owners are the LID and hydromodification plans to assist in the preparation, implementation, and approval of water pollution mitigations to retrofit those projects. Unlike in *Newhall* and *Department of Finance*, that service is not provided to anyone else, and only affected developers and property owners will be charged for the service. The service will not be provided to those not charged. Even if the citizens of Riverside County receive some indirect benefit from this service, as suggested by the claimants, that does not make the fee a tax under the plain language of Proposition 26.

[1838] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1839] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1840] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

Fees are not taxes under Proposition 26 when they are charges for a benefit conferred or privilege granted,[1841] for a government service or product provided to the payor and not others,[1842] reasonable regulatory fees for permits,[1843] and charges imposed as a condition of property development.[1844]

Therefore, the Commission finds that the claimants have regulatory fee authority under their police powers sufficient as a matter of law to cover the costs of the new state-mandated activities related the retrofitting program pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for the following activities:

- *Except as applicable to a claimant's own municipal development (which is not eligible for reimbursement)*, develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, prioritizing work plans, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements.[1845]
- *Except for a claimant's own municipal development,* track and inspect any completed retrofitted BMPs in accordance with Section F.1.f. of the test claim permit.[1846]

In addition, the claimants have fee authority sufficient as a matter of law to cover the costs to require the implementation of Active/Passive Sediment Treatment (AST) for sediment at constructions sites that are determined to be an exceptional threat to water quality, pursuant to Section F.2.d.3. of the test claim permit.[1847] AST requires the use of "mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge" at those sites.[1848] As the Fact Sheet explains:

[1841] California Constitution, article XIII C, section 1(e)(1).

[1842] California Constitution, article XIII C, section 1(e)(2).

[1843] California Constitution, article XIII C, section 1(e)(3).

[1844] California Constitution, article XIII C, section 1(e)(6).

[1845] Exhibit A, Test Claim, filed November 10, 2011, pages 247-248 (test claim permit, Section F.3.d.1.-4.).

[1846] Exhibit A, Test Claim, filed November 10, 2011, page 249 (test claim permit, Section F.3.d.5.).

[1847] Exhibit A, Test Claim, filed November 10, 2011, page 231 (test claim permit, Section F.2.d.3.).

[1848] Exhibit A, Test Claim, filed November 10, 2011, page 283 (test claim permit, Attachment C).

> For sites that are identified as exceptional threat to water quality, active/passive sediment treatment (AST) is required to be implemented *in addition* to the minimum set and/or enhanced sediment control BMPs. AST is required at construction sites that are identified by the Copermittee as an exceptional threat to water quality due to high turbidity or suspended sediment levels in the site's effluent even when other sediment control BMPs have been implemented. In cases where the Copermittee's designated minimum set of BMPs and/or enhanced BMPs are not able or expected to be able to reduce turbidity or suspended sediment levels to a level that will be protective of water quality, AST is *necessary* and is considered MEP for the discharges from these sites.[1849]

There is no evidence in the law or the record to suggest that the claimants could not impose a regulatory fee on developers or construction site owners to cover the reasonable costs of requiring AST for sediment at construction sites as part of the permitting process. The fees would be not levied for unrelated revenue purpose, can be fairly allocated among the fee payers, and the service is not provided to those not charged.[1850]

Accordingly, the Commission finds that the County and cities have fee authority within the meaning of Government Code section 17556(d) sufficient as a matter of law to cover the cost of the new state-mandated activities related to LID (Section F.1.d.1., 2., 4., 7.), Hydromodification (Section F.1.h.), BMP Maintenance Tracking (Section F.1.f.), Active/Passive Sediment Treatment (Section F.2.d.3.), and Retrofitting (Section F.3.d.1.-5.) and, thus, there are no costs mandated by the state for these activities and reimbursement is denied.

iii. The claimants do not have regulatory fee authority to comply with Sections K.3.c.3. and K.3.c.4. of the test claim permit to annually report to the Regional Board on development because there is no evidence in the law or the record that the Regional Board intended the annual reporting requirements to provide a service or benefit to the developer or property owner.

Finally, the Draft Proposed Decision found that the claimants' regulatory authority to impose fees extended to the annual reporting requirements on development (i.e, the Annual JRMP Reporting Checklist on Construction, New Development, Post Construction Development, Municipal (other than their own)/Commercial/Industrial (Section K.3.c.3.), and the Annual JRMP Reporting Requirements listed in Table 5 on

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[1849] Exhibit A, Test Claim, filed November 10, 2011, page 512 (Fact Sheet/Technical Report), emphasis added.

