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Commission on
State Mandates

November 4, 2022

Heather Halsey
Executive Director
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Re: Cities of Dublin and Union City and Alameda Countywide Clean Water Program Comments on Proposed Draft Decision in Test Claim 09-TC-03, California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII and XVIII

Dear Ms. Halsey:

I am writing as Claimant Representative for Claimants Union City and City of Dublin in pending consolidated Test Claims 16-TC-03, 10-TC-01, 10-TC-02, 10-TC-03 and 10-TC-05 ("Consolidated Test Claims"), and on behalf of the Alameda Countywide Clean Water Program as an interested member of the public,[1] to provide comments on the Draft Proposed Decision ("Draft Decision") in Test Claim 09-TC-03, dated August 17, 2022. Like the claimants in this matter, the Alameda Countywide Clean Water Program entities are subject to expensive unfunded permit conditions imposed by the State in their stormwater discharge permit. The requirements in the Alameda Countywide Clean Water Program entities' stormwater permit at issue in the Consolidated Test Claims are estimated to collectively cost $250 million annually for all permittees.

The comments of Claimants Union City and City of Dublin are summarized as follows:

[1] The Alameda Countywide Clean Program is a consortium of stormwater agencies made up of Alameda County, the cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, Union City, the Alameda County Flood Control and Water Conservation District, and the Zone 7 Water Agency.

I. ***National Pollutant Discharge Elimination System Program ("NPDES") permit, Order No. R8-2009-0030 (hereinafter, "Test Claim Permit") requirements at issue are not federal mandates.*** In the only two reported appellate decisions considering the application of the federal mandate exception to stormwater permits, regional water quality control boards, the State Water Resources Control Board and the Department of Finance (collectively, "the State") argued that 14 separate permit requirements were federal and not state mandates. For each and every requirement considered, the State's argument was rejected and the requirements were found to be state mandates. The same analysis applies to the State's federal mandates arguments here, and the result should be the same.

The California Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) and the Third Appellate District of the California Court of Appeal in *Department of Finance v. Commission on State Mandates* (2017), have directly addressed the federal mandate exception to Constitutional subvention in the context of municipal separate storm sewer system ("MS4") permits. The Supreme Court held that *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.* Thus, the Test Claim Permit requirements are not federally mandated costs because they were not expressly or explicitly required by federal law. Further, the Supreme Court found that deference to a regional board permitting decision is only appropriate where the agency found the imposed requirements were the *only means* by which the federal standard could be implemented. The Draft Decision does not follow this test with respect the Test Claim Permit conditions implementing the federal waste load allocation ("WLA") requirements, as it must. Rather, the Draft Decision states only that "the Regional Board … did not have the power or discretion to ignore the WLAs adopted in the TMDLs." (Draft Decision ["DD"] at p. 123.) However, the test established in by the Supreme Court in *Dept. of Finance* is not whether a regional board has "the power or discretion to ignore" a federal requirement, but whether a regional board has the discretion to determine how the federal requirement is met.

II. ***The permit requirements at issue reflect multiple layers of discretion by the State.*** The State and Santa Ana Regional Water Quality Control Board ("Regional Board"), in fact, exercised multiple layers of discretion in imposing the Test Claim Permit requirements at

issue. At the highest level, the State *voluntarily* chose to administer its own permitting program under the federal Clean Water Act ("CWA"). As the Supreme Court in *Department of Finance v. Commission on State Mandates* stated, "It is clear federal law did not compel the Regional Board to impose these particular requirements. *There was no evidence the state was compelled to administer its own permitting system* rather than allowing the EPA do so under the CWA." (1 Cal. 5th 749, 767.) Furthermore, the Draft Decision acknowledges that the Regional Board exercised its discretion to not impose requirements more stringent than that required by federal law, although California law provides the regional boards with that discretion. The Regional Board exercised multiple layers of discretion in setting water quality standards, TMDLs and the particular Test Claim Permit requirements at issue. These include, but are not limited to: the Regional Board's exercise of discretion in determining beneficial uses, water quality objectives to reasonably protect beneficial uses and implementation programs to achieve water quality objectives; the "tradeoff" in determining whether best management practices ("BMPs") or other nonpoint source pollution controls make more stringent load allocations practicable, in which case wasteload allocations can be made less stringent (40 C.F.R. Part 130.2(i)); and the Regional Board's prescribing of waste discharge requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge. Furthermore, there has been no finding by the Regional Board – as there must be to find a federal mandate here – that the requirements were the "only means" of implementing the federal requirement. In fact, such a showing cannot be made as the record is replete with examples of the State selecting between multiple options in complying with the federal CWA requirements.

III. ***The permit requirements at issue are a "new program" or "higher level of service."*** The Draft Decision takes the position that the Test Claim Permit requirements are not a "program" because they implement a general pollution ban, applicable to all dischargers. This is not the appropriate analytical approach and was in fact recently rejected by the Second Appellate District. In that case, the state argued that NPDES permit requirements were not a new program for purposes of Section 6 because they were imposed to prevent pollution, not to provide a public service. The court disagreed stating, "[t]his view … ignores the terms of the Regional Board's permit; the challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions … that the local governments were not previously required to perform." (*Department of Finance v. Commission on State Mandates* (2021) 59

Cal.App.5th 546, 560.) Likewise here, the Test Claim Permit requires claimants to propose specific actions to achieve the WLAs, obtain Regional Board approval, and then implement those actions, which are also subject to re-evaluation and the imposition of new or revised BMPs. Furthermore, the fact that some private dischargers are also subject to WLAs does not mean that the Test Claim Permit requirements implementing the TMDLs are not unique to government or that the claimants are akin to private dischargers. First, the Test Claim Permit requires programs that carry out the governmental function of providing services to the public. The permit requirements at issue require the MS4 operator permittees to provide a new program of water pollution abatement services which is applicable to the local government because they are providing stormwater drainage and flood control systems, a uniquely public service. Furthermore, the TMDL permit requirements impose unique requirements on local governments that do not apply generally to all residents and entities in the state. Local governments are uniquely responsible for controlling pollutants generated by third parties and coming from properties they do not own or control. Additionally, contrary to the implication made in the Draft Decision, not all discharges are subject to the WLAs. Some MS4 operators, as well as numerous industrial and construction dischargers are exempt. Finally, the Draft Decision asserts that the requirements do not increase the level of service provided to the public because "requirements to monitor metals, pesticides 'and constituents which are known to have contributed to impairment of local receiving waters' were required by the prior permit" program or to increase services in an existing program. To determine whether a program imposed by the permit is new or a higher level of service, courts compare legal requirements imposed by the new permit with those in effect before the new permit became effective. Here there is no question that the Test Claim Permit requirements increase services when compared to the prior permit, as is apparent from the face of the Test Claim Permit Sections XVIII.B.9 and XVIII.B.10.

IV. ***Constitutional revenue restrictions cause a $500-800 million annual funding gap for local Stormwater Programs.*** The Draft Decision incorrectly concludes that the claimants are not "compelled to rely on proceeds of taxes to pay for the new state-mandated activities," apparently because "the claimants have a number of different revenue streams with which to fund stormwater pollution control activates." As an initial matter, in contrast to every reported decision to consider the issue, the Draft Decision improperly evaluates funding sources of the stormwater programs as a whole instead of considering whether fee

authority exists for the particular requirement at issue. Additionally, the proposition that local stormwater programs are not required to rely on proceeds of taxes to pay for new programs and increased levels of service flies in the face of the accepted reality that local agencies have very limited viable means to raise the sufficient funds needed to meet the regulatory requirements imposed by the regional boards for NPDES programs. The inability of local agencies to raise sufficient revenue for stormwater programs due to constitutional restrictions is well-established. In March 2014, the Public Policy Institute of California released a report entitled "Paying for Water in California" that estimated local agencies have stable funding for no more than half that amount, leaving a gap of $500 million to $800 million per year.

