STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

March 24, 2023

Mr. David Burhenn
Burhenn & Gest, LLP
624 South Grand Avenue, Suite 2200
Los Angeles, CA 90017

Mr. Kris Cook
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Decision
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

Dear Mr. Burhenn and Mr. Cook:

On March 24, 2023, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

Commission on State Mandates
980 9th Street, Suite 300 Sacramento, CA 95814 | www.csm.ca.gov | tel (916) 323-3562 | email: csminfo@csm.ca.gov

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Santa Ana Regional Water Quality Control Board, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and XVIII (Adopted May 22, 2009) Filed on June 30, 2010; Revised December 19, 2016 and January 3, 2017 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.[1]	Case No.: 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, Adopted May 22, 2009* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 24, 2023*) (*Served March 24, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on March 24, 2023.

Heather Halsey, Executive Director

[1] Note that the cities of Garden Grove, Laguna Hills, Laguna Woods, La Habra, La Palma, Los Alamitos, Orange, Santa Ana, Stanton, Tustin, Westminster, and Yorba Linda, which are not claimants in this matter, are also co-permittees subject to the test claim permit, and are eligible to submit reimbursement claims for any approved activities in this Test Claim.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Santa Ana Regional Water Quality Control Board, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and XVIII (Adopted May 22, 2009) Filed on June 30, 2010; Revised December 19, 2016 and January 3, 2017 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.[1]	Case No.: 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, Adopted May 22, 2009* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 24, 2023*) (*Served March 24, 2023*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 24, 2023. David Burhenn and Amanda Carr appeared on behalf of the claimants. Donna Ferebee appeared on behalf of the Department of Finance (Finance). Jennifer Fordyce, Catherine Hagan, and Michael Lauffer appeared on behalf of the State Water Resources Control Board (State Board) and the Santa Ana Regional Water Quality Control Board (Regional Board). Bryan Brown of Meyers Nave appeared on behalf of interested person Alameda Countywide Clean Water Program.

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 at the hearing by a vote of 6-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes

[1] Note that the cities of Garden Grove, Laguna Hills, Laguna Woods, La Habra, La Palma, Los Alamitos, Orange, Santa Ana, Stanton, Tustin, Westminster, and Yorba Linda, which are not claimants in this matter, are also co-permittees subject to the test claim permit, and are eligible to submit reimbursement claims for any approved activities in this Test Claim.

Member	Vote
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Scott Morgan, Representative of the Director of the Office of Planning and Research	Yes
Renee Nash, School Board Member	Yes
Sarah Olsen, Public Member	Absent
Lynn Paquin, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim alleges reimbursable state mandated activities arising from Order No. R8-2009-0030 (test claim permit), issued by the Santa Ana Regional Water Quality Control Board (Regional Board) on May 22, 2009, effective June 1, 2009.[2] The test claim permit amended a prior discharge permit (Third Term Permit) for the co-permittee cities, county and flood control district (which includes the claimants), which limited the discharge of certain specified constituent pollutants into the waters within the jurisdiction of the Regional Board. The test claim permit: identifies wasteload allocations (WLAs) for receiving waters to comply with Total Maximum Daily Loads (TMDLs) adopted pursuant to section 303(d) of the federal Clean Water Act[3]; requires that low impact development (LID) and hydromodification prevention be considered in the planning and site design of new development and significant redevelopment projects, including municipal projects; expands public education and outreach requirements, including to residential areas; and increases the scope and costs of the commercial and industrial inspections programs.

The claimants allege sections XVIII.B.1 through XVIII.B.5, XVIII.B.7 through XVIII.B.9, XVIII.C.1, and XVIII.D.1 of the test claim permit require them to comply with numeric effluent limits for a number of constituent pollutants (metals, organochlorine compounds, selenium, fecal coliform, and pesticides), to implement TMDLs for those pollutants in Newport Bay, San Diego Creek, and reaches in the San Gabriel River and Coyote Creek. As explained in the test claim permit, these waterbodies were impaired and 303(d) listed since these constituents exceeded applicable State water quality standards. One of the listed causes of the impairment was urban runoff.[4] Federal law requires that TMDLs be established for each 303(d) listed waterbody for each of the pollutants causing impairment.[5] The test claim permit requires the claimants to develop and submit specific plans, as discussed below, and identifies the WLAs previously

[2] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 352 [Order No. R8-2009-0030].

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

[4] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 284 [Order No. R8-2009-0030].

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

adopted in the TMDLs.[6] The test claim permit requires monitoring within the receiving waters, and if the monitoring results indicate an exceedance of the WLAs, claimants are required to reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan.[7]

The Commission finds that the requirements in Sections XVIII.B.8 and XVIII.B.9 of the test claim permit impose a state-mandated new program or higher level of service to submit to the Regional Board a Cooperative Watershed Program to implement the TMDL for selenium and to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL.

However, Sections XVIII.B.5 and 7 do not impose any requirements.

In addition, the remaining requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1, to monitor, implement BMPs, and revise BMPs to comply with the WLAs in the TMDLs for fecal coliform, metals, organochlorine compounds, selenium, and pesticides if an exceedance occurs, do not mandate a new program or higher level of service. The fecal coliform TMDL became effective in 1999,[8] and the prior 2002 permit identified the wasteload allocations (WLAs) for fecal coliform and imposed the same requirements as the test claim permit. The following specific provisions from the prior permit relating to the fecal coliform TMDL state the following:

- "A fecal coliform TMDL for Newport Bay has also been established. The WLAs from these TMDLs are included in this order. Dischargers to these water bodies are currently implementing these TMDLs. This order specifies the WLAs and includes requirements for the implementation of these WLAs."[9]
- "The permittees shall revise Appendix N of the DAMP [Drainage Area Management Plan] to include *implementation measures* and schedules for further studies related to the TMDL for fecal coliform in Newport Bay, as set forth in the January 2000, March 2000 and April 2000 Newport Bay Fecal Coliform TMDL Technical Reports submitted by the permittees."[10]
- "The permittees shall . . . *monitor* representative areas along the Orange County coastline, as well as a minimum of six inland water bodies/channels, for total coliform, fecal coliform, and Enterococcus in order to determine the impacts of storm water and nonstorm water runoff on loss of beneficial uses to receiving waters. Inland monitoring

[6] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 338 et seq. [Order No. R8-2009-0030].

[7] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 349 [Order No. R8-2009-0030].

[8] Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL.

[9] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 403 [Order No. R8-2002-0010, Finding 19].

[10] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010, Section XVI.3].

stations shall be located to include channels/creeks which are currently impaired for pathogens."[11]

The DAMP (mentioned in the second bullet above) is the principal guidance document for urban stormwater management programs in Orange County, and was required to be developed by the claimants to reduce pollutants in urban stormwater runoff to the MEP by the first and second term permits.[12] The prior permit required the claimants to implement management programs, monitoring programs, implementation plans and all BMPs outlined in the DAMP within each respective jurisdiction, and take any other actions as may be necessary to meet the MEP standard.[13] If the permittees detected an exceedance of water quality standards, then the permittees "shall revise the DAMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;" and "implement the revised DAMP and monitoring program in accordance with the approved schedule."[14] The prior permit also required the claimants to "demonstrate compliance with all the requirements in this order and specifically with Section III.2 Discharge Limitations and Section IV. Receiving Water Limitations, through timely implementation of their DAMP and any modifications, revisions, or amendments . . . determined by the permittee to be necessary to meet the requirements of this order."[15] The prior permit further required the claimants to "implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order."[16]

Moreover, meeting water quality standards for metals, organochlorine compounds, selenium, and pesticides is not new to the claimants; narrative and numeric criteria or objectives existed in the Basin Plan and the CTR before the TMDLs were adopted[17] and compliance with those standards

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[11] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 444 [Order No. R8-2002-0010, Monitoring and Reporting Program, section III.D.1].

[12] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 403, 465 [Order No. R8-2002-0010, Finding 21 and Fact Sheet].

[13] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 410-411 [Order No. R8-2002-0010].

[14] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

[15] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010].

[16] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010].

[17] Exhibit Q (45), Water Quality Control Plan (1995 Basin Plan), pages 63, 70, 67-68, 72; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 401 [Order No. R8-2002-0010, Finding 40].

was expressly required under the prior permit by performing the same activities as required by the test claim permit. The prior permit:

- Required that discharges from the MS4 shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives).[18]
- Prohibited illegal and illicit non-stormwater discharges from entering into the MS4.[19]
- Required that DAMP and its components be designed to achieve compliance with receiving water limitations through timely implementation of control measures and BMPs.[20]
- Required that if the claimants continue to cause or contribute to an exceedance of water quality standards, the claimants shall promptly notify and submit a report to the Regional Board that describes the BMPs currently implemented and the additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Once approved, the claimants shall revise the DAMP and monitoring program to incorporate the approved modified BMPs, and implement the revised program.[21]
- Required the claimants to demonstrate compliance with the discharge limitations and receiving water limitations through timely implementation of their DAMP. "The DAMP, as included in the Report of Waste Discharge, including any approved amendments thereto, is hereby made an enforceable component of this order."[22]
- Required the claimants to implement "additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order."[23]

[18] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[19] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 412 [Order No. R8-2002-0010].

[20] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[21] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

[22] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 433 [Order No. R8-2002-0010].

[23] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 433 [Order No. R8-2002-0010].

- Required the claimants to comply with the Monitoring and Reporting Program (R8-2002-0010), which is attached to the Third Term Permit.[24] This program required the claimants to conduct several types of monitoring, including mass emissions monitoring, in order to determine if the MS4 is contributing to exceedances of water quality objectives or beneficial uses by comparing the results to the CTR, the Basin Plan, the Ocean Plan, or other relevant standards. Dry and wet weather monitoring was required and all samples had to be tested for metals, pesticides, "and constituents which are known to have contributed to impairment of local receiving waters."[25]

  The Monitoring and Reporting Program further required the claimants to develop "strategies to evaluate the impact of storm water and non-storm water runoff on all impairments within the Newport Bay watershed and other 303(d) listed bodies."[26] In addition, the Monitoring and Reporting Program states that "[s]ince the 303(d) listing is dynamic, with new waterbodies and new impairments being identified over time, the permittees shall revise their monitoring plan to incorporate new information as it becomes available."[27]

  The claimants' Water Quality Monitoring Program was included in their 2003 DAMP, and shows that the claimants monitored for metals, selenium, diazinon and chlorpyrifos, and other pesticides.[28]

Thus, despite the claimants' arguments to the contrary, the claimants were required by the prior permit to comply with water quality standards for these pollutants, by monitoring, implementing BMPs, and if the monitoring results indicate an exceedance of water quality standards, the claimants had to reevaluate current BMPs or propose new BMPs, and once approved, implement the revised plan. If water quality standards under the prior permit were not met, the claimants could have been held in violation of that permit.[29] Accordingly, the implementation

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[24] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 434, 441 et seq. [Order No. R8-2002-0010].

[25] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 443 [Order No. R8-2002-0010].

[26] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[27] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[28] Exhibit Q (32), Santa Ana Region Water Quality Monitoring Program, February 2003, page 16, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/2021-03/2003_DAMP_Exhibit-11_III_SantaAnaWaterQualityMonitoring.pdf (accessed November 20, 2022).

[29] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 58-59 (State Water Board, Order WQ 2015-0075); *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866; *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377.

requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1 are not new and do not impose a new program or higher level of service.

The Commission further finds that the LID and hydromodification requirements in Sections XII.B. through XII.E. of the test claim permit for new development and significant redevelopment municipal projects do not mandate a new program or higher level of service. There is no legal requirement imposed by the state, or evidence of practical compulsion (certain and severe penalties or other draconian consequences) forcing local government to undertake municipal priority development projects.[30] Therefore, the LID and hydromodification prevention requirements are not mandated by the state. In addition, the activities are not unique to local government, but apply to all priority development projects, and do not provide a peculiarly governmental service to the public within the meaning of article XIII B, section 6, and, thus, do not impose a new program or higher level of service.

In addition, the LID and hydromodification planning activities required by section VII.B.1, to annually review the existing structural treatment control and other BMPs for New Developments, submit any changes for review and approval by the Executive Officer, revise the appropriate tables in the Water Quality Management Plan [WQMP] with the latest information on BMPs, and provide additional clarification regarding their effectiveness and applicability, are *not* new. The claimants were required by the prior permit to perform these activities.[31]

However, the LID and hydromodification planning activities required to be performed by the claimants under their regulatory authority for all new development and significant redevelopment projects pursuant to Sections XII.C.1, XII.D.5, and XII.E.1 (requiring the update of the model WQMP to incorporate LID principles, preparing a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis, and develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs) are new, mandated by the state, and impose a new program or higher level of service.

In addition, the test claim permit imposes some new state-mandated programs or higher levels of service pertaining to the Public Education and Outreach Program (Sections XIII.1, XIII.4, and XIII.7 of the test claim permit); the Residential Program (Section XI.4 of the test claim permit); and the Municipal Inspections programs for Industrial and Commercial facilities (Sections XIII.4, IX.1, X.1-3, X.5, and X.8 of the test claim permit).[32]

The Commission further finds that some of the new state-mandated activities result in costs mandated by the state based on the following findings:

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[30] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753; *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) 13 Cal.5th 800, 815.

[31] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[32] *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, 629.

- There is substantial evidence in the record, as required by Government Code section 17559, that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.[33]
- Pursuant to article XIII C, section 1(e)(3) of the California Constitution, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, and other cases, the claimants have the authority under their police powers and by statute to impose regulatory fees to comply with Sections XIII.4 (the portion requiring inspectors to distribute educational information (Fact Sheets) during their inspections of commercial and industrial facilities), IX.1, X.1-3, X.5, and X.8 of the test claim permit related to the inspection of industrial and commercial facilities, and Sections VII.C.1, XII.D.5, and XII.E.1 of the test claim permit related to LID and hydromodification planning, which are sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities.
- The claimants have the authority under their police powers and by statute to impose stormwater fees on property owners to comply with Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit to submit a proposed Cooperative Watershed Program for the selenium TMDL, develop a constituent-specific source control plan to for the San Gabriel metals TMDL, comply with the new mandated public education activities, and develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. However, from June 1, 2009 through December 31, 2017 only, and based on the court's holding in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*City of Salinas),* which interpreted article XIII D of the California Constitution as requiring the voter's approval before any stormwater fees can be imposed, there are costs mandated by the state for these activities. When voter approval is required by article XIII D, the claimants do *not* have the authority to levy fees sufficient as a matter of law to cover the costs of these activities within the meaning of Government Code section 17556(d).
- Beginning January 1, 2018, and based on the *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 to comply with the new requirements imposed by Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit to develop and submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, the public education program, and the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, 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

[33] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 151-304.

matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

Accordingly, the Commission partially approves this Test Claim and finds that the following activities constitute a reimbursable state-mandated program from June 1, 2009, through December 31, 2017 only:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)[34]
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)[35]
- Public education program:
    - By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012. (Section XIII.1.)[36]
    - Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and retail sales industry; residential/commercial landscape construction and service industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter. (Section XIII.4.)[37]
    - The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in

[34] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.8].

[35] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.9].

[36] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[37] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

local newspapers, County or city websites, local libraries, city halls, or courthouses. (Section XIII.7.)[38]

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. (Section XI.4.)[39]

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

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes, shall be identified and deducted from any claim submitted for reimbursement.

All other sections, activities, and costs pled in the Test Claim are denied.

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[38] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[39] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316-317 [Order No. R8-2009-0030, Section XI.4].

I. Chronology

05/22/2009	The Test Claim Permit, Santa Ana Regional Water Quality Control Board, Order No. R8-2009-0030 was adopted; the Test Claim Permit became effective on June 1, 2009.[40]
06/30/2010	The claimants filed the Test Claim.[41]
07/09/2010	Commission staff issued the Notice of Complete Test Claim Filing and Schedule for Comments.
07/20/2010	The Department of Finance (Finance) filed a petition for writ of administrative mandamus on the Commission's Decision on Test Claims 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21, issued September 3, 2009, which addressed Los Angeles Regional Water Quality Control Board Order No. 01-182, NPDES Permit CAS004001.[42]
07/27/2010-01/21/2011	The Regional Board requested four extensions of time to file comments, which were granted for good cause.
03/09/2011	The Regional Board filed comments on the Test Claim.[43]

[40] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 352 [Order No. R8-2009-0030, p. 82].

[41] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017.

[42] Superior Court of California, County of Sacramento, Case No. 34-2010-80000605. Because this test claim raised issues similar to those being litigated with respect to the Los Angeles Regional Board Order that was the subject of the writ, the Commission placed this claim on inactive status pending the outcome of this litigation.

[43] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011; Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011.

03/10/2011	Finance filed comments on the Test Claim.[44]
03/23/2011, and 06/01/2011	The claimants requested two extensions of time to file rebuttal comments, which were granted for good cause.
06/17/2011	The claimants filed rebuttal comments in four volumes.[45]
10/16/2013	The Court of Appeal for the Third District issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. B237153 (Superior Court Case No. 34-2010-80000605).
01/29/2014	The California Supreme Court granted review of *Department of Finance v. Commission on State Mandates*, Case No. S214855 (3d Dist. Court of Appeal Case No. B237153; Superior Court Case No. 34-2010-80000605).
06/08/2016	Commission staff issued the Request for Additional Information seeking the full administrative record of the test claim permit.
06/23/2016	The State and Regional Boards (collectively Water Boards) requested an extension of time to file the administrative record of the Permit, which was approved.
08/05/2016	The Regional Board filed the administrative record of the Permit in three parts.[46]
08/29/2016	The California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. S214855.
09/21/2016	Commission staff issued a request for additional briefing regarding the Supreme Court's decision in *Department of Finance v. Commission* and notice of a tentative hearing date.[47]

[44] Exhibit D, Finance's Comments on the Test Claim, filed March 10, 2011.

[45] Exhibits E and F, Claimants' Rebuttal Comments, Volumes 1 and 4, filed June 17, 2011. Volume 2 of Claimants' Rebuttal Comments includes copies of the test claim permit, the Fact Sheet, and the prior permit, which are already in Exhibit A, and Volume 3 includes copies of statutes, regulations, and case law cited by the claimants in their rebuttal comments. Because of the enormous size of this record, Volumes 2 and 3 cannot reasonably be included as an exhibit. However, the entirety of Volumes 2 and 3 are available on the Commission's website on the matter page for this test claim: https://csm.ca.gov/matters/09-TC-03/doc28.pdf (Volume 2); https://csm.ca.gov/matters/09-TC-03/doc27.pdf (Volume 3).

[46] Because of its enormous size, this record cannot reasonably be included as an exhibit. Documents contained therein and cited in this document are being included as excerpts. However, the entirety of all three parts are available on the Commission's website on the matter page for this Test Claim: https://csm.ca.gov/matters/09-TC-03.php.

[47] Exhibit G, Request for Additional Briefing and Notice of Tentative Hearing Date, issued September 21, 2016.

10/21/2016	The claimants filed a response to the request for additional briefing.[48]
10/21/2016	Finance filed a response to the request for additional briefing.[49]
10/21/2016	The Regional Board filed a response to the request for additional briefing.[50]
10/28/2016	The claimants filed a late supplemental response to the Request for Additional Briefing.[51]
11/16/2016	The California Supreme Court denied rehearing of *Department of Finance v. Commission on State Mandates*, and issued the final decision.[52]
11/18/2016	Commission staff issued the Notice of Incomplete Joint Test Claim Filing.
12/19/2016	The claimants filed the Response to Notice of Incomplete Joint Test Claim Filing.
12/23/2016	Commission staff issued the Notice of Complete Joint Test Claim Filing and Renaming of Matter.
01/03/2017	Co-claimant, City of Lake Forest, filed a Corrected Test Claim Form.
04/16/2018	The claimants filed an inquiry regarding the hearing date.
04/19/2018	Commission staff issued the Response to Claimants' Inquiry Regarding Hearing Date and Notice of Tentative Hearing Date.
05/03/2018	The claimants filed comments on the response to claimants' inquiry.
07/05/2022	The claimants filed an inquiry regarding the hearing date.
08/17/2022	Commission staff issued the Draft Proposed Decision.[53]

[48] Exhibit J, Claimants' Response to the Request for Additional Briefing, filed October 21, 2016.

[49] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016.

[50] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016.

[51] Exhibit K, Claimants' Late Supplemental Response to the Request for Additional Briefing, filed October 28, 2016.

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

[53] Exhibit L, Draft Proposed Decision, issued August 17, 2022.

08/23/2022 - 10/24/2022	The claimants, the Water Boards, Finance, and the Cities of Dublin and Union City and the Alameda Countywide Clean Water Program requested extensions of time to file comments on the Draft Proposed Decision, which were approved for good cause.
11/04/2022	The claimants filed comments on the Draft Proposed Decision.[54]
11/04/2022	The Water Boards filed comments on the Draft Proposed Decision.[55]
11/04/2022	Finance filed comments on the Draft Proposed Decision.[56]
11/04/2022	The Cities of Dublin and Union City and the Alameda Countywide Clean Water Program filed comments on the Draft Proposed Decision.[57]
01/12/2023	Commission staff issued the Proposed Decision for the January 27, 2023 hearing.
01/13/2023	The Water Boards and Finance filed requests to postpone the hearing until the next regularly scheduled hearing, which was granted for good cause.

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.[58] "*This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act.*"[59] 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 2009,

[54] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022.

[55] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022.

[56] Exhibit O, Finance's Comments on the Draft Proposed Decision, filed November 4, 2022.

[57] Exhibit P, Cities of Dublin's and Union City's and the Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022.

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

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

when the test claim 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."[60] 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.[61]

In 1948, the Federal Water Pollution Control Act "adopted principles of state and federal cooperative program development, limited federal enforcement authority, and limited federal financial assistance."[62] 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."[63]

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.

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

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

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

[62] Exhibit Q (40), U.S. 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 December 15, 2017), page 4.

[63] Exhibit Q (40), U.S. 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 December 15, 2017).

not been identified "as a significant contributor of pollution."[64] 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 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.[65] The Act prohibits "the discharge of any pollutant by any person" without an NPDES permit.[66] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from *any* point source."[67] 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.[68] 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."[69] Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies.[70] 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.]

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

[65] *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).

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

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

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

[69] See United States Code, title 33, section 122.26(b)(13) and Exhibit Q (44), U.S. EPA, National Pollutant Discharge Elimination System (NPDES) Stormwater Program, Problems with Stormwater Pollution, https://www.epa.gov/npdes/npdes-stormwater-program (accessed August 10, 2017).

[70] Exhibit Q (43), U.S. EPA, NPDES Stormwater Program, Stormwater Discharges from Municipal Sources, https://www.epa.gov/npdes/stormwater-discharges-municipal-sources, (accessed December 2, 2022), page 3.

> 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.[71]

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.[72] "This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act."[73]

MS4s are thus established point sources subject to the CWA's NPDES permitting requirements.[74]

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 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.[75]

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

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[71] *Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 840-841(citing *Natural Res. Def. Council v. 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 40 Code of Federal Regulations parts. 9, 122, 123, and 124)).

[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.

[74] *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*, 966 F.2d 1292, 1295- 1298.

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

discharge does not hurt water quality or people's health."[76] A NPDES permit specifies "an acceptable level of a pollutant or pollutant parameter in a discharge." [77]

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[78] deems appropriate for the control of such pollutants.[79] 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[80] than those already contained in their discharge permits, except in certain narrowly defined circumstances.[81]

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 waters." (33 U.S.C. § 1251(a).) Toward this end, the Act provides for two sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. (See §§ 1311, 1314.) "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. (See § 1313.) These standards supplement effluent limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable

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[76] Exhibit Q (42), U.S. EPA, NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed July 17, 2020).

[77] Exhibit Q (42), U.S. EPA, NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed July 17, 2020).

[78] 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.

[79] 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)).

[80] 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).

[81] 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).

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).)[82]

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, 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

i. *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.[83] 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 40 Code of Federal Regulations 131.36, 131.38, and California state adopted water quality control plans and basin plans.[84] 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 waters be maintained to the maximum extent possible unless certain findings are made.[85]

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.[86] When water quality criteria are met, water quality will generally protect the designated use."[87] 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

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

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

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

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

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

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

> 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.[88]

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.[89] 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 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.[90]

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.[91]

ii. *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

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

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

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

[91] 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.")

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."[92] 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."[93]

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."[94] 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.[95]

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 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."[96] 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.[97] 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]."[98] 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."[99]

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[92] 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.

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

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

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

[96] 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.

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

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

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

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."[100] 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.[101]

iii. *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.

iv. *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 storm water. 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 Antidegrdation 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, section 40 Code of Federal Regulations 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.[102]

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

[101] 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.").

[102] United States Code, title 33, section 1311(b)(1)(C), which states that "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"; 33 U.S.C. section 1342(o)(3), which states that

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 title."[103] 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."[104]

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.[105] 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."[106] 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.[107]

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

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"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 40 Code of Federal Regulations 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."

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

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

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

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

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

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.[108] 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. EPA promulgated this rule to fill a gap in California water quality standards that was created 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 EPA's promulgation of the NTR in December of 1992.[109] 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.

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[108] Exhibit Q (13), Federal Register, Volume 57, Number 246 (NTR), page 142.

[109] Exhibit Q (12), Federal Register, Volume 65, Number 97 (CTR), page 7.

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).[110] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[111]

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."[112]

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."[113] Section 13001 describes the state and regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

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

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

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

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

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.[114]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, also known as basin plans.[115] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[116] 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;
- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[117]

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."[118] 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.[119]

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

[115] Water Code sections 13240-13247.

[116] Water Code sections 11352–11354.

[117] Water Code section 13050(j), see also section 13241.

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

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

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."[120] 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."[121]

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."[122] 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."[123] 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]."[124] 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*

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[120] 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)).

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

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

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

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

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.)

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*.)[125]

2. California's Antidegradation 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

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

higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;

NOW, THEREFORE, BE IT RESOLVED:

Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will 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."[126]

[126] Exhibit Q (34), State Water Resources Control Board Administrative Procedures Update 90-004, page 4.

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.

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.[127] The Ocean Plan was also amended in 2009 and five times thereafter, 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

[127] California's first adopted its Ocean Plan in 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 to regarding total recoverable metals, compliance schedules, toxicity definitions, and the list of exceptions, adopted 9/15/2009).

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.

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).[128] There are 126 chemicals on the federal CTR[129] 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 on April 2, 2019 (Resolution No. 2019-0015), effective on 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

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

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

implementation to achieve water quality objectives.[130] Basin Plans 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.[131]

E. The History of the Test Claim Permit

The Regional Board issued the earliest municipal storm water permit for the co-permittees in 1990 (hereafter, "First Term Permit").[132] The First Term Permit stated that the Orange County Flood Control District (OCFCD) serves an area of approximately 511 square miles, including 400 miles of storm drain systems.[133]

The Regional Board adopted the Water Quality Control Plan (Basin Plan) in 1983, containing water quality objectives and beneficial uses of waters in the region, and in July 1989 adopted a Basin Plan amendment, incorporating revised beneficial use designations for the ground and surface waters of the region.[134] In addition, the California Ocean Plan, amended in 1990, "contains revised water quality objectives for California ocean waters in accordance with Section 303(c)(I) of the Clean Water Act and Section 13170.2(b) of the California Water Code."[135] The First Term Permit explained that "[t]he requirements contained in this order are necessary to implement the Ocean Plan and the Water Quality Control Plan."[136] The First Term Permit identified the receiving waters affected by storm drain systems within the County, including, but not limited to, the Santa Ana River, San Diego Creek, Lower and Upper Newport Bay, and portions of the San Gabriel River.[137] The First Term Permit further explained:

> Numeric and narrative water quality standards exist for these water bodies. Currently, this permit does not contain numeric limitations for any constituents [i.e., pollutants] because the impact of stormwater discharges on the water quality of the above named receiving waters has not been fully determined. Extensive water quality monitoring and analysis of the data are essential to make that

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[130] Water Code section 13241.

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

[132] Exhibit B, Regional Board's Comments on Test Claim, filed March 9, 2011, page 3.

[133] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 595 [Order No 90-71]. Note that some of the receiving waters affected by the storm drain systems within the County are within the jurisdiction of the San Diego Regional Board, and are regulated by Order number 90-38, and subsequent orders.

[134] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 597 [Order No 90-71].

[135] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 597 [Order No 90-71].

[136] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 597 [Order No 90-71].

[137] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 597-598 [Order No 90-71].

> determination. This order requires the dischargers to continue to monitor the stormwater discharges or begin monitoring as necessary, and to analyze the data. Additionally, the order also requires development and implementation of best management practices (BMPs) in accordance with the [Water Quality Act] of 1987. It is anticipated that with the implementation of BMPs by the dischargers, the pollutants in the stormwater runoff will be reduced and the quality of the receiving waters will be improved. The ultimate goal of the urban stormwater runoff management program is to attain water quality consistent with the water quality objectives for the receiving waters to protect the beneficial uses.[138]

The First Term Permit required generally that dischargers (meaning the MS4 permittees) "shall prohibit illegal discharges from entering into the municipal storm drain systems" and "shall develop and implement best management practices (BMPs) to control discharge of pollutants to the maximum extent practicable to waters of the United States."[139] Maximum extent practicable, in turn, was defined to mean "to the maximum extent possible, taking into account equitable considerations of synergistic, additive, and competing factors, including but not limited to, gravity of the problem, fiscal feasibility, public health risks, societal concern, and social benefits."[140]

The First Term Permit further required the dischargers to turn over any data on stormwater discharges to the MS4s, including historical averages and extremes; information for identification and characterization of the sources of pollutants, including land use activities and drainage areas; any information on illicit discharges to the MS4s; a description of existing stormwater management programs and structural or non-structural BMPs implemented; a description of existing monitoring programs; information regarding the discharge of pollutants; and "any other existing information that is pertinent to this permit."[141]

The First Term Permit also required dischargers to conduct a "reconnaissance survey" to detect illicit discharges or possible leaks or spills, and then to prosecute and eliminate illegal discharges;[142] to develop and implement a Drainage Area Management Plan (DAMP), including BMPs to control the discharge of pollutants;[143] to develop and implement a Stormwater System

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[138] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 599 [Order No 90-71].

[139] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 603 [Order No 90-71].

[140] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 603 [Order No 90-71].

[141] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 604-606 [Order No 90-71].

[142] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 606-608 [Order No 90-71].

[143] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 609-611 [Order No 90-71].

Monitoring Plan and Receiving Water Monitoring Plan, designed to measure the effectiveness of BMPs and the extent of compliance with water quality objectives; and finally, to enact or maintain the necessary legal authority to effectively enforce the permit's terms and requirements, and prohibit illicit discharges.[144]

That First Term Permit was amended in 1996, by order number 96-31 ("Second Term Permit"). The Second Term Permit again noted that although the "plans and policies contain numeric and narrative water quality standards…[t]his order does not contain numeric effluent limitations for any constituents because the impact of the storm water discharges on the water quality of the receiving waters has not yet been fully determined."[145] The Second Term Permit contained several expectations and responsibilities that were more specific than the First Term Permit, but generally required permittees to monitor and inspect their MS4s; maintain legal authority within the jurisdiction to prohibit illicit discharges; pursue enforcement actions as necessary; and coordinate with one another in the implementation of the water quality objectives.[146]

With respect to discharge limitations, the Second Term Permit required permittees to prohibit illicit discharges, and "require controls to reduce the discharge of pollutants to the maximum extent practicable." In addition, the Second Term Permit stated that the discharge of storm water from the permittees' storm sewer systems to waters of the United States "containing pollutants which have not been reduced to the maximum extent practicable is prohibited."[147] The Second Term Permit went on to state that receiving water limitations have been established based on beneficial uses, and for key constituents, and that the permittees "shall not cause continuing or recurring impairment of beneficial uses or exceedances of water quality objectives." However, the Second Term Permit provided that the permittees "will not be in violation of this provision so long as…" they participate in a review of their Drainage Area Management Plan (DAMP) and revise it as necessary (and implement any revisions called for) in cooperation with the Regional Board.[148] And, the Second Term Permit required the permittees to develop a training program for inspections, and to continue public outreach and public education efforts.[149]

In addition, the Second Term Permit required permittees to prepare an Environmental Performance Report to address public agency facilities and activities "not currently required to

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[144] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 611-614 [Order No 90-71].

[145] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 647 [Order No. 96-31].

[146] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 648-650 [Order No. 96-31].

[147] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 650 [Order No. 96-31].

[148] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 652-653 [Order No. 96-31].

[149] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, pages 655-656 [Order No. 96-31].

obtain coverage under the State's general storm water permits," and to annually report on actions taken by the permittees to eliminate discharges of pollutants at public agency facilities.[150] Further, for municipal construction projects that may result in land disturbance of five acres or more, the permittees were required to notify the Executive Officer of the Regional Board, and develop and implement a Storm Water Pollution Prevention Plan and a monitoring program.[151]

In 1999, the Regional Board adopted an amendment to the Water Quality Control Plan for the Santa Ana River Basin to establish a Total Maximum Daily Load (TMDL) for fecal coliform bacteria in Newport Bay.[152] That TMDL specified numeric water quality objectives for fecal coliform bacteria in Newport Bay to protect water contact recreation and shellfish harvesting, both identified as beneficial uses for the water body.[153] The 1999 Resolution states that "[t]he TMDL-related Basin Plan amendment…requires the implementation of [BMPs] to control bacterial inputs to provide a reasonable assurance that water quality standards will be met."[154, 155] However, the 1999 Resolution did not contain a numeric WLA for urban runoff, including stormwater. The attachment to the order stated that "[a] prioritized, phased approach to the control of bacterial quality in the Bay…is appropriate, given the complexity of the problem, the paucity of relevant data on bacterial sources and fate, the expected difficulties in identifying and implementing appropriate control measures, and uncertainty regarding the nature and attainability of the [shellfish harvesting beneficial use] in the Bay."[156] Accordingly, the numeric limit for urban runoff is required "[a]s soon as possible but no later than (14 years after State TMDL Approval)."[157] In addition, the 1999 TMDL Order required the County of Orange,

[150] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 656 [Order No. 96-31].

[151] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 657 [Order No. 96-31].

[152] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 376 [Resolution No. 99-10].

[153] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 376 [Resolution No. 99-10].

[154] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 377 [Resolution No. 99-10].

[155] Exhibit B, Regional Board's Comments on Test Claim, filed March 9, 2011, page 3 [citing Santa Ana Regional Board Orders 90-71, 96-31, R8-2002-0010].

[156] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 381 [Attachment to Resolution No. 99-10].

[157] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 383 [Attachment to Resolution No. 99-10].

among others, to submit several planning documents to identify and characterize point sources of fecal coliform, including urban runoff into Newport Bay.[158]

In 2002, the Regional Board further amended the stormwater permit for the County of Orange, the Orange County Flood Control District, and the co-permittees ("Third Term Permit").[159] The Third Term Permit noted that since 1998 a number of water bodies within the area have been listed as impaired, including San Diego Creek, Reaches 1 and 2; Upper and Lower Newport Bay; Anaheim Bay; Huntington Harbor; Santiago Creek; and Silverado Creek.[160] Accordingly, and pursuant to federal regulations, TMDLs were adopted for San Diego Creek and Newport Bay, for some of the constituent pollutants identified as causing the impairment.[161] The Third Term Permit therefore "specifies the WLAs and includes requirements for the implementation of these WLAs."[162] The Third Term Permit summarized the prior permits:

> Order No. 90-71 (first term permit) required the permittees to: (1) develop and implement the DAMP and a storm water and receiving water monitoring plan; (2) eliminate illegal and illicit discharges to the MS4s; and (3) enact the necessary legal authority to effectively prohibit such discharges. The overall goal of these requirements was to reduce pollutant loadings to surface waters from urban runoff to the maximum extent practicable (MEP). Order No. 96-31 (second term permit) required continued implementation of the DAMP and the monitoring plan, and required the permittees to focus on those areas that threaten beneficial uses.[163]

The Third Term Permit went on to state that it "outlines additional steps for an effective storm water management program and specifies requirements to protect the beneficial uses of all receiving waters." In addition, "[t]his order requires the permittees to examine sources of pollutants in storm water runoff from activities which the permittees conduct, approve, regulate

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[158] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, Attachment 31, page 391 [Attachment to Resolution No. 99-10].

[159] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 397 [Order No. R8-2002-0010].

[160] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 402 [Order No. R8-2002-0010].

[161] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 402-403 [Order No. R8-2002-0010 (Compare Finding 18, stating impairment findings for San Diego Creek and Upper and Lower Newport Bay for metals, pesticides, pathogens, nutrients and sedimentation, to Finding 19, stating TMDLs developed for sediment and nutrients, and for fecal coliform in Newport Bay.)].

[162] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 403 [Order No. R8-2002-0010].

[163] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 403 [Order No. R8-2002-0010].

and/or authorize by issuing a license or permit."[164] Accordingly, the Third Term Permit stated that "it is the Regional Board's intent that this order require the implementation of best management practices to reduce to the maximum extent practicable, the discharge of pollutants in storm water from the MS4s in order to support attainment of water quality standards."[165] Specifically, the Third Term Permit stated that a "discharge of storm water from the MS4s to waters of the United States containing pollutants that have not been reduced to the maximum extent practicable is prohibited,"[166] and that discharges from the MS4s "for which a Permittee is responsible, shall not cause or contribute to a condition of nuisance, as that term is defined in Section 13050 of the Water Code."[167] The Third Term Permit further provided that discharges from the MS4s must not cause exceedances of water quality standards for surface waters or ground water, but "[i]f permittees continue to cause or contribute to an exceedance of water quality standards," the permittees can ensure compliance with the permit by promptly notifying the Executive Officer, including a report on 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.[168] In other words, "the order includes a procedure for determining whether storm water discharges are causing exceedances of receiving water limitations and for evaluating whether the DAMP must be revised in order to comply with this aspect of the order." The Third Term Permit thus "establishes an *iterative process to maintain compliance with the receiving water limitations*."[169]

The Third Term Permit further required permittees to "continue to prohibit all illegal connections to the MS4s…" and if "routine inspections or dry weather monitoring indicate any illegal connections, they shall be investigated and eliminated or permitted within 120 days."[170] And, the Third Term Permit required each permittee to develop and maintain a computerized inventory of all construction sites within its jurisdiction where soil will be moved or cement will be mixed; to prioritize those sites for inspection as high, medium, or low threat to water quality; and to conduct construction site inspections, including an evaluation of the effectiveness of

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[164] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 403 [Order No. R8-2002-0010].

[165] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 407 [Order No. R8-2002-0010].

[166] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 412 [Order No. R8-2002-0010].

[167] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[168] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 413-414 [Order No. R8-2002-0010].

[169] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 407 [Order No. R8-2002-0010].

[170] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 416 [Order No. R8-2002-0010].

BMPs, at frequencies determined by the high, medium, or low threat designation.[171] Permittees were required to enforce their ordinances and permits at all construction sites to maintain compliance with the Order.[172] In addition, each permittee was required to develop and maintain a computerized inventory of industrial and commercial facilities that have the potential to discharge pollutants to the MS4, and to prioritize those facilities as high, medium, or low threat to water quality. Permittees were then required to inspect those facilities with a frequency based on the threat designation, and enforce all ordinances and permits as necessary.[173]

And, with respect to new development and significant redevelopment, the Third Term Permit required permittees to undertake certain activities and exercise oversight to "minimize the short and long-term impacts on receiving water quality from new developments and re-developments…"[174] Specifically, permittees were required to "review their planning procedures and CEQA document preparation processes to ensure that urban runoff-related issues are properly considered and addressed…" review "watershed protection principles and policies in their General Plan…" review, and "as necessary revise their current grading/erosion control ordinances…" and "through conditions of approval, ensure proper maintenance and operation of any permanent flood control structures installed in new developments."[175]

Additionally, the Third Term Permit required permittees to review existing BMPs for potential improvements or revisions, and submit a revised WQMP for urban runoff from new development/significant redevelopment projects. The WQMP must include BMPs for source control, pollution prevention, and/or structural treatment BMPs; and must "reflect consideration of the following goals, which may be addressed through on-site and/or watershed-based BMPs[:]"

> a. The pollutants in post-development runoff shall be reduced using controls that utilize best available technology (BAT) and best conventional technology (BCT).
>
> b. The discharge of any listed pollutant to an impaired waterbody on the 303(d) list shall not cause an exceedence [sic] of receiving water quality objectives.[176]

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[171] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 417 [Order No. R8-2002-0010].

[172] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 418 [Order No. R8-2002-0010].

[173] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 418-422 [Order No. R8-2002-0010].

[174] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 422 [Order No. R8-2002-0010].

[175] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 423-424 [Order No. R8-2002-0010].

[176] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 425 [Order No. R8-2002-0010].

The Third Term Permit articulated volume-based or flow-based requirements for structural BMPs, and provided that "structural infiltration BMPs" must be designed to protect groundwater, and shall not cause a nuisance or exceedance of groundwater water quality objectives.[177]

The Third Term Permit further required that permittees continue to implement public education efforts, and complete a public awareness survey to determine the effectiveness of the current public and business education strategy.[178] Permittees were required to, when feasible, participate in joint outreach with other programs and other municipal storm water programs to ensure a consistent message, and to sponsor or staff a table or booth at community events to distribute educational materials to the public.[179] Further, by March 1, 2002, permittees were required to establish a Public Education Committee, which shall meet at least twice per year, and shall make recommendations on the public and business education program. The Committee was also required by November 15, 2002 to "propose a study for measuring changes in knowledge and behavior as a result of the education program."[180] Permittees were also required to "develop public education materials to encourage the public to report (including a hotline number and web site to report) illegal dumping and unauthorized, non-storm water discharges from residential , industrial, construction and commercial sites into public streets, storm drains, and other waterbodies…"[181] And, by July 1, 2003, permittees were required to "develop BMP guidance for the control of those potentially polluting activities not otherwise regulated by any agency…" including household use of fertilizers, pesticides, herbicides and other chemicals, mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting.[182]

With respect to municipal facilities and activities, the Third Term Permit required each permittee to "implement the recommendations in the Environmental Performance Report to ensure that public agency facilities and activities do not cause or contribute to a pollution or nuisance in receiving waters."[183] Further, permittees shall complete an assessment of their flood control facilities to "evaluate opportunities to configure and/or reconfigure channel segments to function

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[177] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 426-427 [Order No. R8-2002-0010].

[178] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

[179] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

[180] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[181] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[182] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[183] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

as pollution control devices…"[184] The principal permittee was required, by July 1, 2002, to develop and distribute "model maintenance procedures for public agency activities such as street sweeping; catch basin stenciling; [and] drainage facility inspection, cleaning and maintenance."[185] The principal permittee was also required by July 1, 2002, to develop and distribute BMP guidance for "public agency and contract field operations and maintenance staff" on appropriate pollution control measures, how to respond to spills, and reports of illegal discharges.[186] And, the principal permittee was required to provide annual training to public agency staff and contract field operations staff with respect to "fertilizer and pesticide management, model maintenance procedures, implementation of environmental performance reporting program and other pollution control measures."[187] Permittees were required to "attend at least three of these training sessions during the five year term of this permit."[188] By July 1, 2004, the permittees were required to develop and submit for approval a more aggressive program for cleaning out drainage facilities, including catch basins, and with frequencies between monthly and annually, based on priority factors such as distance to receiving waters, beneficial uses and impairments of beneficial uses, historical pollutant types and loads, and the presence of downstream facilities.[189]

Finally, the Third Term Permit required permittees to meet target load allocations for nutrients in urban runoff, including nitrogen and phosphorus in the Newport Bay watershed; and allocations for sediment in urban runoff for Newport Bay and San Diego Creek. However, the Third Term Permit provided that permittees "shall meet the following target load allocations…by implementing the BMPs contained in [the appendices] of the DAMP…" and in accordance with the implementation plan for the applicable TMDLs.[190] In other words, implementing BMPs constitutes "compliance" with the TMDLs. Then, by July 1 of each year, the permittees were required to evaluate the DAMP "to determine whether any revisions are necessary in order to reduce pollutants in MS4 discharges to the maximum extent practicable." The first annual review was also required to include a review of the formal training needs of municipal

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[184] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[185] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[186] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[187] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[188] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[189] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 429 [Order No. R8-2002-0010].