[1850] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

New Development, Construction, Municipal (other than their own), Commercial/Industrial, Residential (Section K.3.c.4.)). In comments on the Draft Proposed Decision, the claimants contend they do not have the authority to impose regulatory fees for the annual reporting requirements since the purpose is not to administer or facilitate the interaction between the claimants and property owners/operators or projects within their jurisdictions, a task which potentially could be funded through regulatory fees, but rather to "maintain records demonstrating that Permit activity requirements have been met, which allows the San Diego Water Board to confirm compliance as needed...."[1851] The claimants are correct here. Section K.3. of the test claim permits states that "Each Annual Report must verify and document compliance with this Order as directed in this section."[1852] The Fact Sheet for the test claim permit states that:

> Each Copermittee is required to maintain records demonstrating that Permit activity requirements have been met, which allows the San Diego Water Board to confirm compliance as needed, such as via inspections, program audits, or requests for information per [Water Code] sections 13225 and 13267.
>
> [¶¶]
>
> In addition, the Order maintains many activity-based reporting requirements related to enforcement of local requirements, with an emphasis on the results from such activities. This is intended to facilitate review of the contributions that inspection and enforcement activities have made toward meeting the goals of the Order."[1853]

There is no evidence in the law or the record that the Regional Board intended the annual reporting requirements to provide a service or benefit to the developer or property owner, or that the annual reporting requirements have anything to do with issuing building permits.[1854] The purpose is to provide information to the Regional Board showing that the permittees are complying with the permit. Accordingly, the Commission finds that the claimants do not have regulatory fee authority to comply with Sections K.3.c.3. and K.3.c.4. of the test claim permit to annually report to the Regional Board on development.

[1851] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 34-35 (citing to the Fact Sheet).

[1852] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.a.).

[1853] Exhibit A, Test Claim, filed November 10, 2011, pages 540-541 (Fact Sheet/Technical Report, Section K.).

[1854] California Constitution, article XIII C, section 1(e)(1), (2), (3), and (6).

c. The County and cities do not have authority to levy property-related fees within the meaning of Government Code section 17556(d) when voter approval of the fee is required by article XIII D of the California Constitution (Proposition 218) and, thus, from November 10, 2010, to December 31, 2017, there are costs mandated by the state for the remaining new mandated activities related to the SALs Wet Weather MS4 Discharge Monitoring Program (Section D.2.), the Watershed Workplan (Sections G.1.-5.); the Annual JRMP Reporting(Sections K.3.c.1.-4) ; and Special Studies (Section II.E.2.-5. of Attachment E.). However, there are **no** costs mandated by the state within the meaning of Government Code section 17556(d) for these activities, beginning January 1, 2018, when, based on the plain language of SB 231, stormwater property-related fees became exempt from the voter approval requirements of article XIII D (Proposition 218).

The remaining new mandated activities relating to the SALs Wet Weather MS4 Discharge Monitoring Program (Section D.2. and Attachment E., Section II.B.3), the Watershed Workplan (Sections G.1.-5.); the Annual JRMP Reporting (Sections K.3.c.1.-4); and Special Studies (Section II.E.2.-5. of Attachment E.).

The claimants have constitutional police power (Cal. Const., art. XI, § 7) and statutory authority to impose property-related fees for these remaining new state mandated activities.[1855] An example of such a property-related stormwater fee that covers the costs of complying "with applicable local, state, and federal stormwater regulations," which would include the activities here, is the property-related fee adopted in 2014 by the City of San Clemente (which is not a permittee under the test claim permit), and was in effect from February 7, 2014 through June 30, 2020.[1856]

The claimants contend, however, that SB 231 is unconstitutional as it "attempts to reinterpret the Constitution in contradiction of the intent of the voters when they adopted Proposition 218" as follows:[1857]

- The plain language and structure of Proposition 218 do not support SB 231's definition of "sewer." The plain meaning of article XIII D, section 6(c) is that the term "sewer" or "sewer services" pertains only to sanitary sewers and not to MS4s. In attempting to expand the facilities and services covered by this term,

[1855] See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1856] Exhibit J (3), City of San Clemente Municipal Code, title 13, chapter 13.34, sections 13.34.010-13.34.030.

[1857] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 35-42.

SB 231 is an invalid modification of Proposition 218 that seeks to override voter intent.[1858]

- The statutes relied on by the Legislature when enacting SB 231 present only limited examples of how the term "storm sewer" or "sanitary sewer" were employed. "It is clear that in all, a distinction is drawn between sanitary sewers and storm sewers."[1859]
- There is significant evidence that the Legislature and the courts considered "sewers" to be different from "storm drains" prior to the adoption of Proposition 218. Thus, there was no "plain meaning" of "sewer" as a term that meant both sanitary and storm sewers, as stated in in the legislative findings.[1860]

The Water Boards assert that the reimbursement period for the Test Claim should end on January 6, 2016, when the test claim permit was superseded by Order No. R9-2015-0100 which became effective on January 7, 2016.[1861] In addition, the Water Boards' characterize Proposition 218 as a power sharing measure between local property owners and local government which does not deprive the local government of its fee authority. Thus, with the reimbursement period ending on January 6, 2016, the Water Boards conclude that the claimants have had fee authority for the entire reimbursement period and Government Code section 17556(d) bars all reimbursement.[1862]

The Department of Finance contends that the claimants have fee authority sufficient as a matter of law to cover all costs mandated by the state within the meaning of Government Code section 17556(d), and that the fee authority is undiminished by Proposition 218.[1863]

As described below, the Commission finds that the County and cities have authority to impose stormwater property-related fees for the remaining new mandated activities identified above, subject to article XIII D (Proposition 218), which until January 1, 2018, required voter approval before fees could be charged. Government Code section 17556(d) does not apply to deny a claim when voter approval of the fee is required from November 10, 2010, the beginning date of the potential period of reimbursement, to

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[1858] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 37-39.