IV. ***The State is headed for a "fiscal cliff" with its own Gann limit***. The overall purpose and effect of Proposition 4 should inform the Commission's analysis. This year, the State was in crisis because it was projected to exceed its own "Gann Limit." This problem could at least be mitigated if the claimants' Test Claim is approved and they receive subventions that would then apply to the local government appropriations limit.

I. The Draft Decision Improperly Finds The Test Claim Permit Conditions At Issue Are Federally-Mandated Costs, Ignoring The Analytical Approach Compelled By Controlling Supreme Court And Appellate Authority

Though two reported appellate decisions have considered the State's argument that 14 stormwater permit requirements (between the two cases) are federal mandates, not one of those permit requirements was found to be a federal mandate by the courts. The Supreme Court's analysis compels the same result here, but the Draft Decision nonetheless finds numerous federal mandates. We respectfully request that the Commission reconsider that approach and follow the law as explained by California' appellate judiciary.

Since 2016, the California Supreme Court in (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749 ("*Dept. of Finance I*")) and the Third Appellate District of the California Court of Appeal in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661 ("*Dept. of Finance, San Diego*"), have directly addressed the federal mandate exception to Constitutional subvention under section 6 in the context of MS4 permits. Collectively, these courts looked at 14 permit requirements related to inspection, trash receptacles, street sweeping and cleaning stormwater

conveyances, a hydromodification plan, low impact development practices, education programs, urban runoff management programs, effectiveness assessments and permittee collaboration. As in this test claim, both of these decisions involve permit requirements stemming from the federal CWA requirements that stormwater permits "require controls to reduce the discharge of pollutants to the maximum extent practicable [("MEP")], including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(B)(iii).) With regard to *each of these 14 permit requirements*, the Supreme Court and the Third Appellate District found that the requirements were not federally mandated costs because they were not expressly or explicitly required by federal law. The Draft Decision is a marked and improper departure from controlling Supreme Court authority because it does not apply the correct test announced in *Dept. of Finance I* and subsequently applied in *Dept. of Finance, San Diego*. Moreover, the Draft Decision does not find that the permit requirements at issue were the "only means" by which the federal standard could be implemented, as required by *Dept. of Finance I.* In addition, the Supreme Court found "[i]t is clear federal law did not compel the Regional Board to impose these particular requirements" because "[t]here was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA to do so under the CWA." (1 Cal. 5th at 767, emphasis in original.) Thus, there is serious doubt about whether *any* California-issued NPDES permit requirement can be a federally-mandated cost exempted from subvention.

A. Supreme Court's Decision In *Dept. of Finance I* (2016)

In *Dept. of Finance I,* which involved four trash receptacle and inspection requirements in the Los Angeles County MS4 Permit,[2] the State and Los Angles Regional Water Quality Control Board argued that the federal CWA required the Los Angeles Regional Board to impose specific permit controls to reduce the discharge of pollutants to the "maximum extent practicable" and that when the Regional Board determined the permit's conditions, those conditions were part of the federal mandate. (1 Cal.5th at 759-60.) The MS4 operators argued, in turn, that the conditions were not mandated by federal law because nothing in the CWA or the federal regulations required them to install

[2] In *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546 ("*Dept. of Finance II*"), the Second Appellate District found that all four of these permit conditions were a new program or higher level of service under Section 6.

trash receptacles or perform site inspections. (*Id.* at 760.) The Supreme Court framed the dispute as follows, which is the same question at issue with respect to the Test Claim Permit:

> The question here is how to apply that [federal mandate] exception [to subvention] 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.

(*Id.* at 763, emphasis added.) After reviewing relevant caselaw, the Court "distill[ed] the following principle":

> 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*….
>
> Review of the Commission's decision requires a determination as to whether federal statutory, administrative, or case law imposed, or compelled the Regional Board to impose, the challenged requirements on the Operators.

(*Id.* at 765, 767, emphasis added.)

The Supreme Court found the trash receptacles and inspection requirements at issue were not federally mandated. First, the Court noted that the State of California *voluntarily* chose to administer its own CWA program:

> It is clear federal law did not compel the Regional Board to impose these particular requirements. *There was no evidence the state was compelled to administer its own permitting system* rather than allowing the EPA do so under the CWA.

(1 Cal.5th at 767, emphasis added.) In so finding, the Court stated that, by voluntarily choosing to administer its own permitting program, the State of California did not limit itself to federal water quality standards:

> California was the first state authorized to issue its own pollutant discharge permits. [cites] 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))…. 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."

(Id. at 757.) The Court also relied on the Third Appellate District's "similar" decision in *Division of Occupational Safety & Health v. State Bd. of Control* (1987) 189 Cal.App.3d 794. In that case, as here, the state chose to administer its own program to implement requirements of the federal Occupational Safety and Health Act of 1970. (*Id.* at 765 - 766.) Under that program, the state issued a regulation that required local fire districts to maintain three-person firefighting teams where, previously, the local fire districts had been permitted to maintain two-person teams. (*Ibid.*) The court found that the exception for federally mandated costs did not apply, reasoning that a federal OSHA regulation arguably required the maintenance of three-person firefighting teams, but that regulation specifically excluded local fire districts. (*Ibid.*) The Supreme Court in *Dept. of Finance I* stated with regard to *Division of Occupational Safety:*

> Had the state elected to be governed by *Fed. OSHA standards*, that exclusion would have allowed those fire districts to maintain two-person teams. The conditions for approval of the *state's plan* required effective enforcement and coverage of public employees. But those conditions did not make the costs of complying with the state regulation federally mandated. "[T]he initial decision to establish ... a federally approved [local] plan is an option which the state exercises freely." …. Because the state "was not required to promulgate [the state regulation] to comply with federal law, the exemption for federally mandated costs does not apply."

(*Id.* at 766, emphasis in original.) Referring to *Division of Occupational Safety*, the Supreme Court in *Dept. of Finance I* further stated: "Here, as in that case, the state *chose to administer its own program*, finding it 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." (*Id.* at 767, emphasis added.) Thus, like the conditions in the State's OSHA plan, the

approved conditions in the Test Claim Permit are similarly enforceable requirements of the CWA, but that does not make the costs of complying with the Regional Board's conditions federally mandated. By finding that "[i]t is clear federal law did not compel the Regional Board to impose these particular requirements [because] [t]here was no evidence the state was compelled to administer its own permitting system"(*ibid.*), the Supreme Court's decision in *Dept. of Finance I*, as referenced above, raises serious questions about whether *any* California-issued NPDES permit condition can be a federally mandated cost exempted from subvention.

"Moreover," suggesting the foregoing discussion was an independent grounds for its holding, the Supreme Court also found:

> [T]he Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. *But the EPA's regulations gave the [Regional Board] discretion to determine which specific controls were necessary to meet that standard*.

(1 Cal.5th at 767-68, emphasis added.) In evaluating whether the Regional Board exercised discretion with respect to inspection requirements at issue in the that test claim permit, the Court found "[n]either 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" and "[t]he state exercised its 'true discretion' by selecting the specific requirements it imposed on local governments." (*Id.* at 770-71, emphasis added.) With respect to trash receptacle requirements, the Court affirmed the Commission's determination that "the trash receptacle requirement was not a federal mandate because neither the CWA nor the regulation cited by the State *explicitly* required the installation and maintenance of trash receptacles." (*Id.* at 771, emphasis added.)