[190] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 430-432 [Order No. R8-2002-0010].

employees, and a review of coordinating meeting/training for NPDES inspectors.[191] The Third Term Permit stated that "[t]his order expires on January 18, 2007 and the permittees must file a Report of Waste Discharge (permit application) no later than 180 days in advance of such expiration date as application for issuance of new waste discharge requirements."[192]

F. The Test Claim Permit, Order No. R8-2009-0030

In accordance with Code of Federal Regulations, title 40, section 122.26(d), section 13260 of the California Water Code, and the requirements of the Third Term Permit, the co-permittees filed a Report of Waste Discharge (ROWD), which starts the NPDES permit renewal process, as part of the iterative stormwater management program, on July 21, 2006. The ROWD "discusses the Permittees' Third Term Permit compliance activities and includes a description of accomplishments, an assessment of program effectiveness, and a proposed management program (a draft 2007 Drainage Area Management Plan ("DAMP")) for the period 2007-2012."[193] The report "identified many positive program outcomes and, where the assessments indicated the need for improvement, proposed changes and added program development commitments to the Drainage Area Management Plan (DAMP)."[194] Specifically, the ROWD contained the following, as described by the Regional Board in its draft permit renewal:

> a) A summary of status of current Storm Water Management Program;
>
> b) A Proposed Plan of Storm Water Quality Management Activities for 2007-[2012], as outlined in the Draft 2007 Drainage Area Management Plan (DAMP). The 2007 DAMP includes all the activities the permittees propose to undertake during the next permit term, goals and objectives of such activities, and an evaluation of the need for additional source control and/or structural and non-structural BMPs and proposed pilot studies;
>
> c) The permittees have developed Local Implementation Plans (LIPs); established a formal training program; and developed a program effectiveness assessment strategy and Watershed Action Plans;
>
> d) A Performance Commitment that includes new and existing program elements and compliance schedules necessary to implement controls to reduce pollutants to the maximum extent practicable;
>
> e) A summary of procedures implemented to detect illegal discharges and illicit connection practices;

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[191] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[192] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 434 [Order No. R8-2002-0010].

[193] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 418 [Report of Waste Discharge, July 21, 2006].

[194] Exhibit Q (2), City of Fullerton's Comments on Draft Permit, January 20, 2009, page 1 [Administrative Record on Order No. R8-2009-0030, Part I].

f) A summary of enforcement procedures and actions taken to require storm water discharges to comply with the approved Storm Water Management Program;

g) A summary of public agency activities, results of monitoring program, and program effectiveness assessment; and,

h) A fiscal analysis.[195]

The Regional Board then released a draft permit on November 10, 2008, and scheduled a public workshop on the draft for November 21, 2008.[196] At that workshop, the Regional Board presented several changes in the draft permit, including increased permittee accountability through Water Quality Management Plan (WQMP) review and the adoption of a Local Implementation Plan (LIP); municipal inspection program changes emphasizing abandoned or idle construction sites, and recalibrating prioritization criteria for construction sites, as well as improving enforcement on mobile cleaning services, and adding residential inspections; and, the 2008 draft permit "emphasizes the use of Low Impact Development (LID) as a way of mitigating development's effect on flows and pollutant loading."[197] After voluminous public comment and subsequent public hearings, the Regional Board adopted the test claim permit, Order No. R8-2009-0030, on May 22, 2009.[198]

The test claim permit and its explanatory Fact Sheet total over 120 pages, and include a substantial amount of background material, as well as a number of provisions carried over from the Third Term Permit. Accordingly, the following provisions are alleged in this Test Claim to impose reimbursable state-mandated activities and costs.

- Sections XVIII.B.1 through XVIII.B.5, XVIII.B.7 through XVIII.B.9, XVIII.C.1, and XVIII.D.1 address activities that implement TMDLs adopted by U.S. EPA or the Regional Board, and pre-TMDL requirements.[199]
- Section XII. of the permit addresses Low Impact Development (LID) and Hydromodification requirements for new development and significant redevelopment,

[195] Exhibit Q (14), First Draft of Tentative Order No. R8-2008-0030, page 7 [Administrative Record on Order No. R8-2009-0030, Part I].

[196] Exhibit Q (14), First Draft of Tentative Order No. R8-2008-0030, page 1 [Administrative Record on Order No. R8-2009-0030, Part I].

[197] Exhibit Q (21), Presentation, *Orange County MS4 Permit Urban Storm Water Runoff Management Program*, November 21, 2008, pages 1-21 [Administrative Record on Order No. R8-2009-0030, Part I].

[198] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 68; 317 [Order No. R8-2009-0030].

[199] See Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 63.

including specific planning requirements in Sections XII.B.1., XII.C.1, XII.D.5, and XII.E.1;[200]

- Section XIII. of the permit addresses activities related to Public Education and Outreach;[201]
- Section XI. of the permit addresses a Residential Program intended to reduce discharges from residential facilities and residential areas and activities;[202] and
- Sections IX. and X. of the permit address activities relating to municipal inspections of industrial and commercial facilities, including developing and maintaining a GIS database of defined categories of industrial and commercial facilities.[203]

III. Positions of the Parties

A. Claimants' Position

The claimants include the County of Orange and Orange County Flood Control District, which is named the "principal permittee" in the test claim permit, as well as fourteen of the co-permittee incorporated cities within the Regional Board's jurisdiction.[204] The claimants allege new state-mandated reimbursable activities arising from the adoption by the Regional Board of an updated stormwater discharge permit, Order No. R8-2009-0030. The claimants allege that these new requirements constitute a state-mandated local program, in excess of the federal requirements of the Clean Water Act and regulations; and, claimants allege that they do not have fee authority sufficient to cover the costs of the mandated activities.

1. The Claimants Allege New Activities Under Five General Program Areas of the Permit.

The claimants seek reimbursement for the costs incurred under the following five general program areas of the test claim permit, listed in the order presented in the Test Claim:

a. The claimants contend that several requirements in Section XVIII. of the permit impose a new state-mandated program involving implementation of TMDLs. Specifically, the claimants seek reimbursement for Sections XVIII.B.1 through 5, XVIII.B.7 through XVIII.B.9, XVIII.C.1, and XVIII.D.1, which are alleged to

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[200] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 81-90.

[201] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 90-94.

[202] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 94-97.

[203] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 97-103.

[204] The cities that filed jointly with the County of Orange include: Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach, and Villa Park.

impose "specific numeric waste load allocations or load allocations" based on "either the EPA promulgated TMDLs for toxic pollutants…or Regional Board promulgated TMDLs for other toxic pollutants which have not yet been 'approved by EPA pursuant to 40 CFR 130.7.'"[205] The claimants assert that "all of the adopted or to be adopted TMDLs referenced in [the test claim order] have been based on what is known as the 'California Toxics Rule'…adopted by EPA in May of 2000."[206] Yet, claimants argue, "a review of CTR itself, as well as EPA's Responses to Comments made in connection with CTR…even further confirms that TMDLs, once approved by EPA, impose no specific federal mandates on the State, but only trigger 'a number of discretionary choices' for the State to make."[207] The claimants argue that the CTR was not intended to impose numeric effluent limits on municipal dischargers: "Instead, EPA stated that with respect to Stormwater permits, 'compliance with water quality standards through the use of Best Management Practice (BMPs) is appropriate.'"[208] Claimants conclude that "[a]s such, each of the TMDL Programs as described below that seek to require compliance with wasteload allocations through the use of 'numeric effluent limitations,' are unfunded State mandates subject to reimbursement."[209]

b. Sections XII.B. through XII.E. of the test claim permit, "as they are applied to municipal projects," regarding New "Low Impact Development" (LID) and Hydromodification prevention requirements involving Water Quality Management Planning for new development and significant redevelopment projects.[210] These sections impose WQMP requirements on project proponents that must be enforced by the municipal permittees as applied to municipal development and redevelopment priority projects.[211] The claimants also allege the planning

[205] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 71.

[206] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 71.

[207] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 71.

[208] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 71-72 [Citing California Toxics Rule, 65 Fed. Reg. 31703].

[209] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 75-76.

[210] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 84.

[211] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 84-90.

requirements in Sections XII.B.1., XII.C.1, XII.D.5, and XII.E.1 impose a reimbursable state-mandated program.[212]

c. Section XIII., new Public Education Program requirements involving the conducting of a public awareness survey (Subsection XIII.1 of the Permit), the conducting of sector-specific workshops (Subsection XIII.4 of the Permit), and the development and implementation of a new Public Participation program involving various water quality plans and fact sheets (Subsection XIII.7 of the Permit).[213]

d. Section XI., new requirements for residential areas, including public education/BMPs for residential areas and activities that are potential sources of pollutants; and a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations.[214]

e. Sections IX. and X., new requirements to develop, track, and maintain a Geographical Information System (GIS) electronic mapping for Industrial Facilities subject to inspections and newly specified additional categories of Commercial Facilities as set forth in Sections IX. (Municipal Inspections of Industrial Facilities) and X. (Municipal Inspections of Commercial Facilities) of the test claim permit that are now included in the inspections program.[215]

2. The Claimants Argue that the Entire Permit Exceeds the Federal Requirements of the CWA and Implementing Regulations.

The claimants raise several complex legal arguments supporting their interpretation that the entire test claim permit, as well as the specific programmatic elements that they allege to be reimbursable state-mandated activities, exceed the minimum requirements of the federal CWA, or exceed the Maximum Extent Practicable standard called for under the CWA, where applicable.

[212] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 24-25.

[213] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 90-94.

[214] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 94-97.

[215] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 97-103.

a. The claimants argue that the State and Regional Boards' authority under State water quality law and regulations is much broader than under the Clean Water Act.

The claimants acknowledge the overarching nature of the federal CWA, but argue that "because the state of California has broader authority to regulate discharges than the EPA would under the CWA, the requirements in NPDES permits issued by the State and Regional Boards frequently exceed the requirements of federal law."[216] The claimants argue that the State and Regional Boards' authority under California's Porter-Cologne is broader than that under the CWA, and that therefore: "It is under this authority that the State and Regional Boards act when issuing NPDES permits that exceed the minimum requirements set forth in federal law, namely Title 40, section 122.26 of the Code of Federal Regulations." The claimants allege that the State and Regional Boards have acknowledged as much:

> The courts, the State Board and the Regional Boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the minimum requirements of the CWA. In a decision on the merits of the 2001 NPDES permit for San Diego County, the State Board acknowledged that the since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the State," rather than being limited to "waters of the United States." As the State Board has expressed it, "the inclusion of 'waters of the State' allows the protection of groundwater, which is generally not considered to be 'waters of the United States.'"[217]
>
> The Regional Boards have also acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are based, therefore, on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report regarding the San Diego Regional Water Quality Control Board's draft 2001 permit, it was found that 40% of the draft permit requirements "exceed the federal regulations" because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.[218]

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[216] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 58.

[217] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016 and January 3, 2017, pages 59-60 [citing *In Re Building Industry Association of San Diego County and Western States Petroleum Association*, State Board Order WQ 2001-15, Fn 20, Exhibit 9 to the Miscellaneous Authorities included with Section 7 – Documentation].

[218] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016 and January 3, 2017, page 60 [citing p. 1896 (San Diego Regional Board Staff Report, dated December 13, 2000, p. 3, ¶14, included as Exhibit 18 under Section 7 – Documentation to these Test Claims)].

The claimants further argue that *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613 supports an interpretation of the State's authority over water pollution controls as being much broader than federal minimum requirements:

> Lastly, in *Burbank*, the California Supreme Court acknowledged that aspects of NPDES permits can exceed federal requirements, and held that to the extent such provisions are not required by federal law, the State and Regional Boards are required to consider state law restrictions on agency action. Implicit in the Court's decision is the requirement that orders issued by the State and Regional Boards are subject to State Constitutional restrictions, including those on funding set forth in Article XIII B section 6 of the California Constitution.[219]

Further, the City of Irvine, in a late supplemental comment, cites a 2015 Order from the State Board, in which the Regional Boards' discretion under the CWA is acknowledged as follows:

> In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, **but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.**
>
> [¶…¶]
>
> Accordingly, **since the State Water Board has discretion under federal law** to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board **may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.**[220]

Thus, the claimants urge that the Regional Board's authority to dictate the terms of the test claim permit is much broader under state law than under the federal law.

b. <u>The claimants argue that the authority and discretion to impose specific permit terms does not mean that all permit terms are in furtherance of federal requirements.</u>

The claimants contend that *Long Beach Unified School Dist. v. State* (1990) 225 Cal.App.3d 155 establishes the concept that "whenever the State exercises its discretion to impose a new program or higher level of service, that program or service will represent a state mandate even if it is

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[219] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 60 [citing *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 618].

[220] Exhibit K, Claimants' Late Supplemental Response to the Request for Additional Briefing, filed October 28, 2016, page 3 [emphasis in original].

imposed as part of a federally mandated regulatory scheme."[221] The claimants describe *Long Beach Unified* as follows: "In that case, the court found that an executive order that required school districts to take specific steps to measure and address racial segregation in local public schools constituted a reimbursable mandate to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under the prior governing law."[222] The claimants cite the Commission's prior decision in *Discharge of Stormwater Runoff*, 07-TC-09, in which the Commission found: "As in *Long Beach Unified*…the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law…" and therefore the permit exceeds the federal mandate to that extent.[223]

The claimants further argue that merely because a permit term satisfies the MEP standard required by the CWA does not mean that term is mandated by the CWA: "The Board admits that it has virtually unlimited 'discretion' to determine what is required by MEP, asserting that because '[t]he MEP approach is an ever evolving, flexible, and advancing concept,' the Board 'is entitled to considerable deference in its determination of what practices are within the federal minimum requirements.'"[224] However, the claimants challenge the State Board's theory:

> The Board's contention that all permit terms are federal mandates because federal law "mandates" that the Board exercise its "discretion" to impose permit terms is nonsensical. By definition, having "discretion" to impose a permit term means the permit term is not "mandated" by federal law.
>
> [¶…¶]
>
> The plain language of the Act shows precisely what it requires, i.e., the Board "shall require controls to reduce the discharge of pollutants *to the maximum extent practicable* … and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants." As such, the only mandate required of the Board when developing NPDES permits is compliance with the general MEP standard, and, as recognized by controlling law and the Board itself, the Board has "wide discretion" in determining what permit terms to include to meet the MEP standard.[225]

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[221] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 14.

[222] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 14 [citing *Long Beach Unified School Dist. v. State* (1990) 225 Cal.App.3d 155, 173].

[223] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 15.

[224] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 15-16 [citing Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, pp. 8-9].

[225] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 16-17 [citing *Elderverse v. Anderson* (1962) 205 Cal.App.2d 326, 331; *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 942-43 ("A discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts but

The claimants also cite to a 1993 memorandum issued by the State Board's Chief Counsel, which expressed a highly flexible and discretionary understanding of MEP:

> On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First the requirement is to *reduce* the discharge of pollutants, rather than totally prohibit such discharge. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section 402(p)(3)(A)), is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water.[226]

The claimants thus conclude that "[g]iven the 'wide discretion' and 'flexibility' the Board has in developing permit terms under the MEP standard, as well as the fact that the Board may impose controls that go beyond the MEP standard as it 'determines appropriate,' the Board plainly had a 'true choice' when developing the 2009 Permit terms that are the subject of this Test Claim."[227]

The claimants further argue that the courts have repeatedly recognized the broad discretion of the permitting authority not only to determine what permit conditions are consistent with MEP, but also to impose requirements that exceed MEP. In *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, the claimants assert that "the Ninth Circuit held that the US EPA (or a state implementing agency) has the authority to impose numeric effluent limits in MS4 Permits, but that Congress did not mandate effluent limits if the US EPA (or the state implementing agency) determined they were not necessary."[228] The claimants also cite *City of Burbank*, in which the California Supreme Court held that when a regional board is considering more stringent pollution controls than required by federal law (thus confirming that such authority is beyond question), it may consider economic or feasibility factors: "The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority…"[229]

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only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own."); 33 U.S.C. §1342(p)(3)(B)(iii)].

[226] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 17-18 (emphasis in original) [citing Exhibit F, Claimants' Rebuttal Comments, Attachments, Volume 4 of 4 filed June 17, 2011, p. 313-314 "MEP Memo"].

[227] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 18 [citing 33 U.S.C. § 1342(p)(3)(B)(iii); *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564].

[228] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 20 [citing *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167].

[229] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 20-21 [quoting *City of Burbank v. State Water Resources Control Bd*. (2005) 35 Cal.4th 613, 628].

The claimants also argue that more recent EPA guidance documents do not constitute a federal mandate; nor alter the discretionary nature of the disputed permit terms. The claimants acknowledge that without the State Board and the nine Regional Boards administering the NPDES program, U.S. EPA would act as the permitting authority. However, there is no showing that U.S. EPA would impose the same disputed permit terms. Moreover, the plain language of the guidance that the State Board cites states that it is not binding on EPA or the states.[230] The claimants further note that "[m]oreover, the US EPA routinely encourages state implementing agencies to include programs in municipal NPDES permits that the US EPA has questionable authority to impose."[231]

And, the claimants argue that "[t]he State's claim that federal law requires the Board to impose permit terms that go beyond the MEP standard is baseless."[232] The claimants assert that "the Board cannot plausibly claim that it has 'no true choice' regarding whether to impose permit terms that are admittedly 'discretionary.'"[233] The claimants argue that "the Board has cited absolutely no authority of any kind that supports the proposition that the Act requires the Board to impose any requirements that go beyond the MEP standard."[234]

Finally, in response to a Commission request for additional briefing, the claimants point out that *Department of Finance v. Commission* (2016) 1 Cal.5th 749 clearly rejects the Regional Board's assertion that the Commission must defer on issues of what terms within an NPDES permit are federally mandated, and, the claimants assert, presents a clear test for the Commission to apply to determine the scope of the federal mandate with respect to storm water test claims.[235]

The test articulated in *Dept. of Finance*, according to the claimants, is best stated in the following passage:

> 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

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[230] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 21-22 [citing Exhibit F, Claimants' Rebuttal Comments, Volume 4, filed June 17, 2011, p. 11 (Claimants' Exhibit 19, United States Environmental Protection Agency Office of Water, Office of Wastewater Management, Water Permits Division, MS4 Permit Improvement Guide, April, 2010, p. 3)].

[231] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 23 [citing Exhibit F, Claimants' Rebuttal Comments, Volume 4, filed June 17, 2011, p. 58 (Claimants' Exhibit 19, United States Environmental Protection Agency Office of Water, Office of Wastewater Management, Water Permits Division, MS4 Permit Improvement Guide, April, 2010, p. 50)].

[232] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 24.

[233] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 24.

[234] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 25.

[235] Exhibit J, Claimants' Response to Request for Additional Briefing, filed October 21, 2016, pages 5-6 [citing and quoting *Department of Finance v. Commission* (2016) 1 Cal.5th 749, 768-769].

> discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," that requirement is not federally mandated.[236]

Accordingly, the claimants assert that applying the case law to each alleged activity leads to the conclusion that none of the disputed permit terms are federally mandated, including some similar terms in prior permits that have been determined to be state mandates by either the Commission or the Court.[237] The specific arguments for each alleged activity are addressed in the analysis.

3. The Claimants Argue that They Do Not Have Fee Authority Sufficient to Cover the Costs of the Mandated Program Within the Meaning of Government Code Section 17556(d).

The claimants state generally that they "are not aware of any State, federal or non-local agency funds that are or will be available to fund these new activities."[238] They further assert that "[t]he Joint Test Claimants do not have fee authority to offset these costs."[239] The claimants maintain that the only source of funding to cover the costs of the mandated activities "are General Fund monies of the Joint Test Claimants."[240] However, claimants do acknowledge:

> [F]or the City of Brea, some funding was also available through an Urban Runoff/NPDES Fund and for the City of Buena Park, some funding was available through a Water Enterprise Fund. For the County, some additional funding was available through landfill gate fees and special district funding, among other sources. See Section 6 Declarations, Paragraph 8.[241]

The claimants further argue that "[m]ost of the programs developed by local governments to comply with their obligations under the 2009 Permit are not directed at individual dischargers but rather are designed to deal with multiple sources of pollutants being transported by storm water from multiple properties being put to a wide range of uses."[242] The claimants assert that

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[236] Exhibit J, Claimants' Response to the Request for Additional Briefing, filed October 21, 2016, page 2 [citing *Department of Finance v. Commission* (2016) 1 Cal.5th 749, 765].

[237] Exhibit J, Claimants' Response to the Request for Additional Briefing, filed October 21, 2016, page 7.

[238] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 104

[239] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 104

[240] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 104.

[241] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 104.

[242] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 59.

"local governments typically have a very limited ability to regulate existing lawful uses of property."[243]

Moreover, "limitations in Articles XIII A, XIII B, XIII C, and XIII D of the California Constitution severely constrain the local government's ability to impose taxes and fees in a situation where the payor of the fee is using its property for a use that are is directly regulated by the local government or where the individual property owner, occupant or user of that property is not directly availing itself of governmental services."[244] Accordingly, the claimants allege that "Permittees do not have the ability to fund any of these programs by a fee that could be imposed without a vote of the electorate."[245]

The claimants further allege that pursuant to the amendments made to article XIII C by Proposition 26 (2010), "virtually any revenue device enacted by a local government" is a "tax requiring voter approval, unless it [falls] within certain enumerated exceptions."[246] The claimants assert that after Proposition 26, a fee "must be such that it recovers no more than the amount necessary to recover costs of the governmental program being funded by the fee,"[247] and "the person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee."[248] The claimants assert that a fee or charge that does not fall within the enumerated exceptions of article XIII C, section 1 is "automatically deemed a tax, which must be approved by the voters."[249]

Finally, the claimants argue that any jurisdiction-wide fees levied on property owners to fund a permittee's stormwater program (or any activities required under the test claim permit) must comply with article XIII D:

> Although property related fees are expressly exempted from the requirements of Article XIII C by § 1(e)(7), Article XIII D also requires voter approval of most property related fees. The courts have expressly held that stormwater fees charged to owners and occupants of property by a local government require voter approval before they may be imposed.[250]

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[243] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 59.

[244] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 59.

[245] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 60.

[246] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 60.

[247] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 61.

[248] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 61.

[249] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 61.

[250] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 65.

The claimants cite to *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, which claimants assert "dealt with a stormwater fee that the City of Salinas attempted to enact without voter approval," and the court held the fee invalid.[251]

Accordingly, the claimants maintain that articles XIII C and XIII D "severely limit the Permittees' power to impose fees," and "[a]ny fees developed by the Permittees to fund the portions of the MS4 Permit that are the subject of this unfunded mandate claim could only be imposed by some form of special tax or property related fee that would require either a 2/3 vote of the electorate affected by the tax or a majority vote of the property owners subject to the property related fee."[252]

4. The Claimants' Comments on the Draft Proposed Decision

The claimants filed comments on the Draft Proposed Decision, reiterating the points made above.[253] These comments are specifically addressed in the analysis.

B. The Regional Board's Position

The Regional Board urges the Commission to deny the Test Claim. The Regional Board states that it "issued the Permit [i.e., the test claim order] pursuant to legal requirements contained in the federal Clean Water Act ("CWA"), its implementing regulations, and guidance from the United States Environmental Protection Agency ("U.S. EPA")."[254] The Board further states that "[p]ursuant to federal law, U.S. EPA authorized the Santa Ana Water Board to issue the Permit in lieu of issuance by U.S. EPA itself."[255] Further, the Regional Board states: "As required by federal statute, regulations, and guidance, the Permit requires numerous actions the Co-Permittees must take to reduce the flow of pollutants into waters in the Santa Ana Water Board's jurisdictional watershed."[256] The Regional Board acknowledges that the test claim permit results in costs incurred: "This Test Claim seeks reimbursement by the State of California for expenses the Claimants either have incurred or will incur in implementing numerous requirements of the Permit."[257] However, the Regional Board maintains that the claimants, in addition to establishing the new activities of the test claim permit "must also prove that the costs are mandated on them by the state, rather than by federal law, and must prove that any additional

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[251] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 66-67 [citing *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354-1355].

[252] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 68.

[253] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022.

[254] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 1.

[255] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 1.

[256] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

[257] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

costs beyond the federal mandate are substantial and not *de minimis*."[258] And, "[f]inally, they must establish that they are required to use tax monies to pay for permit implementation."[259]

1. The Regional Board Asserts that the Requirements of the Test Claim Permit Do Not Constitute Mandated New Programs or Higher Levels of Service to the Public.

The Regional Board maintains that "Claimants have not established that the challenged provisions impose new programs or higher levels of service."[260] The Regional Board argues that "[m]any of the provisions are nearly identical to those in the 2002 permit, and other activities, even if not previously required, are already being carried out by some of the Co-Permittees."[261]

Additionally, the Regional Board asserts that "neither federal nor state law requires that parties discharge to waters of the United States."[262] Instead, the Regional Board argues that "by electing to discharge pollutants to the waters of the United States, Claimants have elected to create the condition triggering federal and state requirements to obtain an MS4 permit."[263]

The Regional Board further asserts that the Permit "does not involve requirements imposed uniquely upon local government."[264] The Board argues that "[l]aws of general application are not entitled to subvention…where local agencies are required to perform the same functions as private industry, no subvention is required."[265] The Board reasons that because industrial and construction entities are required to obtain and comply with NPDES permits, which are in some cases more stringent than for MS4s, the test claim permit cannot be considered uniquely imposed on local government.[266]

2. The Regional Board Asserts that Federal Law, Not State Law, Mandates the Issuance of the Permit as a Whole, and the Specific Requirements Are Consistent with Federal Law and EPA Guidance.

The Regional Board argues that federal law, rather than state law, "mandates the issuance of the Permit as a whole, including the challenged provisions."[267] Further, the Regional Board asserts that "[t]he CWA requires that the Permit be issued to the local governments: it is not a question

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[258] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2 [emphasis in original].

[259] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

[260] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 11.

[261] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 11.

[262] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 12.

[263] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 12.

[264] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 17.

[265] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 17.

[266] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 17.

[267] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

of 'shifting' the costs from the state to the local agencies."[268] The Regional Board asserts that the "specific requirements challenged are consistent with the requirements of federal law, its implementing regulations, and federal agency guidance."[269] And, the Regional Board argues that "[e]ven if the Permit was interpreted as going beyond federal law, any additional state requirements for each requirement are *de minimis*."[270]

The Regional Board acknowledges that the CWA "does not provide a specific set of permit terms that the permitting agency must include in each MS4 permit." However, the program "mandates that the permitting agency exercise discretion and choose specific controls, generally BMPs, to meet a legal standard," which is found in section 402(p)(3)(B)(iii) of the CWA:

> [S]hall 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.

The Regional Board asserts that the courts have identified "two independent requirements" in this provision: first, that the permit must include controls to reduce pollutants to the maximum extent practicable (MEP); and second, that the permit must include "such other provisions as the permit writer deems appropriate for controlling pollutants."[271]

With respect to what specifically is required to satisfy MEP, the Regional Board states that "it was first established in the CWA in 1987," and "is akin to a technology-based standard."[272] The Regional Board holds that "[t]he fundamental requirement that municipalities reduce pollutants in MS4s to the MEP remains a cornerstone of the mandate imposed upon municipalities by the federal CWA and implementing NPDES regulations."[273] More specifically, the Regional Board asserts that "MEP is generally a result of emphasizing pollution prevention and source control BMPs as the first lines of defense in combination with appropriate structural and treatment methods serving as additional lines of defense…[and] is an ever evolving, flexible, and advancing concept, which considers technical and economic feasibility."[274] Accordingly, the Regional Board maintains that "[a]s technical knowledge about controlling urban runoff continues to advance and change, so does that which constitutes compliance with the MEP

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[268] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

[269] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2.

[270] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 2 [emphasis in original].

[271] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 7 [citing *Defenders of Wildlife v. Browner* (9th Cir 1999) 191 F.3d 1159, 1166].

[272] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 8.

[273] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 8.

[274] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 8.

standard."[275] The Regional Board notes that while "MEP as a legal requirement" has not changed, "what has changed in successive permits is the level of specificity included in the permit to define what constitutes MEP."[276] The Regional Board argues that in *Building Industry Ass'n of San Diego County v. State Water Board*, the court of appeal upheld the San Diego Regional Board-issued MS4 permit, finding that MEP "is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness."[277] Thus, the Regional Board argues, "the Court of Appeal's *Building Industry* decision demonstrates that the Santa Ana Water Board is entitled to considerable deference in its determination of what practices are within the federal minimum requirements."[278]

With respect to "such other provisions" as the permit writer deems appropriate for the control of such pollutants, the Regional Board argues that "this provision is mandatory and binding on the Santa Ana Water Board as the authorized NPDES permit writer."[279] Therefore, "contrary to what Claimants appear to argue in their Test Claim, when relying on this provision, the state does not exceed federal law in using its discretion to impose permit provisions that are necessary to control pollutants."[280]

The Regional Board also responds to the argument that the NPDES permitting program represents a shifting of responsibilities and costs, and could be found to constitute a state mandate under *Long Beach Unified School Dist. v. State*:

> In *Long Beach*, the federal requirements at issue stemmed from general constitutional obligations to alleviate racial segregation articulated in several federal court decisions. These court decisions did not impose any specific requirements on the school districts in California. *Long Beach* included no comprehensive federal program that required specific steps and specific standards to be met by all schools and school districts. There was, in fact, no federal mandate on the school districts at all. Thus, with its Executive Order, the State of California created a state mandate where no federal mandate previously existed. Accordingly, any specific provisions would necessarily be a state mandate because the state took a vague federal constitutional obligation, along with suggestions from federal court decisions, and translated it into very specific requirements.
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> This test claim, on the other hand, involves two separate and very clear federal mandates – one for the permittee and one for the permitting agency. The first is the unambiguous federal mandate directly on permittees (Claimants) to obtain a

[275] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 8.

[276] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 8.

[277] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 9.

[278] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 9.

[279] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 9.

[280] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 9.

NPDES permit that imposes requirements that control pollutants to the MEP and any other appropriate water quality control measures. As opposed to general constitutional obligations at issue in *Long Beach*, the CWA, as implemented by EPA's regulations, creates a comprehensive regulatory strategy including very specific permit requirements that apply directly to local agencies' storm sewer discharges… Second, the CWA contains a separate mandate on the permitting agency, whether federal or state, to issue permits pursuant to the same standards set forth in CWA section 402(p).

The fact that the CWA contains two separate mandates marks the critical difference between *Long Beach* and the instant claim. Even if the State of California did not administer the NPDES program, Claimants would have been required to obtain an MS4 permit for their discharges. Thus, when the Santa Ana Water Board issued the Permit, it did so pursuant to the federal mandate for permit writers, not for permittees. Importantly, Claimants do not challenge the federal mandate to obtain the Permit. Rather, they challenge the Santa Ana Water Board's execution of the federal mandate as a permit writer.

Where the Santa Ana Water Board contends the Commission erred in its analytical approach is in applying *Long Beach* holding to the wrong federal mandate. In *Long Beach*, the federal mandate at issue was from the United States Constitution directly to the school districts. Thus, when the State of Calfornia [sic] issued the Executive Order in *Long Beach*, it did so pursuant to absolutely no federal mandate on the state itself. Put another way, the federal court decisions required no additional state involvement in order to meet the constitutional obligations regarding racial segregation. Accordingly, an Executive Order including more specific requirements than those suggested by the federal courts was de facto an unfunded state mandate.

On the contrary, when the San Diego Water Board (or Santa Ana Water Board in this case) established specific provisions in the MS4 permit, it did so pursuant to the CWA's specific mandate for the permitting agency. As explained above, this federal mandate specifically requires the permitting agency to establish permit provisions to control pollutants to the MEP and such other provisions as appropriate to control such pollutants. Thus, as opposed to *Long Beach*, where the State of California translated a general constitutional obligation into specific requirements absent any federal mandate to do so, the Santa Ana Water Board established permit provisions pursuant to CWA's direct mandate on permitting agencies. Accordingly, unlike *Long Beach*, the mere act of selecting specific permit provisions itself cannot de facto create an unfunded mandate. An unfunded mandate can only exist if, in establishing the permit provisions, the Santa Ana Water Board includes provisions that go beyond federal requirements. Therefore, in determining whether an unfunded mandate exists, the Commission

must analyze whether the challenged provision goes beyond the legal standards set forth in 402(p)(3)(B)(iii).[281]

The Regional Board further argues that *Dept. of Finance* "has limited applicability because, unlike the 2001 Los Angeles Permit, the 2009 Permit includes a finding that the requirements implement only federal law."[282] The Board asserts that "Findings 1-5 of the Permit and Section II of the Fact Sheet set forth the Board's regulatory basis for issuing the Permit."[283] The Board further asserts that "[t]he 2009 Permit contains no express or implied statement that any of the provisions are authorized by State law."[284]

The Board further argues that the Supreme Court's decision is limited to interpreting MEP, "and did not address other federal laws or regulations which mandate Permit provisions challenged in the Test Claim."[285] The Board asserts that because the analysis in *Dept. of Finance* "turned on whether, and to what extent, the MEP standard and specific implementing regulations compelled the Los Angeles Regional Board to impose the challenged permit conditions…the Supreme Court decision has limited application when the federal standard compelling a challenged permit provision is wholly separate from the MEP standard…"[286] The Board asserts that "a significant number of the challenged provisions of the 2009 Permit relate to the implementation of total maximum daily load ('TMDL') requirements."[287] The Board argues that federal law "specifically compelled the Santa Ana Water Board to include the TMDL-related provisions in the 2009 Permit."[288] The Board maintains that the regulations requiring NPDES permits to contain effluent limitations "consistent with the assumptions and requirements of any available wasteload allocation…provides an independent basis, separate from the federal MEP standard,

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[281] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, pages 14-16 (citing *Long Beach Unified School Dist. v. State of California* (1990) 22 Cal.App.3d 155).

[282] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 2.

[283] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 2.

[284] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 3.

[285] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 4.

[286] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 4.

[287] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 4.

[288] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 5 [citing 40 CFR § 122(d)(1)(vii)(B)].

for including the challenged TMDL-related provisions."[289] Further, the Board argues that its discretion with respect to the TMDL-related provisions is significantly narrower:

> Developing provisions to meet the MEP standard necessarily requires consideration and balancing of numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness in light of evolving technology and scientific understandings of pollutant control. In contrast, part 122(d)(1)(vii)(B) specifically directs the Board to include effluent limits which are consistent with the assumptions of any applicable WLAs. In other words, the Board had no "true choice" but to include the TMDL-related provisions in the 2009 Permit.[290]

The Board asserts that "[i]n exercising this limited discretion, the Board simply translated the WLAs directly into effluent limits – so the effluent limitations were exactly the same as the WLAs."[291]

Similarly, the Board asserts that the LID and Hydromodification prevention requirements; Public Education Program requirements; and Residential Program requirements are all compelled by other federal regulations:

> Sections XII.B through XII.E include low impact development and hydromodifcation requirements which implement 40 Code of Federal Regulations part 122.26(d)(2)iv)(A)(2). Section XIII includes requirements for public education and outreach which implement 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)(6). Section XI includes requirements for reducing pollutants from residential facilities which implement 40 Code of Federal Regulations parts 122.26(d)(2)(iv)(A)(6) and 122.26(d)(2)(iv)(A). Because federal law compelled the Board to include these requirements, and the Board determined that these provisions were necessary to meet these federal requirements in conformity with the federal MEP standard, the Board is entitled to appropriate level of deference in making this determination.[292]

Accordingly, the Board asserts that none of the challenged permit requirements are state-mandated.

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[289] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 5 [quoting 40 CFR § 122(d)(1)(vii)(B)].

[290] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 5.

[291] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 5.

[292] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, pages 5-6.

3. The Regional Board Asserts That None of the Requirements of the Test Claim Permit Are Reimbursable Because Claimants Have Authority to Impose Charges or Fees to Pay for Any Alleged Costs.

Additionally, the Board argues that the local agencies possess fee authority within the meaning of section 17556, and therefore reimbursement is not required. The Board asserts that all claimants "have the ability to charge fees to businesses to cover inspection costs…" and that "there may be limitations concerning the percent of voters or property owners who must approve assessments under California law, but cities and counties can and do adopt fees from their residents and businesses that fund their storm water programs."[293] The Board maintains that the claimants "have failed to show that they must use tax monies to pay for these requirements."[294] Further, the Board argues that any requirements that the Commission might find reimbursable would be de minimis, and would not require payment from tax monies.[295] The Board argues that while the claimants allege "more than $200 million over the Permit's term, the Permit largely continues and refines the requirements of the 2002 permit," and therefore "the vast majority of the costs to implement the Permit are not new."[296] The Board further argues that "previously reported program costs are not all attributable to compliance with MS4 permits," and that only some portion of the provisions of the Permit will be found to exceed federal law.[297] Accordingly, those costs that are solely attributable to the test claim permit will be de minimis.[298]

4. The Regional Board Asserts That Claimants Have Not Exhausted Their Administrative Remedies, and That a Test Claim Before the Commission Is an Improper Collateral Attack on the Test Claim Permit.

Finally, the Regional Board argues that the claimants have not exhausted their administrative remedies with the State Board, and filing a Test Claim with the Commission, especially to the extent that the Test Claim implicates the issue of whether permit provisions exceed MEP, constitutes an improper collateral attack on the Permit.[299]

The Board asserts that the Water Code provides an administrative remedy under section 13320(a). "Therefore, the question of whether permit provisions exceed the MEP standard is more properly brought before the State Water Board."[300] The Board argues that "[a]llowing the Commission to adjudicate a matter properly within the expertise and jurisdiction of the State

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[293] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[294] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[295] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[296] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[297] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[298] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[299] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, pages 18-19.

[300] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 19.

Water Board offends the basic policies of the doctrine of exhaustion."[301] The Board concludes that "the Commission must abstain from hearing the Test Claim until the State Water Board has determined whether the provisions of the permit exceed the MEP standard."[302]

5. The Water Boards' Comments on the Draft Proposed Decision

The Water Boards filed joint comments on the Draft Proposed Decision, which are specifically addressed in the analysis.[303] These comments contend that the requirement in Section XVIII.B.8 of the test claim permit to develop a Cooperative Watershed Program to comply with the selenium TMDL is not mandated by the state.[304] The Water Boards also contend that the claimants have fee authority sufficient as matter of law pursuant to Government Code section 17556(d) to comply with all new requirements. They further contend that if the Commission finds that voter approval is required for property-related fees, it does not divest claimants of their authority to impose fees and that if the Commission finds that voter approval procedures divest claimants of fee authority for costs prior to January 1, 2018, the Commission should find that claimants cannot establish they are forced to use local proceeds from taxes if they have not sought voter approval for proposed fees.[305] Finally, the Water Boards argue that no reimbursement is required after January 1, 2018 because of SB 231, which exempted stormwater fees from the voter approval requirement of article XIII D of the California Constitution.[306]

C. Finance's Position

Finance urges the Commission to deny the Test Claim. Finance argues that the test claim permit is issued as a result of the "state's role as a permitting authority acting on behalf of the federal government…" and that "the state requirements, in the absence of a state statute, would still be imposed on local agencies by federal law."[307] In addition, Finance argues that the new or additional activities in the test claim permit, as compared with the prior Third Term Permit, are a result of "an iterative process whereby each successive permit becomes more refined and expanded as needed," and that this expansion is necessary to comply with the CWA.[308] Finance further argues that the specific provisions of the test claim permit were "necessary and consistent

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[301] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 19.

[302] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 19.

[303] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022.

[304] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 1-4.

[305] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, page 4-7.

[306] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 4-9.

[307] Exhibit D, Finance's Comments on Test Claim, filed March 10, 2011, page 1.

[308] Exhibit D, Finance's Comments on Test Claim, March 10, 2011, page 2.

with the Board's federally-delegated authority…" and that "implementing permit activities is not a governmental function unique to local agency dischargers."[309]

With respect to the recent Supreme Court decision in *Department of Finance v. Commission* (2016) 1 Cal.5th 749, Finance "defers to the State Water Resources Control Board and the Santa Ana Regional Water Quality Control Board on the impact of the Supreme Court decision on the federal law component of the state mandate determination."[310]

With respect to the fee authority question, Finance states that it "believe[s] claimants do have fee authority undiminished by Propositions 218 or 26."[311] Finance notes that Proposition 26 "specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes." Finance further argues that "claimants have authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via voter approval as may be required by Proposition 218."[312] Finance concludes that "[l]ocal governments can choose not to 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."[313]

Additionally, "Finance further asserts that claimants continue to have regulatory fee authority that does not require voter approval under Propositions 218 and 26…sufficient to pay for alleged mandated activities of the hydromodification plan and low-impact development."[314] Finance asserts that fees imposed as a condition of property development (or redevelopment) are not subject to Propositions 218 or 26, and are supported both by local governments' reserved police power authority, and the Mitigation Fee Act (Gov. Code § 66000 et seq.).[315]

Finance filed comments on the Draft Proposed Decision, focusing on the fee authority issues and arguing that "because SB 231 was a clear overruling of the wrongly-decided *City of Salinas* case, the Commission should also find that from the beginning of the potential period of

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[309] Exhibit D, Finance's Comments on Test Claim, March 10, 2011, page 2.

[310] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 1.

[311] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 1.

[312] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 1.

[313] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 1.

[314] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 2.

[315] Exhibit H, Finance's Response to the Request for Additional Briefing, filed October 21, 2016, page 2.

reimbursement the voter approval requirement did not apply to claimants and therefore did not impede their fee authority."[316]

D. Position of Interested Persons, Cities of Dublin and Union City, and the Alameda Countywide Clean Water Program.

On November 4, 2022, the Cities of Dublin and Union City, and the Alameda Countywide Clean Water Program, jointly filed comments on the Draft Proposed Decision.[317] The Cities are claimants in other stormwater test claims pending with the Commission (10-TC-02/03/05 and 16-TC-03), but are not permittees under the test claim permit. 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.[318] These interested persons comment on the TMDL provisions of this Decision as follows.

They urge the Commission to apply *Department of Finance v. Commission on State Mandates* (2016) and *Department of Finance v. Commission on State Mandates* (2017) to the TMDL provisions of the test claim permit and find that the activities are mandated by the state, rather than be considered part and parcel to a federal mandate. According to the interested persons, those cases held that when the activities are expressly or explicitly required by federal law, there is no federal mandate. Furthermore, these decisions hold that deference to the Regional Board is only appropriate where the agency found that the requirements were the *only means* by which the federal standard could be implemented.[319] The comments explain that "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.)[320] Moreover, the federal mandate exception does not apply because the CWA "*does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance*."[321]

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[316] Exhibit O, Finance's Comments on the Draft Proposed Decision, filed November 4, 2022, pages 1-2.

[317] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022.

[318] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 1.

[319] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 2.

[320] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 11.

[321] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 12.

The interested persons assert that the permit requirements reflect multiple layers of discretion by the state. At the highest level, the State *voluntarily* chose to administer its own permitting program under the federal Clean Water Act. Other levels of discretion 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 BMPs or other nonpoint source pollution controls make more stringent load allocations practicable, in which case WLAs 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.[322]

The interested parties conclude that the TMDL requirements impose a new program or higher level of service. The program is not a general pollution ban, applicable to all dischargers; a position rejected by *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560. Rather, 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 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. While there are 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 – the interested persons take the position that 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). Additionally, the interested persons assert not all discharges are subject to the WLAs – some MS4 operators, as well as numerous industrial and construction dischargers are exempt.