[1859] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 39-40.

[1860] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 40-42.

[1861] Exhibit F, Water Boards' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 4-5.

[1862] Exhibit F, Water Boards' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 5-6.

[1863] Exhibit H, Finance's Late Comments on the Draft Proposed Decision, filed May 22, 2023, pages 1-2.

December 31, 2017.[1864] However, beginning January 1, 2018, SB 231 exempted property-related stormwater fees from the voter approval requirement of article XIII D (Proposition 218), which then makes only the voter protest provisions of article XIII D apply to property-related stormwater fees.[1865]

i. The voter protest and approval requirements of article XIII D for property-related fees.

Article XIII D, as added by Proposition 218 "imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.'"[1866] Specifically, assessments and property-related fees are subject to notice and hearing requirements, and must meet a threshold of proportionality with respect to the amount of the exaction and the purposes to which it is put. Section 4, addressing assessments, provides:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.[1867]

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency "shall consider all

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[1864] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

[1865] Government Code sections 53750, 53751 (amended by Statutes 2017, chapter 536 (SB 231)).

[1866] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 citing California Constitution, article XIII D, section 3).

[1867] California Constitution, article XIII D, section 4(a).

protests…and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.[1868]

Similarly, section 6 provides for a proportionality requirement with respect to property-related fees and charges:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
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> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
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> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.[1869]

And, section 6 provides for notice and a public hearing similarly to section 4; but, unlike section 4, section 6 does not expressly require the notice to inform parcel owners of their right to protest the proposed fee, nor is the notice required to be in the form of a ballot to be returned.[1870]

[1868] California Constitution, article XIII D, section 4(c)-(e).

[1869] California Constitution, article XIII D, section 6(b).

[1870] Compare California Constitution, article XIII D, section 6(a)(1)-(2) with article XIII D, section 4(a).

Finally, section 6(c) also provides that voter approval is required for property-related fees and charges *other than* for water, sewer, and refuse collection services.[1871]

Many of the limitations stated in Proposition 218 are not new, as most special assessment acts under prior law required notice and a public hearing, and many such acts also provided for majority protest of affected parcel owners to defeat a proposed assessment.[1872] Despite the existence of such limitations before Proposition 218, the court in *County of Placer v. Corin* held that assessments were sufficiently distinct from taxes as to be outside the scope of articles XIII A and XIII B.[1873]

After Proposition 218 came *Apartment Assn. of Los Angeles County, Richmond*, and *Bighorn-Desert View*.[1874] In each of these cases, the California Supreme Court narrowly construed the procedural and substantive limitations of article XIII D. In *Apartment Assn.*, the Court rejected a challenge under article XIII D, section 6 to the city's ordinance imposing fees on residential rental properties, finding that the fees were not "imposed by an agency upon a parcel or upon a person as *an incident of property ownership*…"[1875] The Court held that Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only "when they burden landowners as *landowners*."[1876] The residential rental fee ordinance at issue "imposes a fee on its subjects by virtue of their ownership of a business — i.e., because they are landlords," and, thus, the fee was not subject to the requirements of article XIII D.[1877]

In *Richmond*, the District imposed a "capacity charge" on applicants for *new* water service connections, and thus could not prospectively identify the parcels to which the charge would apply; that is, it could not have complied with the procedural requirements of notice and hearing under article XIII D, section 4. The Court held that the impossibility of compliance with section 4 was one reason to find that the capacity charge was not an assessment, within the meaning of article XIII D.[1878] The Court also found that the charge was to be imposed on applicants for new service, rather than

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[1871] California Constitution, article XIII D, section 6(c).

[1872] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

[1873] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

[1874] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409; *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205.

[1875] California Constitution, article XIII D, sections 2(e) and 3, emphasis added; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-842.

[1876] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, emphasis in original.

[1877] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[1878] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

users receiving service through existing connections, and that that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.[1879] Accordingly, the Court concluded: "Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees."[1880]

In *Bighorn-Desert View*, the Court rejected a local initiative designed to impose a voter approval requirement on all future rate increases for water service,[1881] finding that article XIII D, section 6's express *exemption* from voter approval for sewer, water, and refuse collection "would appear to embody the electorate's intent as to when voter-approval should be required, or not required."[1882] The Court concluded:

> [U]nder section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but…[article XIII C, section 3] does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 ["We should not presume ... that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected (see Stats. 1969, ch. 1175, § 5, p. 2274, 72B West's Ann. Wat.-Appen., *supra,* ch. 112, p. 190), will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in

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[1879] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

[1880] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

[1881] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

[1882] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

> subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.[1883]

In 2019, the Third District Court of Appeal issued its decision in *Paradise Irrigation District*, which directly addresses (in the context of water services) the claimants' assertion that cities and counties are without authority to impose new fees in light of the voter protest provisions of Proposition 218, and that mandate reimbursement is therefore warranted.[1884] In *Paradise Irrigation District*, the Third District Court of Appeal observed:

> This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and irrigation districts' authority to levy fees so that they are entitled to subvention for state-mandated regulations requiring water infrastructure upgrades. The Water and Irrigation Districts do not argue this court wrongly decided *Connell, supra,* 59 Cal.App.4th 382, 69 Cal.Rptr.2d, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell.*[1885]

Ultimately the court preserved and followed the rule of *Connell*, finding, based in large part on a discussion of *Bighorn-Desert View*, that "Proposition 218 implemented a power-sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts' fee authority."[1886] The court held, "[c]onsistent with the California Supreme Court's reasoning in *Bighorn*, we presume local voters will give appropriate consideration and deference to state mandated requirements relating to water conservation measures required by statute."[1887] In addition, the court held "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[1888] However, the court said, "[w]e adhere to our holding in *Connell* that the

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[1883] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

[1884] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1885] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1886] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1887] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1888] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

inquiry into fee authority constitutes an issue of law rather than a question of fact."[1889] The court found that water service fees, being expressly exempt from the voter approval provisions of article XIII D, section 6(c), therefore do not require voter preapproval, as would new taxes.[1890] In addition, the court followed and relied upon *Bighorn-Desert View*'s analysis of a power-sharing relationship between local agencies and their constituents, including the presumption that "local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency…" and that the notice and hearing requirements of article XIII D, section 6(a) "will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive."[1891] Accordingly, the court found that that power-sharing arrangement "does not undermine the fee authority that the districts have," and the majority protest procedure of article XIII D, section 6(a) "does not divest the Water and Irrigation Districts of their authority to levy fees."[1892] The court noted that statutory protest procedures already existed, and "the possibility of a protest under article XIII D, section 6 does not eviscerate the Water and Irrigation Districts' ability to raise fees to comply with the Water Conservation Act."[1893] Thus, the court found that Government Code section 17556(d) still applies to deny a claim when the fee authority is subject to voter protest under article XIII D, section 6(a).

The court in *Paradise Irrigation District* did not analyze whether Government Code section 17556(d) applies when voter approval is required.

Recently, however, the Third District Court of Appeal addressed the voter approval issue in *Department of Finance v. Commission on State Mandates* (*Discharge of Stormwater Runoff*) and found that Government Code section 17556(d) does not apply when voter approval is required and, thus, there are costs mandated by the state.[1894] The court's reasoning is as follows:

[1889] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1890] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

[1891] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[1892] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1893] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1894] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

The State contends the reasoning in *Paradise Irrigation Dist*. applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees' governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The "fact that San Diego property owners could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not 'eviscerate' San Diego's police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee."

The State's argument does not recognize a key distinction we made in *Paradise Irrigation Dist*.: water service fees were not subject to voter approval. We contrasted article XIII D's protest procedure with the voter-approval requirement imposed by Proposition 218 on new taxes. Under article XIII C, no local government may impose or increase any general or special tax "unless and until that tax is submitted to the electorate and approved" by a majority of the voters for a general tax and by a two-thirds vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Cal. Const., art. XIII D, § 6, subd. (c).) (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 192, 244 Cal.Rptr.3d 769.) The implication is the voter approval requirement would deprive the districts of fee authority.

Since the fees in *Paradise Irrigation Dist*. were not subject to voter approval, the protest procedure created a power sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist*. correctly described as a "speculative and uncertain threat." (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 184, 244 Cal.Rptr.3d 769.)

Here, a fee for stormwater drainage services is *not* valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees' police power to proposing the fee. Like article XIII C's limitation on local governments' taxing authority, article XIII D provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the

property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Cal. Const., art. XIII D, § 6, subd. (c).) The State's argument ignores the actual limitation article XIII D imposes on permittees' police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason Section 6 exists and requires subvention. As stated earlier, the purpose of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the "next logical step" to article XIII A, limits the growth of appropriations made from the proceeds of taxes. (Cal. Const., art. XIII B, §§ 1, 2, 8; *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334, 194 Cal.Rptr. 110.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under Section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Section 6 provides them with those resources.

Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in *Paradise Irrigation Dist.*, the voter approval requirement does not create a power sharing arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Section 6 thus requires subvention because of Article XIII D's voter approval requirement. Contrary to the

State's argument, *Paradise Irrigation Dist*. does not compel a different result.[1895]

Thus, after *Paradise Irrigation District* and the 2022 *Department of Finance* case, the Commission is required to find that Government Code section 17556(d) does not apply to deny a claim when voter approval of the fee is required under article XIII D (Proposition 218). However, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

ii. The Commission is required to presume that SB 231 is constitutional, and the Third District Court of Appeal found that SB 231 applies prospectively beginning January 1, 2018. Thus, beginning January 1, 2018, there are no costs mandated by the state because local government has the authority to impose stormwater property-related fees that are subject only to the voter protest provisions of article XIII D.

As indicated above, article XIII D, section 6(c) provides that voter approval is required for property-related fees and charges *other than* for water, sewer, and refuse collection services. Thus, for water, sewer, and refuse collection, only the voter protest provisions apply before fees can be imposed.