Finally, the Supreme Court found that deference to a regional board permitting decision is only appropriate where the agency found "those conditions were the only means by which the [federal] maximum extent practicable standard could be implemented." (1 Cal.5th at 768.)

B. Third Appellate District's Decision In *Dept. of Finance, San Diego* (2017)

The Third Appellate District's subsequent 2017 decision in *Dept. of Finance, San Diego*, *supra*, 18 Cal.App.5th 661, involved 10 permit requirements stemming from the federal CWA's MEP and water quality standard requirements relating to street sweeping and cleaning stormwater conveyances, a hydromodification plan, low impact development practices, education programs, urban runoff management programs, effectiveness assessments and permittee collaboration. The court "follow[ed] the analytical regime established by [*Dept. of Finance I*]," and found that "[n]o federal law, regulation, or administrative [or] case authority expressly required" *any* of these 10 permit requirements:

> Under the test announced in [*Department of Finance I]*, we conclude federal law did not compel imposition of the permit requirements, and they are subject to subvention under section 6. This is because the requirement to reduce pollutants to the "maximum extent practicable" was not a federal mandate for purposes of section 6. Rather, it vested the San Diego Regional Board with discretion to choose how the permittees must meet that standard, and the exercise of that discretion resulted in imposing a state mandate. We also find no federal law, regulation, or administrative [or] case authority that, under the test provided by *Department of Finance*, expressly required the conditions the San Diego Regional Board imposed.

(18 Cal.App.5th at 676; see also *id.* at 667.) Describing the Supreme Court's decision, the court states that the MEP standard "*by its nature is discretionary* and does not by itself impose a federal mandate for purposes of section 6." (*Id.* at 681.) Furthermore, "[t]he high court stated that, to be a federal mandate for purposes of section 6, *the federal law or regulation must 'expressly' or 'explicitly' require the specific condition imposed in the permit*." (*Id.* at 682, emphasis added.)

C. The Draft Decision Is Inconsistent With These Authorities

The Draft Decision does not assert that TMDL WLA and other requirements under Sections XVIII.B.1 through B.5, XVIII.B.7 through B.9, XVIII.C.1, and XVIII.D.1 are "expressly" or "explicitly" required by "federal law, regulation, or administrative or case authority." Rather, the Draft Decision states only that "the Regional Board … did not have the power or discretion to ignore the WLAs

adopted in the TMDLs." (DD at p. 123.) However, the test established in *Dept. of Finance I* is not whether the Regional Board has "the power or discretion to ignore" a federal requirement, but whether the Regional Board has the discretion to determine how a "general standard established by federal law" is met. (1 Cal.5th at 763.) Indeed, the Draft Decision acknowledges the Regional Board's discretion, stating "[f]ederal law requires the Regional Board to take *some action* to include effluent limits *consistent with the WLAs* in those TMDLs when reissuing the permit." (*Ibid.,* emphasis added.) The Draft Decision also states the "[r]egional boards are … required by federal law to include effluent limits '*consistent* with the assumptions and requirements of any available wasteload allocation for the discharge'" and the "definition of 'effluent limitation' in the CWA '*does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance*.'" (*Id.* at 101, emphasis added.) Thus, while the Draft Decision seems to acknowledge the Regional Board had discretion in how to implement the general federal standard, its conclusion is inconsistent with the holdings in *Dept. of Finance I* and *Dept. of Finance, San Diego.* Indeed, the Draft Decision does not discuss or even cite these authorities in its discussion of the federal mandate exception at pages 123-27.

Furthermore, the Draft Decision cites no finding by the Regional Board that the permit conditions were the *only means* by which the federal requirement could be implemented; therefore, under *Dept. of Finance I*, the only possible way to find a federally-mandated cost where the requirement is not specified in federal law is unavailable. (1 Cal.5th at 768.) As set forth in the following comment, the State and the Regional Board exercised multiple layers of discretion in developing and implementing the Test Claim Permit conditions at issue.

II. Development And Implementation Of Water Quality Standards Involves Many Layers Of Regional Board Discretion And, Therefore, The Draft Decision Is Mistaken In Finding A Federal Mandate Under *Dept. Finance I*

The Draft Decision does not apply the "true choice" test established by the Supreme Court's controlling authority in *Dept. of Finance I* and subsequent Court of Appeal authority in *Dept. of Finance, San Diego*. Rather, the Draft Decision states:

> [A]lthough the effluent limits in the test claim permit are "expressed" numerically, they are clearly complied with by way of an iterative, BMP-based process. Requirements to comply with the WLAs adopted in a TMDL, but allowing local government to have

> discretion and flexibility in the terms of that compliance, constitute at most incidental and de minimis requirements that are part and parcel of the federal mandate….

(DD at p. 124.) As described in the prior comment, the federal mandate exception does not apply because, as the Draft Decision acknowledges, the CWA "*does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance*." (DD at p. 101.) Indeed, as shown below, there are multiple layers of discretion exercised by the State and the Regional Board in developing the Test Claim Permit requirements at issue, each of which demonstrate there are no federally-mandated costs under *Dept. of Finance I*.

The rule, as explained by the Supreme Court, is that "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." (*Dept. of Finance I*, 1 Cal. 5th at 765; *Dept. of Finance, San Diego,* 18 Cal.App.5th at 681, 682.) Here, the Regional Board exercises multiple layers of discretion in setting water quality standards, TMDLs and the particular Test Claim Permit conditions at issue.

Most of the requirements at issue in the Test Claim Permit are effluent limitations the state contends are necessary to meet water quality standards established by the State. (40 C.F.R. Part 122.44.) A "water quality standard" defines the water quality goals of a water body, or portion thereof, by (1) designating the use or uses to be made of the water and (2) setting criteria that protect the designated uses. (40 C.F.R. Part 131.2; see also 33 U.S.C. section 1313.) 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 federal CWA, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements which are set forth in California state adopted water quality control plans and basin plans. (DD at p. 46; see 40 C.F.R. Part 130 [applies to "all State, eligible Indian Tribe, interstate, areawide and regional and local CWA water quality planning and management activities… including all updates and continuing certifications for approved Water Quality Management (WQM) plans …"] [40 C.F.R. Part 130.1].)

A TMDL is a regulatory component of the federal CWA "describing a plan for restoring [CWA section 303(d) listed] impaired waters that identifies the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards." (DD at p. 46; see also 33 U.S.C. section

1313(d).) In most cases, both the 303(d) listed impaired waters and TMDLs are identified and developed by the State, and TMDL implementation plans are always developed by the regional boards. (33 U.S.C. section 1313(d)-(e); Wat. Code, § 13242; *Bravos v. Green* (U.S.D.C., D.C. 2004) 306 F.Supp.2d 48, 57 ["there is no statutory language requiring submission to or approval of a State's implementation plan by the EPA; rather, the statute only requires that the EPA approve or disapprove a State's TMDL."].) TMDL is defined as:

> The sum of the individual WLAs for point sources and [load allocations] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(40 C.F.R. Part 130.2(i).)