Finally, the interested persons argue, 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 in section XVIII.B.9, which requires permittees to develop a constituent-specific source control plan for copper, lead and zinc, which must include a monitoring program; and section XVIII.B.10, which requires permittees with discharges to the San Gabriel River/Coyote Creek to develop a monitoring program to monitor dry weather (for copper) and wet weather (for copper, lead, and zinc) flows in Coyote Creek, both of which are new requirements.[323]

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[322] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, pages 2, 3.

[323] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, pages 4, 20, 23-24.

These parties also comment on the issue of costs mandated by the state. They assert that the Draft Proposed Decision incorrectly concludes that the claimants are not "compelled to rely on proceeds of taxes to pay for the new state-mandated activities," because "the claimants have a number of different revenue streams with which to fund stormwater pollution control activities. 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.[324]

Finally, the interested persons assert 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.[325]

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."[326] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[327]

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

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[324] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 5.

[325] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, page 5, 25-41.

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

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[328]
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.[329]
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.[330]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[331]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[332] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[333] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[334]

A. The Commission Has Jurisdiction Over This Test Claim.

1. The Test Claim Was Timely Filed With a Period of Reimbursement Beginning June 1, 2009.

Government Code section 17551 provides that local government test claims shall be filed "not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is

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

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

[330] *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.

[331] *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 1264, 1284; Government Code sections 17514 and 17556.

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

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

[334] *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].

later."[335] At the time this Test Claim was filed, the Commission's regulations defined "within 12 months" as follows:

> For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.[336]

The test claim permit was adopted by the Regional Board on May 22, 2009, and became effective ten days later (June 1, 2009).[337] Twelve months following the effective date of the test claim permit was June 1, 2010.

The claimants state, however, they first incurred costs under the permit "within either FY 2008-09 or FY 2009-10."[338] The earliest date provided in the record is in the declaration of Richard Boon, Chief of the Orange County Stormwater Program within Orange County Public Works, who states that the County first incurred costs under the test claim permit "in June 2009."[339] Therefore, pursuant to Government Code section 17551, and the interpretation of the Commission's regulations that provides until June 30 of the fiscal year following the fiscal year in which costs were first incurred, a timely filing on the 2009 test claim permit must occur prior to June 30, 2011. The test claim was filed June 30, 2010, and is therefore timely filed.[340]

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 June 30, 2010, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2008. However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or June 1, 2009.

2. The Claimants Are Not Required to Exhaust Administrative Remedies with the State Board Prior to Filing a Test Claim with the Commission.

The Regional Board argues that the "test claim [filing] constitutes an impermissible collateral attack on the Permit."[341] The Regional Board asserts that the Test Claim "requires a finding that permit provisions exceed the minimum federal requirements established by the MEP standard,"

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

[336] California Code of Regulations, title 2, section 1183.1(b) (Register 2016, No. 38).

[337] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 352 [Order No. R8-2009-0030].

[338] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 56.

[339] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 113 (Declaration of Richard Boon, Orange County Public Works).

[340] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 1.

[341] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 19.

which is an issue "within the administrative jurisdiction of the State Water Board."[342] The Regional Board maintains that "[t]he Water Code provides an administrative remedy to a party challenging a Regional Water Board decision," and "[a]llowing the Commission to adjudicate a matter properly within the expertise and jurisdiction of the State Water Board offends the basic policies of the doctrine of exhaustion."[343] Relatedly, the Regional Board is asserting that because the resolution of the Test Claim calls upon the Commission to resolve the extent to which the test claim permit is mandated under state law, rather than federal law, the Commission's role intrudes upon the prerogative of the State Board, and overlaps with the direct challenge being brought by the permittees under the Water Boards' processes. The Regional Board concludes that the Commission "must abstain from hearing the Test Claim until the State Water Board has determined whether the provisions of the permit issued by the Regional Board exceed the MEP standard."[344]

The Board's argument is unfounded. The Commission has exclusive jurisdiction to determine whether a statute or executive order imposes a reimbursable state-mandated program, and the Test Claim does not constitute a collateral attack on the test claim permit on the merits.[345]

In *Department of Finance v. Commission on State Mandates*, the Court explained, by way of exposition: "The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims and created the Commission to adjudicate them."[346] The Court later distinguished between a challenging a storm water permit on the merits and seeking reimbursement in the context of a test claim:

> Certainly, in a trial court action challenging the *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817–818, 85 Cal.Rptr.2d 696, 977 P.2d 693) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga*, at p. 1387, 38 Cal.Rptr.3d 450;

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[342] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 18.

[343] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, pages 18-19.

[344] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 19.

[345] Government Code section 17552; *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 917-920, which concludes that NPDES permits are executive orders pursuant to Government Code section 17516 and that the existence of a state mandate is a matter for the Commission's determination.

[346] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 759.

> *Building Industry* [*Assn. of San Diego County v. State Water Resources Control Board* (2004)] 124 Cal.App.4th [866,] 888–889, 22 Cal.Rptr.3d 128.)
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> Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.
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> [¶…¶]
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> Moreover, the policies supporting article XIII B of the California Constitution and section 6 would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question.[347]

Here, the Board is asserting that the Test Claim constitutes a collateral attack on the test claim permit, but *Department of Finance* clearly demonstrates that the courts understand the Commission's role to be distinct from a direct challenge on the merits of a permit: "[t]he narrow question here [is] who will pay" for an alleged mandate, which the Commission is charged with determining in the first instance.[348]

3. The Commission Does Not Have Jurisdiction Over the 2002 Permit and the Requirements Pled in the 2009 Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the 2002 Permit, to Determine if the Activities Required by the 2009 Test Claim Permit Are New.

The claimants' comments on the Draft Proposed Decision contend that "even if certain . . . obligations were carried forward into the 2009 Permit [from the prior 2002 permit], they still are 'new' obligations and a 'higher level of service' because: (1) The 2009 Permit's obligations cannot be compared with those in the 2002 Permit because the permittees were legally precluded from filing a test claim with respect to the obligations in the 2002 Permit [since Government Code section 17516 excluded stormwater permits from the definition of executive order]; and (2) The permittees had no obligation to continue to implement . . . the 2002 Permit once the 2002 Permit terminated."[349] Thus, the claimants are contending that all activities pled in the test claim are new and that the Commission should not be comparing the requirements from the prior permit to the test claim permit. These arguments are not legally correct.

The claimants' second point above contends that all of the requirements in the 2009 test claim permit are new because the claimants had no obligation to continue to comply with the 2002

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[347] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768-769.

[348] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[349] Exhibit M, Claimants' Comments on Draft Proposed Decision, filed November 4, 2022, pages 19-20 (with respect to the TMDL issues), page 32 (with respect to the Public Education requirements).

permit once the 2002 permit terminated.[350] In other words, the claimants want the Commission to interpret stormwater permits as contracts that expire, and that every permit is a new contract. This interpretation is not consistent with article XIII B, section 6 or the courts' interpretation of these permits as executive orders.

Under the Clean Water Act, the term of an NPDES permit is five years.[351] However, states authorized to administer the NPDES program may continue the state-issued permit until the effective date of a new permit, if state law allows.[352] California's regulations provide that the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.[353] As indicated in the test claim permit,

> Order No. R8-2002-0010 [the prior permit] expired on January 19, 2007. On July 22, 2006, the permittees submitted a Report of Waste Discharge for renewal of the Permit. On February 20, 2007, Order No. 2002-0010, NPDES No. CAS618030, was *administratively extended in accordance with Title 23, Division 3, Chapter 9, §2235.4 of the California Code of Regulations*.[354]

Thus, there was no gap in time between the prior permit and the test claim permit.

The courts have found that NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.[355] 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 and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to the prior year.[356] 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

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[350] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 19.

[351] 33 United States Code section 1342(b).

[352] Code of Federal Regulations, title 40, section 122.6(d).

[353] California Code of Regulations, title 23, section 2235.4.

[354] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 275 [Order No. R8-2009-0030, Finding 15].

[355] *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.

[356] 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.

performing certain inspections as required by that stormwater permit were both *new duties* that local governments were required to perform, when compared to prior law ("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").[357]

Other examples include *Lucia Mar Unified School Dist.*, which addressed a 1981 test claim statute that 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.[358] 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 students from their districts at such schools."[359] 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.[360] In *City of San Jose*, the court addressed the1990 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.[361] 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."[362] 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]."[363]

Thus, it is not legally correct or consistent with article XIII B, section 6 to ignore the requirements imposed on the claimants by the prior permit to determine what is new.

Second, the claimants suggest that the test claim permit cannot be compared to the prior 2002 permit since at the time the 2002 permit was adopted, Government Code section 17516 excluded from the definition of "executive order" any order, requirement, rule, or regulation issued by the State Water Resources Control Board or by any Regional Board and, thus, a test claim on the 2002 permit could not have been filed and the claimants could not seek reimbursement for those costs. The claimants therefore contend that they are not precluded from seeking reimbursement for the

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[357] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[358] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

[359] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

[360] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[361] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

[362] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

[363] *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).

activities that were originally required by the prior 2002 permit and carried over to the test claim permit. The claimants' arguments are as follows:

> Thus, in 2002 and 2003, the permittees could not file a test claim seeking reimbursement for obligations imposed by the 2002 Permit. It is well established that a party is not precluded from pursuing a claim in a current proceeding where that party could not have pursued the claim in the past. For example, with respect to "issue preclusion" [fn. omitted] if an issue was not within a court's power to decide the issue in the first action, it is not precluded in a later action. *Strangman v. Duke* [fn. citation omitted] ("The rule of res judicata does not apply to causes or issues which were not and could not be before the court in the first proceeding.") *See also State Compensation Insurance Fund v. Ready Link Healthcare, Inc.* [fn. citation omitted] (defendant not precluded from litigating amount of premium due where such issue could not have been brought in prior administrative proceeding because insurance commissioner lacked power to hear that issue); *Hong Sang Market, Inc. v. Peng* [fn. citation omitted] ("Thus, in a situation in which a court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground ... then a second action in a competent court presenting an omitted theory or ground should be held not precluded"), quoting *Merry v. Coast Community College Dist.* [fn. citation omitted.]
>
> An analogous principle applies with respect to the exhaustion of administrative remedies. Where a party is precluded from exhausting its administrative remedies, or to do so would be futile, the exhaustion requirement is not a bar to further proceedings. Moreover, it is well established that the exhaustion requirement is not applicable where an effective administrative remedy is wholly Jacking. *Glendale City Employees' Association, Inc. v. City of Glendale* [fn. citation omitted] (exhaustion of administrative remedies does not apply if the remedy is inadequate). *See also Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* [fn. citation omitted] (where pursuing administrative remedies would not provide class-wide relief, failure to pursue administrative remedy does not bar such relief).[364]

The claimants are correct that Government Code section 17516(c), as originally enacted, excluded from the definition of "executive order" any order, requirement, rule, or regulation issued by the State Water Resources Control Board or by any Regional Board as follows:

> "Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial

[364] Exhibit M, Claimants' Comments on Draft Proposed Decision, filed November 4, 2022, pages 19-20.

> assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. "Major" means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.[365]

In 2003, the County of Los Angeles and surrounding cities filed a test claim with the Commission (*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-20, and 03-TC-21) which was returned by the Executive Director for lack of jurisdiction based on the plain language of Government Code section 17516. The county and cities appealed to the Commission, and in 2004, the Commission denied the appeal on the ground that it did not have the authority to declare section 17516 unconstitutional pursuant to article III, section 3.5 of the California Constitution.[366] The county and city filed a petition for writ of mandate under Code of Civil Procedure sections 1085 and 1094.5 directing the state to provide reimbursement or directing the Commission to hear the test claims, and a complaint for declaratory relief, requesting the court to declare Government Code section 17516 unconstitutional. The Second District Court of Appeal found that Government Code section 17516 was not consistent with article XIII B, section 6 and was therefore unconstitutional, and remanded the test claims to the Commission to hear them in the first instance.[367] In 2010, Government Code section 17516 was amended to delete the exclusionary paragraph quoted above.[368]

However, even though the Commission could not have accepted stormwater test claims until 2007, when the court determined that section 17516 was unconstitutional, the claimants were not without a remedy following the adoption of the 2002 permit. Like the County of Los Angeles, the claimants could have filed a test claim, which would have been returned, and then filed a lawsuit challenging Government Code section 17516 as unconstitutional and requesting reimbursement under article XIII B, section 6. The claimants could have also filed a lawsuit directly with the courts, bypassing the Commission's administrative process, based on futility grounds since the Commission previously returned the Los Angeles test claims on the ground that it had to presume Government Code section 17516 constitutional. The California Supreme Court explained the futility exception to the exhaustion of administrative remedies as follows:

> Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (Citations omitted.) However, counties may pursue section 6 claims in superior court without first resorting to

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[365] Government Code section 17516(c) (Stats.1984, ch. 1459).

[366] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 904. Article III, section 3.5 of the California Constitution provides that an administrative agency has no power to "declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

[367] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-921.

[368] Government Code section 17516 (as amended by Stats. 2010, ch. 288).

> administrative remedies if they "can establish an exception to" the exhaustion requirement. (Citation omitted.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case.[369]

The futility exception was applied in the *County of San Diego* case, which sought reimbursement under article XIII B, section 6 for the Medically Indigent Adult statutes. There, the County of San Diego invoked this exception by alleging that the Commission's denial of its claim was "virtually certain" because the Commission had previously denied the claims of other counties, ruling that county medical care programs for adult medically indigent adults are not state-mandated and, therefore, counties are not entitled to reimbursement.[370] Since the Commission rejected the Los Angeles Test Claim (which alleged the same claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile.[371]

Thus, the claimants were not precluded from seeking a remedy from the courts after the 2002 permit was adopted.

Moreover, the Commission does not now have the authority to determine if the activities required by the 2002 permit are eligible for reimbursement under article XIII B, section 6. The 2002 permit was adopted on January 18, 2002, and became effective ten days later.[372] At that time, Government Code section 17551 did not contain a period of limitations to file a test claim; as long as the alleged mandate was adopted after January 1, 1975, a test claim could be filed at any time. Effective September 30, 2002, however, Government Code section 17551(c) was amended to require test claims to be filed "not later than three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision."[373] The 2002 permit became effective on January 28, 2002 (after January 1, 2002) and, thus, the claimants had three years from that date, or until January 28, 2005, to file a test claim on the 2002 permit. Since the period of limitations has expired, the Commission no longer has the authority to determine if the activities originally required by the 2002 permit are eligible for reimbursement under article XIII B, section 6.[374]

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[369] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.

[370] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.

[371] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 90.

[372] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 435 [Order No. R8-2002-0010].

[373] Government Code section 17551 (Stats. 2002, ch. 1124).

[374] *American Federation of Labor v. Unemployment Insurance Appeals Bd.* (1996) 13 Cal.4th 1017, 1042, "[A]dministrative agencies have only the powers conferred on them, either expressly or by implication, by Constitution or statute."

Accordingly, in accordance with article XIII B, section 6 and the authorities cited above, the requirements pled in the 2009 test claim permit are compared to prior law, including the prior 2002 permit, to determine if the required activities are new.

B. Some Activities Required by the Test Claim Permit Impose a State-Mandated New Program or Higher Level of Service.

1. The Requirements in Sections XVIII.B.8 and XVIII.B.9 of the Test Claim Permit, to Submit to the Regional Board a Cooperative Watershed Program to Implement the TMDL for Selenium and to Develop a Constituent-Specific Source Control Plan to Comply with the San Gabriel Metals TMDL, Impose a State-Mandated New Program or Higher Level of Service. However, the Remaining Requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1, to Monitor, Implement Best Management Practices (BMPs), and Revise BMPs to Comply with the Wasteload Allocations (WLAs) in the TMDLs if an Exceedance Occurs, Do Not Mandate a New Program or Higher Level of Service.

The claimants allege sections XVIII.B.1 through XVIII.B.5, XVIII.B.7 through XVIII.B.9, XVIII.C.1, and XVIII.D.1 of the test claim permit require them to comply with numeric effluent limits for a number of constituent pollutants (metals, organochlorine compounds, selenium, fecal coliform, and pesticides), to implement total maximum daily loads (TMDLs) for those pollutants in Newport Bay, San Diego Creek, and reaches in the San Gabriel River and Coyote Creek.[375] The claimants allege that the test claim permit imposes the following requirements:

1) compels compliance with numeric limits taken from wasteload allocation within TMDLs;

2) requires compliance with numeric limits derived from TMDLs not "approved by EPA";

3) requires that the Permittees actually develop certain TMDLs (which is the responsibility of the State and/or the EPA); and

[375] The interested persons assert that section XVIII.B.10 of the test claim permit, which implements the metals TMDL for Coyote Creek, requires permittees with discharges to the San Gabriel River/Coyote Creek to develop a monitoring program to monitor dry weather (for copper) and wet weather (for copper, lead, and zinc) flows in Coyote Creek. (Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, pages 4, 20, 23-24.) However, the claimants did not plead section XVIII.B.10 and this Decision does not analyze that section. (See Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 76-80, identifying claims relating only to Sections XVIII.B.1-5, XVIII.B.7-9, XVIII.C.1, and XVIII.D.1; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 112-114 (Declaration of Richard Boon, Chief of the Orange County Stormwater Program within Orange County Public Works, declaring costs for only Sections XVIII.B.1-5, XVIII.B.7-9, XVIII.C.1, and XVIII.D.1); Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 6-8.)

4) requires the Permittees to conduct various studies and monitoring, and develop and implement new programs and implementation plans, all in connection with the development of TMDLs.[376]

As explained in the Findings of the test claim permit, these waterbodies were listed under section 303(d) as impaired since these constituents exceeded applicable State water quality standards. One of the listed causes of the impairment was urban runoff.[377] Federal law requires that TMDLs be established for each 303(d) listed waterbody for each of the pollutants causing impairment.[378] In 2002, U.S. EPA adopted TMDLs for the region's waterbodies with respect to metals, organochlorine compounds, selenium, and pesticides in Newport Bay and San Diego Creek, and the test claim permit implements those TMDLs. In addition, the Regional Board was in the process of developing its own TMDLs to replace the U.S. EPA TMDLs, and the test claim permit imposes requirements related to that transition. The test claim permit also implements the 1999 TMDL for fecal coliform in San Diego Creek and Newport Bay, and implements 2007 TMDLs adopted by U.S. EPA for metal and selenium for permittees that have discharges tributary to the San Gabriel River or Coyote Creek.

As explained below, the Commission finds that the requirements in Sections XVIII.B.8 and XVIII.B.9 of the test claim permit imposes a state-mandated new program or higher level of service to submit to the Regional Board a Cooperative Watershed Program to implement the TMDL for selenium and to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL. However, Sections XVIII.B. 5 and 7 do not impose any requirements. In addition, the remaining requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1, to monitor, implement BMPs, and revise BMPs to comply with the WLAs in the TMDLs if an exceedance occurs, do not mandate a new program or higher level of service.

a. Federal law requires states to establish TMDLs for impaired waterbodies to attain water quality standards necessary to protect the designated beneficial uses of the waterbody and requires that effluent limits "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" contained in a TMDL be included in NPDES Permits.

As discussed in the Background, the CWA requires states to develop a list of waters within their jurisdiction that are "impaired," meaning that existing controls of pollutants are not sufficient to meet water quality standards (including the numeric criteria in the NTR and CTR) necessary to permit the designated beneficial uses, such as fishing or recreation. States must then rank those impaired waters by priority, and establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet

[376] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 80.

[377] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 284 [Order No. R8-2009-0030, p. 14, para. 40].

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

water quality standards.[379] A TMDL represents the total assimilative capacity of a water body for a specific constituent pollutant, with a margin of safety, which is protective of that water body's identified beneficial uses. Usually a TMDL will also include WLAs, which divide up the total assimilative capacity of the receiving waters among the known point source dischargers, and load allocations (LAs) for non-point source discharges.[380] The development of a TMDL triggers further regulatory action by the state, as explained by the court in *City of Arcadia v. U.S. EPA*:

> TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir.2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–85 (9th Cir.1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g., *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies.... The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D.Wash.1996) ("TMDL development in itself does not reduce pollution.... TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes ... state or local plans for point and nonpoint source pollution reduction ...."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir.1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

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[379] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[380] United States Code, title 33, section 1313(d). Code of Federal Regulations, title 40, section 130.2(h) defines WLA as "The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." Code of Federal Regulations, title 40, section 130.2(g) defines LA as "The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished."

> For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id*.[381]

Once a TMDL is adopted, it must be approved by U.S. EPA. If U.S. EPA does not approve the TMDL, it must, within 30 days after disapproval "establish such loads for such waters as [it] determines necessary to implement the water quality standards applicable to such waters."[382] A regional board is then required by federal law to incorporate the TMDL into the Basin Plan.[383] Basin Plan amendments do not become effective until approved by the State Water Board and the Office of Administrative Law (OAL).[384]

Regional boards are then required by federal law to include effluent limits that comply with "all applicable water quality standards" and are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" in NPDES permits as follows:

> When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:
>
> (A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and
>
> (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.[385]

An "effluent limitation" is defined in the CWA as "*any restriction* established by a State or the Administrator on *quantities, rates, and concentrations* of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."[386] The definition of "effluent limitation" in the CWA "does not specify that a limitation must be numeric, and

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[381] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

[382] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, section 130.7(d)(2).

[383] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, sections 130.6, 130.7(d)(2).

[384] California Government Code section 11353.

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

[386] United States Code, title 33, section 1362(11). See also Code of Federal Regulations, title 40, section 122.2.

provides that an effluent limitation may be a schedule of compliance."[387] Federal EPA guidance states, however, that in cases where adequate information exists to develop more specific numeric effluent limitations to meet water quality standards, these numeric limitations are to be incorporated into stormwater permits as necessary and appropriate.[388] Any schedule of compliance shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.[389] Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement.[390] If the compliance schedule extends past the expiration date of the permit, the schedule must include the final effluent limitations in the permit to ensure enforceability under the CWA.[391] Schedules of compliance included in a permit must be approved by EPA and be based on a reasonable finding, adequately supported by the administrative record, that:

- The compliance schedule will lead to compliance with an effluent limitation to meet water quality standards by the end of the compliance schedule.[392]
- The compliance schedule is "appropriate" and that compliance with the final water quality based effluent limit is required "as soon as possible."[393]
- The discharger cannot immediately comply with the water quality based effluent limit upon the effective date of the permit.[394]

In addition, to meet water quality standards federal law also requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the

[387] *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.

[388] Exhibit Q (16), *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761, August 26, 1996.

[389] Code of Federal Regulations, title 40, section 122.47(a)(1).

[390] Code of Federal Regulations, title 40, section 122.47(a)(3).

[391] Exhibit Q (37), U.S. EPA Memorandum, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits*, May 10, 2007, page 2.

[392] United States Code, title 33, section 1311(b)(1)(C); Code of Federal Regulations, title 40, sections 122.2, 122.44(d)(1)(vii)(A).

[393] Code of Federal Regulations, title 40, section 122.47(a)(1); Exhibit Q (37), U.S. EPA Memorandum, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits*, May 10, 2007, pages 2-3.

[394] Code of Federal Regulations, title 40, section 122.47(a)(1).

environment.[395] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[396]

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 penalties.[397]

b. Before the test claim permit was adopted, TMDLs for metals, organochlorine compounds, selenium, fecal coliform, and pesticides in San Diego Creek, Lower Newport Bay, San Gabriel River, and Coyote Creek were adopted, and the prior permit required the permittees to meet water quality standards by monitoring, implementing BMPs and all necessary controls to prevent the discharge of these pollutants, and to report any exceedances to the Regional Board.

In May 1996, the State submitted a 303(d) list, which identified three water quality limited segments for Newport Bay (Upper and Lower Newport Bay, and San Diego Creek) as impaired due to several toxic pollutants (metals, pesticides, and priority organics) and designated this watershed as high priority for TMDL development, which was partially approved and modified by U.S. EPA.[398] In 1997, Defend the Bay, Inc. filed a lawsuit alleging that the State of California failed to establish TMDLs for the Upper and Lower Newport Bay, and San Diego Creek, and thus sought to compel the U.S. EPA to establish TMDLs in those segments under the Clean Water Act.[399] Defend the Bay alleged that the State's failure to establish TMDLs imposed on U.S. EPA a nondiscretionary duty to develop TMDLs for Newport Bay. The parties settled the case without protracted litigation, the terms of which were then approved by the court on November 13, 1997, with a consent decree. The consent decree recognized that California had submitted a "303(d) list" identifying parts of Newport Bay as impaired in May of 1996, and that

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[395] 33 United States Code section 1342(p)(3)(B)(iii) 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 State determines appropriate for the control of such pollutants." (Emphasis added.) See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[396] 40 Code of Federal Regulations 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.

[397] United States Code, title 33, sections 1319, 1342(b)(7), 1365(a).

[398] Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), page 1; Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, pages 3-4 [Excerpt from Administrative Record on Order No. R8-2009-0030, Part I].

[399] Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), pages 1-2.

California's failure to establish TMDLs for Newport Bay "imposes on EPA a nondiscretionary duty to develop TMDLs…" In addition, "[d]uring the negotiation of the consent decree, Regional Board staff provided a more specific list of pollutants covered by these general pollutant categories used in the listing decisions, and the consent decree refers to this more specific pollutant list."[400] Accordingly, the consent decree required EPA to assure that TMDLs for metals, nutrients, pathogens, pesticides, priority organics, and sediment in Water Quality Limited Segments in Newport Bay identified in the State 303(d) List are established, with the last TMDL established by January 2002, consistent with the following schedule:[401]

> 1. TMDLs for nutrients and sediment for the reaches of Newport Bay listed pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d), on the State 303(d) List for these pollutants will be established no later than January 15, 1998;
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> 2. A TMDL for pathogens for the reaches of Newport Bay listed pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d), on the State 303(d) List for this pollutant will be established no later than January 15, 2000; and
>
> 3. TMDLs for the metals, pesticides and priority organics identified in subparagraph IV.B of this Consent Decree for the reaches of Newport Bay listed pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d), on the State 303(d) List for these pollutants will be established no later than January 15, 2002.
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> 4. If the State fails to establish any of the TMDLs for identified WQLSs in Newport Bay for the pollutants of concern identified in subparagraphs IV.A.1 through IV.A.3 by the deadline provided for in this Consent Decree, EPA shall establish TMDLs for those pollutants by no later than 90 days following the deadline set forth in subparagraphs IV.A.1 through IV.A.3.[402]

Paragraph 3 of the consent decree refers to the metals, pesticides, and priority organics identified in subparagraph IV.B of the consent decree as needing TMDLs in Newport Bay. Subparagraph B identifies the following pollutants:

> San Diego Creek
>
> Metals: Cadmium, Chromium, Copper, Lead, Zinc
>
> Priority Organics: Endosulfan, DDT, PCBs, Toxaphene, Chlorpyrifos

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[400] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, page 4 [Excerpt from Administrative Record on Order No. R8-2009-0030, Part I].

[401] Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), page 2; see also, Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 461 [Order No. R8-2002-0010, Fact Sheet], which is a 1998 303(d) list identifying Newport Bay and San Diego Creek as impaired for metals, nutrients, pathogens, pesticides, priority organics, and sediment.

[402] Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), pages 2-3.

Upper Newport Bay

Metals: Cadmium, Chromium, Copper, Lead, Mercury, Silver, Zinc

Priority Organics: Endosulfan, DDT

Lower Newport Bay

Metals: Arsenic, Cadmium, Copper, Lead, Selenium, Silver, Mercury, Zinc

Priority Organics: Chlordane, Endosulfan, DDT, PCBs, Toxaphene, Chlorpyrifos, Chlorbenside, Dieldrin.[403]

In accordance with paragraph 1 of the consent decree, on October 9, 1998, the Regional Board adopted Basin Plan Amendments establishing TMDLs for "nutrients" (nitrogen and phosphorus) and sediment in Newport Bay and San Diego Creek, which as explained further below, was implemented in the Third Term Permit (prior permit).[404]

On November 24, 1998, the Regional Board adopted a TMDL on fecal coliform bacteria in Newport Bay "to correct ongoing violations of existing Basin Plan water quality objectives for fecal coliform and the impairment of beneficial uses resulting therefrom."[405] On April 9, 1999, the Regional Board adopted a resolution amending its Basin Plan that incorporated the TMDL and an implementation schedule for fecal coliform bacteria in Newport Bay. That Resolution indicates that as a result of excessive levels of coliform, water-contact recreation and shellfish harvesting have been threatened in Newport Bay since the 1970s.[406] The implementation schedule provided for meeting the targets 14 and 20 years from the date of adoption, respectively, meaning 2013 and 2019, but called for the TMDLs to be "adjusted, as appropriate, based on completion of the studies [described in the Order]."[407] The TMDL and Resolution explain that urban runoff including stormwater, agricultural runoff, vessel waste, and natural sources contributed to the exceedance and, thus, the TMDL established WLAs and LAs to assure compliance with water contact recreation and shellfish standards by the compliance deadlines. The TMDL set numeric limits as follows:

> For the protection of the water contact recreation beneficial use, these objectives specify that Newport Bay shall not contain fecal coliform in excess of a 5 sample/month log mean of 200 organisms/100 mL, and not more than 10% of the samples exceed 400 organisms/100 mL for any 30- day period. To protect the shellfish harvesting beneficial use, the Basin Plan also requires that Newport Bay

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[403] Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), page 3.

[404] Exhibit Q (22), Regional Board Resolution 98-101, Sediment TMDL, page 4; Exhibit Q (35), State Water Resources Control Board Approval of Resolution 98-100, Nutrients TMDL.

[405] Exhibit Q (36), TMDL for Fecal Coliform Bacteria in Newport Bay, November 24, 1998, page 6.

[406] Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, page 4.

[407] Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, page 6.

> have a median fecal coliform density of less than 14 MPN (most probable number)/100 mL, and not more than 10% of the samples exceed 43 MPN/100 mL.[408]

The TMDL further required the County of Orange, the Cities of Tustin, Irvine, Costa Mesa, Santa Ana, Orange, Lake Forest and Newport Beach, and the agricultural operators in the Newport Bay watershed to propose plans and reports, including those for routine monitoring to determine compliance with the bacterial quality objectives in Newport Bay, reports to identify and characterize fecal coliform inputs, and a plan for evaluation and source identification monitoring and studies to determine compliance with the WLAs and LAs.[409] The TMDL was approved by OAL and codified at California Code of Regulations, title 23, section 3975, which states the following:

> Regional Board Resolution No. 99-10, adopted on April 9, 1999, by the Santa Ana Regional Water Quality Control Board (SARWQCB), modified the regulatory provisions of the Water Quality Control Plan for the Santa Ana Region by establishing a Total Maximum Daily Load (TMDL) for fecal coliform bacteria discharged in the Newport Bay. The TMDL addresses impairment due to pathogens in Newport Bay in a prioritized, phased approach. Compliance with objectives to protect water contact recreation are to be achieved no later than 14 years after State approval of the TMDL; objectives to protect shellfish harvesting are to be met no later than 20 years after State approval of the TMDL. Concentration-based allocations are assigned for vessel waste, urban runoff, natural sources, and agricultural runoff. The TMDL will be reevaluated and revised, if appropriate, based on monitoring results and relevant studies. These studies include source identification and characterization, development of a bacterial water quality model, a shellfish harvesting and a water contact recreation beneficial use assessment, and evaluation of a vessel waste program. Revision of the TMDL would be considered through the Basin Plan amendment process. Upon completion and consideration of studies and any appropriate Basin Plan amendment, the Regional Board shall adopt a plan for achieving the targets. This plan will use a phased compliance approach with priorities and compliance schedules assigned based on the use and area affected and the nature, magnitude, and timing of violations. The fecal coliform TMDL contains an implicitly incorporated margin of safety by not applying adjustments for dilution, natural die-off, and tidal flushing.[410]

In 2001-2002, U.S. EPA and Regional Board staff evaluated the more recent water quality data to help determine whether TMDLs were needed for each of the toxic pollutants identified in the

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[408] Exhibit Q (36), TMDL for Fecal Coliform Bacteria in Newport Bay, November 24, 1998, page 36; Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, page 1.

[409] Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, pages 12-18.

[410] California Code of Regulations, title 23, section 3975 (Register 99, No. 52).

consent decree. They determined that TMDLs were not needed for arsenic, which was originally identified in the consent decree for Lower Newport Bay.[411]

In 2002, the Regional Board adopted the prior permit, which noted that:

> TMDLs have been developed for sediment and nutrients for San Diego Creek and Newport Bay. A fecal coliform TMDL for Newport Bay has also been established. The WLAs from these TMDLs are included in this order. Dischargers to these water bodies are currently implementing these TMDLs. This order specifies the WLAs and includes requirements for the implementation of these WLAs.[412]

The prior permit required permittees to meet the seasonal target load allocations for nutrients (nitrogen, phosphorus) and sediment for the Newport Bay Watershed by implementing BMPs, in accordance with the 1998 TMDLs adopted by the Regional Board.[413] The prior permit further required that the permittees revise Appendix N of their Drainage Area Management Plan (DAMP) to include implementation measures and schedules for further studies related to the fecal coliform TMDL.[414] The Fact Sheet to the 2002 permit further indicates that "[o]ther TMDLs for the Newport Bay watershed are being developed by the Regional Board (for diazinon, chlorpyrifos and selenium) and U.S. EPA (for legacy pesticides and other metals)."[415] Thus, the prior permit states that the order "may be reopened to include additional requirements based on new or revised TMDLs."[416] In addition, the prior permit:

- Prohibits illegal and illicit non-stormwater discharges from entering into the MS4.[417]
- Prohibits the discharge of stormwater from the MS4 to waters of the United States containing pollutants that have not been reduced to the MEP.[418]

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[411] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, page 4 [Administrative Record on Order No. R8-2009-0030, Part I, page 1217].

[412] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 402-403 [Order No. R8-2002-0010, Finding 19].

[413] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 430-432 [Order No. R8-2002-0010].

[414] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[415] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 460 [Order No. R8-2002-0010, Fact Sheet].

[416] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[417] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 412 [Order No. R8-2002-0010].

[418] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 412 [Order No. R8-2002-0010].

- Requires that discharges from the MS4 shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives).[419]
- Requires that the DAMP (Drainage Area Management Plan) and its components be designed to achieve compliance with receiving water limitations through timely implementation of control measures and BMPs.[420]
- Requires that if permittees continue to cause or contribute to an exceedance of water quality standards, the permittees shall promptly notify and submit a report to the Regional Board that describes the BMPs currently implemented and the additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Once approved, permittees shall revise the DAMP and monitoring program to incorporate the approved modified BMPs, and implement the revised program.[421]
- Requires permittees to demonstrate compliance with the discharge limitations and receiving water limitations through timely implementation of their DAMP. "The DAMP, as included in the Report of Waste Discharge, including any approved amendments thereto, is hereby made an enforceable component of this order." In addition to the requirements in the prior permit and the DAMP, "each permittee shall implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order."[422]
- Requires permittees to comply with the Monitoring and Reporting Program (R8-2002-0010), which is attached to the prior permit.[423] This program required permittees to conduct several types of monitoring, including mass emissions monitoring, in order to determine if the MS4 is contributing to exceedances of water quality objectives or beneficial uses by comparing the results to the CTR, the Basin Plan, the Ocean Plan, or other relevant standards.[424] Dry and wet weather monitoring was required and all samples had to be tested for metals, pesticides, "and constituents which are known to

[419] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[420] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[421] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

[422] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 433 [Order No. R8-2002-0010].

[423] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 434, 441 et seq. [Order No. R8-2002-0010].

[424] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 442 [Order No. R8-2002-0010].

have contributed to impairment of local receiving waters."[425] Monitoring along the coastline and at a minimum of six inland water bodies was also required to test for fecal coliform.[426] The permittees were also required to develop "strategies to evaluate the impact of storm water and non-storm water runoff on all impairments within the Newport Bay watershed and other 303(d) listed bodies."[427] The Monitoring and Reporting Program further states that "[s]ince the 303(d) listing is dynamic, with new waterbodies and new impairments being identified over time, the permittees shall revise their monitoring plan to incorporate new information as it becomes available."[428]

After the 2002 prior permit was adopted, and due to the State failing to timely do so, U.S. EPA, on June 14, 2002, promulgated TMDLs for selenium, metals (cadmium, chromium, copper, lead, mercury, and zinc), and organochlorine compounds (i.e., diazinon and chlorpyrifos, DDT, chlordane, dieldrin, toxaphene, and polychlorinated biphenyls (PCBs)) in Newport Bay and San Diego Creek, as follows:[429]

> EPA is establishing TMDLs for several toxic pollutants which are exceeding applicable State water quality standards: selenium; several heavy metals; and several organic chemicals including modern pesticides (i.e., diazinon and chlorpyrifos) and legacy pesticides (DDT, Chlordane etc.) and polychlorinated biphenyls (PCBs). The pesticide diazinon is being addressed by these TMDLs because the State found that it is associated with significant water toxicity in San Diego Creek and concluded that it should be addressed by EPA concurrent with the similar pesticide chlorpyrifos, which is addressed by the consent decree. These TMDLs are being developed for specific water bodies in the Newport Bay watershed for which available data indicate that water quality is impaired. Table 1-1 lists the specific water bodies and associated pollutants for which TMDLs are being established.

Water Body (Type)	Element/Metal	Organic Compound
San Diego Creek (freshwater)	Cd, Cu, Pb, Se, Zn	Chlorpyrifos, Diazinon, Chlordane, Dieldrin, DDT, PCBs, Toxaphene

[425] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 443 [Order No. R8-2002-0010].

[426] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 444 [Order No. R8-2002-0010].

[427] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[428] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[429] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002 [Administrative Record on Order No. R8-2009-0030, Part I, pages 1213-1515]; Exhibit Q (4), Consent Decree, *Defend the Bay Inc. v. Marcus*, 1997 WL 732512 (United States District Court, Northern District of California), page 3.

Upper Newport Bay (saltwater)	Cd, Cu, Pb, Se, Zn	Chlorpyrifos, Chlordane, DDT, PCBs
Lower Newport Bay (saltwater)	Cd, Pb, Se, Zn	Chlordane, Dieldrin, DDT, PCBs
Rhine Channel, within Lower Newport Bay (saltwater)	Cu, Pb, Se, Zn, Cr, Hg	Chlordane, Dieldrin, DDT, PCBs

Table 1-1 Toxic pollutants per waterbody requiring TMDL development.[430]

The U.S. EPA TMDLs did not include an implementation plan, but did provide recommendations for implementation.[431]

In 2003, the Regional Board adopted a Basin Plan Amendment that incorporated the WLAs identified in the U.S. EPA-promulgated diazinon and chlorpyrifos TMDLs, and an implementation plan to reduce the usage of diazinon and chlorpyrifos by over 90 percent.[432] The Resolution states that before the adoption of the TMDL, the Basin Plan specified narrative water quality objectives for San Diego Creek and Upper Newport Bay "that toxic substances shall not cause adverse impacts on beneficial uses," but that narrative objective was not being achieved.[433] Investigations conducted in San Diego Creek demonstrated that persistent aquatic toxicity is caused largely by diazinon and chlorpyrifos.[434] The Basin Plan provided specific implementation tasks, which included the requirement for the permittees and the agricultural operators in Newport Bay watershed to propose a plan for routine monitoring by January 30, 2004, to determine compliance with the diazinon and chlorpyrifos TMDLs.[435] The 2003 Resolution also states:

> The TMDL [for Diazinon and Chlorpyrifos] allocates wasteloads to all dischargers in the watershed. Since the TMDL is concentration-based, these wasteloads are concentration limits. The concentration limits *will be incorporated into existing and future discharge permits* in the watershed.

[430] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, pages 3-4 [Administrative Record on Order No. R8-2009-0030, Part I].

[431] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, pages 71-76 [Administrative Record on Order No. R8-2009-0030, Part I].

[432] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL, pages 2, 8.

[433] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL page 1.

[434] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL page 1.

[435] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL pages 8-9.

> Compliance schedules would be included in permits only if they are demonstrated to be necessary.[436]

The TMDL "Task Schedule" in the 2003 Basin Plan Amendment states that beginning some time in 2005, "but no later than December 1, 2007," "…NPDES permits will be revised to include the TMDL allocations, as appropriate."[437] The TMDL for diazinon and chlorpyrifos was approved by OAL and codified at California Code of Regulations, title 23, section 3977, which states in relevant part the following:

> Regional Board Resolution No. R8-2003-0039, adopted on April 4, 2003 by the Santa Ana Regional Water Quality Control Board, modified the regulatory provisions of the Water Quality Control Plan [Basin Plan] for the Santa Ana Region by establishing a TMDL for chlorpyrifos in Upper Newport Bay and diazinon and chlorpyrifos in San Diego Creek.
>
> The amendment addresses water quality impairment due to aquatic toxicity caused by the presence of diazinon and chlorpyrifos in runoff to San Diego Creek and Upper Newport Bay. The amendment establishes load and wasteload allocations for San Diego Creek as listed in Table 1.
>
> [¶] [Table 1 omitted.]
>
> The amendment includes an implementation plan that specifies completion of the following four tasks by stakeholders in the watershed and by the Regional Board:
>
> (1) Revision of WDR and NPDES discharge permits to include the TMDL allocations;
>
> (2) Implementation of monitoring program by the stakeholders in the watershed for diazinon and chlorpyrifos;
>
> (3) Development of a pesticide runoff management plan by the Regional Board and the stakeholders in the watershed;
>
> (4) Special Studies: the Regional Board will lead studies into the significance of chlorpyrifos atmospheric deposition for Upper Newport Bay and the adequacy of the freshwater allocations for San Diego Creek to protect Upper Newport Bay.[438]

It is not evident from the record of this Test Claim or from other documents publicly available that any of the other 2002 U.S. EPA-promulgated TMDLs for metals, selenium, or

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[436] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL page 8 (emphasis added).

[437] Exhibit Q (24), Regional Board Resolution No R8-2003-0039, Diazinon and Chlorpyrifos TMDL page 8.

[438] California Code of Regulations, title 23, section 3977 (Register 2004, No. 2.)

organochlorine compounds were incorporated in Basin Plan Amendments prior to the adoption of the test claim permit.[439]

In 2007, the Regional Board adopted TMDLs and an implementation plan for organochlorine compounds, which were intended to supplant the 2002 U.S. EPA TMDLs.[440] The Regional Board had "reassessed USEPA's impairment decisions" and found no impairment due to chlordane or PCBs in San Diego Creek, and therefore issued only "Informational TMDLs" for those pollutants, which are not enforceable.[441] The 2007 Order also eliminated the limitation on dieldrin for Lower Newport Bay, finding no impairment anywhere in the watershed.[442] That 2007 Order was never submitted to the State Board or the OAL for approval, however, and was later supplanted by a Basin Plan Amendment adopted in 2011 (after the test claim permit was adopted), which found no impairment for dieldrin in any of the waters, and no impairment for chlordane or PCBs in San Diego Creek and its tributaries.[443] The 2011 Basin Plan Amendment for organochlorine compounds also provided for WLAs approximately three times higher than the U.S. EPA's 2002 Toxics TMDLs, based on subsequent information.[444] That 2011 Resolution was ultimately approved by the State Board on October 16, 2012, and by OAL on July 26, 2013.[445]

Also in 2007, U.S. EPA adopted TMDLs for metals and selenium in the San Gabriel River and its tributaries.[446] The San Gabriel River watershed lies largely within the jurisdiction of the Los Angeles Regional Board, except the upper portion of Coyote Creek and a portion of the

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[439] However, the 2007 Regional Board-adopted organochlorine compounds TMDLs were adopted within a 2011 Basin Plan Amendment, and the 2002 U.S. EPA-promulgated selenium TMDL has been replaced by a Regional Board-adopted Basin Plan Amendment as of August 4, 2017. (See Exhibit Q (31), Santa Ana Basin Plan, Chapter 5, revised February 2016. pp. 166-199 [citing Resolution R8-2011-0037]; Exhibit Q (28), Regional Board Resolution R8-2017-0014, Selenium TMDL.)