In 2002, the Sixth District Court of Appeal in *Howard Jarvis Taxpayers' Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 held that "sewer," for purposes of the voter approval exemption in article XIII D does *not* include storm sewers or storm drains.[1896] *City of Salinas* involved a challenge to a "storm drainage fee" imposed by the City of Salinas in order to fund its efforts "to reduce or eliminate pollutants contained in storm water, which was channeled into a drainage system separate from the sanitary and industrial waste systems," as required by the Clean Water Act.[1897] The fee was imposed on owners of developed parcels of property, and the amount "was to be calculated according to the degree to which the property contributed to runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of the 'impervious area' on that parcel."[1898] Taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the fee was exempt from the voter approval requirements because it was for "sewer" or "water" services under article XIII D, section 6(c). The court disagreed, and construed

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[1895] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[1896] *Howard Jarvis Taxpayers' Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[1897] *Howard Jarvis Taxpayers' Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[1898] *Howard Jarvis Taxpayers' Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

the term “sewer” narrowly, holding that “sewer” referred solely to “sanitary sewerage” (i.e., the system that carries “putrescible waste” from residences and businesses), and did not encompass a sewer system designed to carry only stormwater.[1899] It also held the term “water services” meant “the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.”[1900]

Thus, under the *City of Salinas* case, a local agency’s charges on developed parcels to fund stormwater management were property-related fees that were not covered by Proposition 218’s exemption for “sewer” or “water” services. Therefore, in order for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two-thirds of the electorate in the area was first required to affirmatively approve those fees.

That holding has since been the subject of legislation. In 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to expressly overrule the 2002 *City of Salinas* case.[1901] Government Code section 53750(k) defines the term “sewer” for purposes of article XIII D as including systems that “facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters.” Government Code section 53751 explains why the Legislature thinks the *City of Salinas* case is wrong:

> The court in *Howard Jarvis Taxpayers Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term “sewer.” Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters’ intent by resorting to secondary or subjective indicators. The court in *Howard Jarvis Taxpayers Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other

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[1899] *Howard Jarvis Taxpayers’ Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1900] *Howard Jarvis Taxpayers’ Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

[1901] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.[1902]

The claimants contend that SB 231 is unconstitutional for the reasons stated below as it "attempts to reinterpret the Constitution in contradiction of the intent of the voters when they adopted Proposition 218":[1903]

- The plain language and structure of Proposition 218 do not support SB 231's definition of "sewer." The plain meaning of article XIII D, section 6(c) is that the term "sewer" or "sewer services" pertains only to sanitary sewers and not to MS4s. In attempting to expand the facilities and services covered by this term, SB 231 is an invalid modification of Proposition 218 that seeks to override voter intent.[1904]
- The statutes relied on by the Legislature when enacting SB 231 present only limited examples of how the term "storm sewer" or "sanitary sewer" were employed. "It is clear that in all, a distinction is drawn between sanitary sewers and storm sewers."[1905]
- There is significant evidence that the Legislature and the courts considered "sewers" to be different from "storm drains" prior to the adoption of Proposition 218. Thus, there was no "plain meaning" of "sewer" as a term that meant both sanitary and storm sewers, as stated in in the legislative findings.[1906]

The Commission is required by article III, section 3.5 of the California Constitution to presume the validity of Government Code sections 53750 and 53751, as amended by SB 231, and, as the Third District Court of Appeal recently held, the amendments, absent a clear and unequivocal statement to the contrary, operate *prospectively* beginning January 1, 2018.[1907]

Accordingly, the County and cities have authority to impose stormwater property-related fees for the remaining new mandated activities identified above, subject to article XIII D (Proposition 218), which until January 1, 2018, required voter approval before fees could be charged. Government Code section 17556(d) does not apply to deny a claim

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[1902] Government Code section 53751(f).

[1903] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 35-42.

[1904] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 37-39.

[1905] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 39-40.

[1906] Exhibit G, Claimants' Comments on the Draft Proposed Decision, filed May 19, 2023, pages 40-42.

[1907] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

when voter approval of the fee is required from November 10, 2010, the beginning date of the potential period of reimbursement, to December 31, 2017, and, thus, during this time period, there are costs mandated by the state.[1908] However, beginning January 1, 2018, SB 231 exempted property-related stormwater fees from the voter approval requirement of article XIII D (Proposition 218), which then makes only the voter protest provisions of article XIII D apply to property-related stormwater fees.[1909] Thus, beginning January 1, 2018, there are no costs mandated by the state and reimbursement is denied.

iii. The Water Boards' assertion that the reimbursement period for the Test Claim should end on January 6, 2016, when the next NPDES permit was adopted and became effective, is not consistent with article XIII B, section 6.

The Water Boards assert that the reimbursement period for the Test Claim should end on January 6, 2016, when the test claim permit was superseded by Order No. R9-2015-0100 which became effective on January 7, 2016.[1910] In other words, the Water Boards want the Commission to interpret stormwater permits as contracts that expire. This interpretation is not consistent with article XIII B, section 6 or the courts' interpretation of these permits as executive orders.

The courts have found that NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.[1911] The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit.[1912] Thus, reimbursement under article XIII B, section 6 continues to be required for each fiscal year actual

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[1908] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

[1909] Government Code sections 53750, 53751 (amended by Statutes 2017, chapter 536 (SB 231)).