There are a number of discretionary determinations by the State in implementing the federal CWA requirements described above in developing and implementing Test Claim Permit requirements at issue. With regard to the establishment of water quality standards and the development of water quality control plans, the Draft Decision acknowledges that the plans are the regional boards' primary regulatory tool. (DD at p. 52; see Water Code sections 13240-13247.) In developing the water quality plans, the regional boards exercise discretion in determining (1) beneficial uses, (2) water quality objectives to reasonably protect beneficial uses, and (3) implementation program to achieve water quality objectives. (Water Code section 13050(j), see also section 13241.) As stated in *the Water Quality Control Plan (Basin Plan) For The Santa Ana River Basin* ["Santa Ana Plan"]:

> [E]ach Regional Board is to set water quality objectives that will insure the reasonable protection of beneficial uses and the prevention of nuisance, with the understanding that water quality can be changed somewhat without unreasonably affecting beneficial uses. The California Water Code also lists the specific factors which are to be considered in establishing water quality objectives…. Implementation plans are to include, but are not

> limited to: (1) a description of the nature of the actions necessary to achieve the objective, including recommendations for appropriate action by any entity, public or private; (2) a time schedule for the actions to be taken; and (3) a description of the surveillance to be undertaken to determine compliance with the objectives.

(Santa Ana Plan at p. 1-2.)

Under Water Code section 13050(f), "beneficial uses" "*include, but are not limited to,* domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, *and other aquatic resources or preserves*." (Emphasis added.) Under section 13050(h), "water quality objectives" are defined 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." Section 13243 further provides the regional boards the discretion to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted." The regional board "shall establish such water quality objectives in water quality control plans a*s in its judgment* will ensure the reasonable protection of beneficial uses and the prevention of nuisance." (Water Code section 13241, emphasis added.) State law provides that the regional boards, in exercising this discretion, consider the following when developing water quality objectives, each of which is subject to the regional boards' judgment:

> (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.

(Water Code section 13241.) Furthermore, the CWA regulations provide a Use Attainability Analysis process to remove beneficial uses that are not existing

uses if it is determined they are not attainable. (40 C.F.R. Part 131.10(g)-(j).) Indeed, in addition to exercising discretion with regard to these considerations, the State "shall from time to time (but at least once each three year period …) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." (33 U.S.C. section 1313(c)(1).)

With regard to the TMDLs, the Regional Board also exercises many layers of discretion. Indeed the definition of TMDL itself contemplates discretionary decisions on the part of the State in developing the TMDLs: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. *Thus, the TMDL process provides for nonpoint source control tradeoffs*." (40 C.F.R. Part 130.2(i), emphasis added.)

Thus, it is clear that the Test Claim Permit requirements are based on multiple layers of discretion in both the development of water quality standards and the TMDLs/WLAs which implement them. The State and Regional Board, therefore, made many decisions constituting a "true choice" under *Dept. of Finance I*.

The Draft Decision departs from the Supreme Court's analytical approach *Dept. of Finance I* by asserting that effluent limits "are clearly complied with by way of an iterative, BMP-based process" and that "[r]equirements to comply with the WLAs adopted in a TMDL, but allowing local government to have discretion and flexibility in the terms of that compliance, constitute at most incidental and de minimis requirements…." (DD at p. 124.) However, the Court in *Dept. of Finance I* rejected a similar analysis with respect to trash receptacle requirements. There, the operators were required to include a description of practices and procedures in their permit application. (*Dept. of Finance I*, 1 Cal.5th at 771-72.) However, because "the issuing agency has discretion whether to make those practices conditions of the permit (40 C.F.R. Part 122.26(d)(2)(iv))" and because "[n]o regulation cited by the State required trash receptacles at transit stops," the Supreme Court found those costs were not federally mandated. (*Ibid.*)

Furthermore, there has been no finding by the Regional Board – as there must be to find a federal mandate not explicitly stated in federal law – that the conditions were the "only means" of implementing the federal requirement. (*Dept. of Finance I*, 1 Cal.5th at 768.) In fact, such a showing cannot be made as the record is replete with examples of the State selecting between multiple options in complying with the CWA requirements. For example:

- In developing the definitions of recreational beneficial uses, "[t]he administrative record … documents the *extensive consideration of alternatives* appropriate to clarify the REC1 definition to reflect the underlying scientific assumptions of the USEPA criteria, and expectations regarding the likelihood of immersion and ingestion." (Santa Ana Plan at p. 3-5, emphasis added.)

- The Test Claim Permit itself shows the Regional Board exercised discretion in determining how to meet water quality standards. While the Permit states that "[t]he requirements contained in this order are necessary to protect water quality standards of the receiving waters and to implement the [applicable] plans and policies,"[3] and that "it is the Regional Board's intent that this order require the implementation of best management practices (BMPs) to reduce to the maximum extent practicable, the discharge of pollutants in urban storm water from the MS4s in order to support attainment of water quality standards" (Test Claim Permit p. 2 of 93), the Permit states that approach is consistent with "most of the municipal storm water permits issued in California" (*Id*. at p. 25 of 93), thus acknowledging that there are other means to meet the federal requirements. Furthermore, if monitoring results indicate an exceedance of the WLAs, the permittees must reevaluate current BMPs or propose new BMPs, which are again subject to the approval of the Regional Board. (DD at p. 18; Test Claim Permit section XVIII.B.9].)

For each of these reasons, it is clear that the Test Claim Permit conditions at issue are not, as the Draft Decision asserts, "at most incidental and de minimis requirements that are part and parcel of the federal mandate." At multiple levels – from the State's choice to implement its own NPDES program, to the designation of uses, to the development of water quality standards and TMDLs, to determining the how to implement the TMDLs in the permit, to enforcement of permit conditions through review and approval of claimants' plans – the Test Claim Permit conditions at issue are the result of many layers of discretion exercised by the Regional Board. Accordingly, the Test Claim Permit conditions

[3] Applicable plans and policies include all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board, the Water Quality Control Plan for the Santa Ana River Basin, the California Toxics Rule; and the California Toxics Rule Implementation Plan. (Test Claim Permit p. 1 of 93),

under SectionssXVIII.B.1 through B.5, XVIII.B.7 through B.9, XVIII.C.1, and XVIII.D.1 not federally mandated costs under *Dept. of Finance I.*

III. The Test Claim Permit Requirements Are "New Programs" Or "Higher Levels Of Service"

The Draft Decision finds that several of the Test Claim Permit requirements are not a new program or higher level of service. For purposes of section 6, a "program" refers to either "(1) programs that carry out the governmental function of providing services to the public, or (2) laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' [Citation.]" (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.) The term "higher level of service" refers to "state mandated increases in the services provided by local agencies in existing 'programs.'" (*Ibid.*) With regard to the Test Claim Permit conditions implementing the TMDL, the Draft Decision asserted three reasons for its conclusions, none of which are in accordance with applicable law.

A. The Test Claim Permit BMP Requirements Provide Services To The Public And Impose Unique Requirements On Local Governments

The Draft Decision asserts that the conditions do not impose a new program or higher level of service because "all dischargers, public and private alike, are subject to WLAs when their permits are issued or renewed and, thus, the requirements are not unique to government." (DD at pp. 21-22.) As an initial matter, the Supreme Court's test in *San Diego Unified School Dist.* sets forth *two separate and alternative inquiries* – whether the conditions carry out the governmental function of providing services to the public ***or*** whether the conditions impose unique requirements on local governments – and not a single test. The Draft Decision wrongly blends the test into a single analysis. In any event, the Draft Decision essentially takes the position that the Test Claim Permit requirements are not a "program" because they implement a general pollution ban, applicable to all dischargers. This is not the appropriate analytical approach under *San Diego Unified School Dist.* and was in fact recently rejected by the Second Appellate District in *Department of Finance II.* In that case, the state argued that NPDES permit conditions to require trash receptacles at transit stops and to inspect business sites were not a new program for purposes of section 6 because they were imposed to prevent pollution, not to provide a public service. The court disagreed:

> This view … ignores the terms of the Regional Board's permit; the challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions – installing and maintaining trash receptacles and inspecting business sites – that the local governments were not previously required to perform. Although the purpose of requiring trash collection at transit stops and business site inspections was undoubtedly to reduce pollution in waterways, the state sought to achieve that goal by requiring local governments to undertake new affirmative steps resulting in costs that must be reimbursed under section 6.