[440] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 340-341 [Order No. R8-2009-0030].

[441] See Exhibit Q (29), Regional Board Staff Report on Organochlorine Compounds Revised TMDLs, July 15, 2011, page 2.

[442] See Exhibit Q (25), Regional Board Resolution No. R8-2007-0024, Attachment 2, Organochlorine Compounds TMDLs, page 1.

[443] Exhibit Q (27), Regional Board Resolution No. R8-2011-0037, Attachment 2, Organochlorine Compounds TMDLs, page 1.

[444] Exhibit Q (27), Regional Board Resolution No. R8-2011-0037, Attachment 2, Organochlorine Compounds TMDLs, page 7.

[445] Exhibit Q (33), State Water Resources Control Board Resolution No. 2012-0051, Organochlorine Compounds (OAL Approval 07/26/2013; Cal. Code Regs., tit. 23, § 3979.6 [Register 2013, No. 30]).

[446] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007.

watershed draining to the estuary lie within the jurisdiction of the Santa Ana Regional Board.[447] Segments of the San Gabriel River and its tributaries exceed water quality objectives for copper, lead, selenium, and zinc.[448] Wet and dry weather numeric targets were established for metals and are based on CTR criteria:

> Numeric targets for the TMDL are based on CTR criteria. As stated in section 2.1.2, CTR criteria are expressed as dissolved metals because dissolved metals more closely approximate the bioavailable fraction of metals in the water column. However, sources of metals loading to the watershed include metals associated with particulate matter. Once discharged to the river, particulate metals could dissolve, causing the criteria to be exceeded. The TMDL targets, and resulting waste load allocations, are expressed in terms of total recoverable metals to address the potential for dissolution of particulate metals in the receiving water. Attainment of numeric targets expressed as total recoverable metals will ensure attainment of the dissolved CTR criteria.
>
> Separate numeric targets are developed for dry and wet weather because hardness values and the fractionation between total recoverable and dissolved metals vary between dry and wet weather. As in other TMDLs (e.g., the Los Angeles River Metals TMDL), the distinction between wet and dry weather is operationally defined as the 90th percentile flow in the river. Because separate wet-weather TMDLs are required for San Gabriel Reach 2 and Coyote Creek, the distinction between wet- and dry-weather is separately defined for these two reaches.[449]

WLAs for metals and selenium were established for Publicly Owned Treatment Works (POTWs), municipal stormwater, industrial stormwater, and construction stormwater in the 2007 TMDL.[450]

c. The Test Claim Permit imposes requirements to comply with the WLAs identified in the TMDLs for metals, organochlorine compounds, selenium, fecal coliform, and pesticides in San Diego Creek, Lower Newport Bay, San Gabriel River, and Coyote Creek.

Finding 31 of the test claim permit indicates that the permittees have conducted urban runoff and receiving water monitoring as required under the first, second and third term permits. The third term, or prior permit, required monitoring using a wide array of methods to assess impacts caused by pollutants in urban runoff. In addition to monitoring the water column under wet and

[447] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007, page 25.

[448] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007, page 6.

[449] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007, page 22.

[450] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007, pages 43-49.

dry weather conditions, the permittees were required to monitor water column toxicity, mass emission rates, estuaries and wetlands including sediment and benthic monitoring, bacteriological/pathogen concentrations and bioassessment analysis. These monitoring programs indicated exceedances of the Basin Plan and the CTR for a number of constituents, and exceedances of the public health and safety standards for total coliform, fecal coliform, and Enterococci bacteria in receiving waters adjacent to public beaches and public water contact sport areas.[451, 452]

Finding 52 explains that the test claim permit requires the permittees to comply with the TMDL WLAs by implementing necessary BMPs and continued monitoring:

> This order requires permittees to comply with established TMDL wasteload allocations specified for urban runoff and/or storm water by implementing the necessary BMPs. NPDES regulations at 40 CFR 122.44(d)(vii)(B) require that permits be consistent with wasteload allocations approved by U.S. EPA. This order requires the permittees to comply with the urban runoff/storm water wasteload allocations specified in (1) Regional Board-adopted and USEPA approved TMDLs (including TMDLs for nutrients, fecal coliform, diazinon and chlorpyrifos); (2) Regional Board-adopted TMDLs that are approved by the State Board and State Office of Administrative Law and that are thereby effective (approval of organochlorine compounds TMDLs by the State is pending); and, (3) USEPA-promulgated TMDLs (including toxics TMDLs for the Newport watershed). Continuation of water quality/biota monitoring and analysis of the data are essential to better understand the impacts of storm water discharges on the water quality of the receiving waters, impairment caused by urban runoff,

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[451] See Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 281-282 [Order No. R8-2009-0030].

[452] For example, AB 411 violations, which refers to Health and Safety Code section 115880 (Stats. 1997, ch. 765 (AB 411)). Section 115880 required the Department of Health Services (DHS) to amend its regulations to (1) require the testing of waters adjacent to public beaches for microbiological contaminants, including total coliform, fecal coliform, and Enterococci bacteria; (2) require weekly monitoring of beaches with storm drains that discharge during dry weather and visited by more than 50,000 people per year from April 1 through October 31 by the local health officer or environmental health agency; and (3) establish protective minimum standards for total coliform, fecal coliform and Enterococci bacteria. DHS adopted the minimum protective bacteriological standards for receiving waters adjacent to public beaches and public water contact sport areas, which are codified at California Code of Regulations, title 17, section 7958 (Register 99, Nos. 31, 49). The regulations further provide that "[i]n order to determine that the bacteriological standards specified in 7958 above are being met in a water-contact sports area designated by a Regional Water Quality Control Board in waters affected by a waste discharge, water samples shall be collected at such sampling stations and at such frequencies as may be specified by said board in its waste discharge requirements." (Cal. Code Regs., tit. 17, § 7959(a).)

compliance with the wasteload allocations and for assessing the effectiveness of control measures.[453]

Sections XVIII.B.1 through 3 summarize the background of the TMDLs adopted and that the Regional Board is working on replacement TMDLs. These sections do not impose any activities on the claimants.[454]

Section XVIII.B.4 of the test claim permit and Tables 1 A/B/C, 2 A/B/C/D, and 3 require permittees in the Newport Watershed to comply with the WLAs established in the 2002 U.S. EPA-promulgated TMDLs for metals (cadmium, copper, lead, zinc, mercury, and chromium) in San Diego Creek, Newport Bay, and the Rhine Channel; and organochlorine compounds (DDT, chlordane, dieldrin, PCBs, and toxaphene) in San Diego Creek, Upper and Lower Newport Bay, and the Rhine Channel.[455] Section XVIII.B.4 also addresses compliance with the WLAs adopted by U.S. EPA for selenium in San Diego Creek,[456] and since section XVIII.8 also addresses that TMDL, those two sections are also discussed further below. These U.S. EPA-promulgated TMDLs were established pursuant to the consent decree in 2002, after the prior permit was approved, and were technical TMDLs that did not include implementation plans or compliance schedules.[457] The test claim permit now requires permittees to comply with the WLAs in those TMDLs by monitoring within the receiving waters, and reevaluating current BMPs or proposing new BMPs if an exceedance occurs, as described in section XVIII.E. of the permit. Section XVIII.E. ("Compliance Determination with TMDLs and BMP Implementation") states the following:

1. Except for sediment TMDLs in San Diego Creek and Newport Bay, compliance determinations shall be based on monitoring within the receiving waters. For sediment TMDLs, compliance determination shall be based on monitoring in the Creek.
2. Based on the TMDLs, effluent limits have been specified to ensure consistency with the wasteload allocations. If the monitoring results indicate an exceedance of the

[453] See Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 281-282 [Order No. R8-2009-0030].

[454] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 338 [Order No. R8-2009-0030].

[455] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 338-340 [Order No. R8-2009-0030]; see also, Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, pages 38 ,42, 47, 49, 59-60, 67 [Administrative Record on Order No. R8-2009-0030, Part I], which identify the WLAs for urban runoff for these pollutants that were incorporated into Section XVIII.B.4, Tables 1 A/B/C, 2 A/B/C/D, and 3, of the test claim permit.

[456] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 340 [Order No. R8-2009-0030].

[457] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 338 [Order No. R8-2009-0030].

> wasteload allocations, the permittees shall reevaluate the current control measures and propose additional BMPs/control measures. This reevaluation and proposal for revisions to the current BMPs/control measures (revised plan) shall be submitted to the Executive Officer within 12 months of determining that an exceedance has occurred. Upon approval, the permittees shall immediately start implementation of the revised plan.[458]

The Monitoring and Reporting program is attached to the test claim permit and states that "permittees *shall continue* to implement the 2003 Monitoring Program. The permittees shall review the 2003 Monitoring Program on an annual basis and determine the need for any modifications to the program."[459]

Sections XVIII.B.7 and XVIII.B.8 discuss the transition from the U.S. EPA TMDLs for metals and selenium to replacement TMDLs developed by the Regional Board. Section XVIII.B.7 states that Regional Board staff, in collaboration with stakeholders, is developing TMDLs for metals and selenium, which will include implementation plans and monitoring programs, that are intended to replace the U.S. EPA TMDLs. Section XVIII.B.7 then requires permittees within the Newport Bay watershed to "continue to participate in the development and implementation of these TMDLs."[460] The plain language that the permittees rely on, "shall continue," suggests that participating in the development and implementation of the TMDLs for metals and selenium is not new. The claimants are already required to provide their monitoring and reporting data under the prior permit and under federal regulations generally.[461] To the extent "continue to participate" means continue to provide monitoring data so that accurate and attainable TMDLs and WLAs can be developed, the test claim permit does not impose a new requirement. Moreover, the claimants' narrative does not illuminate exactly what "participate in the development" of TMDLs means, if anything more. Accordingly, there is no evidence in the record or the permit that the activity of continuing to "participate in the development and implementation" of TMDLs for metals and selenium to supplant the 2002 U.S. EPA-promulgated TMDLs constitutes a new requirement of the test claim permit.

Section XVIII.B.8 addresses selenium in the San Diego Creek and Newport Bay, and states the following:

> Selenium is a naturally occurring element in the soil but its presence in surface waters in the Newport Bay watershed is largely the result of changes in the hydrologic regime as the result of extensive drainage modifications. Selenium-

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[458] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 349 (Order No. R8-2009-0030].

[459] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 358-359 [Order No. R8-2009-0030]. (Emphasis added.)

[460] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 342 [Order No. R8-2009-0030].

[461] See, e.g., Code of Federal Regulations, title 40, sections 122.44, 122.48; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 446 [Order No. R8-2002-0010].

> laden shallow and rising groundwater enters the storm water conveyance systems and flows into San Diego Creek and its tributaries. Groundwater inputs are the major source of selenium in San Diego Creek and Newport Bay. Currently, there are no economically and technically feasible treatment technique to remove selenium from the water column. The stakeholders have initiated pilot studies to determine the most efficient methods for treatment and removal of selenium. Through the Nitrogen and Selenium Management Program, the watershed stakeholders are developing comprehensive selenium (and nitrogen) management plans, which are expected to form the basis, at least in part, for the selenium implementation plan (and a revised nutrient TMDL implementation plan). A collaborative watershed approach to implement the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay is expected. *A proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan must be submitted by the stakeholders covered by this order within 24 months of adoption of this order, or one month after approval of the selenium TMDLs by OAL, whichever is later*. The Program must be implemented upon Regional Board approval. *As long as the stakeholders are participating in and implementing the approved Cooperative Watershed Program, they will not be in violation of this order with respect to the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay*. In the event that any of the stakeholders does not participate, or if the collaborative approach is not approved or fails to achieve the TMDLs, the Regional Board will exercise its option to issue individual waste discharge requirements or waivers of waste discharge requirements.[462]

As indicated above, U.S. EPA adopted a selenium TMDL in 2002 for San Diego Creek and Newport Bay based on the selenium criterion specified in the CTR, but that TMDL did not have an implementation plan.[463] On December 20, 2004, before the test claim permit was adopted, the Regional Board adopted Order No. R8-2004-0021, which is a general waste discharge permit that specifies interim performance-based and final numeric effluent limitations for selenium for short-term groundwater-related discharges in response to the 2002 U.S. EPA TMDL.[464] Dischargers subject to Order R8-2004-0021 agreed to form a working group, and committed to fund and participate in a work plan.[465] The claimants' 2006 ROWD confirms that the Nitrogen and Selenium Management Program was launched by a group of watershed stakeholders in response to Order No. R8-2004-0021.[466] The work plan was intended to develop a

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[462] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 342-343 [Order No. R8-2009-0030], emphasis added.

[463] Exhibit Q (38), U.S. EPA, Newport Bay Toxics TMDLs, June 14, 2002, pages 3-4 [Administrative Record on Order No. R8-2009-0030, Part I]; Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 7.

[464] Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 8.

[465] Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 9.

[466] Exhibit Q (18), Orange County ROWD, July 21, 2006, pages 169-170.

comprehensive understanding of and management plan for selenium to assist the Regional Board in developing an implementation plan for the TMDL as follows:

> As discussed above, certain of dischargers subject to this Order have agreed to form a Working Group and have committed to fund and participate in a Work Plan. The Work Plan is intended to develop a comprehensive understanding of and management plan for selenium, as well as nitrogen, discharges to surface waters within the Newport Bay watershed that result from groundwater-related inflows. This work is expected to assist the Regional Board in refining the TMDL and in developing a TMDL implementation plan by identifying appropriate selenium load and wasteload allocations for the several categories of groundwater-related inflows, and by developing a recommended offset, trading or mitigation program. As such, the Work Plan goes beyond issues related to the short-term groundwater-related discharges regulated by this Order. In addition, the Working Group has committed to perform studies necessary to develop a selenium site-specific objective, if appropriate, based on the outcome of other Work Plan elements.[467]

The components of the Work Plan "committed to by the Working Group" include monitoring, assessment of selenium sources in the watershed, and identifying and assessing selenium BMPs.[468]

Finding 46 of the test claim permit then states that "It is expected that the implementation plan will include the opportunity for an adaptive, collaborative approach by stakeholders in the watershed to address selenium and nitrogen in comprehensive and efficient fashion. This approach may be implemented through a cooperative agreement or, alternatively, through waste discharge requirements or a conditional waiver of waste discharge requirements."[469]

The claimants argue that section XVIII.B.8 requires the permittees to establish a "Cooperative Watershed Program" to meet the requirements of a Selenium TMDL Implementation Plan, and thereafter implement the cooperative program.[470]

The Water Boards contend that the development and implementation of the Cooperative Watershed Program specified in section XVIII.B.8 does not impose any requirements on the permittees, but rather was included as an option at the urging of the claimants "to effectively deploy limited resources during the development and approval of replacement TMDLs for

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[467] Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 9; see also, Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 286 [Order No. R8-2009-0030, Finding 46].

[468] Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 9.

[469] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 286 [Order No. R8-2009-0030, Finding 46].

[470] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 78.

nitrogen and selenium."[471] The Water Boards point to earlier comments filed by the Regional Board, which state:

> . . . . during permit development, some Claimants voiced concerns that if the Permit incorporated the WLAs for selenium contained in the U.S. EPA as numeric effluent limitations, Claimants would be required to develop and implement control strategies for complying with the WLAs and at the same time continue to participate in the development of a replacement TMDL that would likely contain very different BMPs. [Footnote omitted.] The Santa Ana Water Board found this argument persuasive in terms of allocating funds most efficiently for water quality-related activities. Accordingly, the Santa Ana Water Board expressly did not require compliance with the existing WLAs for selenium as numeric effluent limitations as long as the Claimants were "participating in and implementing the approved Cooperative Watershed Program." This is an example of a particularly complex impairment problem, which is why the U.S. EPA 2010 Memorandum recognized the need for flexibility in establishing permit requirements derived from WLAs. Claimants now challenge this provision, included at Claimants' urging, that allows them to continue efforts to develop a TMDL to replace the 2002 U.S. EPA TMDL without simultaneously expending funds to implement BMPs that will likely become obsolete if/when a revised TMDL is adopted and approved by U.S. EPA. [Footnote omitted.][472]

The Water Boards also contend that "because claimants can choose whether to comply with the Section XVIII.B.4 WLAs through the process set forth in Section XVIII.E or through participation in the development of the Cooperative Watershed Program, the test claim permit does not require compliance solely in accordance with Section XVIII.E. Therefore, the test claim permit contains no requirement to comply with the WLAs in accordance with Section XVIII.E. of the test claim permit."[473]

The Water Boards' comments suggest that the claimants specifically requested a cooperative program when implementing the selenium TMDL and, thus, section XVIII.B.8 should be denied. Government Code section 17556(a) does provide an exception to a finding of costs mandated by the state and, thus, no reimbursement under article XIII B, section 6 is required when "[t]he claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority." However, section 17556(a) requires evidence in the record of that request in the form of "[a] resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the

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[471] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, page 2.

[472] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 31.

[473] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, page 4.

meaning of this subdivision." The Water Boards have not submitted any evidence as required by Government Code section 17556(a) to support the assertion that the claimants requested the activities required by section XVIII.B.8.

Rather, the record shows that the claimants agreed to form a working group under Order R8-2004-0021 (the general waste discharge permit that specifies interim performance-based and final numeric effluent limitations for selenium for short-term groundwater-related discharges in response to the 2002 U.S. EPA TMDL), and develop a work plan to collect data, assess selenium sources and selenium BMPs that could be applied in the watershed to help the Regional Board develop an implementation plan for the selenium TMDL.[474] The work plan was approved by the executive officer of the Regional Board before the adoption of the test claim permit.[475] Although the information gathered from the work plan may lay the foundation for developing a "Cooperative Watershed Program," there's no discussion in the claimants' ROWD or in Order No. R8-2004-0021 that the claimants would develop a "Cooperative Watershed Program."

The plain language of the test claim permit shows that the requirement to submit the Cooperative Watershed Program is not optional, as suggested by the Water Boards: "A proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan *must* be submitted by the stakeholders covered by this order within 24 months of adoption of this order, or one month after approval of the selenium TMDLs by OAL, whichever is later."[476]

Pursuant to Water Code section 15, the word "shall" imposes a mandatory duty, while the word "may" is permissive. The Water Code does not define "must." However, the primary rule of statutory interpretation is that the words are to be given their plain and ordinary meaning.

> In the first step of the interpretive process we look to the words of the statute themselves. [Citations.] The Legislature's chosen language is the most reliable indicator of its intent because ' "it is the language of the statute itself that has successfully braved the legislative gauntlet." ' [Citation.] We give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning.[477]

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[474] Exhibit Q (11), Fact Sheet and Order No. R8-2004-0021, December 20, 2004, page 9; Exhibit Q (18), Orange County ROWD, July 21, 2006, page 170.

[475] Exhibit Q (18), Orange County ROWD, July 21, 2006, pages 169-170 ("Over the five year permit, the NSMP working group is implementing a comprehensive work plan focusing on developing watershed based management strategies for groundwater of selenium and nitrogen in the Newport Bay watershed. This work plan has been approved by the Executive Officer of the Santa Ana Regional Board ….").

[476] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 342-343 [Order No. R8-2009-0030].

[477] *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082–1083.

The courts have found that the ordinary meaning of 'shall' or 'must' is typically of mandatory effect and, thus, the word "must" in Section XVIII.B.8 indicates that the permit is imposing a requirement on the claimants to submit a proposed Cooperative Watershed Program.[478]

Thus, even if the claimants were working to develop a cooperative program before the adoption of the test claim permit, the requirement to submit the proposed "Cooperative Watershed Program" to the Regional Board is now required by the test claim permit. Pursuant to Government Code section 17565, "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Before the Cooperative Watershed Program is approved, the claimants are required to comply with the WLAs in the U.S. EPA TMDL for selenium pursuant to Section XVIII.B.4 of the test claim permit by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance occurs in accordance with Section XVIII.E.[479]

Once the Cooperative Watershed Program is approved, Section XVIII.B.8 states, on the one hand, that the program "must be implemented" to avoid any "violation of this order with respect to the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay," but also acknowledges that "[i]n the event that any of the stakeholders does not participate, . . . the Regional Board will exercise its option to issue individual waste discharge requirements or waivers of waste discharge requirements."[480] Based on this language, the claimants have the option of complying with the Cooperative Watershed Program, or performing the activities individually by complying with the WLAs for selenium pursuant to Section XVIII.B.4 of the test claim permit. The claimants are not required to incur costs to comply with both Section XVIII.B.4 and Section XVIII.B.8 after the Cooperative Watershed Program is approved. Although these two compliance choices are provided, the claimants do not have an option to do nothing. The permit clearly requires that they comply with one or the other in order to meet the water quality standards for selenium, and it is expected that the claimants would choose to implement and comply with the Cooperative Watershed Program since, as the Water Boards state, that option does "not require compliance with the existing WLAs for selenium as numeric effluent limitations as long as the Claimants were 'participating in and implementing the approved Cooperative Watershed Program.'"[481]

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[478] *California Teachers Assn v. Governing Board* (1977) 70 Cal.App.3d 833, 842.

[479] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 340 [Order No. R8-2009-0030].

[480] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 342-343 [Order No. R8-2009-0030].

[481] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 31; Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, page 2.

Under either option, the claimants (either through cooperative agreements, as indicated in the test claim permit findings,[482] or individually) are required to monitor for selenium, reevaluate current BMPs or propose new BMPs if an exceedance occurs. Federal law requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit and implement BMPs to control the pollutants.[483] In addition Section XVIII.E. of the test claim permit, which is expressly identified in Section XVIII.B.4, requires compliance with the TMDLs by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance occurs. Again, section XVIII.E. states the following:

> 1. Except for sediment TMDLs in San Diego Creek and Newport Bay, compliance determinations shall be based on monitoring within the receiving waters. For sediment TMDLs, compliance determination shall be based on monitoring in the Creek.
>
> 2. Based on the TMDLs, effluent limits have been specified to ensure consistency with the wasteload allocations. If the monitoring results indicate an exceedance of the wasteload allocations, the permittees shall reevaluate the current control measures and propose additional BMPs/control measures. This reevaluation and proposal for revisions to the current BMPs/control measures (revised plan) shall be submitted to the Executive Officer within 12 months of determining that an exceedance has occurred. Upon approval, the permittees shall immediately start implementation of the revised plan.[484]

Thus, the Commission finds that section XVIII.B.8 of test claim permit requires the following:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan within 24 months of adoption of this order, or one month after approval of the selenium TMDLs by OAL, whichever is later.
- Until the Cooperative Watershed Program is approved, the claimants are required to comply with the WLAs established by U.S. EPA's TMDL for selenium in Section

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[482] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 286 [Order No. R8-2009-0030, Finding 46].

[483] 33 United States Code section 1342(p)(3)(B)(iii) 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 State determines appropriate for the control of such pollutants." (Emphasis added.) See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[484] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 349 [Order No. R8-2009-0030].

XVIII.B.4 of the test claim permit, by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance occurs in accordance with section XVIII.E.

- After the Cooperative Watershed Program is approved, the claimants may either comply with the approved cooperative program or individually comply with the WLAs established by U.S. EPA's TMDL for selenium in Section XVIII.B.4 of the test claim permit, by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance.

Section XVIII.B.5 states that the Regional Board adopted TMDLs in 2007, including an implementation plan, to replace the U.S. EPA-promulgated TMDLs for organochlorine compounds, and that those TMDLs are pending approval by the State Board, OAL, and U.S. EPA.[485] The provision states that "*upon approval* of the Regional Board-adopted organochlorine compounds TMDLs by the State Board and the Office of Administrative Law, the permittees shall comply with both the EPA wasteload allocations specified in Tables 2 A/B/C/D [as required by Section XVIII.B.4] and the Regional Board wasteload allocations in Table 4, respectively."[486] In accordance with the Regional Board TMDLs, compliance with the allocations specified in Table 4 shall be achieved as soon as possible but no later than December 31, 2015.[487] "Upon approval of the Regional Board-approved organochlorine compounds TMDLs by EPA, the applicable wasteload allocations shall be those specified in Table 4."[488] Although Section XVIII.B.5 requires compliance with Table 4 (which incorporates WLAs from the 2007 Regional Board-adopted TMDLs), the plain language of the Section XVIII.B.5 indicates that the 2007 Regional Board-adopted TMDLs had not yet been submitted for approval by the State Board and OAL,[489] and therefore this provision had no force and effect at the time it was adopted. More importantly, the 2007 Regional Board-adopted TMDLs were in fact *never* submitted for approval as adopted; instead, they were amended in 2011, with WLAs that were substantially higher than those adopted in 2007 and stated in Table 4 of the test claim

[485] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 340-341 [Order No. R8-2009-0030]. See also, Exhibit Q (25), Regional Board Resolution No. R8-2007-0024, Attachment 2, Final Basin Plan Amendment, September 7, 2007.

[486] The 2007 Organochlorine Chlorine TMDLs were revised by Regional Board Resolution No. R8-2011-0037, and approved by the State Board on October 16, 2012 and by OAL on July 26, 2013. (Exhibit Q (26), Regional Board Resolution R8-2011-0037, Organochlorine Compounds TMDL.)

[487] A later Order, not at issue in this claim, Regional Board Resolution No. R8-2011-0037, extends the compliance deadline to seven years after OAL approval of the order. Exhibit Q (27), Regional Board Resolution No. R8-2011-0037, Attachment 2, Organochlorine Compounds TMDLs, page 6.

[488] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 340-341 [Order No. R8-2009-0030].

[489] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 340 [Order No. R8-2009-0030].

permit.[490] Accordingly, section XVIII.B.5, which requires compliance with Table 4 (which incorporates WLAs from the 2007 Regional Board-adopted TMDLs that were never submitted for approval), never took effect, and does not constitute a required activity.

Section XVIII.B.9 of the test claim permit requires permittees with discharges tributary to the San Gabriel River or Coyote Creek to develop and implement a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, until a TMDL implementation plan is developed.[491] The constituent specific source control plan "shall be designed to ensure compliance" with WLAs for dry and wet weather, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. The source control plan shall include a monitoring program and shall be completed within 12 months from the date of adoption of the test claim permit. In addition, as with all TMDLs in the permit except for sediment, the claimants are required to comply with Section XVIII.E. to reevaluate the current BMPS and control measures and propose additional BMPs, and if approved implement the revised BMP plan, if the monitoring results indicate an exceedance of the WLAs.

The constituent source control plan was not included in the record for this claim. However, the Orange County ROWD dated October 3, 2013, explains the County of Orange initiated the development of the "Source Control Plan and Monitoring Program" to comply with the metals TMDL, which was finalized in June 2010, and began monthly monitoring of six sites for total and dissolved metals on behalf of the watershed cities as follows:

> The San Gabriel River and Impaired Tributaries TMDLs (Coyote Creek Metals TMDL) established mass-based WLAs for total copper, total lead, and total zinc in wet weather and total copper in dry weather. The TMDLs were established for the Los Angeles Region since most of the San Gabriel River watershed lies within that region, but 54% of the Coyote Creek watershed lies in Orange County within the jurisdictional boundary of the Santa Ana Regional Board. While the Los Angeles Regional Board has no jurisdiction over portions of Coyote Creek within Orange County, the Santa Ana Regional Board deferred to the findings of Los Angeles Regional Board and incorporated some TMDL requirements into the Orange County MS4 Permit, particularly the development of a Source Control Plan and Monitoring Program (SCP).
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> In 2009, the County initiated SCP development. A Work Group was convened, consisting of the County and the cities of Anaheim, Brea, Buena Park, Cypress, Fullerton, La Habra, La Palma, Los Alamitos, Placentia, and Seal Beach

[490] Exhibit Q (27), Regional Board Resolution No. R8-2011-0037, Attachment 2, Organochlorine Compounds TMDLs, page 7 [Reflecting WLAs for DDT, Toxaphene, Chlordane and PCBs that are approximately three times greater (in grams per year) than those stated in Table 4 (Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 341 [Order No. R8-2009-0030)].

[491] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030]. See also, Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 27, 2007.

(watershed cities), to help guide SCP development. The SCP was finalized and approved by the Work Group in June 2010.

In July 2010, the County initiated monitoring activities under the SCP on behalf of the watershed cities. Since then, a total of six sites have been monitored monthly for total and dissolved metals, hardness, and other parameters. These sites will continue to be monitored to establish baseline water quality conditions in the watershed.[492] In addition, a 2021 newsletter issued by the Orange County Stormwater Program, indicates that the Source Control Plan found that vehicle brake pads were a significant source of copper, and that due to legislation that phased out copper in brake pads by 2025, and routine BMPs (street sweeping, catch basin cleaning), copper loading decreased during dry weather, along with wet weather lead and zinc levels.[493]

Section XVIII.C.1 requires permittees to comply with the WLAs for fecal coliform adopted in the 1999 TMDL in accordance with Tables 8A and 8B to protect waters designated for contract recreation and shellfish by the 2013 and 2019 deadlines, as follows:

> The Regional Board adopted a TMDL implementation plan for fecal coliform bacteria in Newport Bay that included a compliance date for water contact recreation standards no later than December 30, 2013 (within the permit term), and with shellfish standards no later than December 30, 2019. The allocations are shown in the tables below. The permittees shall comply with the wasteload allocations for urban runoff in Tables 8A and 8B in accordance with the deadlines in Tables 8A and 8B. Compliance determination for fecal coliform shall be based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay. (The permittees may use the current sampling locations for compliance determination.)[494]

Table 8A identifies the WLA for urban runoff with respect to fecal coliform in waters designated for contact recreation, which must be achieved no later than December 30, 2013. The WLA for urban runoff is based on monitoring conducted at representative sampling locations, and limits fecal coliform as follows: five samples for any 30-day period shall not exceed a geometric mean of 200/100 ml of fecal coliform, and not more than 10 percent of the total samples during any 30-day period shall exceed 400/100 ml of fecal coliform. This is the same WLA identified in the fecal coliform TMDL.[495]

Table 8B identifies the WLA for urban runoff with respect to fecal coliform in waters designated for shellfish, which must be achieved no later than December 30, 2019. The WLA is based on

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[492] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 134.

[493] Exhibit Q (46), *Watershed Appreciation - Get to Know the Coyote Creek Watershed*, Orange County Stormwater Program, dated September 30, 2021, page 6, https://h2oc.org/blog/coyote-creek/ (accessed November 20, 2022).

[494] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 344-345 [Order No. R8-2009-0030].

[495] Exhibit Q (36), TMDL for Fecal Coliform Bacteria in Newport Bay, November 24, 1998, page 36; Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, page 1.

monitoring conducted at representative sampling locations, and limits fecal coliform as follows: monthly median of less than 14 MPN/100 ml of fecal coliform, and not more than ten percent of the total samples to exceed 43 MPN/100 ml of fecal coliform. This is the same WLA identified in the fecal coliform TMDL.[496]

As explained in Section XVIII.E., compliance with the fecal coliform TMDL requires that if the monitoring results indicate an exceedance of the WLAs in Section XVIII.C.1, the permittees shall reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan.

And finally, Section XVIII.D.1 requires permittees in the Newport Bay Watershed to comply with the WLAs in Tables 9A and 9B for pesticides (diazinon and chlorpyrifos in San Diego Creek and chlorpyrifos in Upper Newport Bay).[497] As described above, the 2002 U.S. EPA-promulgated TMDLs included WLAs for diazinon and chlorpyrifos, and those TMDLs were incorporated in a 2003 Basin Plan Amendment, which stated that NPDES permits would be revised to include the WLAs for diazinon and chlorpyrifos.[498] Section XVIII.D.1 and Tables 9A and 9B now require permittees to comply with the WLAs in those TMDLs by monitoring conducted at the representative monitoring stations within San Diego Creek and Upper Newport Bay, and if the monitoring results indicate an exceedance of the WLAs in Section XVIII.D.1, the permittees shall reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan. "[T]he permittees may use current monitoring locations for this purpose."[499]

Accordingly, the test claim permit includes the following requirements to comply with the WLAs identified in the TMDLs:

- Comply with the WLAs specified in the 2002 U.S. EPA-promulgated TMDLs and in Tables 1 A/B/C, 2 A/B/C/D, and 3, for metals (cadmium, copper, lead, zinc, mercury, and chromium) in San Diego Creek, Newport Bay, and the Rhine Channel, and organochlorine compounds (DDT, chlordane, dieldrin, PCBs, and toxaphene) in San Diego Creek, Upper and Lower Newport Bay, and the Rhine Channel by monitoring within the receiving waters, and if the monitoring results indicate an exceedance of the WLAs, reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan. (Order No. R8-2009-0030, Section XVIII.B.4.)
- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the implementation plan for the 2002 U.S. EPA selenium TMDL within

[496] Exhibit Q (36), TMDL for Fecal Coliform Bacteria in Newport Bay, November 24, 1998, page 36; Exhibit Q (23), Regional Board Resolution No. 99-10, Fecal Coliform TMDL, page 1.

[497] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 346 [Order No. R8-2009-0030].

[498] Exhibit Q (24), Regional Board Resolution No. R8-2003-0039, Diazinon and Chlorpyrifos TMDL.

[499] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 346 [Order No. R8-2009-0030].

24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Order No. R8-2009-0030, Section XVIII.B.8.)

- Until the Cooperative Watershed Program is approved, comply with the WLAs in Section XVIII.B.4 of the test claim permit (2002 U.S. EPA TMDL on selenium), by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance occurs. (Order No. R8-2009-0030, Sections XVIII.B.4, XVIII.B.8.)
- After the Cooperative Watershed Program is approved, either comply with the approved cooperative program or individually comply with the WLAs established by the 2002 U.S. EPA TMDL for selenium in Section XVIII.B.4 of the test claim permit, by monitoring, reevaluating current BMPs or proposing new BMPs if an exceedance. (Order No. R8-2009-0030, Section XVIII.B.8.)
- Permittees with discharges tributary to the San Gabriel River or Coyote Creek shall develop and implement a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, until a TMDL implementation plan is developed. The constituent specific source control plan "shall be designed to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. The source control plan shall include a monitoring program and shall be completed within 12 months from the date of adoption of the test claim permit. If the monitoring results indicate an exceedance of the WLAs, reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan. (Order No. R8-2009-0030, Section XVIII.B.9.)
- Comply with the WLAs for urban runoff in Tables 8A and 8B for fecal coliform by December 30, 2013 to protect water contact recreation standards, and by December 30, 2019 to protect shellfish standards. Compliance shall be based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay. The permittees may use the current sampling locations for compliance determination. If the monitoring results indicate an exceedance of the WLAs, reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan. (Order No. R8-2009-0030, Section XVIII.C.1.)
- Comply with the WLAs in Tables 9A and 9B for pesticides (diazinon and chlorpyrifos in San Diego Creek and chlorpyrifos in Upper Newport Bay) based on monitoring conducted at representative monitoring stations within San Diego Creek and Upper Newport Bay. Current monitoring locations may be used for this purpose. If the monitoring results indicate an exceedance of the WLAs, reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan. (Order No. R8-2009-0030, Section XVIII.D.1.)

Sections XVIII.B. 5 and 7 of the test claim permit do not impose any requirements.

d. The requirements in Sections XVIII.B.8 and XVIII.B.9 of the test claim permit to submit a Cooperative Watershed Program to comply with the TMDL for selenium and to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL constitute state-mandated new programs or higher levels of service. However, the remaining requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1, to monitor, implement BMPs, and revise BMPs to comply with the WLAs in the TMDLs if an exceedance occurs, do not mandate a new program or higher level of service.

The claimants argue that the Regional Board was not mandated by federal law to impose numeric effluent limits on municipal stormwater permittees. Nor does federal law require municipal stormwater permittees to comply with water quality standards or WLAs to achieve those standards.[500] The claimants contend that in *Defenders of Wildlife v. Browner*, "the Ninth Circuit held that the US EPA (or a state implementing agency) has the authority to impose numeric effluent limits in MS4 Permits, but that Congress did not mandate effluent limits if the US EPA (or the state implementing agency) determined they were not necessary."[501] Claimants also cite to *Building Industry Association of San Diego County v. State Water Resources Control Board*, in which the court reasoned: "With respect to municipal storm water 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 instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"[502] The claimants assert that "both EPA and the State Board have made clear that numeric effluent limits are not required to be complied with under federal law, and that an adaptive best management practices approach should instead be adhered to." Claimants state the following:

> The State Water Resources Control Board ("State Board") itself recognized that the requirement to comply with water quality standards in MS4 permits is imposed as a matter of discretion. In *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements For Municipal Separate Storm Sewer System (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating From the City of Long Beach MS4,* State Board Order WQ 2015-0075 (June 16, 2015) ("Order WQ 2015-0075"), which addressed the issue of whether an iterative, BMP-based process in an MS4 permit could constitute compliance with water

[500] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 9.

[501] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 65-66; Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 9-10 [referring to *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167].

[502] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 66. *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874.

quality standards (there, compliance with receiving water limitations imposed in the 2012 Los Angeles MS4 permit), the State Board found that:

> In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-stormwater discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, *but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency."*

Id. at 10 (emphasis added). [Fn. omitted.]

There is thus no federal mandate for MS4 permits to impose requirements for permittees to strictly comply with water quality standards. Any such requirements are imposed as a matter of discretion. *A fortiori,* this principle applies to the imposition of a permit requirement to comply with any vehicle to achieve those water quality standards, including TMDL WLAs, since WLAs are a component of TMDLs and are adopted "to attain and maintain the applicable narrative and numerical *WQS [water quality standard]."* [FN. omitted.] In other words, if federal law does not require MS4 discharges to comply with water quality standards, then federal law also does not require MS4 dischargers to comply with permit requirements, such as WLAs, designed to attain those standards. Any requirement to do so is imposed as a matter of discretion by the permitting authority, here the Santa Ana Water Board.[503]

The claimants further state that "Here, the Water Board had a true choice as to whether to require compliance with WLAs in the 2009 Permit. Neither the applicable federal statute, 33 U.S.C. § 1342(p)(3)(B), nor the regulation, 40 CFR § 122.44(d)(l), required this obligation to be imposed in an MS4 permit.[504]

The claimants also disagree that although the effluent limits in test claim permit are expressed numerically, they are complied with by way of an iterative BMP-based process, since the State Board, in Order WQ 2015-0075, made it clear that the iterative BMP-based approach set forth in Order 99-05 did *not* act as a "safe harbor" to protect MS4 permittees from enforcement if they were engaged in that approach.[505] "In other words, even if there is an iterative process, the numeric WLAs still drive that process. Thus, if there is an "exceedance" of the numeric WLA, this triggers both the need to "reevaluate" current control measures and to "propose" additional control measures. These requirements to reevaluate and propose additional control measures are, again, based on a

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[503] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 10.

[504] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 12.

[505] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 15.

discretionary decision by the Santa Ana Water Board to require compliance with numeric WLAs expressed in a TMDL."[506]

The claimants further believe that the compliance requirements are new. Citing to case law showing that TMDLs are simply planning tools that require additional action, the claimants contend that "[a]s a legal matter, incorporation of a TMDL constitutes the imposition of additional pollution control requirements for permittees."[507] The claimants then list the following projects completed to comply with the TMDLs, supported by a declaration from James Fortuna, Manager of the North Orange County Watershed Management Area for the Orange County Stormwater Program:

> For example, with respect to the TMDL and associated WLAs for selenium in San Diego Creek and Newport Bay, since the inception of the 2009 Permit, permittees have undertaken projects such as: the design and construction of the Peters Canyon Channel Water Capture and Reuse Pipeline, at an approximate cost of $7,728,000, and the Santa Ana-Delhi Diversion, at an approximate cost of $5,827,000 (Fortuna Decl., ¶ 6.b) as well as various investigations under the Nitrogen and Selenium Management Program Working Group, including a selenium water balance investigation (at an approximate cost of $160,000), studies for developing selenium site specific objectives (at an approximate cost of $349,000) and treatment technology evaluations and additional consultant support (at an approximate cost of $1,058,000) (Fortuna Decl., ¶ 6.c). In addition, the City of Newport Bay undertook restoration and maintenance efforts for Big Canyon Creek (at an approximate cost of $6,674,318 since 2009) and other selenium reduction efforts (at an approximate cost of$3,325,368 since 2009) (Fortuna Decl., ¶ 6.d).
>
> With respect to the TMDL and associated WLAs for organochlorine compounds ("OCs") in Newport Bay and San Diego Creek, permittees have undertaken the preparation of a WLA Evaluation Assessment required to be sent to the San Diego Water Board (at an approximate cost of $44,000) (Fortuna Decl., ¶ 7.b).
>
> With respect to the TMDL and related WLAs for metals in Coyote Creek for wet and dry weather, programs undertaken to comply include monitoring, laboratory and data management costs (at an approximate cost of $1,121,398 since 2011) (Fortuna Decl., ¶ 8.a).
>
> With respect to the TMDL and related WLAs for fecal coliform in Newport Bay, permittees have undertaken projects to complete engineering evaluations and analyses for new potential structural BMP projects at locations that drain into Newport Bay (at an approximate cost of $302,936) (Fortuna Decl., ¶ 9.a) and the development and implementation of a Source Investigation Design Study to

[506] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 16.

[507] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 16-17.

> evaluate human sources of fecal contamination and conduct target source investigations (presently ongoing, at an approximate cost of $200,000 as of 2022) (Fortuna Decl., ¶ 9.b).
>
> In addition to these efforts, permittees, working through the Newport Bay TMDL Partners, which serves as a planning body to discuss additional studies, research, monitoring, reporting, development and revision of programs related to Newport Bay TMDLs generally in the Newport Bay watershed, spent approximately $5,332,960 in reimbursing the labor costs of Orange County personnel since 2009 (Fortuna Decl., ¶ 10).
>
> The Proposed Draft also concludes that the requirement "to monitor metals, pesticides, and constituents which are known to have contributed to impairment of local receiving waters was required by the prior permit and are not new." Proposed Draft at 127. However, as set forth in the Fortuna Declaration, monitoring requirements under the 2009 Permit were substantially upgraded from those under the 2002 Permit in several respects. That upgrading included, for the selenium TMDL, the monitoring of bird egg and fish tissue for the presence of selenium (at an approximately cost of $755,000) since 2010 (Fortuna Decl., ¶ 6.a). With respect to the OCs TMDL, additional monitoring costs were incurred related to the addition of three groups of compounds to the list of analytes (at an approximate cost of $816,264 since 2010) (Fortuna Decl., ¶ 7.a**)** and bird egg and fish tissue monitoring for OCs (at an approximate cost of $755,000 since 2010) (Fortuna Decl., ¶ 7.c).[508]

Finally, the claimants contend that the new requirements provide a governmental service to the public and are uniquely imposed on local government. "The 2009 Permit's requirement that the permittees implement programs to comply with the WLAs were not mere bans or limits on pollutions levels. They were obligations to implement programs to reduce pollutants to the levels set forth in the WLAs."[509] They further argue:

> The WLA requirements in the 2009 Permit are also unique to the MS4 permittees, because those specific WLAs are imposed *only* on local government entities, not private discharges. *See Dept. of Finance II [fn. omitted]* (where a permit applies by its terms only to the local government entities, obligations imposed by it are unique). Moreover, the activities compelled by the WLAs, reduction of pollutants

[508] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 17-18, 111-115. It should be noted that several costs identified in the claimants' comments (those for special studies and a WLA Evaluation Assessment required to be sent to the San Diego Water Board), are not required by the sections of the permit pled.