[1910] Exhibit F, Water Boards' Comments on the Draft proposed Decision, filed May 19, 2023, pages 4-5.

[1911] *County of Los Angeles v. Commission on State Mandates* (2007) Cal.App.4th 898, 905, 919-920; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[1912] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763.

increased costs are incurred by local government to comply with the reimbursable state-mandated program.[1913]

Moreover, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs, and thus a new program or higher level of service, compared to the law before the enactment of the test claim statute or executive order.[1914] This was the case in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, where the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections as required by that stormwater permit were both new duties that local governments were required to perform, when compared to the prior permit ("the mandate to install and maintain trash receptacles at transit stops is a 'new program' within the meaning of section 6 because it was not required prior to the Regional Board's issuance of the permit").[1915]

Order No. R9-2015-0100, as referenced by the Water Boards, is the subject of a pending Test Claim filed by the County of Riverside, the Riverside County Flood Control and Water Conservation District, and the Cities of Murrieta, Temecula, and Wildomar.[1916] The requirements imposed by the permit at issue in this case (Order No. R9-2010-0016) may continue uninterrupted in the 2015 permit, and the parties can address whether the costs to comply with the requirements of Order No. R9-2010-0016 continue. As shown in this Decision, many requirements that were pled were actually shown to *not* be new when compared to the prior permit, and reimbursement is not

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[1913] See also, Government Code sections 17514 ["Costs mandated by the state" means any increased costs which a local agency or school district is required to incur . . . as a result of any statute . . . which mandates a new program or higher level of service"]; 17560 ["A local agency or school district may, by February 15 following the fiscal year in which costs are incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year"] and 17561 ["The state shall reimburse each local agency and school district for all "costs mandated by the state . . . ."].

[1914] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91; *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (see also page 869, footnotes 6 and 7, and page 870, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes).

[1915] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[1916] Commission on State Mandates, Test Claim on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a, B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)a, E.5.c(3), E.5.e, E.6, F.1.a, F.1.b, F.2.a, F.2.b, F.2.c, F.3.b(3), and F.3.c*, 16-TC-05, https://csm.ca.gov/matters/16-TC-05.shtml (accessed on July 28, 2023).

required in those cases. However, there is no evidence in this record that the new state-mandated activities are no longer required or mandated by the state on January 7, 2016, as asserted by the Water Boards.

Therefore, and as stated above, reimbursement for the costs incurred to comply with the new state-mandated activities that require the voter's approval before property-related stormwater fees can be imposed, are eligible for reimbursement through December 31, 2017, and reimbursement ends beginning January 1, 2018.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim only for the County of Riverside and the city copermittees, and finds that the following activities impose a reimbursable state-mandated program from November 10, 2010, the beginning date of the potential period of reimbursement, to December 31, 2017:

A. SALs – Development and Submittal of Wet Weather MS4 Discharge Monitoring Program

1. Collaborate with all permittees to develop a year-round, watershed based, wet weather MS4 discharge monitoring program to sample a representative percentage of the major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E. of the test claim permit, within each hydrologic subarea.[1917]
2. The principal copermittee shall submit to the Regional Board for review and approval, a detailed draft of the wet weather MS4 discharge monitoring program to be implemented.[1918]

B. Watershed Workplan

1. The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs.[1919]
2. The copermittees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4.[1920]

[1917] Exhibit A, Test Claim, filed November 10, 2011, page 206 (test claim permit, Section D.2.).

[1918] Exhibit A, Test Claim, filed November 10, 2011, pages 206 and 309 (test claim permit, Section D.2., which incorporates by reference Attachment E., Section II.B.3.).

[1919] Exhibit A, Test Claim, filed November 10, 2011, page 255 (test claim permit, Section G.1.d.).

[1920] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.3.).

3. The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.[1921]
4. The annual watershed review meetings shall be open to the public and adequately noticed.[1922]
5. Each permittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan.[1923]

C. <u>Annual JRMP Report</u>

1. Include in the annual fiscal analysis a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.[1924]
2. Provide in the annual report an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended.[1925]
3. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, provide the following information in the Checklist pursuant to Section K.3.c.3.:
   a. Construction:
      1) Number of Active Sites
      2) Number of Inactive Sites
      3) Number of Sites Inspected
      4) Number of Violations
   b. New Development:
      1) Number of Development Plan Reviews

[1921] Exhibit A, Test Claim, filed November 10, 2011, page 256 (test claim permit, Section G.4.).

[1922] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1923] Exhibit A, Test Claim, filed November 10, 2011, page 257 (test claim permit, Section G.5.).

[1924] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.1.)

[1925] Exhibit A, Test Claim, filed November 10, 2011, page 262 (test claim permit, Section K.3.c.2.).