(59 Cal.App.5th at 560.) Likewise here, the BMPs require specific methods to achieve the WLAs and are subject to Regional Board approval and are subject to re-evaluation and the imposition of new or revised BMPs.

Furthermore, for several reasons, the fact that some private dischargers are also subject to WLAs does not mean that the Test Claim Permit conditions implementing the TMDLs are not unique to government or that the claimants are akin to private dischargers.

First, the Test Claim Permit requires programs that carry out the governmental function of providing services to the public. The permit requirements at issue require the MS4 operator permittees to provide a new program of water pollution abatement services which are applicable to the local government because they are providing stormwater drainage and flood control systems, a uniquely public service. Indeed, local stormwater control to protect the public from flooding is a quintessential public safety function akin to police and fire protection. (*O'Hara v. Los Angeles County Flood Control Dist.* (1941) 19 Cal.2d 61, 63 [according to the California Supreme Court, "the construction of improvements … for purposes of flood control is no less essential to the public health and safety than the grading of streets"].) The historical context is important to consider. Most of the claimants had established flood control infrastructure prior to the application of the federal CWA to stormwater in 1987. Thus, the existing public infrastructure is critical to the function of any municipality – including roads with drainage systems, municipal streets, catch basins, and even curbs and gutters – in 1987 became a point source subject to regulation under the NPDES Program. (*San Diego Unified School Dist.*, 33 Cal.4th at 875 ["the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government…."].) The Test Claim Permit conditions, therefore, are analogous to requirements imposed on fire protection services and public education where the Courts of Appeal have required subvention. (See *Carmel Valley Fire*

Protection Dist. v. State of California (1987) 190 Cal.App.3d 521, 537-538 [an executive order requiring county firefighters be provided with protective clothing and safety equipment was subject to subvention because the increased safety equipment resulted in more effective fire protection]; *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173 [an executive order requiring school districts to take specific measures to address racial segregation in local public schools was a "higher level of service" imposed on public education].)

Furthermore, the TMDL permit conditions impose unique requirements on local governments that do not apply generally to all residents and entities in the state. Local governments are uniquely responsible for controlling pollutants generated by third parties and coming from properties they do not own or control. Unlike other regulated dischargers, MS4s are responsible for the control of urban stormwater runoff which is "inherently difficult to control and assign responsibly given its diffuse, non-point source origin from a wide range of public and private properties." (Reshmina William, A. Bryan Endres, Ashlynn S. Stillwell, Integrating Green Infrastructure into Stormwater Policy: Reliability, Watershed Management, and Environmental Psychology As Holistic Tools for Success, 38 UCLA J. Envtl. L. & Pol'y 37, 45 (2020), citing *Nat. Res. Def. Council v. City of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 884-85, rev'd on other grounds, *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Counci*l (2013) 568 U.S. 78.) Government-operated stormwater control system, unlike other dischargers, drain land that is privately-owned or controlled, and includes residential driveways, apartment complexes and most commercial and office structures and parking lots, as well as public right of ways, including public streets and sidewalk easements. Thus, in providing the essential public function of flood control, the stormwater control infrastructure also receives pollutants and trash generated from everyone in the community. These pollutants come from automobiles, commercial trucks, fuels, combustion equipment, atmospheric deposition and other polluting substances that are ubiquitous throughout our communities. An example of a third party source that is unregulated is pesticides. Although the state authorized the use of pesticides by the public and pest control companies, only MS4 operators are responsible for pesticide-related toxicity in runoff. All of these third-party sources are unregulated under the NPDES Program making local governments unique. Thus, only local governments are responsible for controlling this this third party runoff by virtue of their unique role in operating and maintaining public flood control infrastructure.

Additionally, contrary to the implication made in the Draft Decision, not all discharges are subject to the WLAs. The federal CWA only requires an NPDES

permit for discharges of pollutants from "point sources," defined as "any discernible, confined and discrete conveyance…." (33 U.S.C. §§ 1311, 1362(14).) "Nonpoint" source pollution, on the other hand, is not regulated under the NPDES Program. Nonpoint source pollution is ubiquitous and "arises from many dispersed activities over large areas," is "not traceable to any single discrete source," and "is very difficult to regulate through individual permits." (*Ecological Rights Found. v. Pac. Gas & Elec. Co.* (9th Cir. 2013) 713 F.3d 502, 508.) "[T]he CWA does not regulate the largest contributor to water quality degradation: nonpoint source pollution." (*Nolan, Calming Troubled Waters: Local Solutions*, 44 Vt. L. Rev. 1, 23 (Fall 2019).) Thus, pollutants in runoff from private and commercial vehicles, the roofs of office buildings and retail and commercial development, parking lots, residential development (including driveways, private roads, and large residential parking garages), etc., are all nonpoint sources of pollution that are unregulated by individual permits under the NPDES Program (but are regulated under municipal stormwater permits, as described below). Thus, the federal CWA does not impose WLA requirements on all dischargers, as the Draft Decision claims.

Moreover, only three general categories of stormwater discharges are regulated under the NPDES Program, and there are many exceptions. As noted above, runoff is a nonpoint source pollution and is not generally regulated under the NPDES Program. However, runoff that is captured and channeled through a conveyance system is "point source" discharge. (*Greater Yellowstone Coal. v. Lewis* (9th Cir.2010) 628 F.3d 1143, 1152.) Even then, however, there are only three general categories of stormwater "point sources" that are regulated under the NPDES Program – municipal discharges, and discharges associated with certain industrial and construction activities. Of these, only local governments are responsible for controlling pollutants generated by third parties on land the local governments do not own or control (and are therefore subject to unique requirements in the Test Claim designed to control such pollutants). Furthermore, within each of these categories, there are still further exceptions:

- Under the federal CWA, certain small MS4s serving a population of less than 10,000 may seek a waiver from permitting requirements under specified circumstances. (See 40 C.F.R. Part 123.35 subd. (d)(2).) Additionally, the State Board has provided for a waiver of permitting requirements under the MS4 General Permit for communities outside of urbanized areas with a population of 20,000 or less with an annual median household income ("MHI") that is less than 80 percent of the statewide annual MHI. (MS4 General Permit at 9-10; see Wat. Code, § 79505.5, subd. (a).) Thus, while MS4s are regulated under the NPDES Program, certain Small MS4s are excluded from regulation or may obtain

a waiver from the MS4 General Permit requirements. Given these exclusions, WLAs do not even apply to all municipal dischargers, let alone all dischargers.

- Stormwater discharges "associated with an industrial activity" are regulated under the NPDES Program. (33 U.S.C. § 1342 subd. (p)(2).) Discharges "associated with industrial activity" means "the discharge from any conveyance … directly related to manufacturing, processing or raw materials storage areas at an industrial plant." (40 C.F.R. Part 122.26 subd.(b)(14).) The NPDES Program regulations cover 11 industrial subcategories either by a Standard Industrial Classification ("SIC") code or by a description of the industrial facility covered. Regulated industrial activities are required to obtain a General Industrial Activities Stormwater Permit ("GIASP"). Even at an industrial site subject to regulation under the GIASP, there are many industrial activities that are excluded from regulation. For example, "areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water" are excluded. (40 C.F.R.. Part 122.26 subd. (b)(14).) Thus, even if a facility is regulated as an industrial activity, stormwater runoff from the plant's employee parking lot and the roof of the facility's office building, for example, would be sources of pollutants that are unregulated under the NPDES Program and not subject to WLAs.