[509] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 23.

in municipal stormwater discharges, lie solely within the purview of government agencies, not private parties.[510]

Accordingly, any numeric effluent limits derived from "WLAs contained within various TMDLs, go beyond federal law and represent unfunded State mandated programs subject to reimbursement under the California Constitution."[511]

The Cities of Dublin and Union City, and the Alameda Countywide Clean Water Program also urge the Commission to approve reimbursement for the TMDL provisions, arguing that the activities exceed federal law and were imposed at the State's discretion.[512]

The Regional Board contends that the TMDL provisions do not mandate a new program or higher level of service and asserts that "[i]n exercising this limited discretion, the Board simply translated the WLAs directly into effluent limits – so the effluent limitations were exactly the same as the WLAs."[513] And the Regional Board argues that "[a]lthough the [Test Claim] Permit incorporates the WLAs as numeric effluent limitations, the Permit actually requires an iterative BMP-based approach for compliance…"[514]

The Commission finds that the requirement in Sections XVIII.B.8 and XVIII.B.9 of the test claim permit imposes a state-mandated new program or higher level of service to develop and submit to the Regional Board a Cooperative Watershed Program for selenium as a means of implementing the TMDL, and a constituent-specific source control plan for metals to comply with the San Gabriel River metals TMDL. However, the remaining requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1, to monitor, implement BMPs, and revise BMPs to comply with the WLAs in the TMDLs if an exceedance occurs, do not mandate a new program or higher level of service.

i. *Submission of the Cooperative Watershed Program for Selenium and development of a "constituent-specific source control plan" for copper, lead, and zinc are new, but implementing those plans and the remaining TMDL*

[510] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 21.

[511] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 76.

[512] Exhibit P, Cities of Dublin's and Union City's and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, filed November 4, 2022, pages 2-24.

[513] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 5.

[514] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 21.

requirements are not new and, thus, do not mandate a new program or higher level of service.

Courts have repeatedly held that local government entities are not entitled to reimbursement simply because a state law or order increases the costs of providing required services.[515] Rather, reimbursement under article XIII B, section 6 requires that all elements be met, including that the increased costs result from a new program or higher level of service mandated by the state on the local agency.[516] 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 and impose a program subject to article XIII B, section 6 (by carrying out the governmental function of providing a service to the public, or imposing unique requirements on the local agency).[517]

The requirement in Section XVIII.B.8, to submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the implementation plan for the 2002 U.S. EPA selenium TMDL within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later, is new and was not required by prior law.

In addition, the requirement in Section XVIII.B.9, to develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance with WLAs for dry and wet weather runoff, pursuant to the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA is new. As indicated above, work on that that plan began in 2009 and the plan was adopted in 2010 and was not required by the prior permit.[518]

However, *implementation* of the Cooperative Watershed Program for selenium pursuant to Section XVIII.B.8 and the constituent-specific source control plan for the San Gabriel metals TMDL pursuant to Section XVIII.B.9, as well as compliance with the remaining TMDLs required by Sections XVIII.B.4, XVIII.C.1, and XVIII.D.1, are not new and do not impose a new program or higher level of service.

First, neither the WLAs for fecal coliform, nor the activities required to comply with the WLAs for fecal coliform in accordance with Section XVIII.C.1, are new. As indicated above, the fecal coliform TMDL became effective in 1999, and the test claim permit requires compliance with the WLAs for urban runoff for fecal coliform by December 30, 2013 to protect water contact recreation standards, and by December 30, 2019 to protect shellfish standards. Compliance shall be based on monitoring conducted at representative sampling locations within San Diego Creek

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[515] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal. 4th 859, 877; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[516] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[517] *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).

[518] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 134.

and Newport Bay, and the current sampling locations for compliance determination may be used. If the monitoring results indicate an exceedance of the WLAs, the claimants have to reevaluate current BMPs or propose new BMPs, and once a revised plan is approved, implement the revised plan.

The prior permit also identified the WLAs for fecal coliform and imposed the same requirements as the test claim permit. The following specific provisions from the prior permit relating to the fecal coliform TMDL state the following:

- "A fecal coliform TMDL for Newport Bay has also been established. The WLAs from these TMDLs are included in this order. Dischargers to these water bodies are currently implementing these TMDLs. This order specifies the WLAs and includes requirements for the implementation of these WLAs."[519]
- "The permittees shall revise Appendix N of the DAMP [Drainage Area Management Plan] to include *implementation measures* and schedules for further studies related to the TMDL for fecal coliform in Newport Bay, as set forth in the January 2000, March 2000 and April 2000 Newport Bay Fecal Coliform TMDL Technical Reports submitted by the permittees."[520]
- "The permittees shall . . . *monitor* representative areas along the Orange County coastline, as well as a minimum of six inland water bodies/channels, for total coliform, fecal coliform, and Enterococcus in order to determine the impacts of storm water and nonstorm water runoff on loss of beneficial uses to receiving waters. Inland monitoring stations shall be located to include channels/creeks which are currently impaired for pathogens."[521]

The DAMP (mentioned in the second bullet above) is the principal guidance document for urban stormwater management programs in Orange County, and was required to be developed by the claimants to reduce pollutants in urban stormwater runoff to the MEP by the first and second term permits.[522] The prior permit required the claimants to implement management programs, monitoring programs, implementation plans and all BMPs outlined in the DAMP within each respective jurisdiction, and take any other actions as may be necessary to meet the MEP standard.[523] If the permittees detected an exceedance of water quality standards, then the

[519] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 403 [Order No. R8-2002-0010, Finding 19].

[520] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010, Section XVI.3].

[521] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, p. 444 [Order No. R8-2002-0010, Monitoring and Reporting Program, section III.D.1].

[522] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 403, 465 [Order No. R8-2002-0010, Finding 21, and Fact Sheet].

[523] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 410-411 [Order No. R8-2002-0010].

permittees "shall revise the DAMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;" and "implement the revised DAMP and monitoring program in accordance with the approved schedule.[524] The prior permit also required the claimants to "demonstrate compliance with all the requirements in this order and specifically with Section III.2 Discharge Limitations and Section IV. Receiving Water Limitations, through timely implementation of their DAMP and any modifications, revisions, or amendments . . . determined by the permittee to be necessary to meet the requirements of this order."[525] The prior permit further required the claimants to "implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order."[526] The claimants' 2003 DAMP verifies that

> Once a water quality problem is identified, additional or new Best Management Practices (BMPs) are evaluated for implementation to determine their effectiveness and applicability. Since the field of stormwater management is a dynamic one, it is necessary for the Permittees to continue this systematic and iterative process of revising, adding or deleting BMPs as necessary in order to maintain a successful and responsive program.[527]

Thus, complying with the WLAs for fecal coliform pursuant to Section XVIII.C.1 of the test claim permit is not new, and does not impose a new program or higher level of service.

The remaining provisions in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, and XVIII.D.1 implement the TMDLs for metals, organochlorine compounds, other pesticides (diazinon and chlorpyrifos), and selenium, which were developed and adopted by U.S. EPA after the prior permit became effective and, thus, the WLAs were not expressly identified in the prior permit. Section XIIIV.B.8, regarding selenium, gives the claimants an option to not comply with the WLA established for selenium as long as they participate in the Cooperative Watershed Program to monitor and implement BMPs. If they choose not to comply with the Cooperative Watershed Program, then the claimants have to comply with the WLA for selenium by individually monitoring, implementing BMPs, and if the monitoring results indicate an exceedance of water quality standards, the claimants are required to reevaluate current BMPs or propose new BMPs, and once approved, implement the revised plan. Compliance with the metals, organochlorine compounds, and pesticides TMDLs also require monitoring, implementing BMPs, and revising

[524] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

[525] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010].

[526] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010].

[527] Exhibit Q (5) DAMP July 1, 2003, Section 3 - Plan Development, page 1.

the BMPs if exceedances occur. The test claim permit expressly allows the claimants to continue to use "current monitoring locations . . . for this purpose."[528] These activities are not new.

TMDLs calculate the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[529] The TMDL and the WLAs allocated to dischargers are required by federal law to be established at levels necessary to meet water quality standards.[530] Meeting water quality standards for these pollutants is not new to the claimants; narrative and numeric criteria or objectives existed in the Basin Plan and the CTR before the TMDLs were adopted and compliance with those standards was required under the prior permit by performing the same activities as required by the test claim permit.

As indicated in the Background, the Basin Plan designates the beneficial uses of the waters of the Region and specifies water quality standards intended to protect those uses.[531] The Basin Plan included water quality objectives for enclosed bays and estuaries and for inland surface waters, which stated that "[t]oxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health," and that "concentrations of toxic substances in the water column, sediments or biota shall not adversely affect beneficial uses."[532] The Basin Plan also contained site-specific objectives for metals and numeric limits for metals in groundwater.[533] The prior permit acknowledged the Basin Plan in the Findings as follows: "A revised Water Quality Control Plan (Basin Plan) was adopted by the Regional Board and became effective on January 24, 1995. The Basin Plan contains water quality objectives and beneficial uses for water bodies in the Santa Ana Region."[534] The Findings in the test claim permit also indicate that the claimants' monitoring showed exceedances of numeric criteria established in the CTR, which "apply to waters identified in the Basin Plan chapters designating beneficial uses for waters within the region."[535] The prior permit noted that if not properly controlled, urban runoff

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[528] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 341, 345, 346, 358 [Order No. R8-2009-0030 ("The permittees shall continue to implement the 2003 Monitoring Program.")].

[529] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[530] Code of Federal Regulations, title 40, section 130.2(h), 130.7(c)(1) ["TMDLs hall be established for all pollutants preventing or expected to prevent attainment of water quality standards"]; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095–1096.

[531] Federal Code of Regulations, title 40, section 130.7(b)(3).

[532] Exhibit Q (45), Water Quality Control Plan (1995 Basin Plan), pages 63, 70.

[533] Exhibit Q (45), Water Quality Control Plan (1995 Basin Plan), pages 67-68, 72.

[534] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 401 [Order No. R8-2002-0010, Finding 40].

[535] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 281-281 [Order No. R8-2009-0030, Finding 31]; Code of Federal Regulations, title 40, section 131.38(d)(1).

may contain elevated levels of pathogens, pesticides (including diazinon, chlorpyrifos), and heavy metals (cadmium, chromium, copper, lead, zinc), and storm water can carry these pollutants to the receiving waters and that "TMDLs for the Newport Bay watershed are being developed by the Regional Board (for diazinon, chlorpyrifos and selenium) and U.S. EPA (for legacy pesticides and other metals)"[536] The Findings in the prior permit further make clear that the receiving water limitations were included to "assure that the regulated discharge does not violate water quality standards established in the Basin Plan at the point of discharge to waters of the State."[537] Accordingly, the prior permit expressly:

- Required that discharges from the MS4 shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives).[538]
- Prohibited illegal and illicit non-stormwater discharges from entering into the MS4.[539]
- Required that the DAMP and its components be designed to achieve compliance with receiving water limitations through timely implementation of control measures and BMPs.[540]
- Required that if the claimants continue to cause or contribute to an exceedance of water quality standards, the claimants shall promptly notify and submit a report to the Regional Board that describes the BMPs currently implemented and the additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Once approved, the claimants shall revise the DAMP and monitoring program to incorporate the approved modified BMPs, and implement the revised program.[541]
- Required the claimants to demonstrate compliance with the discharge limitations and receiving water limitations through timely implementation of their DAMP. "The DAMP,

[536] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 408, 460 [Order No. R8-2002-0010].

[537] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 401 [Order No. R8-2002-0010, Finding 37].

[538] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[539] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 412 [Order No. R8-2002-0010].

[540] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

[541] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

as included in the Report of Waste Discharge, including any approved amendments thereto, is hereby made an enforceable component of this order." [542]

- Required the claimants to implement "additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order."[543]
- Required the claimants to comply with the Monitoring and Reporting Program (R8-2002-0010), which is attached to the Third Term Permit.[544] This program required the claimants to conduct several types of monitoring, including mass emissions monitoring, in order to determine if the MS4 is contributing to exceedances of water quality objectives or beneficial uses by comparing the results to the CTR, the Basin Plan, the Ocean Plan, or other relevant standards. Dry and wet weather monitoring was required and all samples had to be tested for metals, pesticides, "and constituents which are known to have contributed to impairment of local receiving waters."[545]

The Monitoring and Reporting Program further required the claimants to develop "strategies to evaluate the impact of storm water and non-storm water runoff on all impairments within the Newport Bay watershed and other 303(d) listed bodies."[546] In addition, the Monitoring and Reporting Program states that "[s]ince the 303(d) listing is dynamic, with new waterbodies and new impairments being identified over time, the permittees shall revise their monitoring plan to incorporate new information as it becomes available."[547]

The claimants' Water Quality Monitoring Program was included in their 2003 DAMP, and shows that the claimants monitored for metals, selenium, diazinon and chlorpyrifos, and other pesticides.[548]

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[542] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 433 [Order No. R8-2002-0010].

[543] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 433 [Order No. R8-2002-0010].

[544] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 434, 441 et seq. [Order No. R8-2002-0010].

[545] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 443 [Order No. R8-2002-0010].

[546] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[547] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 445 [Order No. R8-2002-0010].

[548] Exhibit Q (32), Santa Ana Region Water Quality Monitoring Program, February 2003, page 16, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/2021-03/2003_DAMP_Exhibit-11_III_SantaAnaWaterQualityMonitoring.pdf (accessed November 20, 2022). Section 1187.5(c) of the Commission's regulations provides that "Official notice may be taken in the manner and of the information described in Government Code Section 11515." Government Code section

Thus, despite the claimants' arguments to the contrary, the claimants were required by the prior permit to comply with water quality standards for these pollutants, by monitoring, implementing BMPs, and if the monitoring results indicate an exceedance of water quality standards, the claimants had to reevaluate current BMPs or propose new BMPs, and once approved, implement the revised plan. If water quality standards under the prior permit were not met, the claimants could have been held in violation of that permit.

As explained by the State Water Board, "[w]hen 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," as follows:

> We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. 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 US EPA 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*

11515 states the following: "In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency."

> *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.] The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions.[549]

The courts have upheld this interpretation. In *Building Industry Association of San Diego County v. State Water Resources Control Board*,[550] 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."[551] 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.[552] 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."[553] 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 MEP 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 the MEP standard.[554] The court, however, rejected BIA's interpretation, and held that the permit provisions requiring compliance with water quality standards are proper under federal law.[555]

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[549] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 58-59 [State Water Board, Order WQ 2015-0075, emphasis added].

[550] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866.

[551] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 876-877.

[552] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[553] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[554] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 880, 890.

[555] *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

Similarly, in *Natural Resources Defense Council, Inc. v. County of Los Angeles*,[556] 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 CTR, the NTR, 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.[557] 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.[558] NRDC filed a lawsuit alleging that the permittees violated the Clean Water Act 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.[559] The permittees argued they could not be held liable for violating the permit based solely on monitoring data because the monitoring was not designed or intended to measure compliance of any permittee, 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.[560] 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.[561]

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determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

[556] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194.

[557] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[558] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1200.

[559] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1201.

[560] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1204-1205.

[561] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1206-1207.

The court also found that nothing in the MS4 permitting scheme of federal law relieves permittees of the obligation to monitor their compliance with the permit and the Clean Water Act.[562] "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."[563] The court remanded the case to the lower courts to determine the appropriate remedy for the county's violations.[564]

And in *City of Rancho Cucamonga v. Regional Water Quality Control Bd.,* the court noted that there is no statutory right to a "safe harbor" provision to be included as the term of the permit:

> 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 "safe harbor" provision to be included as the term of the permit. We agree.[565]

Moreover, existing federal law requires the claimants to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the environment.[566]

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[562] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1209.

[563] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210, emphasis in original.

[564] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210.

[565] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1388.

[566] 33 United States Code section 1342(p)(3)(B)(iii) 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 State determines appropriate for the control of such pollutants." (Emphasis added.) See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

Thus, the claimants were subject to water quality standards and criteria for these pollutants under the prior permit, and were required to perform the same activities under both state and federal law. Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, and XVIII.D.1 of the test claim permit do not add any new requirements, or direct how the monitoring and BMP requirements have to be implemented.

Finally, compliance with WLAs for the San Gabriel metals TMDL is not unique to government. WLAs were also established for Publicly Owned Treatment Works (POTWs), and industrial stormwater and construction stormwater dischargers.[567] Thus, both public and private dischargers are required to comply with the WLAs in the San Gabriel metals TMDL and, thus, compliance with that TMDL is not unique to government. In this respect, the TMDL requirements are no different from the alleged mandated activities in *County of Los Angeles v. Department of Industrial Relations*.[568] In that case, the County sought reimbursement for complying with earthquake and fire safety regulations applicable to elevators in public buildings.[569] The "County acknowledges that the elevator safety regulations apply to all elevators, not just those which are publicly owned."[570] The court concluded that therefore the regulations "do not impose a 'unique requirement' on local government, [and] they do not meet the second definition of 'program' established by [County of Los Angeles I]."[571] Similarly, in *City of Richmond*, state law exempted public safety employees from the requirement to pay death benefits to a deceased employee's survivors under workers compensation statutes.[572] After the state repealed the exemption for public safety employees, the city sought reimbursement for the payment of workers compensation death benefits, which had to be made in addition to a PERS death benefit.[573] The court denied reimbursement, finding that the payment of death benefits under the workers compensation statutes was not unique to government. The court agreed with the Commission; "[t]hat [the test claim statute] affects only local government does not compel the conclusion that it imposes a unique requirement on local government."[574]

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[567] Exhibit Q (39), U.S. EPA TMDLs for Metals and Selenium, San Gabriel River and Impaired Tributaries, March 26, 2007, pages 43-49.

[568] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[569] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[570] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[571] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[572] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1193-1194.

[573] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[574] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

Therefore, even if the claimants have incurred increased costs to comply with the TMDLs, the requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, and XVIII.D.1 of the test claim permit are not new and do not impose a new program or higher level of service.

Accordingly, the Commission finds that Sections XVIII.B.8 and XVIII.B.9 impose the following new requirements:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the implementation plan for the 2002 U.S. EPA selenium TMDL within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)

The remaining requirements in Sections XVIII.B.4, XVIII.B.8, XVIII.B.9, XVIII.C.1, and XVIII.D.1 of the test claim permit are denied.

ii. *Sections XVIII.B.8 and XVIII.B.9 of the test claim permit impose a state-mandated new program or higher level of service to submit a Cooperative Watershed Program for selenium and to develop a "constituent-specific source control plan" for metals in the San Gabriel River.*

As indicated above, the Commission finds that the following activities are new:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the implementation plan for the 2002 U.S. EPA selenium TMDL within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)

The Commission further finds that these activities constitute 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.[575]

Federal law does not mandate permittees to develop and submit a Cooperative Watershed Program to control selenium or to develop a constituent-specific source control plan for metals. Instead, federal law leaves some discretion to the permitting authority to structure effluent limits consistent with the assumptions and requirements of the applicable WLAs.[576] Additionally, federal law states that permits for MS4s may be issued on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[577] Thus, with respect to these activities, the Regional Board exercised its discretion to require the claimants to develop and submit to the Regional Board a program to control selenium based on a cooperative watershed approach, and a constituent-specific source control plan for metals. These new requirements are mandated by the state.

Moreover, the requirements impose 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."[578] These requirement are uniquely imposed on the local government claimants and, thus, they impose a new program or higher level of service.

Accordingly, the Commission finds that the requirements in Section XVIII.B.8 to submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan, and the requirement in Section XVIII.B.9 to develop a constituent-specific source plan in the San Gabriel River mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

2. Sections XII.B. – XII.E. of the Test Claim Permit, Which Address Low Impact Development (LID) and Hydromodification Prevention for New Development and Significant Redevelopment Projects, Including Municipal Projects, Do Not Impose a State-Mandated New Program or Higher Level of Service. However, Some of Regulatory Planning Requirements Imposed by These Sections Do Impose a State-Mandated New Program or Higher Level of Service.

The test claim permit seeks to reduce pollutants in the MS4 and in the receiving waters in part by requiring careful planning in the development and redevelopment of urban areas within the watershed. The Permit states that "[u]rban development increases impervious surfaces and storm water runoff volume and velocity and decreases vegetated, pervious surface areas available for

[575] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

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

[577] Code of Federal Regulations, title 40, section 122.26(a)(5).

[578] *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.

infiltration and evapotranspiration of storm water."[579] The Permit includes a finding that "USEPA has determined that LID [Low Impact Development]/green infrastructure can be a cost-effective and environmentally preferable approach for the control of storm water pollution and will minimize downstream impacts by limiting the effective impervious area of development."[580] The goal of the LID and hydromodification 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: "Recent studies have indicated that low impact development (LID) is one of the most effective ways to minimize any adverse impacts on storm water runoff quality and quantity resulting from urban developments."[581]

The majority of activities in sections XII.B. through XII.E. of the Permit involve incorporating LID and hydromodification prevention considerations into the planning and site design of a new development or significant redevelopment projects. These activities and requirements are directed toward project proponents themselves, including private entities, based on the plain language. The claimants recognize that activities directed toward project proponents are not local government mandates, and accordingly, claimants allege the requirements of the test claim permit, sections XII.B. through XII.E., only "as they are applied to municipal projects."[582] The claimants allege that municipal projects include "municipal yards, recreation centers, civic centers, and road improvements."[583] In addition, claimants have alleged that "hospitals, laboratories, medical facilities, recreational facilities, airfields, parking lots, streets, roads, highways, and freeways" are projects that are "integral to the Permittee's function as municipal entities [sic]."[584] The claimants allege that the following are "mandated activities" set forth in sections XII.B. through XII.E. as they relate to "municipal projects that qualify as "priority development projects" under the 2009 Permit:"

- Develop a program to ensure that water quality protection, including LID principles and "Green Streets" requirements, are incorporated into priority development municipal projects, and implement the program within 18 months of adoption of the test claim permit.

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[579] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 289 [Order No. R8-2009-0030].

[580] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 290 [Order No. R8-2009-0030].

[581] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 387 [Order No. R8-2009-0030, Fact Sheet, Section IX.8].

[582] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 84.

[583] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 88.

[584] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

- Incorporate EPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets" for all streets, roads, highways and freeways of 5,000 square feet or more of paved surface.
- Include BMPs for source control, pollution prevention, site design, LID implementation and structural treatment control BMPs.
- Infiltrate, harvest and re-use, evapotranspire, or bio-treat the 85th percentile storm event at completed project sites.
- Maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems and water bodies.
- Limit disturbance of natural water bodies and drainage systems; conserve natural areas; preserve trees; minimize compaction of highly permeable soils; protect slopes and channels; and minimize impacts from stormwater and urban runoff on the biological integrity of natural drainage systems and water bodies.
- Minimize changes in hydrology and pollutant loading; require incorporation of controls, including structural and non-structural BMPs, to mitigate the projected increases in pollutant loads and flows; ensure that post-development runoff durations and volumes from a site have no significant adverse impact on downstream erosion and stream habitat; minimize the quantity of storm water directed to impermeable surfaces and the MS4s; minimize paving, minimize runoff by disconnecting roof leader and other impervious areas and directing the runoff to pervious or landscaped areas, minimize directly connected impervious areas; design impervious areas to drain to pervious areas; consider construction of parking lots and walkways with permeable materials; minimize pipes, culverts and engineered systems for stormwater conveyance thereby minimizing changes to time of concentration on site; utilize rain barrels and cisterns to collect and re-use rainwater; maximize the use of rain gardens and sidewalk storage; and maximize the percentage of permeable surfaces distributed throughout the site's landscape to allow more percolation of stormwater into the ground.
- Preserve wetlands, riparian corridors, vegetated buffer zones and establish reasonable limits on the clearing of vegetation from the project site.
- Use properly designed and well-maintained water quality wetlands, bio-retention areas, filter strips and bio-filtration swales; consider replacing curb gutters and conventional stormwater conveyance systems with bio-treatment systems, where such measures are likely to be effective and technically and economically feasible.
- Evaluate whether the project will adversely impact downstream erosion, sedimentation or stream habitat, and develop a hydrograph with pre and post-development time of concentration for a two-year frequency storm event. If the evaluation determines adverse impacts are likely to occur, implement additional site design controls, on-site

management controls, structural treatment controls or in-stream controls to mitigate the impacts.

- If site conditions do not permit infiltration, harvesting and re-use, evapotranspiration, or bio-treatment of the design capture at the project site as close to the source as possible, implement an in lieu/mitigation project, in additional to treatment in the stormwater on site.[585]

The claimants' comments on the Draft Proposed Decision further state that they are seeking reimbursement "to devise plans to incorporate best management practices ("BMPs") regarding Low Impact Development ("LID") and hydromodification principles ("HMP") into PDPs [priority development projects] (defined in Subsection XII.B.2), and then to implement those plans in municipal PDPs."[586] The claimants now identify the following planning requirements:

- Section XII.B.1 requires permittees to "annually review the existing structural treatment control and other BMPs for New Development and submit any changes for review and approval by the Executive Officer." The principal permittee is required to "revise the appropriate tables in the Water Quality Management Plan [for new development projects] with the latest information on BMPs and provide additional clarification regarding their effectiveness and applicability."
- Section XII.C.1 requires permittees to "update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D)" and, within 12 months after the adoption of the 2009 Permit to submit the updated model WQMP "for review and approval by the Executive Officer."
- Section XII.D.5 (which relates to hydromodification) requires permittees to prepare a Watershed Master Plan for each of four identified watersheds, which is required to integrate water quality, hydromodification, water supply, and habitat. The Master Plan must include maps to identify areas susceptible to hydromodification and a hydromodification model to use as a tool for project developers to select storm water preventative and mitigative site BMPs. The permittees are required to submit the maps and a model plan for one watershed to the Santa Ana Water Board Executive Officer by May 22, 2011. Watershed Master Plans for the remaining watersheds were required to be completed 24 months after approval of the model Plan.
- Section XII.E.1 (relating to LID alternatives and in-lieu programs) requires the principal permittee, "in collaboration with the co-permittees," to develop technically-based

[585] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 88-90.

[586] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 24-25.

feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs and to submit that to the Executive Officer for approval.[587]

The claimants allege these activities were not addressed in the Draft Proposed Decision, but were properly pled since all of sections XII.B-XII.E were identified. The claimants point to the following sentences in their Test Claim narrative to support their position:

> The Proposed Draft, however, overlooks these requirements in its discussion of Section XII. Proposed Draft at 131-33. The Test Claim included all requirements in Sections XII.B-XII.E and Claimants' Narrative Statement discussed the costs of "developing a State-mandated program," development of a model WQMP, and other permittee-specific planning requirements. *See* Narrative Statement at 31-34. The "Actual Increased Costs of Mandate" section of the Narrative Statement further specifically discussed costs relating to these planning efforts. Narrative Statement at 37. Claimants' Rebuttal Narrative Statement also referenced the LID/HMP planning requirements: "The 2009 Permit requires the Permittees to take immediate actions related to low impact development and hydromodification. These steps include updating the model WQMP to incorporate low impact development and hydromodification principles and developing feasibility criteria for project evaluation to determine the feasibility of implementing low impact development BMPs." Claimants' Rebuttal Narrative Statement at 43.[588]

The Test Claim pleading does not clearly request reimbursement for the planning activities since the Test Claim stated that the claimants were seeking reimbursement for the LID and hydromodification activities as they relate to municipal projects only, and listed only the activities relating directly to the municipal projects as the "mandated activities" identified above. As the claimants admit, the LID and hydromodification planning activities benefit all project developers.[589]

However, the test claim form pleads sections XII.B-XII.E and review of the declarations filed with the Test Claim identifies a couple of the alleged planning activities as follows:

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[587] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 24-25.

[588] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 25.

[589] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 24-25 ["Proposed Sections XII.B through XII.E of the 2009 Permit require Claimants to devise plans to incorporate best management practices ("BMPs") regarding Low Impact Development ("LID") and hydromodification principles ("HMP") *into PDPs"*; "Section XII contains several distinct requirements for Claimants to develop planning documents to govern Water Quality Management Plans ("WQMPs") *used by PDP developers"*; "The [Watershed] Master Plan must include maps to identify areas susceptible to hydromodification and a hydromodification model *to use as a tool for project developers* to select storm water preventative and mitigative site BMPs." Emphasis added.]

- "The permittees . . . collectively retained a consultant team to assist with developing a public agency project element within the *Model* WQMP."
- "The permittees . . . shared the cost of a hydromodification susceptibility analysis of north Orange County's surface water drainage systems. Hydromodification susceptibility maps were prepared and language added to the model WQMP and Technical Guidance Document. The draft map data were verified using mapping and photography and updated as needed."[590]

Thus, this Decision will address the planning activities in sections XII.B.1, XII.C.1, XII.D.5, and XII.E.1. However, this Decision does *not* address other requirements that may be imposed on the principal permittee in section VII.B. since there is no discussion of these activities in the Test Claim and declarations as required by Government Code section 17553.

As described below, the Commission finds that *some* of planning activities required by sections XII.B. through XII.E. are new and that the new activities are mandated by the state, apply uniquely to local government, and therefore mandate a new program or higher level of service.

However, the LID and hydromodification requirements imposed on all priority development projects, including municipal projects, are not mandated by the state because they are triggered by a local decision to develop property, are not unique to government, and therefore do *not* mandate a new program or higher level of service.

a. Sections XII.C.1, XII.D.5, and XII.E.1 of the test claim permit impose new planning requirements that are constitute mandated new programs or higher levels of service. However, the planning requirements in section XII.B.1 are not new.

The specific requirements in sections XII.B.1, XII.C.1, XII.D.5, and XII.E.1 of the test claim permit related to LID and hydromodification planning are under the section of the permit titled "Water Quality Management Plan (WQMP) for Urban Runoff (for New Development/ Significant Redevelopment)," which states the following:

- Annually review the existing structural treatment control and other BMPs for New Developments and submit any changes for review and approval by the Executive Officer. Within 12 months of adoption of this order, the principal permittee shall revise the appropriate tables in the Water Quality Management Plan [WQMP] with the latest information on BMPs and provide additional clarification regarding their effectiveness and applicability. (Section VII.B.1.)[591]
- Within 12 months of adoption of this order, update the model WQMP to incorporate LID principles (as per Section XII.C) and address the impact of urbanization on downstream

[590] See for example, Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 110-111 [Declaration of Richard Boon, Chief of the Orange County Stormwater Program], 122-124 [Declaration of Keith Linker, Principal Civil Engineer for the City of Anaheim], 129-131 [Declaration of Brian M. Ingallinera, Environmental Services Manager for the City of Brea]. Emphasis added.

[591] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 319 [Order No. R8-2009-0030].

hydrology (as per Section XII.D), and submit a copy of the updated model WQMP shall for review and approval by the Executive Officer. (Section VII.C.1.)[592]

- Prepare a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis. The Watershed Master Plans shall integrate water quality, hydromodification, water supply, and habitat for the following watersheds: Coyote Creek-San Gabriel River; Anaheim Bay-Huntington Harbour; Santa Ana River; and Newport Bay-Newport Coast. Components of the Plan shall include: (1) maps to identify areas susceptible to hydromodification including downstream erosion, impacts on physical structure, impacts on riparian and aquatic habitats and areas where storm water and urban runoff infiltration is possible and appropriate; and, (2) a hydromodification model to make available as a tool to enable proponents of land development projects to readily select storm water preventive and mitigative site BMP measures. The maps shall be prepared within 12 months of the adoption of this order and a model Plan for one watershed shall be prepared within 24 months of adoption of this order. The model Watershed Master Plan shall be submitted to the Executive Officer for approval. Watershed Master Plans shall be completed for all watersheds 24 months after approval of the model Watershed Master Plan. The Watershed Master Plans shall be designed to meet applicable water quality standards and the Federal Clean Water Act. (Section XII.D.5.)[593]
- Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the Executive Officer should be considered for alternatives and in-lieu programs. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval. (Section XII.E.1.)[594]

As indicated above, the claimants' declarations state they "retained a consultant team to assist with developing a public agency project element within the Model WQMP." The plain language of the test claim permit, however, does not require any specific project elements for public

[592] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 323 [Order No. R8-2009-0030].

[593] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 328 [Order No. R8-2009-0030].

[594] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 328-329 [Order No. R8-2009-0030].

agency projects to be included in the Model WQMP, nor does it require the hiring of a team of consultants. All of the LID and hydromodification planning activities described above relate directly to their regulatory duties over *all* new development and significant redevelopment projects.

i. *The requirements in sections XII.C.1, XII.D.5, and XII.E.1 are new, but the requirements in section XII.B.1 are not.*

Finding 63 of the test claim permit explains that the prior permit required the permittees to develop a model WQMP to be included in their Drainage Area Management Plan (DAMP) to provide a framework to incorporate watershed protection principles into the planning, construction, and post-construction phases of new and redevelopment projects (as defined). The model WQMP had to include site design, source control and treatment control elements to reduce the discharge of pollutants in urban runoff. Finding 63 states in relevant part the following:

> On October 5, 2000, the State Board adopted Order No. WQ-2000-11, which is a precedential order. Order No. WQ-2000-11 required that urban runoff generated by 85th percentile storm events from specific types of development categories should be infiltrated, filtered or treated. The essential elements of this precedential order were incorporated into the Region 8 Orange County third term permit. In accordance with the requirements specified in the third term permit, the permittees developed a model Water Quality Management Plan (WQMP) by amending their Drainage Area Management Plan (DAMP). The model WQMP provides a framework to incorporate watershed protection principles into the permittees planning, construction and post-construction phases of defined new and redevelopment projects. The model WQMP includes site design, source control and treatment control elements to reduce the discharge of pollutants in urban runoff. On September 26, 2003, the Regional Board approved the model WQMP. The permittees have incorporated provisions of the model WQMP into their LIPs. The permittees are requiring new developments and significant redevelopments to develop and implement appropriate project WQMPs.[595]

The prior permit required the following activities:

- Review planning procedures and CEQA review processes to ensure that "runoff-related issues are properly considered and addressed," and review and update their General Plan and Conditions of Approval to ensure that watershed protection principles are considered and incorporated. The review "should include," but not be limited to, the following considerations:
  a. Limit disturbance of natural water bodies and drainage systems; conserve natural areas; protect slopes and channels; and minimize impacts from storm water and urban runoff on the biological integrity of natural drainage systems and water bodies;

[595] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 291 [Order No. R8-2009-0030].

b. Minimize changes in hydrology and pollutant loading; require incorporation of controls, including structural and non-structural BMPs, to mitigate the projected increases in pollutant loads and flows; ensure that post-development runoff rates and velocities from a site have no significant adverse impact on downstream erosion and stream habitat; minimize the quantity of storm water directed to impermeable surfaces and the MS4s; and maximize the percentage of permeable surfaces to allow more percolation of storm water into the ground;

c. Preserve wetlands, riparian corridors, and buffer zones and establish reasonable limits on the clearing of vegetation from the project site;

d. Encourage the use of water quality wetlands, biofiltration swales, watershed-scale retrofits, etc., where such measures are likely to be effective and technically and economically feasible;

e. Provide for appropriate permanent measures to reduce storm water pollutant loads in storm water from the development site; and,

f. Establish development guidelines for areas particularly susceptible to erosion and sediment loss.[596]

- The permittees shall continue to implement the new development BMPs (DAMP, Appendix G).[597]
- Submit a revised WQMP for new development and significant development to include BMPs for source control, pollution prevention, and/or structural treatment BMPs.[598] "The goal of the WQMP is to develop and implement practicable programs and policies to minimize the effects of urbanization on site hydrology, urban runoff flow rates or velocities and pollutant loads."[599]
- During the time that the WQMP is being revised, the permittees shall implement their existing requirements for new development (Appendix G of the DAMP). If the Executive Officer does not approve the revised WQMP by October 1, 2003, as meeting the goals of reducing post development runoff and ensuring that the discharge of any pollutant does not cause an exceedance of receiving water quality objectives, then structural BMPs shall be required for all new and significant redevelopment. Minimum structural BMPs must

[596] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 423-424 [Order No. R8-2002-0010].

[597] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 424 [Order No. R8-2002-0010].

[598] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 424-425 [Order No. R8-2002-0010].

[599] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 425 [Order No. R8-2002-0010].

be sized to infiltrate, filter, or treat urban runoff generated by 85th percentile storm events.[600]

- By July 1 of each year, the permittees shall evaluate the DAMP to determine whether any revisions are necessary in order to reduce pollutants in MS4 discharges to the maximum extent practicable.[601]

The Commission finds that the activities required by section VII.B.1, to annually review the existing structural treatment control and other BMPs for New Developments, submit any changes for review and approval by the Executive Officer, revise the appropriate tables in the Water Quality Management Plan [WQMP] with the latest information on BMPs, and provide additional clarification regarding their effectiveness and applicability, are *not* new. As indicated above, the claimants were required by the prior permit to annually evaluate their DAMP, which included the new development BMPs and the WQMP, and to make any necessary revisions in order to reduce pollutants in MS4 discharges to the MEP.[602]

However, the following requirements imposed by sections XII.C.1, XII.D.5, and XII.E.1 of the test claim permit are new:

- Within 12 months of adoption of this order, update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D) and a copy of the updated model WQMP shall be submitted for review and approval by the Executive Officer. (Section VII.C.1.)[603]

  Under the prior permit, the claimants' planning documents "should" have included information on hydrology and requirements to limit disturbances of natural water bodies and drainage systems and to conserve natural areas.[604] However, they were not required to include these principles, or other LID and hydromodification principles in the model plan.

- Prepare a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis. The Watershed Master Plans shall integrate water quality, hydromodification, water supply, and habitat for the following watersheds: Coyote Creek-San Gabriel River; Anaheim Bay-Huntington Harbour; Santa Ana River; and Newport Bay-Newport Coast. Components of the Plan shall include: (1) maps to identify

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[600] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 425-426 [Order No. R8-2002-0010].

[601] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[602] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 432 [Order No. R8-2002-0010].

[603] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 323 [Order No. R8-2009-0030].

[604] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 423-424 [Order No. R8-2002-0010].

areas susceptible to hydromodification including downstream erosion, impacts on physical structure, impacts on riparian and aquatic habitats and areas where storm water and urban runoff infiltration is possible and appropriate; and, (2) a hydromodification model to make available as a tool to enable proponents of land development projects to readily select storm water preventive and mitigative site BMP measures. The maps shall be prepared within 12 months of the adoption of this order and a model Plan for one watershed shall be prepared within 24 months of adoption of this order. The model Watershed Master Plan shall be submitted to the Executive Officer for approval. Watershed Master Plans shall be completed for all watersheds 24 months after approval of the model Watershed Master Plan. The Watershed Master Plans shall be designed to meet applicable water quality standards and the Federal Clean Water Act. (Section XII.D.5.)[605]

- Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the Executive Officer should be considered for alternatives and in-lieu programs. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval. (Section XII.E.1.)[606]

ii. *The new planning activities required by XII.C.1, XII.D.5, and XII.E.1 are mandated by the state.*

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."[607] 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,

[605] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 328 [Order No. R8-2009-0030].

[606] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 328-329 [Order No. R8-2009-0030].

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

> and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[608]

Federal regulations also 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 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 *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 water quality; and appropriate educational and training measures for construction site owners.[609]

Federal law, however, does not require the specific planning activities required by sections XII.C.1, XII.D.5, and XII.E.1 of the test claim permit.

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions relating to trash and inspection requirements imposed by an NPDES stormwater permit issued by the Los Angeles Regional Board were mandated by the state or by 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.[610]

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[608] Code of Federal Regulations, title 40, section 122.2.

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

[610] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

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.[611]

Applying that test to the permit issued by the Los Angeles Regional Board in the *Department of Finance* case, the court found that the Regional 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 Clean Water Act broadly directs the Board to issue permits with conditions designed to reduce pollutant discharges to the MEP, and the federal regulations give broad discretion to the Boards to determine which specific controls are necessary to meet the MEP standard.[612] 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."[613]

In 2017, the Third District Court of Appeal applied the Supreme Court's test to an NPDES permit issued by the San Diego Regional Water Board, which contained LID and hydromodification planning requirements similar to the test claim permit at issue in this case.[614] The court held that there is no dispute that Clean Water Act 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."[615] 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*

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[611] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[612] *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).

[613] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769-770, emphasis added.

[614] *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.

[615] *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).

considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable."[616]

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.[617]

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."[618] "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."[619]

With respect to the hydromodification plan requirements in the permit, the state claimed the requirement arises from U.S. 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.[620]

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 above, argued that the requirements were necessary to achieve federal law. The court held that "nothing in the application regulation

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[616] *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).

[617] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681-682.

[618] *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.

[619] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[620] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 684.

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."[621]

The same analysis and findings apply to the planning activities required sections XII.C.1, XII.D.5, and XII.E.1 of the test claim permit. Accordingly, the Commission finds that these activities are newly mandated by the state.

iii. *The new mandated activities required by XII.C.1, XII.D.5, and XII.E.1 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."[622] Only one of these alternatives is required to establish a new program or higher level of service.[623]

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 intent of the WQMP, . . .and other programs and policies incorporated into this order is to minimize the impact from the project on water quality and the environment."[624] Moreover, "[t]he 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.[625] Thus, the new mandated activities also provide a governmental service to the public.

b. <u>The LID and hydromodification requirements imposed on municipal priority development project proponents do not impose a state-mandated new program or higher level of service.</u>

The LID and hydromodification prevention requirements imposed on project proponents are triggered at the planning stages of all new development and significant re-development projects, which the permit deems *priority* development projects.[626] *Priority projects* are defined by their scale and their potential to contribute pollutants in section XII.B.2, and include private and municipal priority development projects, as follows:

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[621] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 685.

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

[623] *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.

[624] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 292 [Order No. R8-2009-0030, Finding 65].

[625] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[626] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 319 [Order No. R8-2009-0030].

- Significant redevelopment including the addition or replacement of 5,000 square feet or more of impervious surface, *but not including* routine maintenance that preserves the original line and grade, hydraulic capacity, original purpose of the facility; and not including emergency redevelopment activity required to protect public health and safety;
- New development projects creating 10,000 square feet or more of impervious surface;
- Automotive repair shops;
- Restaurants where the area of development is 5,000 square feet or more;
- Hillside developments on 5,000 square feet or more, located on areas with known erosive soil conditions or where the slope is twenty-five percent or more;
- Developments of 2,500 square feet of impervious surface or more, adjacent to or discharging directly into environmentally sensitive areas, such as areas designated in the Ocean Plan as Areas of Special Biological Significance or waterbodies listed on the CWA Section 303(d) list;
- Parking lots of 5,000 square feet or more of impervious surface exposed to stormwater;
- Streets, roads, highways and freeways of 5,000 square feet or more of paved surface used for transportation of automobiles, trucks, motorcycles and other vehicles (excluding routine road maintenance where the footprint is not changed) shall incorporate USEPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets"[627] in a manner consistent with the maximum extent practicable standard;
- Retail gasoline outlets of 5,000 square feet or more with a projected average daily traffic of 100 or more vehicles;
- Emergency and public safety projects may be excluded if the delay to prepare a WQMP compromises public safety, public health and/or environmental protection.[628]

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[627] See Exhibit Q (41), U.S. EPA, Managing Wet Weather with Green Infrastructure Municipal Handbook, Green Streets (December 2008), page 4. [This guidance document provides a number of pollutant control techniques to consider when developing roads, including narrower streets (less impervious area); vegetated roadside swales; bioretention curb extensions and planters; permeable pavement; and sidewalk trees and tree boxes. The guidance states:

> Although the design and appearance of green streets will vary, the functional goals are the same: provide source control of stormwater, limit its transport and pollutant conveyance to the collection system, restore predevelopment hydrology to the extent possible, and provide environmentally enhanced roads. Successful application of green techniques will encourage soil and vegetation contact and infiltration and retention of stormwater.].

[628] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 319-320 [Order No. R8-2009-0030].

The requirements imposed by Sections XII.B. through XII.E. of the Permit on priority development projects include the following:

- Preparing a Water Quality Management Program (WQMP) for the proposed development project, which "shall include BMPs for source control, pollution prevention, site design, LID implementation…and structural treatment control BMPs." (Section XII.B.3-5.)
- Infiltrating, harvesting and re-using, evapotranspiring, or bio-treating the 85th percentile storm event. (Section XII.C.2.)
- Incorporating LID principles in the design of the site to reduce runoff "to maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff," as specified. (Section XII.C.3.)
- Ascertaining the impact of the development on the site's hydrologic regime, and identifying any potential for adverse impacts (hydrologic condition[s] of concern). If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts. (Section XII.D.1-3.)
- Where applicable (such as when a particular BMP is not technically feasible or the cost of BMP implementation outweighs the pollution control benefits), implementing alternatives and in-lieu requirements, as defined by the permittees. (Section XII.E.1.)[629]

    i. *Some of the requirements imposed on priority development projects are new, and some are not.*

Some of these requirements are new, and some are not.