2) Number of Projects Exempted from Interim/Final Hydromodification Requirements

c. Post Construction Development:

1) Number of Priority Development Projects

2) Number of SUSMP Required Post-Construction BMP Inspections

3) Number of SUSMP Required Post-Construction BMP Violations

4) Number of SUSMP Required Post-Construction BMP Enforcement Actions Taken

d. Illicit Discharges and Connections:

1) Number of IC/ID Eliminations

2) Number of IC/ID Violations

e. MS4 Maintenance:

1) Total Miles of MS4 Inspected

f. Municipal/Commercial/Industrial:

1) Number of Facilities

2) Number of Violations[1926]

4. *Except for reporting on the claimants' own municipal projects (which is not eligible for reimbursement)*, report the following information contained in Table 5 pursuant to Section K.3.c.4.:

a. New Development:

1) All revisions to the SSMP, including where applicable: (b) updated procedures for identifying pollutants of concern for each priority development project; (c) updated treatment BMP ranking matrix; (d) updated site design and treatment control BMP design standards.[1927]

2) Brief description of BMPs required at approved priority development projects. Verification that site design, source control, and treatment BMPs were required on all applicable priority development projects.[1928]

[1926] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 296 (test claim permit, Section K.3.c.3., Attachment D.).

[1927] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 2.).

[1928] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 3.).

3) Name and location of all priority development projects that were granted a waiver from implementing LID BMPs pursuant to Section F.1.d.4. during the reporting period.[1929]

4) Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority priority development projects; and verification that the requirements of this Order were met during the reporting period.[1930]

5) Name and brief description of all approved priority development projects required to implement hydrologic control measures in compliance with Section F.1.h. including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels.[1931]

b. Construction:

1) A description of planned ordinance updates within the next annual reporting period, if applicable.[1932]

2) A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.[1933]

3) Any changes to the designated minimum and enhanced BMPs.[1934]

4) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility; (b) date of

[1929] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 4.).

[1930] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 263 (test claim permit, Section K.3.c.4., Table 5. New Development 5.).

[1931] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. New Development 6.).

[1932] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 1.).

[1933] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 2.).

[1934] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 3.).

enforcement actions by facility; (c) brief description of the effectiveness of each high-level enforcement action at construction sites.[1935]

5) Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.[1936]

c. Municipal (*other than a claimant's own development*):

1) Updated source inventory.[1937]

2) All changes to the designated municipal BMPs.[1938]

3) Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.[1939]

4) Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) List of projects retrofitted; (b) List and description of structures evaluated for retrofitting; (c) List of structures still needing to be evaluated and the schedule for evaluation.[1940]

5) Include in the summary of the MS4 and MS4 facilities operations and maintenance activities, the (a) Number and types of facilities maintained.[1941]

6) Include (a) types of facilities and (b) summary of the inspection findings in the summary of the municipal structural treatment control operations and maintenance activities.[1942]

[1935] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1936] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Construction 4.).

[1937] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 1.).

[1938] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 2.).

[1939] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 3.).

[1940] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 264 (test claim permit, Section K.3.c.4., Table 5. Municipal 4.).

[1941] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.a.).

[1942] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 5.).

7) Include a list of facilities planned for bi-annual inspections and the justification in the summary of the MS4 and MS4 facilities operations and maintenance activities.[1943]

8) Include in the summary of the municipal areas/programs inspection activities: (a) date of inspections conducted at each facility; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility.[1944]

9) Description of activities implemented to address sewage infiltration into the MS4.[1945]

10) Description of BMPs and their implementation for unpaved roads construction and maintenance.[1946]

d. Commercial/Industrial:

1) Updated inventory of commercial/industrial sources of discharges.[1947]

2) Include the following information in the summary of the inspection program: (a) date of inspections conducted at each facility or mobile business; (b) The BMP violations identified during the inspection by facility; (c) date of enforcement actions by facility or mobile business; (d) brief description of the effectiveness each high-level enforcement actions at commercial/industrial sites including the follow-up activities for each facility.[1948]

3) All changes to designated minimum and enhanced BMPs.[1949]

[1943] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 6.c.).

[1944] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 7.a.-c.).

[1945] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 8.).

[1946] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Municipal 9.).

[1947] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 1.).

[1948] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 2.).

[1949] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 265 (test claim permit, Section K.3.c.4., Table 5. Commercial/Industrial 3.).

e. Residential:

1) All updated minimum BMPs required for residential areas and activities.[1950]

2) Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.[1951]

f. Retrofitting Existing Development:

1) Updated inventory and prioritization of existing development identified as candidates for retrofitting.[1952]

2) Description of efforts to retrofit existing developments during the reporting year.[1953]

3) Description of efforts taken to encourage private landowners to retrofit existing development.[1954]

4) A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated.[1955]

5) Any proposed retrofit or regional mitigation projects and time lines for future implementation.[1956]

g. Workplans:

1) Updated workplans including priorities, strategy, implementation schedule, and effectiveness evaluation.[1957]

[1950] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 1.).

[1951] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Residential 3.).

[1952] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 1.).

[1953] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 2.).

[1954] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 3.).

[1955] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 4.).

[1956] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Retrofitting Existing Development 5.).

[1957] Exhibit A, Test Claim, filed November 10, 2011, pages 262, 266 (test claim permit, Section K.3.c.4., Table 5. Workplans).