- Other industrial activities are excluded because they are not "directly related" to manufacturing. For example, in *Decker v. Nw. Envtl. Def. Ctr.* (2013) 568 U.S. 597, water from logging roads used by a timber harvester ran into ditches, culverts, and channels that discharged into nearby rivers and streams. (568 U.S. at 606.) The discharges often contained large amounts of sediment that was potentially harmful to fish and other aquatic organisms. (*Ibid*) Although clearly these conveyances were sources of pollutants to waters of the United States, the U.S. Supreme Court held these conveyances were excluded from regulation under the NPDES Program because they were directly related to the harvesting of raw materials, and not to "manufacturing," "processing," or "raw materials storage areas." (*Id*. at 625.)

- While stormwater dischargers from construction activities are regulated under the federal regulations (see 40 C.F.R. Part 122.26 subd. (b)(14)(x)), the NPDES Program categorically excludes construction that disturbs less than one acre (40 C.F.R. Part 122.26 subd. (b)(15)). Thus, runoff from

the construction of much commercial and residential development is unregulated under the NPDES Program.

- Further, the General Construction Activities Stormwater Permit ("GCASP") applicable to construction activities greater than one acre exempts numerous activities, including, but not limited to: discharges related to routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of the facility; disturbances to land surfaces solely related to agricultural operations such as disking, harrowing, terracing and leveling and soil preparation; and stormwater runoff from oil, gas, and mining operations excluded under 33 U.S.C. § 1342 subd. (l)(2). (GCASP at 5.)[4] Furthermore, construction sites between one and five acres that can certify that construction activity will occur only when the rainfall erosivity factor meets a designated level (rainfall erosivity is an index that describes the power of rainfall to cause soil erosion) are exempt from the GCASP. (*Ibid*.)

In summary, the lynchpin of the Draft Decision regarding this issue is that the TMDL permit conditions are imposed under a law of general application. (See DD at pp. 21-22.) As shown above, this is clearly wrong. The WLA requirements are not applicable to all dischargers; rather, the regulations carve out limited entities and activities to regulate and leaves many other discharges unregulated.

B. The TMDL Monitoring Requirements Are A Higher Level Of Service

The Draft Decision asserts that the conditions do not increase the level of service provided to the public because "[r]equirements to monitor metals, pesticides 'and constituents which are known to have contributed to impairment of local receiving waters' were required by the prior permit." (DD at p. 22.) Further, the Draft Decision argues that because the water bodies at issue in this case were identified on the CWA section 303(d) list before the adoption of the prior permit, "the only difference between the prior permit and the test claim permit is that the test claim permit now identifies the WLAs included in the TMDLs so that claimants know the percentage of bacterial loads that need

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4 https://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf (Accessed Oct. 24, 2022).

to be reduced to meet the existing water quality objectives for these water bodies." (*Ibid*.)

The Draft Decision is incorrect. As noted above, the term "higher level of service" refers to "state mandated increases in the services provided by local agencies in existing 'programs.'" (*San Diego Unified School Dist.* 33 Cal.4th at 874.) The application of section 6 does not turn on whether the underlying obligation to abate pollution remains the same. It applies if any executive order, which each permit is, required permittees to provide a new program or a higher level of existing services. Exercising its discretionary authority with each permit, the Regional Board imposed specific conditions it found were necessary in order for permittees to satisfy the WLAs. If those conditions required permittees to provide a new program or to increase services in an existing program, they trigger section 6. To determine whether a program imposed by the permit is new or a higher level of service, courts compare legal requirements imposed by the new permit with those in effect before the new permit became effective. (See *San Diego Unified School Dist*., *supra*, 33 Cal.4th at p. 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.) This is so even if the requirements were arguably designed to satisfy the same standard of performance.

Here there is no question that the Test Claim Permit conditions increase services when compared to the prior permit. For example, the Draft Decision asserts that requirements to monitor metals, pesticides "and constituents which are known to have contributed to impairment of local receiving waters" were required by the prior permit. (DD at p. 22.) But the Test Claim Permit requires more than that. Section XVIII.B.9 states:

> The permittees with discharges tributary to Coyote Creek or the San Gabriel River *shall develop and implement a constituent-specific source control plan* for copper, lead and zinc until a TMDL implementation plan is developed. *The source control plan shall include a monitoring program* and shall be completed within 12 months from the date of adoption of this order. (Emphasis added.)

Section XVIII.B.10 states:

> Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees with discharges to the San Gabriel River/Coyote Creek and/or their tributaries, *shall develop a monitoring program* to monitor dry weather (for

> copper) and wet weather (for copper lead and zinc) flows in Coyote Creek. (Emphasis added).

These are clearly new programs or higher levels of service that were not included in the prior permit.

IV. It Is Indisputable, And Acknowledged By Policy And Legal Experts, That Constitutional Revenue Restrictions Cause A $500-800 Million Annual Funding Gap For Local Stormwater

The Draft Decision incorrectly concludes that the claimants are not "compelled to rely on proceeds of taxed to pay for the new state-mandated activities," apparently because "the claimants have a number of different revenue streams with which to fund stormwater pollution control activates."[5] In contrast to every reported decision to consider the issue, the Draft Decision improperly evaluates funding sources of the stormwater programs as a whole instead of considering whether fee authority exists *for the particular requirement at issue*. (See, e.g., *Dept. of Finance II, supra,* 59 Cal.App.5th at 630 [analyzing individual permit requirements].) Additionally, the proposition that local stormwater programs are not required to rely on proceeds of taxes to pay for new programs and increased levels of service flies in the face of the accepted reality that local agencies have very limited viable means to raise the sufficient funds needed to meet the regulatory requirements imposed by the regional boards for NPDES programs "the state *chose to administer* …, finding it 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." (*Department of Finance I*, *supra*, 1 Cal. 5th at 767, emphasis added.) The inability of local agencies to raise sufficient revenue for stormwater programs due to constitutional restrictions is now well-established. In March 2014, the Public Policy Institute of California released a report entitled "Paying for Water in California" ("2014 PPIC Report") that confirmed the negative impact of these funding restrictions and also estimated the magnitude of the problem.[6] The 2014 PPIC Report concluded that "debilitating structural funding gaps" exist in five of seven sectors of California's water system, including stormwater pollution management. (2014 PPIC Report, p. 2.) The authors concluded Propositions 218 and 26, which severely limited local governments' ability to raise funds, are major causes of this funding gap. (*Id*. at pp. 2, 51, 62.)

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[5] Draft Proposed Decision, p. 173.
[6] Hanak, et al., Paying for Water in California (2014), <http://www.ppic.org/main/publication.asp?i=1086> (accessed Oct. 23, 2022).

The size of the funding gap for stormwater programs as determined by the 2014 PPIC Report is enormous:

> As a very rough indication of the funding gap, we estimate that the total annual costs of meeting urban stormwater permit requirements are in the range of $1 billion to $1.5 billion. Agencies have stable funding for no more than half that amount, leaving a gap of $500 million to $800 million per year….

(2014 PPIC Report, p. 44.) Thus, local agencies must use funds earmarked for essential public services such as roads, recreation facilities, emergency services, etc. As described in the above comments, it is undisputed that the Test Claim Permit imposes more stringent requirements on the claimants, yet the Proposed Draft Decision seems to deny the existence of the well-known stormwater funding gap.

V. It Is More Important Than Ever For The Commission To Approve Subvention For Stormwater Costs Because The State Is Headed For A "Fiscal Cliff" With Its Own Gann Limit, According To The Legislative Analyst And The Controller

While this test claim is primarily focused on implementation of Article XIII B, section 6, of the Constitution and its reimbursement requirement, the overall purpose and effect of Proposition 4 should inform the Commission's analysis. This year, the State was in crisis because it was projected to exceed its own Gann Limit. This problem could at least be mitigated if the claimants' Test Claim is approved and they receive subventions that would then apply to the local government appropriations limit.