The prior permit identified most of the same priority development projects, except that the test claim permit expands the list to now include the following new priority development projects:

- New development projects creating 10,000 square feet or more of impervious surface.
- The prior permit defined priority development projects to include "All hillside developments on 10,000 square feet or more, which are located on areas with known erosive soil conditions or where the natural slope is twenty-five percent or more."[630] The

[629] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 319-330 [Order No. R8-2009-0030].

[630] Exhibit A, Test Claim, filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 425 [Order No. R8-2002-0010].

test claim permit has expanded that to "hillside developments on 5,000 square feet or more."

Thus, hillside developments between 5,000 and 9,999 square feet that are located on areas with known erosive soil conditions or where the natural slope is twenty-five percent or more are now newly defined as a priority development project.

- Streets, roads, highways and freeways of 5,000 square feet or more of paved surface used for transportation of automobiles, trucks, motorcycles and other vehicles (excluding routine road maintenance where the footprint is not changed) shall incorporate USEPA guidance, "Managing Wet Weather with Green Infrastructure: Green Streets" in a manner consistent with the maximum extent practicable standard.

Thus, with respect to these new priority projects, all of the following required activities are new:

- Preparing a Water Quality Management Program (WQMP) for the proposed development project, which "shall include BMPs for source control, pollution prevention, site design, LID implementation…and structural treatment control BMPs." (Section XII.B.3-5.)
- Infiltrating, harvesting and re-using, evapotranspiring, or bio-treating the 85th percentile storm event. (Section XII.C.2.)
- Incorporating LID principles in the design of the site to reduce runoff "to maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff," as specified. (Section XII.C.3.)
- Ascertaining the impact of the development on the site's hydrologic regime, and identifying any potential for adverse impacts (hydrologic condition[s] of concern). If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts. (Section XII.D.1-3.)
- Where applicable (such as when a particular BMP is not technically feasible or the cost of BMP implementation outweighs the pollution control benefits), implementing alternatives and in-lieu requirements, as defined by the permittees. (Section XII.E.1.)[631]

However, the following priority development projects are not new and were identified in both the prior permit and the test claim permit and, thus the copermittees are only newly required to perform the new activities added by the test claim permit with respect to these projects:

[631] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 319-330 [Order No. R8-2009-0030].

- Significant redevelopment including the addition or replacement of 5,000 square feet or more of impervious surface, *but not including* routine maintenance that preserves the original line and grade, hydraulic capacity, original purpose of the facility; and not including emergency redevelopment activity required to protect public health and safety.
- Developments of 2,500 square feet of impervious surface or more, adjacent to or discharging directly into environmentally sensitive areas, such as areas designated in the Ocean Plan as Areas of Special Biological Significance or waterbodies listed on the CWA Section 303(d) list;
- Parking lots of 5,000 square feet or more of impervious surface exposed to stormwater.

The prior permit required these specified categories of priority development projects to prepare a WQMP for the proposed development project that includes source control, pollution prevention, and/or structural treatment BMPs, including minimum structural BMPs that are sized to infiltrate, filter, or treat urban runoff generated by 85th percentile storm events. In addition, the prior permit allowed a waiver to these requirements and alternatives or in-lieu requirements where a particular BMP is not technically feasible or the cost of BMP implementation outweighs the pollution control benefits.[632] Thus, these activities are not new for the categories of priority development projects specified in the prior permit. However, the following activities are new for all priority development projects, including those categories specified in the prior permit:

- Incorporating LID principles in the design of the site to reduce runoff "to maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff," as specified. (Section XII.C.3.)
- Ascertaining the impact of the development on the site's hydrologic regime, and identifying any potential for adverse impacts (hydrologic condition[s] of concern). If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls, structural treatment controls and/or in-stream controls to mitigate the impacts. (Section XII.D.1-3.)

However, as described below, there is no legal requirement imposed by the state for local government to undertake municipal priority development projects, and therefore the LID and hydromodification prevention requirements of the test claim permit with respect to municipal priority development projects are not state-mandated. In addition, the activities are not unique to local government and do not provide a peculiarly governmental service to the public within the meaning of article XIII B, section 6, and, thus, do not impose a new program or higher level of service.

[632] Exhibit A, Test Claim, pages 425-427 [Order No. R8-2002-0010].

ii. *The LID and hydromodification requirements imposed on priority development project proponents are not mandated by the state.*

To determine whether a requirement is mandated by the state, the requirement must be legally compelled by state law; that is, the law creates a mandatory legal obligation to comply with the requirements.[633] 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.[634]

All costs incurred by a municipality as a project proponent under the LID and hydromodification 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*) (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.[635] 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.[636]

In *Kern*, the statute at issue required certain local school committees to comply with notice and agenda requirements in conducting their public meetings.[637] There, 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.[638] 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."[639] However, the Court held that "[c]ontrary to the situation that we described in *City of Sacramento* [*v. State*

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[633] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 [". . . 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."].

[634] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

[635] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

[636] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

[637] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 732.

[638] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 744-745.

[639] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753.

(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."[640]

The claimants specifically dispute the application of *City of Merced* and *Kern*, stating "the 2009 Permit is not a voluntary program, yet it requires the Permittees to incur costs related to low impact development and hydromodification on any municipal project."[641] Furthermore, the claimants argue that "since issuing the *Kern High School Dist*. Decision, the California Supreme Court has rejected application of *City of Merced* in circumstances beyond those strictly present in Kern High School Dist. [sic]."[642] 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 Merced* so as to preclude reimbursement…whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[643]

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.[644] 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."[645] In a footnote the Court acknowledged the argument made by amici and discussed by the Court of Appeal, below, that based on a school district's legal obligation to maintain a safe educational environment for both students and staff, it is inevitable that at least *some* expulsion proceedings

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[640] *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 (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.)].

[641] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

[642] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

[643] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83 [citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888].

[644] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

[645] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

will occur, and thus the hearing procedures should not be said to be entirely the result of voluntary or discretionary activity.[646] 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.[647] Therefore the language cited by claimants is merely dicta, and in any case does not reach a *conclusion* with respect to the prospective application of the *City of Merced* and *Kern* rules.

The Court of Appeal for the Third District addressed the bounds of the *Kern* rule in greater detail, holding that following *City of Merced*, *Kern*, and *San Diego Unified*, there may be activities that involve the exercise of discretion but are nevertheless inevitable in the administration of a mandatory program.[648] The issue in *POBRA* was whether the alleged mandated costs spring from a local entity's "essential and basic function."[649] In *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 held that school districts "do not have provision of police protection as an essential and basic function," and therefore the decision to employ peace officers entitled to the protections of POBRA was a discretionary act that led the district to incur the costs alleged.[650] The court concluded that employing peace officers is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions."[651] 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 embedded, is the only way as a practical matter to comply."[652] 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

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[646] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887, Fn. 22.

[647] *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…"].

[648] *Department of Finance v. Commission* (2009) 170 Cal.App.4th 1355 (*POBRA*).

[649] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[650] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[651] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[652] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 (*POBRA*).

or other draconian consequences, leaving districts no choice but to comply.[653] As recognized by the concurring opinion in that case, "instinct is insufficient to support a legal conclusion."[654]

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, which may occur if the discretionary act is "the only reasonable means to carry out [the claimant's] core mandatory functions.[655] Substantial evidence in the record is required to make a finding of practical compulsion.[656]

Here, claimants assert, without support, that certain municipal projects, including roads and streets "are not optional."[657] 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."[658] This amounts to asserting *both* that the projects are "the only reasonable means to carry out their core mandatory functions"[659] *and* that potential tort liability constitutes "certain and severe…penalties" or other "draconian" consequences.[660]

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 maintenance activities, based on the plain language of the order.[661] Section XII.B.2.a. 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…" and explicitly *excludes*

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[653] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 (*POBRA*).

[654] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1369 (*POBRA*).

[655] *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*).

[656] *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.

[657] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

[658] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

[659] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[660] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754.

[661] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 319-320 [Order No. R8-2009-0030].

"routine maintenance activities that are conducted to maintain the original line and grade, hydraulic capacity, original purpose of the facility, or emergency redevelopment activity required to protect public health and safety."[662] Moreover, and specifically relevant to roads, streets, and highways, applying the "Green Streets" guidance is *not* required for "any road maintenance activities where the footprint is not changed."[663] Therefore, the costs that claimants allege related to municipal projects involving roads can only be those that involve *expanding* the footprint of existing roads or constructing *new* roads. *Maintaining* roads, the failure of which claimants allege would result in significant liability, is not the type of activity that triggers the test claim permit's alleged mandated requirements.

In addition, there is nothing in state statute or case law that imposes a legal obligation on local agencies to develop or redevelop property, construct new buildings or new roads, or to expand or improve roads or buildings, and without such duty, there can be no liability, as asserted by the claimants.[664]

Moreover, there is no evidence in the record that local agencies are practically compelled, as the only reasonable means necessary to carry out core mandatory functions, to develop or redevelop priority municipal projects, including roads, and therefore comply with the downstream new requirements.[665] Nor is there evidence in the record that a failure to develop or redevelop

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[662] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 319 [Order No. R8-2009-0030] (emphasis added).

[663] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 320 [Order No. R8-2009-0030].

[664] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815. See also, 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 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 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."].

[665] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (POBRA).

priority municipal projects would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[666]

In response to the Draft Proposed Decision, the claimants assert that they are mandated to comply with the new requirements since they have constructed a centralized civic center and a transitional housing project for the homeless, which they allege were the only reasonable means to carry out their core mandatory functions.[667] The claimants submit the staff reports supporting the approval of the new civic center and the homeless shelter.[668] The staff report for the civic center indicates that the "the Civic Center FSP anticipates the renovation of several existing facilities and the replacement of several older facilities with new construction. These activities would result in the replacement of older facilities with approximately 700,000 square feet of newly constructed government office uses within the Civic Center FSP area."[669] The staff report for the homeless shelter indicates that project was a redevelopment project "for the construction of improvements on County-owned property located at 2229 South Yale Street, Santa Ana for the Yale Transitional Center for individuals experiencing homelessness" and was going to "shelter up to 425 individuals experiencing homelessness."[670] Thus, both of these projects were defined as priority development projects under the prior permit ("All significant re-development projects, where significant re-development is defined as the addition of 5,000 or more square feet of impervious surface on an already developed site") and, therefore, only the following new activities are at issue with these projects:

- Incorporating LID principles in the design of the site to reduce runoff "to maintain or replicate the pre-development hydrologic regime through the use of design techniques that create a functionally equivalent post-development hydrologic regime through site preservation techniques and the use of integrated and distributed micro-scale storm water infiltration, retention, detention, evapotranspiration, filtration and treatment systems as close as feasible to the source of runoff," as specified. (Section XII.C.3.)
- Ascertaining the impact of the development on the site's hydrologic regime, and identifying any potential for adverse impacts (hydrologic condition[s] of concern). If a hydrologic condition of concern exists, then the WQMP shall include an evaluation of whether the project will adversely impact downstream erosion, sedimentation or stream habitat. If the evaluation determines adverse impacts are likely to occur, the project proponent shall implement additional site design controls, on-site management controls,

[666] *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].

[667] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 26.

[668] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 122-128, 144-149.

[669] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 124.

[670] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 145-146.

structural treatment controls and/or in-stream controls to mitigate the impacts. (Section XII.D.1-3.)

The claimants also submit a declaration from Robert Rodarte, an Administrative Manager for the County of Orange overseeing the Green Infrastructure Program, to support their contentions.[671] Mr. Rodarte's declaration describes the projects the claimants are relying on, and states that "the goals" of the civic center were to "improve the delivery of County services to the community by grouping similar and related services; to improve efficiencies through these departmental adjacencies; reduce energy costs by capitalizing on the Central Utilities Facility; and to improve space usage which will result in lower long-term operating and maintenance costs for the County."[672] Mr. Rodarte declares that the "Yale Transitional Center is focused on '[p]roviding emergency shelter and access to wrap around supportive services will assist individuals experiencing homelessness ... in accessing the appropriate resources to improve their overall health and stability' and also to 'meet a critical need for individuals experiencing homelessness as well as the broader community, while also addressing a pressing social issue that is deeply affecting local businesses and neighborhoods.'"[673]

However, the declaration does not identify why it was necessary to redevelop new projects, or the alternatives discussed when the Board of Supervisors approved these projects, or show that the County had no other reasonable choice but to redevelop these new projects to carry out core functions.[674] Moreover, the transitional housing project for the homeless was the result of a *settlement agreement* between Orange County and attorneys representing the homeless ("The settlement also addresses homeless advocates' complaints about the unsanitary conditions of county-funded homeless shelters. The county reaffirmed its commitments to providing facilities that are accessible, clean, safe and pest-free.")[675] Thus, although the decisions to redevelop these projects may have been good policy decisions, there is no evidence in the record that the County would have suffered certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if it failed to develop these properties and comply with the new required activities.

Accordingly, the Commission finds that the requirements of the test claim permit, sections XII.B. through XII.E., as applied to municipal project proponents for priority development or re-development projects are not mandated by the state.

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[671] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 117-120.

[672] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 118.

[673] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 119.

[674] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 117-120.

[675] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 109.

iii. *The LID and hydromodification prevention requirements imposed on priority development project proponents are not unique to local government and do not provide a peculiarly governmental service to the public within the meaning of article XIII B, section 6, and therefore do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.*

Article XIII B, section 6 requires reimbursement whenever the Legislature or a state agency mandates a new program or higher level of service that results in costs mandated by the state.

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means "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 government and do not apply generally to all residents and entities in the state," as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state*.[676]

The Court further held 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."[677] The law at issue in the *County of Los Angeles* case addressed increased worker's 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' compensation is *not* a program administered by local agencies to *provide service to the public*.[678]

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

[677] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57 (emphasis added).

[678] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 (emphasis added).

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.[679]

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.[680] 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."[681] 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.'"[682]

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 regulations, and thus the regulations were not unique to government.[683] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[684] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in

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[679] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

[680] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[681] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[682] *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"].

[683] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[684] *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].

concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[685] 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.[686]

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.[687] The court found that the regulations were plainly not unique to government.[688] 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 . . . ."[689] The court held that the regulations did not constitute an increased or higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[690] 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." [FN 5 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

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[685] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

[686] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

[687] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[688] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[689] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[690] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546.

> 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.)[691]

Here, the claimants have alleged the LID and hydromodification prevention requirements *as applied to municipal projects*, including "municipal yards, recreation centers, civic centers, and road improvements."[692] In addition, the claimants have alleged that "hospitals, laboratories, medical facilities, recreational facilities, airfields, parking lots, streets, roads, highways, and freeways" are projects that are "integral to the Permittee's function as municipal entities [sic]."[693] 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, parking lots, 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.[694] In this respect, the requirements of the test claim permit are not unique to government, but apply only *incidentally* to the permittees, when the permittees are themselves the proponent of a project that meets the criteria of the Permit. This is no different from the situation addressed in the *County of Los Angeles I* 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 "program" uniquely imposed on local government within the meaning of article XIII B.[695] 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 imposed on local government.[696] The LID and hydromodification prevention requirements apply equally to both municipal and private development projects.

Based on the foregoing, the Commission finds that requirements of sections XII.B., through XII.E., applicable to priority development projects are not unique to government and do not provide a peculiarly governmental service to the public within the meaning of article XIII B, section 6 and, thus, the claimants' request for reimbursement to comply with the LID and

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[691] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, Footnote 5.

[692] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 88.

[693] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 83.

[694] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 319-320 [Order No. R8-2009-0030].

[695] *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].

[696] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

hydromodification requirements for municipal projects in sections XII.B., through XII.E., of the test claim permit is denied.

3. Section XI.4 of the Test Claim Permit Regarding the Residential Program Imposes a State-Mandated New Program of Higher Level of Service to Develop a Pilot Program to Control Pollutant Discharges from Common Interest Areas and Areas Managed by Homeowner Associations or Management Companies. All Other Provisions of Section XI. Are Either Not New, or Not Required.

Section XI. of the test claim permit requires permittees to "develop and implement" a program to reduce discharges of pollutants from residential areas, and the plain language of this section contains a series of "shalls" and "shoulds" when stating the activities as follows:[697]

1. Each permittee *shall* develop and implement a residential program to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard so as to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters.
2. The permittees *should* identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this *should* include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet wastes. The permittees *shall* encourage residents to implement pollution prevention measures. The permittees should work with sub-watershed groups (e.g., the Serrano Creek Conservancy) to disseminate latest research information, such as the UC Master Gardeners Program [fn. omitted] and USDA's Backyard Conservation Program. [Fn. omitted.]
3. The permittees, collectively or individually, *shall* facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes. Such facilitation *should* include educational activities, public information activities, and establishment of curbside or special collection sites managed by the permittees or private entities, such as solid waste haulers.
4. Within 18 months of adoption of this order, the permittees *shall* develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. The permittees *should* evaluate the applicability of programs such as the Landscape Performance Certification Program to encourage efficient water use and to minimize runoff. [Fn. omitted.]
5. The permittees *shall* enforce their Water Quality Ordinance for all residential areas and activities. The permittees should encourage new developments to

[697] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316 [Order No. R8-2009-0030, Section XI.1].

use weather-based evapotranspiration (ET) irrigation controllers. [Fn. omitted.]

6. Each permittee *shall* include an evaluation of its Residential Program in the annual report starting with the first annual report after adoption of this order.[698]

The claimants contend that all of these activities mandate a new program or higher level of service.[699] The claimants point to the Fact Sheet, which states in relevant part the following:

> The Fourth Term Permit has also added a residential program to be implemented by the permittees. This element *improves upon* the existing requirements within the third term permit, by *adding specific criteria associated with developing a more successful means* of reducing the discharge of pollutants from residential areas into the MS4 to the maximum extent practicable.[700]

The claimants also contend that the activities that "should" be done are in fact requirements imposed by the permit. In this respect, the claimants point to case law stating that the words should be interpreted in context, and they rely on the Fact Sheet to the test claim permit, which states that some "should" activities are requirements as follows: "The addition of the Residential Program to the fourth term permit includes requirements for permittees to identify residential areas and activities therein that are potential sources of pollutants and to develop Fact Sheets/BMPs for each and encourage residents to implement the pollution prevention measures."[701]

The Regional Board contends that Section XI. does not impose a state-mandated new program or higher level of service, and argues as follows:

> That the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service. Indeed, the fact that the ROWD clearly states that a Model Residential Program exists in compliance with the prior term San Diego MS4 Permit strongly indicates that a challenged provisions requiring such a program

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[698] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 316-317 [Order No. R8-2009-0030, Section XI.] (emphasis added).

[699] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 96-97.

[700] Exhibit M, Claimants' Comments on Draft Proposed Decision, filed November 4, 2022, page 29, referring to Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 387 [Order No. R8-2009-0030, Fact Sheet (discussion of Municipal Inspection Program)].

[701] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 30, referring to Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 381 [Order No. R8-2009-0030, Fact Sheet (discussion of k. Public Education)].

for the areas within the Santa Ana Water Board's jurisdiction are consistent with the iterative nature of the federal MEP standard.[702]

The Commission finds that section XI. of the test claim permit imposes a state-mandated new program or higher level of service to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. All other provisions of section XI. are either not new, or not required, as described below.

a. Except for the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowners associations, all other activities are not new, but are required by federal law and the prior permit, or are discretionary.

i. *Federal law requires that the stormwater program address discharges from residential areas, including prohibiting non-stormwater discharges and educational activities for the proper management and disposal of used oil and toxic materials.*

Federal law 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."[703] 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.[704]

Federal regulations implementing the CWA require that all applicants for a MS4 permit have a management program that includes stormwater discharges from residential areas as follows:

- The program shall include "structural and source control measures to reduce pollutants from runoff from commercial *and residential areas*…," and the claimants acknowledge this federal law.[705] This shall include "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of

[702] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 38.

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

[704] Code of Federal Regulations, title 40, section 122.2.

[705] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A); Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 96.

pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities . . . ."[706]

- "A description of a program, including inspections, to implement and enforce an ordinance…[which] shall address all types of illicit discharges; however the following category of non-storm water discharges or flows shall be addressed *where such discharges are identified by the municipality as sources of pollutants… landscape irrigation…lawn watering*, *individual residential car washing*…"[707]
- "A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials."[708]
- Permittees are required by federal law to have adequate legal authority established by ordinance that prohibits illicit discharges to the MS4, and controls the discharge of spills, dumping, or disposal of materials other than stormwater to the MS4.[709]

The federal regulations thus require each permittee to have structural and source control measures to reduce runoff from residential areas; ordinances prohibiting illicit discharges, including irrigation and watering when identified as a source of pollutants, and residential auto washing, and "all [other] types of illicit discharges;" and an educational program to facilitate the proper management and disposal of used oil and toxic materials.

The federal regulations also require the permittees to assess the controls to estimate "reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program."[710] In addition, federal law requires the submission of an annual report that describes the "status of implementing the components of the storm water management program that are established as permit conditions," "[p]roposed changes to the storm water management programs," and any "[r]evisions, if necessary, to the *assessment* of controls. . . ."[711, 712]

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[706] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(6).

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

[708] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(6).

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

[710] Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

[711] Code of Federal Regulations, title 40, section 122.26(d)(2)(v); Code of Federal Regulations, title 40, section 122.42(c).

[712] In this respect, the claimant incorrectly states that federal law simply requires the reporting of the status of the components of the stormwater program. (Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 28.) Federal law also requires the

ii. *The prior permit addressed discharges from residential areas and claimants' 2003 DAMP, which was made enforceable by the prior permit, contained a residential program consistent with federal law.*

The claimant is correct that the prior permit did not have a section called "Residential Program," but the prior permit did impose requirements on the claimants to address discharges from residential areas as required by federal law. The claimants' 2003 DAMP and 2006 ROWD acknowledge there were residential program requirements in the prior permit, but they were stated in more general terms: "It should be noted that while the San Diego permit explicitly outlines a residential component, the Santa Ana permit is more general about residential requirements."[713] In fact, the claimants had a "model residential program" in their 2003 DAMP that fulfilled the requirements of the prior permit (Order No. R8-2002-0010) and the permit imposed by the San Diego Regional Water Quality Control Board (R9-2002-0001 governing the southern part of the county), which is discussed further below.[714]

The Findings in the prior permit recognized that "[u]rban runoff contains pollutants from privately owned and operated facilities, such as *residences*, businesses, private and/or public institutions, and commercial establishments."[715] Thus, Finding 15 of the prior permit states that it regulates urban storm water runoff from residential areas as follows:

> This order regulates urban storm water runoff from areas under the jurisdiction of the permittees. Urban storm water runoff includes those discharges from *residential*, commercial, industrial and construction areas within the permitted area and excludes discharges from feedlots, dairies, and farms (also see Finding 16). Storm water discharges consist of surface runoff generated from various land uses in all the hydrologic drainage areas that discharge into the water bodies of the U.S. The quality of these discharges varies considerably and is affected by land use activities, basin hydrology and geology, season, the frequency and duration of storm events, and the presence of illicit disposal practices and illegal connections.[716]

The first and second term permits (Order Nos. 90-71, 96-31) required the claimants to develop and implement a drainage area management plan (DAMP) to reduce pollutants in urban storm

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reporting of any revisions necessary to meet the MEP standard following the assessment of stormwater controls.

[713] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 47 (Model Residential Program); Exhibit Q (18) Orange County ROWD, July 21, 2006, page 13.

[714] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 47.

[715] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 405 [Order No. R8-2002-0010, Finding 28].

[716] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 402 [Order No. R8-2002-0010, Finding 15].

water runoff to the MEP.[717] As explained earlier, the DAMP is the principal guidance document for urban stormwater management programs in Orange County, and as described below, the claimants were required to continue implementing the programs and BMPs described in the DAMP under the prior permit. The prior permit states the following:

> 2. The purpose of this Order is to require the implementation of best management practices to reduce, to the maximum extent practicable, the discharge of pollutants from the MS4 in order to support reasonable further progress towards attainment of water quality objectives.
>
> *Permittees shall demonstrate compliance with all the requirements in this order* and specifically with Section III.2 Discharge Limitations and Section IV. Receiving Water Limitations, *through timely implementation of their DAMP* and any modifications, revisions, or amendments developed pursuant to this order approved by the Executive Officer or determined by the permittee to be necessary to meet the requirements of this order. *The DAMP, as included in the Report of Waste Discharge, including any approved amendments thereto, is hereby made an enforceable component of this order.*
>
> 3. *The permittees shall, at a minimum, implement all elements of the DAMP*. Where the dates in the DAMP are different than those of this order, the dates in this order shall prevail. Any proposed revisions to the DAMP shall be submitted with the Annual Report to the Executive Officer of the Regional Board for review and approval. All approved revisions to the DAMP shall be implemented as per the time schedules approved by the Executive Officer. In addition to those specific controls and actions required by (1) the terms of this Order and (2) the DAMP, each permittee shall implement additional controls, if any are necessary, to reduce the discharge of pollutants in storm water to the maximum extent practicable as required by this Order.[718]

The prior permit therefore required the permittees to:

- Implement management programs, monitoring programs, implementation plans and all BMPs outlined in the DAMP within each respective jurisdiction, and take any other actions as may be necessary to meet the MEP standard.
- Coordinate among their internal departments and agencies, as appropriate, to facilitate the implementation of this Order and the DAMP.
- Establish and maintain adequate legal authority, as required by the Federal Storm Water Regulations.

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[717] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 403, 465 [Order No. R8-2002-0010, Finding 21 and Fact Sheet].

[718] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010] (emphasis added).

- Conduct storm drain system inspections and maintenance in accordance with the criteria developed by the principal permittee. Take appropriate enforcement actions for illicit discharges to the MS4 system owned or controlled by the copermittee.
- Respond to emergency situations, such as accidental spills, leaks, illicit discharges and illegal connections, etc., to prevent or reduce the discharge of pollutants to storm drain systems and waters of the U.S.
- Monitor the implementation of the plans and programs required by this order and determine their effectiveness in protecting beneficial uses.[719]

In addition, all permittees were required to prohibit non-stormwater discharges from entering into the MS4 in accordance with federal regulations.[720] The permittees were also required to review their water quality ordinances and provide a report on the effectiveness of these ordinances and associated enforcement programs, in prohibiting the following types of discharges (including residential discharges) to the MS4s: discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, and concrete mixing equipment; runoff from material storage areas or uncovered receptacles that contain chemicals, fuels, grease, oil, or other hazardous materials; discharges of runoff from the washing of toxic materials from paved or unpaved areas; discharges of pool or fountain water containing chlorine, biocides, or other chemicals; pool filter backwash containing debris and chlorine; and pet waste, yard waste, litter, debris, sediment, etc.[721]

In addition, all permittees were required to comply with receiving water limitations through the DAMP:

> The DAMP and its components shall be designed to achieve compliance with receiving water limitations. It is expected that compliance with receiving water limitations will be achieved through an iterative process and the application of increasingly more effective BMPs. The permittees shall comply with Sections III.2 and IV of this order through timely implementation of control measures and other actions to reduce pollutants in urban storm water runoff in accordance with the DAMP and other requirements of this order, including any modifications thereto.[722]

If the permittees detected an exceedance of water quality standards, then the permittees "shall revise the DAMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring

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[719] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 410-411 [Order No. R8-2002-0010].

[720] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 412-413 [Order No. R8-2002-0010].

[721] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 415 [Order No. R8-2002-0010].

[722] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 413 [Order No. R8-2002-0010].

required;" and "implement the revised DAMP and monitoring program in accordance with the approved schedule."[723]

The prior permit further required the permittees to "continue to implement the public education efforts already underway and shall implement the most effective elements of the comprehensive public and business education strategy contained in the Report of Waste Discharge/DAMP."[724] "The goal of the public and business education program shall be to target 100% of the *residents*, including businesses, commercial and industrial establishments."[725]

By July 1, 2002, the permittees had to "develop public education materials to encourage the public to report (including a hotline number and web site to report) illegal dumping and unauthorized, non-storm water discharges from *residential*, industrial, construction and commercial sites into public streets, storm drains and other waterbodies; clogged storm drains; faded or missing catch basin stencils and general storm water and BMP information. This hotline and web site shall be included in the public and business education program and shall be listed in the governmental pages of all regional phone books."[726]

By July 1, 2003, the permittees had to "develop BMP guidance for the control of those potentially polluting activities not otherwise regulated by any agency including guidelines *for the household use of fertilizers, pesticides, herbicides and other chemicals*, and guidance for mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting. These guidance documents shall be distributed to the public, trade associations, etc., through participation in community events, trade association meetings and/or mail."[727]

By July 1 of each year, the permittees were required to evaluate the DAMP to determine whether any revisions are necessary in order to reduce pollutants in MS4 discharges to the maximum extent practicable.[728]

The claimants' 2003 DAMP, section 9 on Existing Development, complies with these requirements and addresses discharges from residential development, common interest areas, and homeowners' associations.[729] "Model programs were developed for residential and homeowner

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[723] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 414 [Order No. R8-2002-0010].

[724] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

[725] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[726] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[727] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[728] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 432-433 [Order No. R8-2002-0010].

[729] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 1.

association discharges to address pollution prevention, source identification, prioritization, BMP implementation, inspection, monitoring, enforcement, and program report and assessment."[730] The "Model Residential Program" begins on page 47 of the 2003 DAMP, which was developed to comply with the prior permit in this case (Order No. R8-2002-0010):

> The Residential Model Program provides a framework and a process for a municipality to follow consistent procedures for implementing existing residential development components, including:
>
> • Development of a source identification procedure and prioritize residential areas bases on proximity to ESAs within the Permittee's jurisdiction.
>
> • Identification of Best Management Practices (BMPs) most appropriate for each area, based on residential activities.
>
> • Implementation of program, focusing on public outreach and education, but including enforcement activities.
>
> • Reporting program for the assessment of program effectiveness.[731]

Section 9.5.3.1 of the DAMP addresses BMPs designated for high threat residential areas and activities and states the following:

> A set of BMPs has been designated for high threat residential areas and activities. All high priority activities are assumed to occur in all residential areas and that no other residential activities are known to be a significant threat to receiving water quality. As part of the program assessment, Permittees will review available data to determine if additional activities should be considered high threat, if the designated set of BMPs should be expanded, and whether additional residential areas should be considered for enhanced implementation.
>
> Where residential areas and activities generate pollutants for which the receiving water is 303(d) listed, the Permittees may require the implementation of optional BMP controls as part of their enhanced implementation program (see Section 9.5.4). For residential areas directly adjacent to or directly discharging to ESAs, including coastal waters, the Permittees may also be required to implement additional controls to sufficiently reduce pollutant loads. [732]

Section 9.5.3.2 states that BMP Fact Sheets have been prepared for the following residential activities: automobile repair and maintenance; automobile washing; automobile parking; home and garden care; disposal of pet wastes; disposal of green waste; household hazardous waste; and water conservation.[733]

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[730] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 2.

[731] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 48.

[732] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 56.

[733] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 57.

The DAMP further states that public education and outreach activities designed to inform residents about BMPs are critical components to the implementation of the residential program. "Pollution prevention BMPs for the residential program rely on public education and outreach to affect change in behavior, either in curtailing activities generating pollutants, or to purchase alternative products with lower risk of contaminating runoff."[734]

Section 9.5.4.3 of the DAMP contains the enforcement provisions as follows: "Because enforcement will be conducted in steps for specific residences, the Permittee must provide for an inventorying of violations, and where a particular resident is in the enforcement scheme. The enforcement steps include: Notice of Non-compliance; Administrative Compliance Order; Cease and Desist Orders; Infractions and Misdemeanors."[735]

Section 9.5.5 of the DAMP addresses assessment and reporting and states that "Each Permittee is required to prepare a program report regarding their efforts in the residential program. The residential program report will in turn become part of the Permittee's Annual Report submitted to the Principle Permittee and the appropriate RWQCB."[736] Section 9.5.5.2 addresses the effectiveness assessment strategy, which results in an annual assessment and a report for the residential program.[737]

Section 6 of the DAMP addresses the claimants' public education program.[738] That section recognizes that "federal regulations require, as part of the DAMP, a description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials."[739] An Exhibit to the DAMP states that "The County of Orange has a significant household hazardous waste collection program and a used oil recycling outreach program, both of which deliver messages that directly affect the volume of pollutants that end up in the storm drain system."[740] Section 6 further explains that the "First, Second, and Third Term Permits similarly specified that the Permittees continue to implement the public education efforts already underway, participate in joint outreach efforts to ensure that a consistent message on stormwater pollution prevention is brought to the public, encourage the public to report illegal dumping, and develop BMP guidance for the control of those potentially polluting activities not otherwise regulated by any agency."[741] That section also states that "[o]ne of the focuses of during the third term permit was "Outreach for residential

[734] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 57.

[735] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 61.

[736] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 61.

[737] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 63.

[738] Exhibit Q (6), DAMP, July 1, 2003, Section 6 – Public Education.

[739] Exhibit Q (6), DAMP, July 1, 2003, Section 6 – Public Education, page 1.

[740] Exhibit Q (8), DAMP, July 1, 2003, Exhibit 6.1. Recommendations for Expanding the Outreach Program, page 13.

[741] Exhibit Q (6), DAMP, July 1, 2003, Section 6 – Public Education, page 1.

areas and activities focusing on the main types of problems created by residential activities and the BMPs that can be employed to reduce those problems."[742]

iii. *Except for the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowners associations, all other activities required by section XI. of the test claim permit are not new, but are required by federal law and the prior permit.*

Section XI. states that the permittees "shall" perform the following required activities:

- Develop and implement a residential program to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard, in order to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters.
- Encourage residents to implement pollution prevention measures.
- Collectively or individually facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes.
- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies.
- Enforce water quality ordinances for all residential areas and activities.
- Include an evaluation of the residential program in the annual reporting.[743]

Except for the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations, the remaining activities are not new.

As indicated above, federal law explicitly requires that the permit application contain a description of structural and source control measures to reduce pollutants from residential areas; a description of a program to facilitate reporting of illicit discharges (including illegal dumping and activities such as residential car washing, landscape irrigation, and lawn watering); a description of educational activities, public information activities, and other appropriate activities to facilitate proper management and disposal of used oil and toxic materials; adequate legal authority though the adoption of local ordinances to control and prohibit illicit discharges to the MS4; and an assessment of all program areas and an annual report on the status of implementation of the residential program activities and any revisions necessary following the assessment.[744]

The prior permit also required the claimants to prohibit all non-stormwater discharges (which includes used oil, toxic and hazardous materials, and other household wastes); implement

[742] Exhibit Q (6), DAMP, July 1, 2003, Section 6 – Public Education, page 10.

[743] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 316-317 [Order No. R8-2009-0030, Section XI.].

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

management programs, monitoring programs, implementation plans and all BMPs outlined in the DAMP, and take any other actions as may be necessary to meet the MEP standard to meet the receiving water limitations and discharge prohibitions; continue to implement public education efforts that targeted residents; develop public education materials to encourage the public to report (including a hotline number and web site to report) illegal dumping and unauthorized, non-storm water discharges; develop BMP guidance for the control of those potentially polluting activities not otherwise regulated by any agency including guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals; and annually evaluate the DAMP to determine whether any revisions are necessary in order to reduce pollutants in MS4 discharges to the MEP.[745] And the claimants' 2003 DAMP, made enforceable by the prior permit, complied with this prior law.[746]

Accordingly, the following permit terms are required by prior state and federal law, and are *not* new:

- Develop and implement a residential program to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard, in order to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters.
- Encourage residents to implement pollution prevention measures.
- Collectively or individually facilitate the proper collection and management of used oil, toxic and hazardous materials, and other household wastes.
- Enforce water quality ordinances for all residential areas and activities.
- Include an evaluation of the residential program in the annual reporting.[747]

However, there are no provisions in federal law or the prior permit requiring the claimants to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. Thus, this requirement is new.

Section XI. of the test claim permit also identifies activities that the claimants "should" perform:

- As part of the program, permittees "should" identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets and BMPs. This "should" include, at a minimum, residential auto washing and maintenance activities; use and

[745] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 410-433 [Order No. R8-2002-0010].

[746] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 433-434 [Order No. R8-2002-0010]; Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development; Exhibit Q (6), DAMP, July 1, 2003, Section 6 – Public Education; Exhibit Q (8), DAMP, July 1, 2003, Exhibit 6.1, Recommendations for Expanding the Outreach Program.

[747] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 316-317 [Order No. R8-2009-0030, Section XI.].

disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet waste.

- When encouraging residents to implement pollution prevention measures, permittees "should" work with sub-watershed groups to disseminate the latest research information, such as the UC Master Gardeners Program and USDA's Backyard Conservation Program.
- When facilitating the proper collection and management of used oil, toxic and hazardous materials, and other household wastes, permittees "should" include educational activities, public information activities, and establish curbside or special collection sites managed by the permittees or private entities, such as solid waste haulers.
- When developing the pilot program to control pollutant discharges from common areas and areas managed by associations or companies, the permittees "should" evaluate the applicability of programs such as the Landscape Performance Certification Program to encourage efficient water use and to minimize runoff.[748]

The claimants contend that "should" really means "shall" when reviewed in context of the regulatory scheme.[749] The Commission agrees that these provisions have to be read in context, and that the first bullet above (which encourages the identification residential areas and activities that are potential sources of pollutants and the development of Fact Sheets and BMPs for the list of residential discharges) falls within the requirements of existing federal law and the prior permit. Federal law requires the stormwater program to have "structural and source control measures to reduce pollutants from runoff from commercial *and residential areas*…."[750] The prior permit required the claimants to implement the BMPs outlined in the DAMP within each respective jurisdiction, and take any other actions as may be necessary to meet the MEP standard. The prior permit also required the claimants, by July 1, 2003, to "develop BMP guidance for the control of those potentially polluting activities not otherwise regulated by any agency including guidelines for the household use of fertilizers, pesticides, herbicides and other chemicals."[751] And Section 9.5.3.2 of the DAMP, which was made enforceable by the prior permit, states that BMP Fact Sheets have been prepared for automobile repair and maintenance; automobile washing; automobile parking; home and garden care; disposal of pet wastes; disposal of green waste; household hazardous waste; and water conservation.[752]

Similarly, parts of the third bullet above ("when facilitating the proper collection and management of used oil, toxic and hazardous materials, and other household wastes, permittees

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[748] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 316-317 [Order No. R8-2009-0030, pp. 46-47, Section XI.].

[749] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 30.

[750] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(6).

[751] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 410-411, 428, 433-434 [Order No. R8-2002-0010].

[752] Exhibit Q (7), DAMP, July 1, 2003, Section 9 – Existing Development, page 57.

'should' include educational activities, public information activities . . ."), are already required by federal law. Federal law requires that the program include "educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials."[753] The claimants' report that "The County of Orange has a significant household hazardous waste collection program and a used oil recycling outreach program, both of which deliver messages that directly affect the volume of pollutants that end up in the storm drain system."[754] Thus, these "should" activities are already required by federal law and the prior permit, and are not new.

The remaining "should" activities are truly discretionary. There is nothing in the law and no evidence in the record that would support a finding that the remaining "should" activities are required by the test claim permit or by federal law. Thus, the word "should" needs to be interpreted based on its plain and ordinary meaning.

> In the first step of the interpretive process we look to the words of the statute themselves. [Citations.] The Legislature's chosen language is the most reliable indicator of its intent because ' "it is the language of the statute itself that has successfully braved the legislative gauntlet." ' [Citation.] We give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning.[755]

Webster's II New College Dictionary states that the word "should" is used to express a probability or an expectation, or to express conditionality or contingency.[756] Thus, while the Regional Board expects the permittees to perform the required residential program activities in the manner outlined in Section XI. of the permit, there is nothing in the law or any evidence in the record to support a finding that that the remaining "should" activities are mandated by the test claim permit. Instead, it is up to the permittees to decide how best to perform the required activities under their residential program in order to reduce pollutants consistently with the Clean Water Act.

Accordingly, the only new requirement imposed by section XI. of the test claim permit is the following:

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies.

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[753] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(6).

[754] Exhibit Q (8), DAMP, July 1, 2003, Exhibit 6.1., Exhibit 6.1, Recommendations for Expanding the Outreach Program.

[755] *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082–1083.

[756] Webster's II New College Dictionary, page 1022.

b. The new requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies is mandated by the state.

Federal law does not explicitly require a "pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies." It may be that the pilot program for common interest area discharges is related to the proper use of fertilizers or excess irrigation or lawn watering discharges, but there is no evidence in the record establishing such link, and no findings by the Regional Board directly on point. Instead, the record shows that in response to comments the Regional Board replaced the pollution prevention requirements for common interest areas with a "pilot program."[757]

Applying the Supreme Court's dual test articulated in *Department of Finance*, the Commission finds that the pilot program requirement is neither explicitly required nor fairly implied by the plain language of the federal regulations; and, there is no evidence in the record that this permit term is the only means by which to comply with federal law to reduce the discharge of pollutants.[758] Without such findings, the Commission is not required to defer to the Regional Board's determination of what permit terms are necessary to satisfy federal law, including the maximum extent practicable standard.[759, 760]

Thus, the Commission finds that the following requirement is mandated by the state:

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies.[761]

c. The new requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies constitutes 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

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[757] Compare Exhibit Q (14), First Draft of Tentative Order No. R8-2008-0030, page 45 [Administrative Record on Permit No. R8-2009-0030, Part I] with Exhibit Q (15), Fourth Draft of Permit, Order No. R8-2009-0030, page 46 [Administrative Record on Permit No. R8-2009-0030, Part III].

[758] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768; 771.

[759] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769 ["The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated."].

[760] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 38.

[761] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316-317 [Order No. R8-2009-0030].

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."[762]

The Regional Board argues that the test claim permit, as a whole, is not subject to article XIII B, section 6 because the permit does not impose requirements unique to local government. The Board asserts that the entire test claim permit is a law of general application, in that (1) NPDES permits are required for all public and private dischargers; (2) the requirements of NPDES stormwater permits are more stringent for private dischargers than for MS4 permittees; and (3) "the government requirements apply to all governmental entities that operate MS4s, including state, Tribal, and federal facilities; local government is not singled out."[763]

The Commission disagrees and finds that this requirement imposes a new program or higher level of service. The challenged requirement is unique to local government. The test claim "permit applies by its terms only to the local governmental entities identified in the permit; no one else is bound by it."[764] Moreover, the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies imposes a governmental service to the public "because it, together with other requirements, will reduce pollution entering stormwater drainage systems and receiving waters." This requirement is expressly intended "to reduce the discharge of pollutants from residential facilities to the MS4s consistent with the maximum extent practicable standard so as to prevent discharges from the MS4s from causing or contributing to a violation of water quality standards in the receiving waters."[765]

Accordingly, the Commission finds that the activity to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies imposes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

4. Sections XIII.1, XIII.4, and XIII.7 of the Test Claim Permit Impose a State-Mandated New Program or Higher Level of Service For Specified New Public Education and Outreach Requirements.

Section XIII. of the Permit states that permittees "shall continue to implement the public education efforts already underway and…[b]y July 1, 2012, the permittees shall complete a public awareness survey to determine the effectiveness of the current public and business education strategy and any need for changes to the current multimedia public education

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[762] *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, 629.

[763] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 17.

[764] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 630; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 273 [Order No. R8-2009-0030].