D. Special Studies

1. Sediment Toxicity Study

   a. Develop and submit to the Regional Board by April 1, 2012, a workplan to investigate the toxicity of sediment in streams and its potential impact on benthic macroinvertebrate IBI scores. The study must be implemented in conjunction with the stream assessment monitoring in Attachment E. The study must include the following elements:

      1) At least four stream assessment locations must be sampled, including one reference site and one mass loading site. The selection of sites must be done with consideration of subjectivity of receiving waters to discharges from residential and agricultural land uses.

      2) At a minimum, sampling must occur once per year at each site for at least two years.

      3) At a minimum, sediment toxicity analysis must include the measurement of metals, pyrethroids, and organochlorine pesticides. The analysis must include estimates of bioavailability based upon sediment grain size, organic carbon, and receiving water temperature at the sampling site. Acute and chronic toxicity testing must be done using *Hyalella azteca*.

   b. Include the results and a discussion in the monitoring annual report including an assessment of the relationship between observed IBI scores and all variables measured.[1958]

2. Trash and Litter Investigation

   a. Develop and submit to the Regional Board by September 1, 2012, a workplan to assess trash (including litter) as a pollutant within receiving waters on a watershed based scale. The copermittees must select a lead copermittee. The study must include the following elements:

      1) The lead copermittee must identify suitable sampling locations within the Santa Margarita HU.

      2) Trash at each location must be monitored a minimum of twice during the wet season following a qualified monitoring storm event[1959] and twice during the dry season.

      3) The lead copermittee must use the "Final Monitoring Workplan for the Assessment of Trash in San Diego County Watersheds" and "A Rapid

[1958] Exhibit A, Test Claim, filed November 10, 2011, page 314 (test claim permit, Attachment E, Section II.E.2.).

[1959] A qualified monitoring storm event is defined as a minimum of 0.1 inches of precipitation preceded by 72 hours of dry weather.

Trash Assessment Method Applied to Waters of the San Francisco Bay Region" to develop a monitoring protocol.

b. Include the results and a discussion in the monitoring annual report and must, at a minimum, include source identification, an evaluation of BMPs for trash reduction and prevention, and a description of any BMPs implemented in response to study results.[1960]

3. Agricultural, Federal and Tribal Input Study

a. Develop and submit to the Regional Board by September 1, 2012, a workplan to investigate the water quality of agricultural, federal, and tribal runoff that is discharged into their MS4. The study must include the following elements:

1) The copermittees must identify a representative number of sampling stations within their MS4 that receive discharges of agricultural, federal, and tribal runoff that has not co-mingled with any other source. At least one station from each category must be identified.

2) One storm event must be monitored at each sampling location each year for at least two years.

3) At a minimum, analysis must include those constituents listed in Table 1 of the MRP. Grab samples may be utilized, though composite samples are preferred. The copermittees must also measure or estimate flow rates and volumes of discharges into the MS4.

b. Include the results and a discussion from the study in the monitoring annual report.[1961]

4. MS4 and Receiving Water Maintenance Study

a. Develop and submit to the Regional Board by April 1, 2012, a workplan to investigate receiving waters that are considered part of the MS4 and that are subject to continual vegetative clearance activities, for example, mowing. The copermittees must assess the effects of the vegetation removal activities and water quality, including, but not limited to, modification of biogeochemical functions, in-stream temperatures, receiving water bed and bank erosion potential, and sediment transport. The study must include the following elements:

1) The copermittees must identify suitable sampling locations, including at least one reference that is not subject to maintenance activities.

2) At a minimum, the copermittees must monitor pre- and post-maintenance activities for indicator bacteria, turbidity, temperature, dissolved oxygen

[1960] Exhibit A, Test Claim, filed November 10, 2011, page 315 (test claim permit, Attachment E, Section II.E.3.).

[1961] Exhibit A, Test Claim, filed November 10, 2011, pages 315-316 (test claim permit, Attachment E, Section II.E.4.).

and nutrients (nitrite, nitrate, total Kjeldahl nitrogen, ammonia and total phosphorous). The copermittees must also measure or estimate flow rates and volumes.

b. Include the results and a discussion from the study in the annual monitoring report including the relevance of findings to CWA section 303(d) listed impaired waters.[1962]

Any fee revenues received must be identified as offsetting revenue. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, other state funds, and other funds that are not the claimant's proceeds of taxes shall be identified and deducted from this claim.

This Test Claim is denied for the Riverside County Flood Control and Water Conservation District because there is no evidence that the District incurred costs mandated by the state from its proceeds of taxes.

All other activities and sections of the test claim permit and costs pled by the claimants are denied.

[1962] Exhibit A, Test Claim, filed November 10, 2011, page 316 (test claim permit, Attachment E, Section II.E.5.).

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 3, 2023, I served the:

- **Current Mailing List dated October 2, 2023**
- **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Tentative Hearing Date issued October 3, 2023**
- **Decision adopted September 22, 2023**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, 11-TC-03
  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections D.2., G.1.d., G.3.-5., K.3.c.1.-4., and Attachment E., Section II.E.2.-5
  County of Riverside, Riverside County Flood Control and Water Conservation District, and Cities of Murrieta, Temecula, and Wildomar, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 3, 2023 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/2/23

Claim Number: 11-TC-03

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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