In explaining the effect of Proposition 4 to the voters, the first sentence of the Attorney General's ballot summary stated the measure "Establishes and defines annual appropriation limits on state and local governmental entities based on annual appropriations for [the] prior fiscal year."[7] The establishment of appropriations limits for the state and local governments, which became known as "Gann Limits," was the main focus of Proposition 4. The State's obligation in Article XIII B, section 6, to reimburse local governments for new programs or higher levels of services mandated by the State was simply one tool used by the electorate to ensure the Gann Limits would serve the primary goal: to "limit

[7] Ballot Pamp., Special Statewide Elec. (Nov. 6, 1979) Prop. 4, p. 16.

state and local government spending."[8] Indeed, the reimbursement obligation was not among the first five things Paul Gann wrote Proposition 4 would "VERY SIMPLY" do; rather, the reimbursement obligation appears first on the secondary list of what the initiative would "ADDITIONALLY" do.[9]

The state and each local government have their own spending limits. (Cal. Const., art. XIII B, §§ 1, 8, subds. (a) & (b).) Where the state is obligated to provide a subvention under Article XIII B, section 6, the subvention counts against the state's appropriations limit, not the local governments' appropriation limits. (Cal. Const., art. XIII B, § 8, subds. (a), (b); *City of Sacramento*, *v. State of California* (1990) 50 Cal.3d 51,70 (subventions "cut into the *state's* article XIII B spending limit." (Italics in original).)

The State's Gann Limit, also referred to as the "State Appropriations Limit" or "SAL," has been a source of acute concern for California in the last budget cycle. In its initial comments on the budget this year, the Legislative Analyst commented that "Based on recent tax revenue collection data, the state will face a significant state appropriations limit (SAL) requirement – possibly in the tens of billions of dollars – at the time of the May Revision."[10]

By the time of the May Revision, the Legislative Analyst sounded the alarm in even more stark terms:

> ***May Revision Sets Up Fiscal Cliff for 2023-24.*** While the administration meets the SAL requirements across the prior and current year, the Governor leaves $3.4 billion in unaddressed SAL requirements in 2022-23. Moreover, we estimate the state would face an additional SAL requirement of over $20 billion in 2023-24. The Governor's May Revision does not have a plan to address this roughly $25 billion requirement. As a result, the state would very

[8] *Id.* at p. 18.
[9] *Ibid.*, capitalization in original.
[10] California Legislative Analyst's Office, The 2022-23 Budget: State Appropriations Limit Implications (Mar. 30, 2022), p. 1, <https://lao.ca.gov/reports/2022/4583/SAL-Implications-033022.pdf> (accessed Oct. 24, 2022).

> likely face a significant budget problem next year, which could require reductions to programs.[11]

Indeed, State Controller – and Commission member – Betty T. Yee echoed the Legislative Analyst's concern and published an article entitled "Voter-approved Spending Limit Poses New Challenges Amid Unprecedented Revenue Growth" in her May 2022 California Fiscal Focus Report.[12] She noted the Legislative Analyst's "Fiscal Cliff" and listed the potential solutions to this serious problem:

> The Governor and Legislature have several options:
>
> - They can maintain the status quo and budget within the confines of the state constitution;
> - They can consider options suggested by Legislative to provide additional "room" under the SAL:
>   - Lowering taxes;
>   - ***Providing more subventions to local governments***;
>   - Increasing spending on infrastructure;
>   - Spending more on emergencies; and
>   - Reducing non-Excluded Spending; or
> - As done with Prop. 111, the Legislature can introduce a constitutional amendment to change the existing SAL formula and requirements.[13]

Thus, one of the budget solutions available to the State, with obvious relevance to the instant Test Claim and other test claims related to stormwater programs,

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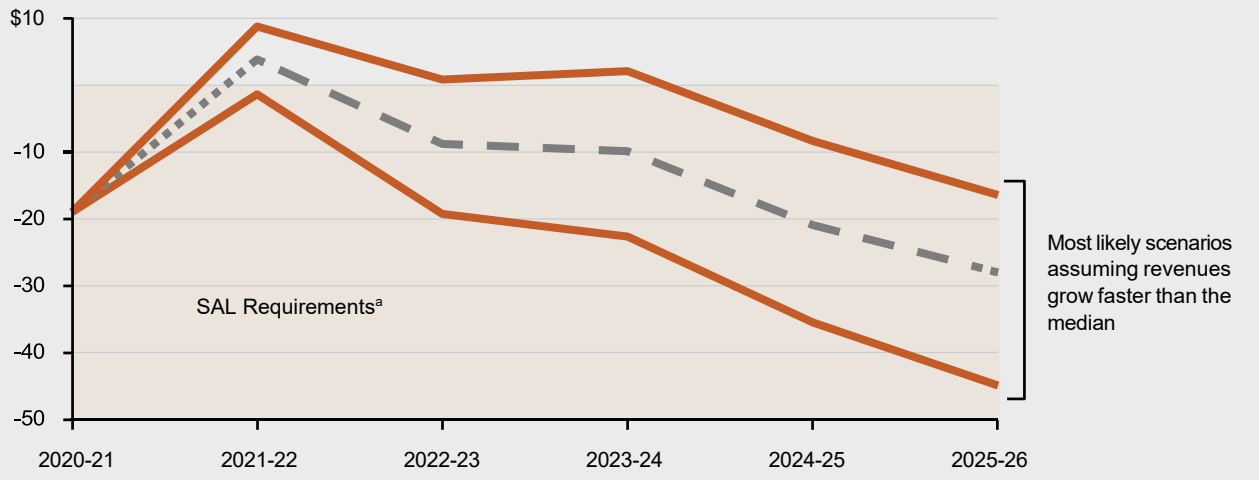
[11] California Legislative Analyst's Office, The 2022-23 Budget: Initial Comments on the Governor's May Revision, p. 1, emphasis in original, <https://lao.ca.gov/reports/2022/4598/Initial-Comments-May-Revision-051622.pdf> (accessed Oct. 24, 2022).
[12] <https://www.sco.ca.gov/2022_05summary.html> (accessed Oct. 24, 2022).
[13] Yee, California Fiscal Focus (May 2022), pp. 2, 4, emphasis added, <https://www.sco.ca.gov/Files-EO/2022_05summary.pdf> (accessed Oct. 24, 2022).

is to provide more subventions to local governments. The Legislative Analyst's Office made the same observation.[14]

The problem, as demonstrated from the Legislative Analyst' figure below, is that the State is likely to run out of "room" under its appropriations limit. The only real question is when it will happen.

Figure 3

If the Economy Continues to Grow,
The State Faces (Large and Growing) SAL Requirements
(In Billions)



[a] This figure shows the annual difference in appropriations subject to the limit and the limit itself. When this amount is negative, the state has a SAL requirement, which it must meet by: (1) spending more on excluded purposes, (2) lowering taxes, or (3) making taxpayer rebates and additional payments to schools. SAL = state appropriations limit.

LAO

Source: California Legislative Analyst's Office, The 2022-23 Budget: State Appropriations Limit Implications (Mar. 30, 2022), p. 4, <https://lao.ca.gov/reports/2022/4583/SAL-Implications-033022.pdf> (accessed Oct. 24, 2022).