[765] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316 [Order No. R8-2009-0030].

efforts."[766] "The findings of the survey and any proposed changes to the current program shall be included in the annual report for 2011-2012."[767] The Permit further provides that permittees "shall sponsor or staff a storm water table or booth at community, regional, and/or countywide events to distribute public education materials to the public."[768] Additionally, permittees shall continue to participate in the Public Education Committee, which shall meet at least twice per year, and shall continue to make recommendations for any changes to the public and business education program.[769] The Permit requires permittees to "continue their outreach and other public education activities," and states that "[e]ach permittee should try to the reach the following sectors: manufacturing facilities; mobile service industry; commercial, distribution and retail sales industry; residential/commercial landscape construction and services industry; residential and commercial construction industry; and residential and community activities."[770] And, the Permit requires permittees to administer individual or regional workshops for each of the aforementioned sectors by July 1, 2010 and annually thereafter, and directs commercial and industrial facility inspectors to distribute educational information (Fact Sheets) during their inspection visits.[771] The Permit also requires permittees to "further develop and maintain public education materials to encourage the public to report illegal dumping and unauthorized, non-storm water discharges from residential, industrial, construction and commercial sites into public streets, storm drains and to surface waterbodies and their tributaries; clogged storm drains; faded or missing catch basin stencils and general storm water and BMP information."[772] The Permit requires, within 12 months of adoption, the permittees "shall further develop and maintain BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle, which are not otherwise regulated by any agency…" including household use of fertilizers and pesticides, mobile vehicle maintenance, carpet cleaning services, commercial landscape maintenance, and pavement cutting; the guidance documents "shall be distributed to the public, trade associations, etc., through participating in community events, trade association

[766] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[767] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[768] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.2].

[769] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.3].

[770] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[771] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[772] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.5].

meetings, and/or by mail."[773] Finally, Section XIII. of the permit requires the principal permittee, in collaboration with the co-permittees, to develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities," and the public shall be informed of the availability of these documents through public notices in local newspapers, County or city websites, local libraries, city halls, or courthouses.[774]

a. Some of the requirements of the Public Education and Outreach Program are new, as compared with the prior permit.

The claimants acknowledge that the public education requirements of the test claim permit are largely similar to the public education requirements of the prior permit:

> The 2002 Permit established many of the programs in the 2009 Permit. The 2009 Permit, however, includes several new requirements that were either suggested in the 2002 Permit, or not included in the 2002 Permit.[775]

However, the claimants allege that the test claim permit "imposes at least six new public education requirements…" These include: (1) a public awareness survey, to be completed by July 1, 2012; (2) recommendations and " a reevaluation of audiences and key messages" by the Public Education Committee; (3) administering individual or regional workshops beginning July 1, 2010 and annually thereafter; (4) "further develop and maintain public education materials" including a hotline number and web site to report illegal dumping and illicit discharges; (5) "further develop and maintain BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle; and (6) develop a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets, and publicize the availability of those documents in local newspapers.[776]

Some of the activities identified by the claimants are new, but some are substantially the same as the Third Term Permit. The Third Term Permit required the permittees to "continue to implement the public education efforts already underway and…implement the most effective elements of the comprehensive public and business education strategy…"[777] Therefore the existence of the public education program is established by the Third Term Permit.

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[773] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.6].

[774] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[775] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 93.

[776] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 93-94.

[777] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

The Third Term Permit also required a public education survey: by July 1, 2002, permittees "shall complete a public awareness survey to determine the effectiveness of the current public and business education strategy."[778] The plain language of the Third Term Permit indicates that this was to be a one-time activity, and the test claim permit requires permittees to repeat the activity. The additional public awareness survey required by July 1, 2012 under the test claim permit and the requirement to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012, constitute new activities.

The Third Term Permit also required permittees, "[w]hen feasible," to participate in joint outreach with other programs, and provided that permittees "shall sponsor or staff a storm water table or booth" at community or regional events.[779] Accordingly, the activity of sponsoring or staffing a table or booth at community events is not new.

The Third Term Permit required establishment of a Public Education Committee, which is required to meet at least twice per year, and which "shall make recommendations for any changes to the public and business education program."[780] The Public Education Committee was required, by July 1, 2002, to develop BMP guidance for restaurants, automotive service centers, and gas stations, which industrial facility inspectors would distribute during inspections.[781] The test claim permit, as noted above, requires permittees to *continue to participate* in the Public Education Committee, and to *continue to make recommendations* for any changes to the public and business education program.[782] These requirements are not new, based on the plain language. Further, the test claim permit requires permittees to "continue their outreach and other public education activities," and states that "[e]ach permittee should try to the reach the following sectors: manufacturing facilities; mobile service industry; commercial, distribution and retail sales industry; residential/commercial landscape construction and services industry; residential and commercial construction industry; and residential and community activities."[783] This provision, based on the plain language, suggests an expansion of the scope of the public

[778] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

[779] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 427 [Order No. R8-2002-0010].

[780] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[781] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[782] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030].

[783] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030].

education program; however, the phrase "should try to reach…" is not mandatory.[784] This does not, therefore, constitute a new required activity.

The Third Term Permit required permittees to "develop public education materials to encourage the public to report (including a hotline number and web site to report) illegal dumping and unauthorized, non-storm water discharges…clogged storm drains; faded or missing catch basin stencils and general storm water and BMP information."[785] The Third Term Permit required permittees, by July 1, 2003, to develop BMP guidance "for the control of those potentially polluting activities not otherwise regulated by any agency," including household use of fertilizers or pesticides, mobile vehicle maintenance, carpet cleaners, commercial landscape maintenance, and pavement cutting."[786] The Third Term Permit stated that "[t]hese guidance documents shall be distributed to the public, trade associations, etc., through participation in community events, trade association meetings and/or mail."[787] The test claim permit states that permittees shall "*further develop and maintain* public education materials to encourage the public to report illegal dumping and unauthorized, non-storm water discharges…"[788] And, the test claim permit requires that within 12 months of adoption, the permittees "shall *further develop and maintain* BMP guidance for the control of those potentially polluting activities identified during the previous permit cycle, which are not otherwise regulated by any agency…"[789] These activities are substantially the same as under the prior permit, and to continue to develop and maintain activities previously required does not increase the level of service provided to the public.

Based on a comparison between the Third Term Permit and the test claim permit, the following requirements of the Public Education Program are new:

- By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to

[784] Webster's II New College Dictionary states that the word "should" is used to express a probability or an expectation, or to express conditionality or contingency. (Webster's II New College Dictionary, page 1022.) The word "should" is not mandatory.

[785] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[786] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[787] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 428 [Order No. R8-2002-0010].

[788] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 (emphasis added) [Order No. R8-2009-0030].

[789] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 (emphasis added) [Order No. R8-2009-0030].

include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012.[790]

- Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and retail sales industry; residential/commercial landscape construction and service industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter, and commercial and industrial facility inspectors shall distribute educational information (Fact Sheets) during their inspection visits.[791]
- The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in local newspapers, county or city websites, local libraries, city halls, or courthouses.[792]

b. <u>The new requirements of the Public Education Program are mandated by the state, and constitute a new program or higher level of service.</u>

The claimants acknowledge that the federal regulations "provide general public education requirements for large municipal stormwater permits," but "do not, however, require anywhere near the level of specificity that the Santa Ana RWQCB has included in the 2009 Permit," and, thus they assert the activities are mandated by the state:[793]

> Title 40, sections 122.26(d)(2)(iv)(A)(6), (B)(6), and (D)(4) of the Code of Federal Regulations provide general public education requirements for large municipal stormwater permits. These Federal Regulations require MS4 Permits to require a public education program. The elements that federal regulations require be part of a public education program are very limited, namely educational activities to facilitate the proper management and disposal of used oil and toxic materials, and appropriate educational and training measures for construction site operators. The regulations do not specifically require workshops for the development of each of the documents required by the 2009 Permit, nor do they require the industry workshop mandated by the 2009 Permit. Because of the lack of specific requirements related to the public education program in the federal regulations, federal law grants Permittees latitude to determine the most

[790] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[791] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[792] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[793] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 92.

> efficient and effective way to solicit that public participation. The prescriptive requirements contained in the 2009 Permit go well beyond what federal law requires.[794]

The claimants further assert that while the prior permit included a public education component, the findings of the test claim Permit "do not set forth any facts to suggest that the additional Public Education Requirement[s] of the [the test claim] Permit were necessary to address any deficiencies of the existing program."[795] Responding specifically to the Supreme Court's test articulated in *Department of Finance*, the claimants argue:

> The specificity and scope of the public education requirements in the Permit similarly go well beyond federal regulatory authority, and demonstrate that the SAWB was exercising its discretion to impose state mandated requirements on the permittees. As the Rebuttal notes, the SAWB set forth no findings that the additional public education requirements were required "to address any deficiencies of the existing program" or were "necessary to address specific pollutants of concern…" Rebuttal at 45. Given the lack of such findings, it cannot be argued the additional public education conditions "were the only means by which the [MEP] standard could be implemented," where deference to the board's expertise in reaching that finding would be appropriate. Slip op. at 22.[796]

The Regional Board argues that federal regulations require the co-permittees to include a description of public education efforts in their permit application (here, their ROWD), and that "[w]hen translating these application requirements into permit terms, the [Regional Board] must comply with the MEP standard."[797] The Regional Board reasons that because MEP is an "iterative, evolving standard," it is expected that "the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard."[798] The Regional Board holds that this "does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service."[799] Further, the Regional Board argues that the Order contains "few discernible differences" from the prior permit: "the 2009 Permit generally requires continuation and fine-tuning of the ongoing efforts developed pursuant to the 2002 Permit."[800] Responding specifically to *Department of Finance*, the Regional Board argues that the decision "has limited applicability because, unlike the 2001 Los

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[794] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 51 [citing 40 C.F.R. §§ 122.26(d)(2)(iv)(A)(6); 122.26(d)(2)(iv)(B)(6); 122.26(d)(2)(iv)(D)(4)].

[795] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 51.

[796] Exhibit J, Claimants' Response to the Request for Additional Briefing, filed October 21, 2016, page 13.

[797] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 37.

[798] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 38.

[799] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 38.

[800] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 38.

Angeles Permit, the 2009 Permit includes a finding that the requirements implement only federal law."[801] The Regional Board cites Finding 3, which states:

> In accordance with Section 402(p) (2) (B) (iii) of the CWA and its implementing regulations, this order requires permittees to develop and implement programs and policies necessary to reduce the discharge of pollutants in urban storm water runoff to waters of the US to the maximum extent practicable (MEP).[802]

In addition, the Regional Board argues that because it has made such findings, it is entitled to deference on the question of the scope of the federal mandate underlying the Permit.[803]

As discussed above, *Department of Finance* requires the Commission to analyze whether each disputed permit term (i.e., each requirement) is expressly required by federal law or, alternatively, is required to reduce pollutants to the maximum extent practicable. In this, the Commission is not required to defer to the Regional Board's determinations on what is required to be included in the permit unless the Regional Board has made findings that the disputed permit terms are the only means by which MEP can be satisfied.[804]

Here, there is nothing in federal law that is sufficiently specific as to require the new permit requirements. As the claimants acknowledge, federal law contains general requirements regarding public education in 40 C.F.R Part 122.26(d)(iv)(A)(6); (B)(6); and (D)(4).[805] Those provisions state, respectively:

> [122.26(d)(iv)(A)] Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:
>
> [¶…¶]
>
> (6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and

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[801] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 2.

[802] See Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 272 [Order No. R8-2009-0030].

[803] Exhibit I, Regional Board's Response to the Request for Additional Briefing, filed October 21, 2016, page 3.

[804] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768 ["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."].

[805] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 92.

other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.[806]

[122.26(d)(iv)(B)] A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

[¶…¶]

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and[807]

[122.26(d)(iv)(D)] A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

[¶…¶]

(4) A description of appropriate educational and training measures for construction site operators.[808]

Nothing in these provisions, nor anywhere else in the federal law, requires the specific activities challenged in this Test Claim. Moreover, there is no evidence in the record that *these requirements* are the only means by which MEP can be met.[809]

Accordingly, the Commission finds that the following activities are new state-mandated activities:

- By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012.[810]
- Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and

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

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

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

[809] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768 ["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."].

[810] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

retail sales industry; residential/commercial landscape construction and service industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter, and commercial and industrial facility inspectors shall distribute educational information (Fact Sheets) during their inspection visits.[811]

- The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in local newspapers, County or city websites, local libraries, city halls, or courthouses.[812]

In addition, the Commission finds that these state-mandated activities are uniquely imposed on the local government permittees, and provide a governmental service to the public to reduce the discharge of pollution in stormwater runoff from the MS4s.[813] Therefore, the requirements impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

5. Sections IX.1, X.1-3, X.5, and X.8 of the Test Claim Permit Impose a State-Mandated New Program or Higher Level of Service For Specified New Activities Relating to Municipal Inspections of Industrial and Commercial Facilities.

The test claim permit requires each permittee to maintain an inventory of industrial and commercial facilities within its jurisdiction that are subject to inspection. The inventory must include "all [industrial] sites that have the potential to discharge pollutants to the MS4…regardless of whether the facility is subject to business permits"[814] and "the types of commercial facilities/businesses listed," including, for example, automotive repair, maintenance, fueling, or cleaning; airplane maintenance, fueling, or cleaning; marinas and boat maintenance, fueling, or cleaning; pest control service facilities; animal facilities such as petting zoos and boarding and training facilities; landscape and hardscape installation; golf courses; and any commercial sites or sources that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Special Biological Significance.[815] The inventory must be maintained in a computer-based database system, and inclusion of a Geographical Information System

[811] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[812] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[813] *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, 629-630.

[814] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 311 [Order No. R8-2009-0030].

[815] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 313 [Order No. R8-2009-0030].

(GIS), as specified, is required.[816] Then, based on each facility's priority ranking, determined by the threat posed to water quality, permittees are required to conduct regular inspections, reviewing the facility's material handling and storage practices, BMP implementation, any evidence of a violation that might cause a threat to water quality.[817] A report on high priority industrial inspections and a copy of the databases for industrial and commercial facilities shall be included in the annual report, and all inspectors are required to be trained.[818] The test claim permit also requires the principal permittee to "continue" to maintain a restaurant inspection program.[819] And the test claim permit requires permittees to develop a mobile business pilot program.[820]

a. Some of the requirements of the Inspections of Industrial and Commercial Facilities program are new, as compared with prior law.

The prior permit required permittees to maintain an inventory of industrial and commercial facilities in a computer-based database, and to inspect those facilities on a schedule based on their potential to impact water quality.[821] At a minimum, high priority sites were required to be inspected at least once by July 1, 2004.[822] In addition, the prior permit required that high priority industrial inspections and a copy of the databases for industrial and commercial facilities (*as identified in the prior permit*) be included in the annual report, and that inspectors be trained.[823] The prior permit also required the principal permitted to develop a restaurant inspection program.[824] Those elements of the program are not new.

However, the test claim permit now requires that inventory to include "a Geographical Information System (GIS), with latitude, longitude (in decimals) or NAD83/WGS84 compatible

[816] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 311; 313 [Order No. R8-2009-0030].

[817] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 312; 314 [Order No. R8-2009-0030].

[818] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030].

[819] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030, Section X.9].

[820] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030].

[821] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 418-421 [Order No. R8-2002-0010].

[822] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 421 [Order No. R8-2002-0010].

[823] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 419-422 [Order No. R8-2002-0010].

[824] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 416 [Order No. R8-2002-0010, Section VI.7].

formatting…"[825] In addition, the categories of commercial facilities subject to inspection are expanded by the test claim permit,[826] and the Permit requires a new "prioritization and inspection schedule," which must include "proximity and sensitivity of receiving waters, material used and wastes generated at the site."[827] Until that prioritization and inspection schedule is approved, at least ten percent of commercial sites are to be ranked "high" priority in terms of the frequency of inspections, and twenty percent to be ranked "medium" priority.[828] The priority rankings also determine the frequency of inspection: high priority sites must be inspected annually, medium priority sites must be inspected every two years, and low priority sites must be inspected at least once during the permit term.[829] And, the permit requires permittees to develop a mobile business pilot program, to address one category of mobile business, such as mobile auto washing/detailing; carpet, drape, and furniture cleaning; or mobile high pressure or steam cleaning. The pilot program must include outreach materials for the business and an

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[825] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 311; 313 [Order No. R8-2009-0030].

[826] The new categories of commercial facilities subject to inspection, as compared with the Third Term Permit, are as follows:

a) Transport, storage or transfer of pre-production plastic pellets.

c) Airplane maintenance, fueling or cleaning;

d) Marinas and boat maintenance, fueling or cleaning;

e) Equipment repair, maintenance, fueling or cleaning;

f) Automobile impound and storage facilities;

g) Pest control service facilities;

h) Eating or drinking establishments, including food markets and restaurants;

j) Building materials retail and storage facilities;

k) Portable sanitary service facilities;

m) Animal facilities such as petting zoos and boarding and training facilities;

q) Golf courses.

(Compare Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, p. 313 [Order No. R8-2009-0030] with pp. 420-421 [Order No. R8-2002-0010].)

[827] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030].

[828] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030].

[829] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030].

enforcement strategy and BMPs for the business type.[830] These activities are newly required, including the inspections for the newly-added categories of commercial facilities, and the increased frequency of inspections that follows from the quotas imposed on facility priority rankings.

b. The new requirements of the Inspections of Industrial and Commercial Facilities program are state-mandated.

The claimants argue that the 2002 permit did not require GIS as a part of the inventory for commercial and industrial facilities, and "there is no express requirement or mention of the use of GIS as part of municipal inspection of commercial facilities in the CWA or the federal regulations."[831] The claimants further argue that "[t]he Regional Board provides no legal justification or authority stating that these 11 new categories [of commercial facilities] pose a significant water quality threat to the MS4," and therefore there is "no legal authority warranting the inclusion of these 11 new categories of commercial facilities and no evidence that these 11 categories are significant non-point source polluters."[832] With respect to costs, the claimants allege that they must purchase equipment and software, and hire consultants to "prepare aerial digital photographs of the Permittees' jurisdictions;" "develop a GIS browser;" "digitize all stormdrain systems and develop a storm drain system digital map [sic];" and "develop a GIS layer that includes all commercial, industrial, and restaurant facilities that are inspected for stormwater compliance."[833]

The Regional Board asserts that the claimants' 2007 DAMP, submitted along with its ROWD, "proposed the prioritization methodology for industrial and commercial facilities inspections," which "specifically identifies *the distance between the facility and a sensitive waterbody* as one of the major factors in the prioritization ranking."[834] The Regional Board accordingly states: "It is difficult to envision how this information would be calculated, recorded and documented for verification without the use of GIS. Thus, the challenged permit provisions flow directly from Claimants' proposal."[835] With respect to the quotas applied to priority rankings on which inspection frequency is based, the Regional Board stated:

> During the third permit term, the permittees were given the opportunity to design a commercial facility ranking system based on a number of criteria including type/size of activity, potential for pollutant discharge and history of pollutant

[830] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030].

[831] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 102.

[832] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 102.

[833] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 103.

[834] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 39.

[835] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 39.

> discharges. Despite this opportunity, in the most recent annual report, some permittees are reporting few or no high priority commercial sites out of hundreds to thousands of sites that met one or more of the 11 categories listed in the third term permit. The 10/40/50 breakdown should be used to ensure that the 10% of commercial facilities with the highest potential for pollutant discharge be ranked 'high' and be inspected annually, similarly for the medium and low priority rankings.[836]

As discussed above, the claimants are required to submit a ROWD before the end of each permit term, and that submission is required to contain proposed additional measures that can be taken to promote water quality in the region. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." Thus, even if the permittees "proposed the prioritization methodology," or were already employing GIS in their inventory of commercial and industrial facilities, the inclusion of these requirements in the test claim permit adopted by the Regional Board still may constitute a new state-mandated activity. Moreover, the claimants' ROWD [DAMP 2007] contains no reference to the expansion of commercial facility categories subject to inspection; nor any plan to impose *quotas* for priority rankings; and, the ROWD/DAMP clearly states that GIS information would remain an *optional* element of each permittee's inventory.[837] Accordingly, the Commission cannot, in the context of a mandates analysis, find that measures proposed in good faith in the ROWD, a planning document that the claimants are required by the applicable provisions of the CWA and the regulations, and by the prior permit, to submit, are not mandated by the state when the measures are then adopted and made mandatory as part of the Regional Board's final permit.[838]

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[836] Exhibit Q (30), Regional Board's Response to Comments on Draft Permit, page 17 [Administrative Record on Order No. R8-2009-0030, Part III].

[837] Exhibit C, Regional Board's Attachments to Comments on the Test Claim, filed March 9, 2011, page 1103.

[838] See, e.g., Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 434 [Order No. R8-2002-0010 ("This order expires on January 18, 2007 and the permittees must file a Report of Waste Discharge (permit application) no later than 180 days in advance of such expiration date as application for issuance of new waste discharge requirements.")]; see also, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 632, which found as follows:

> Although the storm sewer system operator must propose "management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable," it is the "permit-issuing agency" that "determine[s] which practices, whether or not proposed by the applicant, will be imposed as conditions." (*Ibid.*) Thus, as the Commission concluded, in contrast to the school districts' participation in educational programs in *Kern High School District*, the local governments in the instant case "[did] not voluntarily participate" in applying for a permit to operate their

Furthermore, the Commission finds that the new required activities are mandated by the state. As discussed above, when considering whether a permit condition is state-mandated or federally-mandated, the Commission must analyze whether each permit condition is required by federal law and implemented by the state without discretion, or is the only means by which federal law, including the maximum extent practicable standard of the CWA, can be met.[839] Alternatively, if "the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated."[840]

At the time the test claim permit was adopted, federal law did not require GIS or any other electronic or computerized mapping, or impose quotas on priority rankings for commercial inspection sites, or a pilot program for mobile businesses.[841] References in federal regulations to a "map" include only a site map for individual industrial and construction activity permits (§§ 122.26(c)(1)(i)(A) & 122.26(c)(1)(ii)(A)); a "USGS 7.5 minute topographic map" identifying the boundaries of an MS4 covered by the permit application (§ 122.26(d)(1)(iii)(A)); a "drainage system map" of an MS4 used for assigning field screening locations (§ 122.26(d)(1)(iv)(D)(1, 6, 7); and a map showing areas served by combined sewer systems, for purposes of petitioning to reduce the Census estimates of the population served by storm sewer systems proportionally to the ratio of combined sewers to municipal separate storm sewers. (§ 122.26(f)(3)).

The Regional Board cites to part 112.26(d)(2)(F) for its authority to dictate inspection requirements, but this citation is in error, and was most likely intended to have been part 122.26(d)(2)(i)(F).[842] That provision states that a permit application must demonstrate adequate legal authority to "Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."[843] In addition, section 122.26(d)(2)(iv)(C)(1) requires that the permit include a management program to monitor and control pollutants in stormwater discharges to MS4s from industrial facilities, and the program is required to identify priorities and procedures for inspections and establishing and implementing control measures for such discharges. These provisions therefore suggest that inspections are required to ensure compliance with the permit, including prohibitions on illicit discharges; however, they do not demonstrate that the challenged permit conditions, which describe how the state complies with the federal requirement to inspect, and which increased the scope, frequency, and cost of the inspections program(s) are required by federal law.

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stormwater drainage systems; they were required to do so under state and federal law and the challenged requirements were mandated by the Regional Board.

[839] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768; 771.

[840] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[841] See Code of Federal Regulations, title 40, section 122.26 (7-1-08 Edition).

[842] Exhibit Q (30), Regional Board's Response to Comments on Draft Permit, page 13 [Administrative Record on Order No. R8-2009-0030, Part III].

[843] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F) (July 1, 2005 Edition).

The Regional Board also argues that the requirements of the inspection programs are required to meet MEP:

> Additionally, as explained above, MEP is an iterative, evolving standard that requires new and more specific controls that reflect increased understanding of pollution problems and associated control measures. That the 2009 Permit, which is a fourth-term permit, contains additional or better-tailored requirements as necessary to achieve the federal MEP standard does not mean that the Permit is going beyond federal law, or imposing a new program or higher level of service.[844]

But as discussed above, the Supreme Court has made clear that unless the Board made express findings that a permit term is the only means by which MEP can be satisfied, the Commission is not required to defer to the Board's judgment on the federal mandate question.[845] Here, no such specific findings are evident in the record; the Board simply advances the general argument that MEP is an iterative standard and that the test claim permit "contains additional or better-tailored requirements as necessary to achieve the federal MEP standard."[846] The Board does not show why these requirements are necessary to meet MEP, offering only: "During the [Third Term Permit], MS4 Audits conducted by Regional Board staff indicated the need for more regimented oversight regarding commercial inventory management."[847]

Further, as the Supreme Court noted in the *Department of Finance* case, which also addressed permit requirements to inspect commercial and industrial facilities, "state law made the Regional Board responsible for regulating discharges of waste within its jurisdiction…" and "[t]his regulatory authority included the power to 'inspect the facilities of any person to ascertain whether…waste discharge requirements are being complied with.'"[848] The Court further noted: "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."[849] The Court concluded that the Los Angeles Regional Board in that case "had primary responsibility for inspecting these facilities and sites…" but "shifted that responsibility to the Operators by imposing these permit conditions."[850] "Under the

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[844] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 39.

[845] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768 ["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."].

[846] Exhibit B, Regional Board's Comments on the Test Claim, filed March 9, 2011, page 39.

[847] Exhibit Q (30), Regional Board's Response to Comments on Draft Permit, page 17 [Administrative Record on Order No. R8-2009-0030, Part III].

[848] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 770 [citing Water Code §§ 13260; 13267].

[849] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 770.

[850] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 771.

reasoning of *Hayes*, the inspection requirements were not federal mandates."[851] That holding applies here.

Accordingly, the Commission finds the following new requirements of the inspection programs are state-mandated, rather than federally-mandated:

- Include *GIS mapping* (with latitude/longitude (in decimals) or NAD83/WGS84), in the inventories of:
    - All industrial facilities within the jurisdiction that have the potential to discharge pollutants to the MS4, regardless of whether the facility is subject to business permits, licensing, the State's General Industrial Permit or other individual NPDES permit. (Section IX.1.)[852]
    - Fixed commercial facilities within its jurisdiction, including

      a) Transport, storage or transfer of pre-production plastic pellets.

      b) Automobile mechanical repair, maintenance, fueling or cleaning;

      c) Airplane maintenance, fueling or cleaning;

      d) Marinas and boat maintenance, fueling or cleaning;

      e) Equipment repair, maintenance, fueling or cleaning;

      f) Automobile impound and storage facilities;

      g) Pest control service facilities;

      h) Eating or drinking establishments, including food markets and restaurants;

      i) Automobile and other vehicle body repair or painting;

      j) Building materials retail and storage facilities;

      k) Portable sanitary service facilities;

      l) Painting and coating;

      m) Animal facilities such as petting zoos and boarding and training facilities;

      n) Nurseries and greenhouses;

      o) Landscape and hardscape installation;

      p) Pool, lake and fountain cleaning;

      q) Golf courses;

      r) Other commercial sites/sources that the permittee determines may contribute a significant pollutant load to the MS4; and,

[851] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 771.

[852] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 311 [Order No. R8-2009-0030, Section IX.1].

s) Any commercial sites or sources that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Special Biological Significance. (Section X.1.)[853]

- Conduct, or require to be completed, inspections of the following *new* categories of commercial facilities, and provide a copy of the database for the *new* categories of commercial facilities to the Regional Board with each annual report:

  a) Transport, storage or transfer of pre-production plastic pellets.

  c) Airplane maintenance, fueling or cleaning;

  d) Marinas and boat maintenance, fueling or cleaning;

  e) Equipment repair, maintenance, fueling or cleaning;

  f) Automobile impound and storage facilities;

  g) Pest control service facilities;

  h) Eating or drinking establishments, including food markets and restaurants;

  j) Building materials retail and storage facilities;

  k) Portable sanitary service facilities;

  m) Animal facilities such as petting zoos and boarding and training facilities;

  q) Golf courses. (Sections X.1 and X.5)[854]

- Within 12 months of adoption of the Order, develop a prioritization and inspection schedule for the commercial facilities in section X.1. Until that plan is approved, the following minimum criteria must be met: 10% of commercial sites (not including restaurants/food markets) must be ranked "high" (where there are fewer than 100 sites within a municipality, at least ten sites must be ranked "high"); 20% of commercial sites (not including restaurants/food markets) must be ranked "medium;" and the remainder may be ranked "low." (Section X.2.)[855]

- Conduct, or require to be completed, commercial facilities inspections, at frequencies as determined by the threat to water quality prioritization; high priority sites shall be inspected at least once a year, medium priority sites shall be inspected at least every two

[853] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 313 [Order No. R8-2009-0030, Section X.1].

[854] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 313-314 [Order No. R8-2009-0030, Sections X.1, X.5].

[855] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.2].

years, and low priority sites shall be inspected at least once per permit cycle. (Section X.3.)[856]

- Within 12 months of adoption of this order, the permittees shall develop a mobile business pilot program. The pilot program shall address one category of mobile business from the following list: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape and furniture cleaning; mobile high pressure or steam cleaning. The pilot program shall include at least two notifications of the individual businesses operating within the County regarding the minimum source control and pollution prevention measures that the business must implement. The pilot program shall include outreach materials for the business and an enforcement strategy to address mobile businesses. The permittees shall also develop and distribute the BMP Fact Sheets for the selected mobile businesses. At a minimum, the mobile business Fact Sheets should include: laws and regulations dealing with urban runoff and discharges to storm drains; appropriate BMPs and proper procedure for disposing of wastes generated. (Section X.8.)[857]

    c. <u>The new state-mandated requirements under the Inspections for Commercial and Industrial Facilities program constitute new programs or higher levels of service.</u>

Article XIII B, section 6 of the California Constitution requires subvention only for costs incurred to implement a new program or higher level of service. The Court in *County of Los Angeles* held: "We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term—programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[858]

Here, the activities identified above as being new, compared with the prior permit, are uniquely imposed on local government (the permittees) and provide a governmental service the public. "The inspection requirements provide a [new program or] higher level of service because they promote and enforce third party compliance with environmental regulations limiting the amount of pollutants that enter storm drains and receiving waters."[859] Therefore these activities constitute a new program or higher level of service within the meaning of article XIII B, section 6.

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[856] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.3].

[857] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030, Section X.8].

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

[859] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 630.

C. <u>There are Costs Mandated by the State to Comply with Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the Test Claim Permit to Submit a Proposed Cooperative Watershed Program for the Selenium TMDL, Develop A Constituent-Specific Source Control Plan for the San Gabriel Metals TMDL, Comply with the New Public Education Activities, and Develop a Pilot Program to Control Pollutant Discharges From Common Interest Areas and Areas Managed By Homeowner Associations or Management Companies, Only from June 1, 2009, through December 31, 2017. There Are *No* Costs Mandated by the State for the Remaining New Mandated Activities.</u>

As indicated above, the following activities constitute mandated new programs or higher levels of service:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)[860]
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)[861]
- LID and hydromodification Planning Requirements for Development:
    - Within 12 months of adoption of this order, update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D) and a copy of the updated model WQMP shall be submitted for review and approval by the Executive Officer. (Section VII.C.1.)[862]
    - Prepare a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis. The Watershed Master Plans shall integrate water quality, hydromodification, water supply, and habitat for the following watersheds: Coyote Creek-San Gabriel River; Anaheim Bay-Huntington Harbour; Santa Ana River; and Newport Bay-Newport Coast. Components of the Plan shall include: (1) maps to identify areas susceptible to hydromodification including downstream erosion, impacts on physical structure, impacts on riparian and aquatic habitats and areas where storm water and urban runoff infiltration is possible and appropriate; and, (2) a hydromodification model to make available as a tool to

[860] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.8].

[861] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.9].

[862] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 323 [Order No. R8-2009-0030].

enable proponents of land development projects to readily select storm water preventive and mitigative site BMP measures. The maps shall be prepared within 12 months of the adoption of this order and a model Plan for one watershed shall be prepared within 24 months of adoption of this order. The model Watershed Master Plan shall be submitted to the Executive Officer for approval. Watershed Master Plans shall be completed for all watersheds 24 months after approval of the model Watershed Master Plan. The Watershed Master Plans shall be designed to meet applicable water quality standards and the Federal Clean Water Act. (Section XII.D.5.)[863]

- Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the Executive Officer should be considered for alternatives and in-lieu programs. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval. (Section XII.E.1.)[864]

- Inspection of industrial and commercial facilities:
  - Distribute educational information (Fact Sheets) during commercial and industrial facility inspection visits. (Section XIII.4.)[865]
  - Include GIS mapping in the inventories of industrial and commercial facilities. (Section X.1.)[866]

[863] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 328 [Order No. R8-2009-0030].

[864] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 328-329 [Order No. R8-2009-0030].

[865] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[866] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 311 [Order No. R8-2009-0030, section IX.1]; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 313 [Order No. R8-2009-0030, Section X.1].

- Conduct inspections of the new categories of commercial facilities, and provide a copy of the database for the *new* categories of commercial facilities to the Regional Board with each annual report. (Sections X.1., X.3., and X.5).[867]
- Develop a prioritization and inspection schedule. (Section X.2.)[868]
- Develop a mobile business pilot program. (Section X.8.)[869]

- Public education program:
  - By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012. (Section XIII.1.)[870]
  - Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and retail sales industry; residential/commercial landscape construction and service industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter. (Section XIII.4.)[871]
  - The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in local newspapers, County or city websites, local libraries, city halls, or courthouses. (Section XIII.7.)[872]

[867] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 313-314 [Order No. R8-2009-0030, Sections X.1., X.5]; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.3].

[868] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.2].

[869] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030, Section X.8].

[870] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[871] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[872] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. (Section XI.4.)[873]

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."[874]

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 mandated activities result in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, and that none of the exceptions to reimbursement apply to deny this claim. Finance and the Regional Board contend that the claimants have not shown they have been forced to spend proceeds of taxes on this program and that local agencies possess fee authority within the meaning of section 17556(d), and therefore reimbursement is not required.

As explained in the analysis below, the new state-mandated activities result in costs mandated by the state for some of the activities based on the following findings:

- There is substantial evidence in the record, as required by Government Code section 17559, that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.[875]
- Pursuant to article XIII C, section 1(e)(3) of the California Constitution, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, and other cases, the claimants have the authority under their police powers and by statute to impose

[873] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316-317 [Order No. R8-2009-0030, Section XI.4].

[874] *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).

[875] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 151-304.

regulatory fees to comply with Sections XIII.4 (the portion requiring inspectors to distribute educational information (Fact Sheets) during their inspections of commercial and industrial facilities), IX.1, X.1-3, X.5, and X.8 of the test claim permit related to the inspection of industrial and commercial facilities, and Sections VII.C.1, XII.D.5, and XII.E.1 of the test claim permit related to LID and hydromodification planning, which are sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities.

- The claimants have the authority under their police powers and by statute to impose stormwater fees on property owners to comply with Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit to submit a proposed Cooperative Watershed Program for the selenium TMDL, develop a constituent-specific source control plan to for the San Gabriel metals TMDL, comply with the new mandated public education activities, and develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. However, from June 1, 2009 through December 31, 2017 only, and based on the court's holding in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*City of Salinas),* which interpreted article XIII D of the California Constitution as requiring the voter's approval before any stormwater fees can be imposed, there are costs mandated by the state for these activities. When voter approval is required by article XIII D, the claimants do *not* have the authority to levy fees sufficient as a matter of law to cover the costs of these activities within the meaning of Government Code section 17556(d).
- Beginning January 1, 2018, and 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 to comply with the new requirements imposed by Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit to develop and submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, the public education program, and the requirement to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, 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. **There is Substantial Evidence in the Record, as Required by Government Code Section 17559, that the Claimants Incurred Increased Costs Exceeding $1,000 and Used Their Local "Proceeds of Taxes" to Comply with the New State-Mandated Activities.**

    a. The reimbursement requirement in article XIII B, section 6 was included because of the tax and spend 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 (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[876] 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.[877]

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."[878] 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.'"[879] "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.[880] 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.[881] Article XIII B does *not* restrict the growth in appropriations financed from nontax sources, such as "user fees based on reasonable

[876] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[877] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[878] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[879] *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.

[880] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) (emphasis added).

[881] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

costs."[882] And appropriations subject to limitation do not include "[a]ppropriations for debt service." [883]

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."[884] The California Supreme Court, in *County of Fresno v. State of California*,[885] 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*.[886]

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*."[887] 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

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[882] *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).

[883] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[884] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[885] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[886] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

[887] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[888]

b. There is substantial evidence in the record that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.

Consistent with these constitutional principles, reimbursement under article XIII B, section 6 is only required if the claimants show, with substantial evidence in the record,[889] that they have incurred increased costs mandated by the state within the meaning of Government Code section 17514. When alleged mandated activities do not compel the increased expenditure of a local agency's "proceeds of taxes," then reimbursement under section 6 is not required.[890] 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.

All of the claimants have declared they have incurred costs exceeding $1,000. The County of Orange, in a declaration signed by the Chief of the Orange County Stormwater Program, further states that "in addition to its General Fund, [the County] had sources other than County funding, including landfill gate fees and special district funding, for certain Permit obligations. To the extent such fees were employed and/or such funds were appropriated for such obligations, they would not be available for other County obligations."[891] In a second declaration filed by Orange County with the Test Claim, it is declared that the County was designated the principal permittee and the County and the City permittees have a cost-sharing agreement for compliance with the test claim permit.[892] To the extent the County receives funds from other sources, including from fees, grant funding, and from the other copermittees under an agreement, those funds are *not* the

[888] *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).

[889] Government Code section 17559.

[890] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."].

[891] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 114 (Declaration of Richard Boon, Chief of the Orange County Stormwater Program, dated December 19, 2016).

[892] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 117-118 (Declaration of Richard Boon, Chief of the Orange County Stormwater Program, dated December 19, 2016).

County's proceeds of taxes. These funds received by the County are not taxes levied by or for the County, and are not counted against the County's appropriations limit.[893]

The Cities each state that they are unaware of any state or federal funding, and believe that only General Fund revenues are available to cover the costs of any mandated activities.[894]

The record shows, however, that the claimants have a number of different revenue streams with which to fund stormwater pollution control activities, and the record indicates a mix of different revenues being applied throughout the County to pay for the activities required by the Third Term Permit and the test claim permit.

The administrative record for the test claim permit contains the ROWD filed by the permittees to apply for the test claim permit, which is dated July 21, 2006.[895] A more recent ROWD, dated October 3, 2013, (submitted for a Fifth Term Permit renewal) is now available.[896] Both the 2006 ROWD, which reflects the activities and costs under the Third Term Permit, and the 2013 ROWD, which discusses the activities and costs under the test claim permit, include a graphic representation of countywide costs for compliance with the NPDES stormwater MS4 permits.[897] The 2006 ROWD states that "[t]he purpose of this document is to comply with the requirement of the Third Term Permits, Regional Water Quality Control Board Orders R8-2002-0010 (Santa Ana Regional Board) and R9-2002-0001 (San Diego Regional Board) to submit a Report of Waste Discharge 180 days prior to permit expiration."[898] During the period of the fourth term permit the County appears to have discontinued the practice of submitting a ROWD to both

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[893] California Constitution, article XIII B, section 8; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32.

[894] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 125 (Declaration of Keith Linker for the City of Anaheim), 132 (Declaration of Brian M. Ingallinera for the City of Brea), 139 (Declaration of David Jacobs for the City of Buena Park), 147 (Declaration of Baltazar Mejia for the City of Costa Mesa), 154 (Declaration of Gonzalo Vasquez for the City of Cypress), 161 (Declaration of Steven Hauerwass for the City of Fountain Valley), 168 (Declaration of Trung Chanh Phan for the City of Fullerton), 173 (Declaration of Travis Hopkins for the City of Huntington Beach), 181 (Declaration of Thomas Lo for the City of Irvine), 189 (Declaration of Devin Slaven for the City of Lake Forest), 197 (Declaration of John Kappeler for the City of Newport Beach), 204 (Declaration of Luis Estevez for the City of Placentia), 211 (Declaration of Michael Ho for the City of Seal Beach), 217 (Declaration of Jarad Hildenbrand for the City of Villa Park).

[895] Exhibit Q (18), Orange County ROWD, July 21, 2006, page 1 [Administrative Record on Order No. R8-2009-0030, Part I].

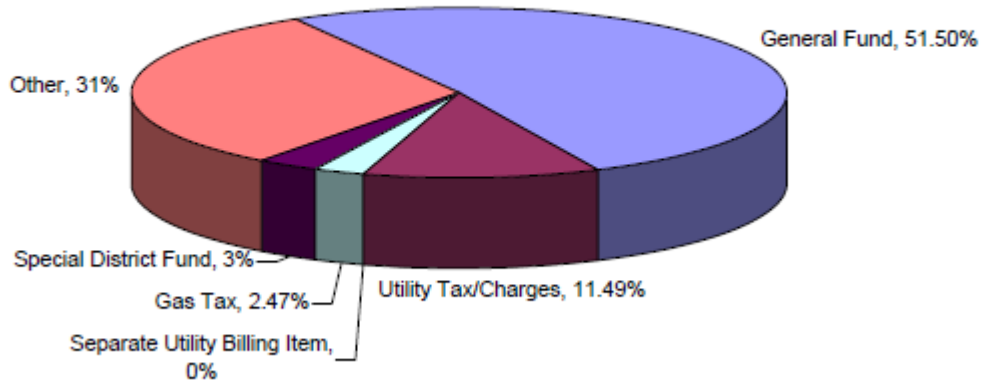
[896] Exhibit Q (19), Orange County ROWD, October 3, 2013.

[897] Exhibit Q (18), Orange County ROWD, July 21, 2006, Fig. 2.2, page 31 [Administrative Record on Order No. R8-2009-0030, Part I]; Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153.

[898] Exhibit Q (18), Orange County ROWD, July 21, 2006, page 9 [Administrative Record on Order No. R8-2009-0030, Part I].

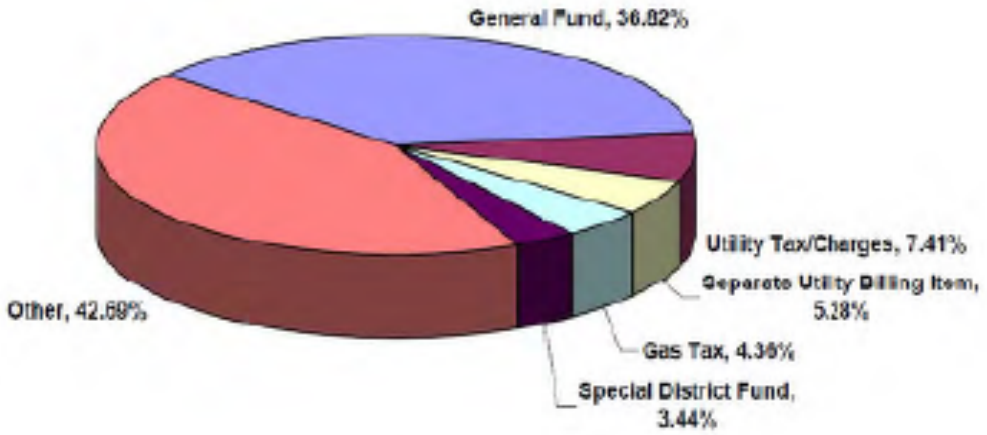
Regional Boards simultaneously. The 2013 ROWD states that it is intended to comply only with Order No. R8-2009-0030 (the test claim permit).[899] The relevant graphics are shown here:

Figure 2.2: 2004-05 Funding Sources



900

Figure 6.2: FY2011-12 Funding Sources



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A few notable pieces of information about the claimants' costs and funding sources applied to their stormwater programs (which include, but are not limited to, the test claim permit activities) can be gleaned from these two ROWDs. First, the 2006 ROWD shows that countywide costs in

[899] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 3.

[900] Exhibit Q (18), Orange County ROWD, July 21, 2006, Fig. 2.2, page 31 [Administrative Record on Order No. R8-2009-0030, Part I].