Here is the Legislative Analyst's conclusion regarding the severity of the problem presented by the State Appropriations Limit:

[14] California Legislative Analyst's Office, The 2022-23 Budget: Initial Comments on the Governor's May Revision, p. 7, <https://lao.ca.gov/reports/2022/4598/Initial-Comments-May-Revision-051622.pdf> (accessed Oct. 24, 2022).

> ***Under Current Law, State Government Very Likely Cannot Grow More.*** In the previous section, we outlined three options to address the short-term budgetary risks currently faced by the state. However, none of these, even all together, would indefinitely forestall the long-term reality of the state's constitutional constraints. *The reality is that state tax revenues are growing faster than the limit and the size of state government has reached the limit set by voters in the 1970s.*[15]

Thus, due to the primary purpose of Proposition 4, the State government cannot increase appropriations under its own Gann Limit even to effectuate important and widely supported policies like improving stormwater quality.

In contrast, local governments, generally, have significant room to grow appropriations under their own Gann Limits. The Legislative Analyst wrote that: "As of 2018-19, *cities and counties had over $150 billion in collective room* under their limits."[16] This large amount of room under local agency Gann Limits is a poignant illustration of how effective constitutional revenue restrictions have been, leading to the oft-quoted description of the purpose of Article XIII B, section 6: 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."[17]

The City of Dublin created the figure below to illustrate how its revenues continue to grow more slowly than its Gann Limit, yielding an appropriations limit that is many times higher than appropriations.

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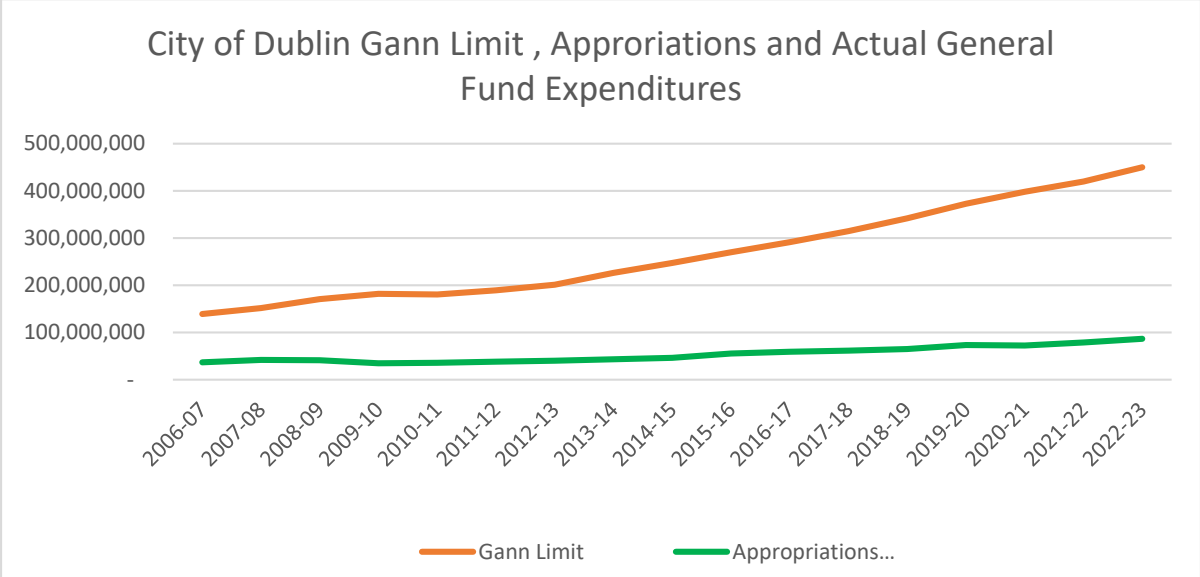
[15] California Legislative Analyst's Office, The 2022-23 Budget: State Appropriations Limit Implications (Mar. 30, 2022), p. 7, first emphasis in original, second italics supplied, <https://lao.ca.gov/reports/2022/4583/SAL-Implications-033022.pdf> (accessed Oct. 24, 2022, emphasis added.).
[16] *Ibid.*
[17] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.



We expect that many claimants in these test claims have similar room to accept State subventions without endangering their Gann Limits. For example, claimant City of Brea staff wrote in its June 16, 2020, staff report that:

> Brea's appropriations that are "subject to the limit" have traditionally been much lower than required by Article XIII B. This year's Appropriations Limit has been calculated to be $108,619,299. Revenues subject to the Appropriations Limit are $43,486,506 *resulting in a favorable gap of $65,132,793.*[18]

While it is apparent that, as the Legislative Analyst opined, "state government very likely cannot grow more," it equally apparent that local governments have the capacity to provide much needed services to the public – like improvements in stormwater programs – if only they were provided with revenues to pay for it.

At the end of the budget cycle this year, the Governor and Legislature managed to avoid the "Fiscal Cliff" with drastic measures. These measures include significant increases in excluded spending ($23.7 billion in qualified capital outlay spending, $9.5 billion in taxpayer rebates, emergency expenditures such as nearly $2 billion in rental relief assistance, and $8.6 billion in Learning

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18 <https://agenda.ci.brea.ca.us/agenda_publish.cfm?id=&mt=ALL&get_month=6&get_year=2020&dsp=agm&seq=2707&rev=0&ag=794&ln=22150&nseq=2705&nrev=0&pseq=2691&prev=0#ReturnTo22150> (accessed Oct. 24, 2022).

Recovery Block Grant funding) and changing the definition of "subvention."[19] Such measures may very well not be available next year or in the years to come.

We respectfully ask the Commission to consider how the Gann Limits for state and local governments have evolved in relation to available revenues and appropriations and consider that this reality likely speaks volumes as to whether Proposition 4 is being interpreted as the voters intended. The State frequently struggles with an abundance of riches, resorting to desperate measures to comply with its Gann Limit, while imposing more and more obligations on local agencies to serve the public without providing any funding source. The stormwater NPDES program is a prime example of how local agencies are required to do and spend significantly more without the necessary funding. Meanwhile, local governments are severely constrained and their tax revenue falls far below their own Gann Limits. This appears to be contrary to what the voters who passed Proposition 4 intended.

Thank you for your consideration of our comments.

I declare under penalty of perjury that the foregoing, signed on November 4, 2022, is true and correct to the best of my personal knowledge, information, or belief.

Sincerely,

Gregory J. Newmark

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[19] California Legislative Analyst's Office, Budget and Policy Post: The 2022-23 California Spending Plan, The State Appropriations Limit (Sept. 30, 2022), <https://lao.ca.gov/Publications/Report/4631#:~:text=Of%20this%20total%2C%20%2414.1%20billion,and%20schools%20and%20community%20colleges.> (accessed Oct. 24, 2022).

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 November 7, 2022, I served the:

- **Cities of Alameda's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision filed November 4, 2022**
- **Claimants' Comments on the Draft Proposed Decision filed November 4, 2022**
- **Finance's Comments on the Draft Proposed Decision filed November 4, 2022**
- **Water Boards' Comments on the Draft Proposed Decision filed November 4, 2022**

  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and, XVIII, 09-TC-03
  Santa Ana Regional Water Quality Control Board, Resolution No. R8-2009-0030, adopted May 22, 2009
  County of Orange, Orange County Flood Control District; and the Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach, and Villa Park, Claimants

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 November 7, 2022 at Sacramento, California.

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COMMISSION ON STATE MANDATES

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Last Updated: 10/28/22

Claim Number: 09-TC-03

Matter: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030

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City of Buena Park
City of Costa Mesa
City of Cypress
City of Fountain Valley
City of Fullerton
City of Huntington Beach
City of Irvine
City of Lake Forest
City of Newport Beach
City of Placentia
City of Seal Beach
City of Villa Park
County of Orange
Orange County Flood Control 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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