[901] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153.

the fiscal year prior to filing (fiscal year 2004-2005) were approximately $73 million.[902] This amount is not broken down by individual city permittees, or by program area, or by watershed, and therefore includes permittees under the San Diego Third Term Permit, Order Number R9-2002-0001. And, because the 2006 ROWD predates the test claim permit that is the subject of this Test Claim, the $73 million constitutes the cost of the program prior to any of the alleged test claim activities. Projected costs for 2005-2006 are stated to be $91.8 million for all city permittees across the county (and for both the Santa Ana and San Diego permit requirements).[903] The ROWD also generally describes some of the funding sources available:

> The funding sources used by the Permittees include: General Fund, Utility Tax, Separate Utility, Gas Tax, and Special District Fund, Others (Sanitation Fee, Fleet Maintenance, Community Services District, Water Fund, Sewer and Storm Drain Fee, Grants, and Used Oil Recycling Grants).[904]

The graph above indicates that 51.5 percent of funds used for NPDES activities under the prior permit (fiscal year 2004-2005 figures) are from "General Fund" revenues.[905] A full 31 percent of funding sources for NPDES activities is identified as "Other," while the remaining funds are identified as "Special District Fund" (3%), "Utility Tax/Charges (11.49%), and "Gas Tax" (2.47%).[906] It is unclear what revenues are included in the designation "Other," or whether "Utility Tax/Charges" would fall within a locality's "proceeds of taxes" subject to the protection of article XIII B, section 6. Neither is it clear in this record the origin of "Special District Fund[s]." However, the local entities' "General Fund" revenues should typically include local tax revenues and state subventions that fall within the conventional definition of "proceeds of taxes."[907] In addition, the "Gas Tax" revenues, though collected by the state and allocated to the counties by statute, fall within the definition of "proceeds of taxes," being a state subvention

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[902] Exhibit Q (18), Orange County ROWD, July 21, 2006, Fig. 2.3, pages 32 [Administrative Record on Order No. R8-2009-0030, Part I].

[903] Exhibit Q (18), Orange County ROWD, July 21, 2006, Section 2.2.5, page 26 [Administrative Record on Order No. R8-2009-0030, Part I].

[904] Exhibit Q (18), Orange County ROWD, July 21, 2006, Section 2.2.5, page 26 [Administrative Record on Order No. R8-2009-0030, Part I].

[905] Exhibit Q (18), Orange County ROWD, July 21, 2006 page 31 [Administrative Record on Order No. R8-2009-0030, Part I].

[906] Exhibit Q (18), Orange County ROWD, July 21, 2006, Fig. 2.2, page 31 [Administrative Record on Order No. R8-2009-0030, Part I].

[907] California Constitution, article XIII C ["All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes."]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [Defining special taxes to mean "taxes which are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes."]

other than a subvention under section 6.[908] Thus the 2006 ROWD provides a snapshot of funding sources prior to the test claim permit, showing that a substantial portion, but not all, of the funds used to pay for stormwater activities countywide (including, but not necessarily limited to, activities required under the Third Term Permit) are from permittees' general fund revenues and from the state-allocated gas tax. These are, facially, appropriations subject to limitation, eligible for protection under article XIII B, section 6. The nature of the remaining revenues and their eligibility for reimbursement is unknown.

The October 3, 2013 ROWD, indicates a similar breakdown in funding sources, and a significant increase in the overall cost of the program. Although the 2013 ROWD is addressed only to the Santa Ana Regional Board, the May 2014 ROWD submitted to the San Diego Regional Board presents exactly the same information, in both narrative and numeric descriptions of the county's program funding.[909] The 2013 ROWD states that countywide costs for Orange County's stormwater programs reached $95 million in fiscal year 2011-2012 (again, that includes all 36 separate municipal entities, and all stormwater activities - not just those newly required by the test claim permit and mandated by the state). And similarly to the 2006 ROWD, the 2013 ROWD states:

> In FY2011-12, the funding sources used by the Permittees to meet these costs included: General Fund, Utility Tax, Separate Utility, Gas Tax, and Special District Fund, Others (Sanitation Fee, Fleet Maintenance, Community Services District, Water Fund, Sewer & Storm Drain Fee, Grants, and Used Oil Recycling Grants) (See Figure 6.2). While increasingly more stringent regulatory obligations prompt consideration being given to creation of dedicated stormwater funding, there are significant obstacles to overcome.[910]

The 2013 ROWD shows a significantly smaller share of program activities funded from "General Fund" (36.82%) and a significantly larger share of activities funded from "Other" (42.69%).[911] It is still unclear what revenues are encompassed within "Other," but the only inference that can be fairly drawn from this shift is that in the intervening years (2005-2012) the claimants have found some means, aside from relying more heavily on tax revenues, to fund the activities of the test claim permit. Indeed, comparing the 2006 ROWD with the 2013 ROWD, the difference in *total spending* and the portion of that spending that derives from the "General Fund" demonstrates that the importance of "Other" funds has only increased. The Commission cannot say, on the basis of these documents and the record filed what funds are included in the designation "Other," or whether "Utility Tax/Charges" might fall within proceeds of taxes; the description is imprecise. However, the two funding sources that can be identified with relative

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[908] 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…"].

[909] See Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153; Exhibit Q (20), Orange County San Diego Region ROWD, May 20, 2014, pages 179-180.

[910] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153.

[911] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153.

certainty as comprising mainly proceeds of taxes, "General Fund," and "Gas Tax" are relied on to a lesser degree after the test claim permit than before: in fiscal year 2004-2005 General Fund and Gas Tax spending totaled approximately 54 percent of the total $73 million, or $39.4 million, according to the 2006 ROWD.[912] In 2011-2012 General Fund plus Gas Tax spending countywide totaled 41.2 percent of $95 million, or $39.1 million, according to the 2013 ROWD.[913] Thus, not only has the *share* of revenues attributable to "proceeds of taxes" decreased, but also the actual *dollar amount* applied to this program has decreased. And, the Commission notes, between $50 and $75 million was already being spent annually under the Third Term Permit,[914] and only the *increase* in costs under the test claim permit is of concern in a test claim analysis. As discussed, the Commission is unable to say definitively that none of the other revenue sources noted in the ROWD are proceeds of taxes; however, the only revenues the expenditure of which facially are proceeds of taxes, are relied upon to fund stormwater costs to a lesser extent after the test claim permit than before.

The record of this Test Claim also contains declarations by each of the permittees, in which a number of alternative revenue sources are noted. For example, the County, the Principal Permittee, states:

> The County, in addition to its General Fund, had sources of other County funding, including landfill gate fees and special district funding, for certain Permit obligations. To the extent such fees were employed and/or such funds appropriated for such obligations, they would not be available for other County obligations. I am informed and believe and therefore state that I am not aware of any other fee or tax which the County would have the discretion to impose under California law to cover any portion of the cost of these new programs/activities.[915]

Thus, as shown by the documents prepared by the claimants countywide, and which are presumed correct,[916] reliance on General Fund revenues has decreased after the test claim permit, while costs have increased. This is inconsistent with the Cities' declarations filed with the Test Claim that they have available only general fund revenues and, with just the test claim filing, there was not substantial evidence in the record that the claimants used their proceeds of taxes on the new state-mandated activities.

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[912] Exhibit Q (18), Orange County ROWD, July 21, 2006, Figs. 2.2, 2.3, pages 31-32 [Administrative Record on Order No. R8-2009-0030, Part I].

[913] Exhibit Q (19), Orange County ROWD, October 3, 2013, page 153.

[914] Exhibit Q (18), Orange County ROWD, July 21, 2006, Fig. 2.3, page 32 [Administrative Record on Order No. R8-2009-0030, Part I].

[915] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 114 [Declaration of Richard Boon, County of Orange].

[916] Evidence Code section 664 provides for a legal presumption that official acts are conducted in accordance with law. Here, the Drainage Area Management Plan, which also doubles as a Report on Waste Discharge, is required by federal law and is presumed to be correct.

In response to the Draft Proposed Decision, the claimants filed comments, additional declarations, and portions of annual reports filed with the Regional Board that were signed under penalty of perjury by employees of some of the claimants (Cities of Costa Mesa, Irvine, Lake Forest, Seal Beach, and Villa Park), which identify the sources of funds used from fiscal year 2009-2010 through 2020-2021 pursuant to the test claim permit.[917] The claimants contend that these cities used general fund revenues for all the new state-mandated activities and, thus, there is substantial evidence in the record that these claimants used their proceeds of taxes on the state-mandated activities.

The claimants submit a declaration from Sarah Chiang, an Environmental Resource Specialist of the Orange County Public Works Department (principal permittee under the test claim permit), who coordinates with the other permittees to submit annual reports and filings required by the test claim permit to the Regional Board.[918] One requirement of the test claim permit is that permittees annually submit a report, referred to as a "Program Effectiveness Assessment" to the Regional Board. Ms. Chiang declares that "[a]s part of my duties, I am required to be familiar with the content of filings required to be made by permittees under the 2009 Permit and how copies of those filings are kept in the ordinary course of business at OC Public Works."[919] She declares that the annual assessments are delivered to Orange County Public Works in compact discs, and then Orange County submits the compact discs to the Regional Board along with a "wet-ink" copy of a "Signed Certified Statement" from each permittee.[920] Section C-2.4 of the annual assessment is a "Fiscal Analysis," where the permittees are required to set forth annual funding sources, divided into various categories, including "General Fund" and "Gas Tax" for these costs.[921] Ms. Chiang then declares the following:

> Attached as Exhibits 2-6 to my Declaration are true and correct copies of excerpts of PEAs [program effectiveness assessments] containing Section C-2.4, Fiscal Analysis, that were retrieved by me from CDs in the possession of OC Public Works covering various fiscal years between 2009-10 and 2020-21 for the Cities of Costa Mesa (Exhibit 2), Irvine (Exhibit 3), Lake Forest (Exhibit 4), Seal Beach (Exhibit 5) and Villa Park (Exhibit 6).[922]

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[917] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 33-37, 150 et seq.

[918] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 151.

[919] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 151.

[920] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 151-152.

[921] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 152.

[922] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 152.

The exhibits to Ms. Chiang's declaration are the relevant pages from section C-2 of the annual assessment report forms submitted by the Cities of Costa Mesa, Irvine, Lake Forest, Seal Beach, and Villa Park for fiscal years 2009-2010 through 2020-2021, showing that between 90 and 100 percent of their costs to comply with the test claim permit was funded with their general fund money, with some cities using 100 percent general fund revenue, and others using less than ten percent from grant funds and gas tax revenues from the remaining categories of funds listed on the form: utility tax/charges; separate utility billing item; gas tax; special district fund, which includes a sanitation fee, benefit assessment, fleet maintenance fund, community services fund, water fund, and sewer and storm drain; the maintenance fee; or other.[923]

Ms. Chiang's declaration also attaches a "true and correct copy of an example" of a signed certified statement required to be included in each annual assessment report, which is signed by an associate engineer from the City of Seal Beach for fiscal year 2012-2013 as follows:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.[924]

Ms. Chiang's declaration closes by declaring, based on her review of the assessment reports filed with the principal permittee, that the City of Cyprus also used 100 percent general fund revenues to comply with permit:

> In addition, from my review of PEAs filed by other permittees, I am familiar with reports made by other permittees regarding the sources of funding used by them for 2009 Permit activities, including the City of Cypress. The PEAs filed by the City of Cypress state that the city used general funds for 100 percent of funding for permit obligations.[925]

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[923] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 157, 159, 162, 165, 168, 171, 174, 177, 180, 183 (for the City of Costa Mesa); 189, 191, 193, 195, 197, 199, 201, 203, 205, 207 (for the City of Irvine); 211, 214, 217, 221, 225, 229, 233, 237, 241 (for the City of Lake Forest); 246, 248, 250, 252, 254, 256, 258, 261, 263, 266, 269 (for the City of Seal Beach); and 272, 274, 277, 280, 283, 286, 289, 292, 295, 298, 301 (for the City of Villa Park).

[924] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 154.

[925] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 152.

The claimants also submit a declaration signed under penalty of perjury from Seung Yang, an engineer for the City of Costa Mesa.[926] Seung Yang supervises the city's compliance with the test claim permit, and reviewed the excerpted pages from the City's program effectiveness assessments for fiscal years between 2010-2011 and 2020-2021, and declares the following:

> Based on my knowledge of the funding sources utilized by the City to pay for requirements of the 2009 Permit, as well as my review of the PEA excerpts, I declare, and am further informed and believe, that the City utilized its General Fund for 100 percent of the costs of complying with the 2009 Permit during the period 2009-2010 through 2020-2021.[927]

Seung Yang's declaration is consistent with the records provided in Sarah Chiang's declaration for the City of Costa Mesa.[928]

Thus, the claimants are relying on copies of relevant pages from annual assessment reports, which are filed by the permittees with the principal permittee and the Regional Board, and declarations from an employee of Orange County, as the principal permittee, and an employee of the City of Costa Mesa declaring that the copies of the records are true and correct copies, to prove that these cities used proceeds of taxes on the state-mandated activities. Except for a copy of one certified signature page from the City of Seal Beach for fiscal year 2012-2013, the signature pages to the remaining reports are not provided, but the declarant declares that the documents were in fact certified.

Although the declarations of Ms. Chiang and Seung Yang are direct evidence and may properly be used to support a fact under the Commission's regulations,[929] the portion of the assessment reports, themselves, are considered hearsay evidence. Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated.[930] Unless an exception to the hearsay rule applies, hearsay evidence alone cannot be used to support a finding because out-of-court statements are generally considered unreliable. The person who prepared the assessment report is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing. Both the Commission's regulations, and provisions of the Administrative Procedures Act (APA), provide that hearsay evidence is admissible if it is inherently reliable, but will not be sufficient in itself to support a finding unless the evidence would be admissible over objection in a civil case with a hearsay exception.[931] In

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[926] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 303.

[927] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 304.

[928] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 157, 159, 162, 165, 168, 171, 174, 177, 180, 183 (for the City of Costa Mesa).

[929] California Code of Regulations, title 2, section 1187.5; *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

[930] Evidence Code section 1200.

[931] California Code of Regulations, title 2, section 1187.5; Government Code section 11513.

such cases, hearsay evidence may be used only for the purpose of supplementing or explaining other evidence.[932]

One of the exceptions to the hearsay rule, however, is in Evidence Code section 1280, the public records exception, which the courts have found reliable if the records are properly authenticated.[933] Section 1280 states the following:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

It is not required that a report from a public employee be sworn to be admissible under Evidence Code section 1280.[934]

The Commission finds that the relevant pages from the assessment reports are properly authenticated by the declarations of Ms. Chiang and Seung Yang and, therefore, the reports fall within the public records exception to the hearsay rule.

Section IV. of the Monitoring and Reporting program made enforceable by the test claim permit[935] requires the claimants to submit an annual progress report to the Executive Officer of the Regional Board and to the Regional Administrator of the U.S. EPA, Region 9, no later than November 15th, of each year, which has to include "[a] unified fiscal accountability analysis, as described in Section XX., Provision, 2, of this order."[936] Section XX. of the test claim permit requires that:

> 1. Each permittee shall secure the resources necessary to meet all requirements of this order.

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[932] California Code of Regulations, title 2, section 1187.5.

[933] *People v. Orey* (2021) 63 Cal.App.5th 529, 551-552.

[934] For example, a hospital report, if properly authenticated, may qualify as a public record under Evidence Code section 1280. (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929-930.)

[935] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 350 [Order No. R8-2009-0030, Section XXI.4].

[936] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 361 [Order No. R8-2009-0030, Monitoring and Reporting Program, Section IV.2(g)].

2. The permittees shall prepare and submit a unified fiscal accountability analysis to the Executive Officer of the Regional Board. The fiscal analysis shall be submitted with the annual report shall, at a minimum, include the following:

   a) Each permittee's expenditures for the previous fiscal year,

   b) Each permittee's budget for the current fiscal year,

   c) *A description of the source of funds*, and

   d) Each permittee's estimated budget for the next fiscal year.[937]

The Monitoring and Reporting program further states that "permittees shall be responsible for the submittal to the principal permittee of all required information/materials needed to comply with this order in a timely manner. All such submittals shall be signed by a duly authorized representative of the permittee under penalty of perjury."[938] The Water Code imposes civil penalties for the failure to comply with the reporting requirements or for false statements made in these documents.[939]

Ms. Chiang declares that as part of her duties with the office of the principal permittee, she is required to be "familiar with the content of filings required to be made by permittees under the 2009 Permit and how copies of those filings are kept in the ordinary course of business at OC Public Works."[940] She further declares that the assessment reports attached to her declaration are "true and correct" copies "of PEAs containing Section C-2.4, Fiscal Analysis, that were retrieved by me from CDs in the possession of OC Public Works covering various fiscal years between 2009-10 and 2020-21 for the Cities of Costa Mesa (Exhibit 2), Irvine (Exhibit 3), Lake Forest (Exhibit 4), Seal Beach (Exhibit 5) and Villa Park."[941] Similarly, Seung Yang, an employee of the City of Costa Mesa, has a duty to supervise the city's compliance with the test claim permit, and reviewed the excerpted pages from the City's program effectiveness assessments for fiscal years between 2010-2011 and 2020-2021.[942]

Thus, the evidence shows that the assessment reports were made by and within the scope of the public employees' duties, were prepared annually as required by the test claim permit, and were

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[937] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 349-350 [Order No. R8-2009-0030, Section XX].

[938] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 361 [Order No. R8-2009-0030, Monitoring and Reporting Program, Section IV.3].

[939] Water Code sections 13268, 13385, 13399.31.

[940] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 151.

[941] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 152.

[942] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 304.

properly authenticated by the declarations submitted by the claimants pursuant to Evidence Code section 1280.[943] There is no evidence rebutting these reports in the record.

Accordingly, the Commission finds that there is substantial evidence in the record that some of the claimants used their proceeds of taxes on the test claim permit in amounts exceeding $1,000. Thus, additional analysis is required to determine if any exception to the definition of "costs mandated by the state" in Government Code section 17556 apply.

2. 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. However, 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.

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 due to the limitations of articles XIII A, XIII C, and XIII D they "do not have the ability to fund any of these programs by a fee that could be imposed *without a vote of the electorate*," and, thus, the fee authority they have is not sufficient to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).[944] The claimants argue, in essence, that by preventing local government from recouping the costs of the mandate through non-tax revenue sources, Propositions 218 and 26 result in limiting the scope of the fee authority exception of Government Code section 17556(d) and that mandate reimbursement is an appropriate remedy in circumstances in which it would not have been previously.

As described below, the claimants' arguments are too broad. Cities and counties have authority under the California Constitution to make and enforce ordinances and resolutions to protect and ensure the general welfare within their jurisdiction, which is commonly referred to as the "police power."[945] That authority includes the power to impose fees or charges that are directed toward a particular activity or industrial or commercial sector, which this analysis will discuss in terms of a "regulatory fee;" fees or charges based on services or benefits received from government, which can be characterized as a "user fee;" fees or charges imposed as a condition of

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[943] In addition, the Commission has previously in this Decision taken official notice of the claimants' DAMPs, which are also annual reports filed with the Regional Board. Under section 1187.5(c) of the Commission's regulations, "Official notice may be taken in the manner and of the information described in Government Code Section 11515."

[944] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 60 (emphasis added).

[945] California Constitution, article XI, section 7. See also, *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

development of real property, often termed "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 (and in some cases certain restrictions) to impose or increase regulatory fees,[946] fees for development of real property,[947] and property-based assessments, fees and charges.[948]

Each of these fees or charges is subject to differing limitations pursuant to Propositions 218 and 26 (Cal. Const., arts. XIII C & XIII D).

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 article XIII D, sections 4 and 6.

"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.[949] Such fees may be adopted as an ordinance or resolution in the context of the legislative body's normal business,[950] subject only to the limitations of article XIII 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.[951]

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[946] See, e.g., 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.").

[947] Government Code section 66001 (providing 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).

[948] 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).

[949] See *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[950] See, e.g., *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 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.").

[951] California Constitution, article XIII C, section 1(e).

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 XIIII C and, thus, Sections XIII.4, IX.1, X.1-3, X.5, and X.8 of the test claim permit related to the inspection of industrial and commercial facilities, and the requirements in Sections VII.C.1, XII.D.5, and XII.E.1 of the test claim permit related to LID and hydromodification planning, are denied.

The courts have also 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 property-related fees that are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution. In this respect, and pursuant to the plain language of Government Code sections 57350 and 57351 (SB 231, eff. 1/1/2018), there are no costs mandated by the state beginning January 1, 2018, when property related fees are subject only to a voter protest and, thus, reimbursement for Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, are denied beginning January 1, 2018.

However, based on the court's holding in *City of Salinas* and before SB 231 became effective, article XIII D required the voter's approval before any property-related fees could be imposed. The Commission finds that the claimants do not have the authority to levy fees within the meaning Government Code section 17556(d) when voter approval is required for property-related fees under article XIII D of the California Constitution and, thus, there are costs mandated by the state for Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, and there are costs mandated by the state for these activities from June 1, 2009 through December 31, 2017 only.

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.* [952] 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,

[952] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

> 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.*[953]

Following the logic of *County of Fresno*, the Third District Court of Appeal held in *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 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.[954] The district acknowledged the existence of fee authority, but argued it was not "sufficient," within the meaning of section 17556(d).[955] 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."[956] The court concluded: "Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry."[957]

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."[958] 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."[959]
And 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

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[953] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[954] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

[955] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

[956] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[957] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[958] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[959] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

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."[960]

Accordingly, the background 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 or undesirable.[961]

b. The claimants have authority to charge regulatory fees sufficient to pay for the requirements in sections XIII.4, IX.1, X.1-3, X.5, and X.8 of the test claim permit related to the inspection of industrial and commercial facilities, and sections VII.C.1, XII.D.5, and XII.E.1 related to LID and hydromodification planning, 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.

i. *The claimants have constitutional and statutory authority to impose regulatory fees, which are exempt from the definition of "tax" under article XIII C of the California Constitution as long as the fees meet a threshold of reasonableness and proportionality.*

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."[962] 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."[963] 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."[964] 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.[965] In addition, "[t]he services for which a regulatory fee

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[960] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[961] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382,

[962] California Constitution, article XI, section 7.

[963] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[964] *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).

[965] 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*

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.'"[966] The courts also hold that water pollution prevention is a valid exercise of government police power.[967]

Moreover, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[968] and fees for development of real property.[969]

Thus, there is no dispute that the co-permittees have authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[970] 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, Proposition 13 (1978) added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase *taxes*.[971] 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

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Dept. of Building & Safety (1953) 116 Cal.App.2d 807 (recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

[966] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, citing to *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[967] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[968] See, e.g., 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.").

[969] Government Code section 66001 (providing 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).

[970] 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).

[971] See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

by local government must be approved by a two-thirds vote of the electors.[972] Proposition 13, however, did not define "special taxes," and a series of judicial decisions tried to define the difference between fees and taxes, and diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[973]

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.[974] 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.[975]

Interpreting the newly-reiterated limitation on local taxes, the 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, in order 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.[976] 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.[977] The *Sinclair Paint* 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-paying public to the pollution-causing industries themselves…"[978] The *Sinclair Paint* 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."[979]

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[972] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

[973] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317–1319.

[974] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

[975] See Exhibit Q (9), Excerpts from Voter Information Guide, November 1996 General Election (Proposition 218, November 5, 1996).

[976] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

[977] *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

[978] *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).

[979] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

In 2010, the voters adopted Proposition 26, partly in response to *Sinclair Paint*.[980] 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."[981] 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];[982] (2) special taxes [with *two-thirds* voter approval];[983] 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.
>
> (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

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[980] See Exhibit Q (10), Excerpts from Voter Information Guide, November 2010 General Election (Proposition 26, Nov. 2, 2010), page 3.

[981] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, Fn. 7 (citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and Fn 5).

[982] California Constitution, article XIII C, section 2.

[983] California Constitution, article XIII C, section 2.

reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[984]

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,[985] and fees or charges for a government service or product provided to the payor and not others.[986] 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),[987] development fees,[988] and assessments or property-related fees or charges adopted in accordance with article XIII D.[989] 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."[990]

The claimants argue that it would be legally impossible for local government to develop a fee that allocates to the individual fee payor the portion of the program costs attributable to the burdens that the payor places on the MS4.[991]

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 distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other."[992] 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."[993] 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

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[984] California Constitution, article XIII C, section 1(e).

[985] California Constitution, article XIII C, section 1(e)(1).

[986] California Constitution, article XIII C, section 1(e)(2).

[987] California Constitution, article XIII C, section 1(e)(3).

[988] California Constitution, article XIII C, section 1(e)(6).

[989] California Constitution, article XIII C, section 1(e)(7).

[990] California Constitution, article XIII C, section 1(e).

[991] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, pages 63-64.

[992] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, Fn. 7 (citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and Fn 5).

[993] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

aggregate,[994] but presumed "each requirement to have independent effect,"[995] 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.[996] 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."[997]

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."[998] However, the court in *616 Croft Ave., LLC* suggests that as long as a development fee is "reasonably related to the broad general welfare purposes for which the ordinance was enacted,"[999] 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.[1000]

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."[1001]

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[994] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[995] *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).

[996] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[997] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[998] California Constitution, article XIII C, section 1(e).

[999] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631.

[1000] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631-632.

[1001] *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*

Moreover, the courts have found that regulatory fees are flexible, and 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 according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[1002]

Accordingly, and with *Sinclair Paint*, *San Diego Gas & Electric*, *Professional Scientists*, and others as examples, 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.[1003] It is not the burden of the state to make this showing on behalf of local government.

Here, the claimants have imposed on themselves the opposite incentive: they do not wish to impose new fees, nor establish that such fees do not constitute a tax; instead they seek mandate reimbursement. They argue the impossibility of imposing or increasing fees, 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 do in fact impose development fees, regulatory fees, and other fees that they have successfully established as fees, rather than taxes, even after the adoption of Propositions 218 and 26. For example, the

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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.").

[1002] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1003] California Constitution, article XIII C, section 1(e).

County of Orange updated its fee schedule for development and building permits on March 10, 2015, and made the following findings:

> NOW, THEREFORE, be it resolved that this Board does hereby:
>
> 1. Find that the adoption of the Resolution approving the proposed fee schedule is Statutorily Exempt from the provisions of CEQA pursuant to Section 15273(a)(1) and (a)(2) of the CEQA Guidelines as the establishment or modification of rates, fees, and charges which are for the purpose of meeting operating expenses, including employee wage rates and fringe benefits and purchasing or leasing supplies, equipment, or materials.
> 2. Find that these fees meet the requirements set forth in subdivision (e)(2), (e)(3), or (e)(5), as applicable, of Section 1 Article XIII C of the California Constitution, and are therefore exempt from the definition of a tax as used therein.
> 3. Find that the revenue resulting from the fees established pursuant to this resolution will not exceed the estimated reasonable costs to provide the services and that the costs of providing these services are reasonably allocated among the fees established hereby.[1004]

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. *There are no costs mandated by the state for the inspection of industrial and commercial facilities required by Sections XIII.4, IX.1, X.1-3, X.5, and X.8 of the test claim permit.*

As indicated above, the following activities mandate a new program or higher level of service:

- Distribute educational information (Fact Sheets) during commercial and industrial facility inspection visits. (Section XIII.4.)[1005]
- Include GIS mapping in the inventories of industrial and commercial facilities. (Section X.1.)[1006]

[1004] Exhibit Q (17), Orange County Development Fee Ordinance, March 10, 2015, page 1.

[1005] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[1006] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 311 [Order No. R8-2009-0030, section IX.1]; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 313 [Order No. R8-2009-0030, Section X.1].

- Conduct inspections of the new categories of commercial facilities, and provide a copy of the database for the *new* categories of commercial facilities to the Regional Board with each annual report. (Sections X.1, X.3, and X.5.)[1007]
- Develop a prioritization and inspection schedule. (Section X.2.)[1008]
- Develop a mobile business pilot program. (Section X.8.)[1009]

However, there are no costs mandated by the state for these activities.

Consistent with the above analysis of article XIII C, section 1(e)(3), the 2021 *Department of Finance* decision of the Second District Court of Appeal addressed NPDES permit requirements issued by the Los Angeles Regional Water Quality Control Board to periodically inspect commercial and industrial facilities to ensure compliance with various environmental regulatory requirements.[1010] 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.[1011]

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.*

[1007] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 313-314 [Order No. R8-2009-0030, Sections X.1, X.5]; Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.3].

[1008] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.2].

[1009] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030, Section X.8].

[1010] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 552.

[1011] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563.

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.[1012]

In addition, the courts have explained that the scope of a regulatory fee is somewhat flexible, is valid as long as it relates to the overall purpose of the regulatory governmental action, and can include inspection, administration, and maintenance of a system of supervision and enforcement.[1013]

Therefore, the Commission finds that local agencies have fee authority sufficient as a matter of law to cover the cost of the following industrial and commercial inspection activities within the meaning of Government Code section 17556(d):

- Distribute educational information (Fact Sheets) during commercial and industrial facility inspection visits.[1014]
- Include GIS mapping in the inventories of industrial and commercial facilities.[1015]
- Conduct inspections of the new categories of commercial facilities, and provide a copy of the database for the *new* categories of commercial facilities to the Regional Board with each annual report.[1016]
- Develop a prioritization and inspection schedule.[1017]
- Develop a mobile business pilot program.[1018]

[1012] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565.

[1013] *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438, citing to *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1014] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[1015] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 311 [Order No. R8-2009-0030, Section IX.1.], 313 [Order No. R8-2009-0030, Section X.1].

[1016] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 313-314 [Order No. R8-2009-0030, Sections X.1, X.5; Order No. R8-2009-0030, Section X.3].

[1017] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 314 [Order No. R8-2009-0030, Section X.2].

[1018] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 315 [Order No. R8-2009-0030, Section X.8].

Accordingly, there are no costs mandated by the state for the inspection of industrial and commercial facilities and the activities required by Sections XIII.4, IX.1, X.1-3, X.5, and X.8 are denied.

iii. *There are no costs mandated by the state for the LID and hydromodification planning activities required by Sections VII.C.1, XII.D.5, and XII.E.1 of the test claim permit.*

As indicated above, the following LID and hydromodification planning activities mandate a new program or higher level of service:

- Within 12 months of adoption of this order, update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D) and a copy of the updated model WQMP shall be submitted for review and approval by the Executive Officer. (Section VII.C.1.)[1019]
- Prepare a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis. The Watershed Master Plans shall integrate water quality, hydromodification, water supply, and habitat for the following watersheds: Coyote Creek-San Gabriel River; Anaheim Bay-Huntington Harbour; Santa Ana River; and Newport Bay-Newport Coast. Components of the Plan shall include: (1) maps to identify areas susceptible to hydromodification including downstream erosion, impacts on physical structure, impacts on riparian and aquatic habitats and areas where storm water and urban runoff infiltration is possible and appropriate; and, (2) a hydromodification model to make available as a tool to enable proponents of land development projects to readily select storm water preventive and mitigative site BMP measures. The maps shall be prepared within 12 months of the adoption of this order and a model Plan for one watershed shall be prepared within 24 months of adoption of this order. The model Watershed Master Plan shall be submitted to the Executive Officer for approval. Watershed Master Plans shall be completed for all watersheds 24 months after approval of the model Watershed Master Plan. The Watershed Master Plans shall be designed to meet applicable water quality standards and the Federal Clean Water Act. (Section XII.D.5.)[1020]
- Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the Executive Officer should be considered for alternatives and in-lieu programs. If a

[1019] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 323 [Order No. R8-2009-0030].

[1020] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 328 [Order No. R8-2009-0030].

particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval. (Section XII.E.1.)[1021]

The claimants contend that they do not have valid fee authority for the LID and hydromodification planning activities for the following reasons: (1) the requirements generally benefit downstream communities and the citizens of Orange County, and not just the developers of priority development projects and, thus, any fee would be a tax; and (2) the number of priority development projects utilizing the LID and hydromodification Plan requirements was unknown when the requirements were developed and, thus, the claimant had no way to fairly allocate costs in accordance with the law.[1022]

The Commission finds that the claimants arguments are misplaced and that they have valid authority under their police powers to charge regulatory fees on all project developers sufficient as a matter of law within the meaning of Government Code section 17556(d) to cover the costs of developing LID and hydromodification planning documents required by Sections VII.C.1, XII.D.5, and XII.E.1 of the test claim permit and, thus, there are no costs mandated by the state for these activities.

As indicated above, the plain language of Proposition 26, or article XIII C, section 1(e), describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[1023] fees or charges for a government service or product provided to the payor and not others,[1024] reasonable regulatory fees for permits,[1025] and charges imposed as a condition of property development.[1026]

As the court in *Professional Scientists* made clear, regulatory fees may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation and includes all costs incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. The claimants "need only apply sound judgment and consider 'probabilities

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[1021] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 328-329 [Order No. R8-2009-0030].

[1022] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 38-40.

[1023] California Constitution, article XIII C, section 1(e)(1).

[1024] California Constitution, article XIII C, section 1(e)(2).

[1025] California Constitution, article XIII C, section 1(e)(3).

[1026] California Constitution, article XIII C, section 1(e)(6).

according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[1027]

Here, creating the LID and hydromodification plans constitute costs that are incident to development permits, which the claimants will issue to priority development projects. This is made clear in the language of the mandated activities:

- Update the model WQMP to incorporate LID principles (as per Section XII.C) and to address the impact of urbanization on downstream hydrology (as per Section XII.D) and a copy of the updated model WQMP shall be submitted for review and approval by the Executive Officer. (Section VII.C.1.)[1028]

  As explained in the test claim permit findings, "[t]he model WQMP provides a framework to incorporate watershed protection principles into the permittees planning, construction and post-construction phases of defined new and redevelopment projects. The model WQMP includes site design, source control and treatment control elements to reduce the discharge of pollutants in urban runoff. On September 26, 2003, the Regional Board approved the model WQMP. The permittees have incorporated provisions of the model WQMP into their LIPs. The permittees are requiring new developments and significant redevelopments to develop and implement appropriate project WQMPs."[1029]

- Prepare a Watershed Master Plan to address the hydrologic conditions of concern on a watershed basis. The Watershed Master Plans shall integrate water quality, hydromodification, water supply, and habitat for specified watersheds. Components of the Plan shall include: (1) maps to identify areas susceptible to hydromodification including downstream erosion, impacts on physical structure, impacts on riparian and aquatic habitats and areas where storm water and urban runoff infiltration is possible and appropriate; and, (2) a hydromodification model to make available as a tool to *enable proponents of land development projects* to readily select storm water preventive and mitigative site BMP measures. (Section XII.D.5.)[1030]

- Within 12 months of adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria *for project evaluation* to determine the feasibility of implementing LID BMPs (feasibility to be based in part, on the issues identified in Section XII.C). This plan shall be submitted to the Executive Officer for approval. Only those projects that have completed a vigorous feasibility analysis as per the criteria developed by the permittees and approved by the

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[1027] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1028] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 323 [Order No. R8-2009-0030].

[1029] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 291 [Order No. R8-2009-0030, Finding 63].

[1030] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 328 [Order No. R8-2009-0030].

> Executive Officer should be considered for alternatives and in-lieu programs. If a particular BMP is not technically feasible, other BMPs should be implemented to achieve the same level of compliance, or if the cost of BMP implementation greatly outweighs the pollution control benefits, a waiver of the BMPs may be granted. All requests for waivers, along with feasibility analysis including waiver justification documentation, must be submitted to the Executive Officer in writing, 30 days prior to permittee approval. (Section XII.E.1.)[1031]

The claimants admit that the LID and hydromodification planning activities benefit project developers.[1032]

However, they also contend that the LID and hydromodification planning requirements generally benefit downstream communities and all citizens of Orange County, and not just the developers of priority development projects and, thus, they assert that any fee would in fact be a tax, citing *Newhall County Water Dist. v. Castaic Lake Water Agency* and *Department of Finance v. Commission on State Mandates* (*Municipal Stormwater and Urban Runoff Discharges*).[1033] The claimants' reliance on these cases 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. 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.[1034] 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

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[1031] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, pages 328-329 [Order No. R8-2009-0030].

[1032] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 24-25 ["Proposed Sections XII.B through XII.E of the 2009 Permit require Claimants to devise plans to incorporate best management practices ("BMPs") regarding Low Impact Development ("LID") and hydromodification principles ("HMP") *into PDPs"*; "Section XII contains several distinct requirements for Claimants to develop planning documents to govern Water Quality Management Plans ("WQMPs") *used by PDP developers"*; "The [Watershed] Master Plan must include maps to identify areas susceptible to hydromodification and a hydromodification model *to use as a tool for project developers* to select storm water preventative and mitigative site BMPs." Emphasis added.]

[1033] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 38 [citing *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451, and *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App. 5th 546, 569].

[1034] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1434-1440.

imported water. It did not provide groundwater, and the groundwater management activities it provided were not services provided just to the retailers. Instead, those activities "redound[ed] to the benefit of all groundwater extractors in the Basin[.]"[1035] 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.[1036]

Similarly, *Department of Finance* (*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.[1037]

This case is different. The service provided directly to developers of priority development projects are the LID and hydromodification plans to assist in the preparation, implementation, and approval of water pollution mitigations for those projects. Unlike in *Newhall* and *Department of Finance*, that service is not provided to anyone else, and only affected priority project developers will be charged for the service. The service will not be provided to those not charged. Even if the citizens of Orange 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. Fees are not taxes under Proposition 26 when they are charges for a benefit conferred or privilege granted,[1038] for a government service or product provided to the payor and

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[1035] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1036] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1037] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

[1038] California Constitution, article XIII C, section 1(e)(1).

not others,[1039] reasonable regulatory fees for permits,[1040] and charges imposed as a condition of property development.[1041]

The claimants' second point - that they had no way to fairly allocate costs in accordance with the law because they did not know the number of priority development projects utilizing the LID and hydromodification plan requirements when the requirements were developed - also fails. Setting the fee does not require mathematical precision. When setting the amount of the fee, local agencies need only "consider 'probabilities according to the best honest viewpoint of [their] informed officials.'"[1042] "No one is suggesting [that the claimants] levy fees that exceed their costs."[1043]

In addition, there is no evidence in the record indicating that the claimants cannot levy a fee that will 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.[1044] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.[1045] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive, or the precise burden each payer may create. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. "An excessive fee that is used to generate general revenue becomes a tax."[1046]

Moreover, the claimants' authority to levy a fee is not contingent on future developers, only the actual collection of the fee is contingent. The authority to levy the fee is derived from their police power, and nothing in the claimants' arguments indicates permittees do not have the authority to levy fees for the HMP and the LID planning requirements.

Accordingly, there are no costs mandated by the state for the LID and hydromodification planning activities and, thus, Sections VII.C.1, XII.D.5, and XII.E.1 are denied.

[1039] California Constitution, article XIII C, section 1(e)(2).

[1040] California Constitution, article XIII C, section 1(e)(3).

[1041] California Constitution, article XIII C, section 1(e)(6).

[1042] *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438

[1043] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

[1044] *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194.

[1045] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948.

[1046] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438.

c. The claimants do not have the authority to levy property-related fees within the meaning of Government Code section 17556(d) when voter approval of the fee is first required and, thus, from June 1, 2009 through December 31, 2017, there are costs mandated by the state for the remaining new activities mandated by sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit. 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.

As indicated above, the following remaining activities mandate a new program or higher level of service:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)[1047]
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)[1048]
- Public education program:
    - By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012. (Section XIII.1.)[1049]
    - Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and retail sales industry; residential/commercial landscape construction and service industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter. (Section XIII.4.)[1050]
    - The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation

[1047] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.8].

[1048] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.9].

[1049] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

[1050] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in local newspapers, County or city websites, local libraries, city halls, or courthouses. (Section XIII.7.)[1051]

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. (Section XI.4.)[1052]

The claimants have constitutional police power (Cal. Const., art. XI, § 7) and statutory authority[1053] to impose property-related fees for the remaining new state mandated activities to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies pursuant to Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit. 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.[1054] In addition, the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they can properly develop stormwater fees, including links to several fee ordinances passed by other cities.[1055]

As described below, however, stormwater property-related fees are subject to Proposition 218, or article XIII D of the California Constitution, which until January 1, 2018, required voter approval before new or increased fees could be charged. Effective January 1, 2018, SB 231 defined "sewer" to include stormwater as an exception to the voter approval requirement in article XIII D, which then makes only the voter protest provisions of article XIII D apply to property-related stormwater fees.

[1051] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[1052] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316-317 [Order No. R8-2009-0030, Section XI.4].

[1053] 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).

[1054] Exhibit Q (3), City of San Clemente Municipal Code, title 13, chapter 13.34, sections 13.34.010-13.34.030.

[1055] Exhibit Q (1), CASQA, Fee Study and Ordinance, https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance (accessed November 23, 2022).

The claimants argue that any fees developed by the co-permittees to fund the portions of the MS4 Permit would be a property-related fee that would require a majority vote of the property owners subject to the fee and, thus, claimants do not have authority sufficient as a matter of law to impose a stormwater fee within the meaning of Government Code section 17556(d).[1056] The claimants also contend that SB 231 is unconstitutional as "an invalid attempt to legislatively modify the California Constitution" as follows:

> Proposition 218, which passed in 1996 and enacted article XIII D, section 6 of the state Constitution ("article XIII D, section 6"), establishing restrictions on the imposition of property-related fees, reflected voter intent to treat sewers as limited to sanitary sewer facilities, and not storm sewers or storm drains. This voter intent cannot be legislatively overridden by SB 231. Therefore, SB 231 should not be relied upon by the Commission to deny Claimants a subvention of funds for activities occurring after January 1, 2018, the effective date of the statute.[1057]

The claimants argue that SB 231 is unconstitutional because:

- 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.[1058]
- 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."[1059]
- 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.[1060]

[1056] Exhibit E, Claimants' Rebuttal Comments, Volume 1, filed June 17, 2011, page 68.

[1057] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 33; see also pages 41-48.

[1058] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 43-45.

[1059] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 46-47.

[1060] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 47-48.

Finally, the claimants contend that "[t]o the extent that SB 231 has any application to the Test Claim, Claimants concur with the finding that SB 231 is not retroactive."[1061]

The Water Boards contend that the claimants have fee authority sufficient as a matter of law to cover the costs of the mandated activities during the entire period of reimbursement pursuant to Government Code section 17556(d), and that this Test Claim should be denied as follows:

- A voter approval requirement does not divest claimants of legal authority to impose fees. The court's reasoning with respect to the voter protest provisions in *Paradise Irrigation District* (where the voter protest requirement were construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority) apply equally when voter approval is required.[1062]
- Even if the Commission finds that the voter approval requirements divest the claimants of their fee authority, the Commission should require the claimants to show they attempted, but failed, to establish the fees due to the voter approval provisions before reimbursement is required.

  > If claimants fail to even attempt to secure voter approval, such as by never bringing a fee proposal to their voters in the first place, they cannot demonstrate that the voter approval provision was an obstacle to imposing necessary fees. Any other conclusion results in the inequitable situation in which local agencies may decline to seek voter approval for a necessary fee instead choosing to seek reimbursement from the state based on the assertion that the agency lacks fee authority sufficient as a matter of law under Government Code section 17556, subdivision (d).[1063]

- Claimants are not entitled to any reimbursement for costs for any mandated activities on and after January 1, 2018.

The Department of Finance also urges the Commission to find that the claimants have fee authority sufficient as a matter of law to cover the costs of the mandated activities pursuant to Government Code section 17556(d), and further asserts that SB 231 applies to the full period of reimbursement. "However, because SB 231 was a clear overruling of the wrongly-decided *City of Salinas* case, the Commission should also find that from the beginning of the potential period of reimbursement the voter approval requirement did not apply to claimants and therefore did not impede their fee authority."[1064]

[1061] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 42.

[1062] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 5-7.

[1063] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 7-8.

[1064] Exhibit O, Finance's Comments on the Draft Proposed Decision, filed November 4, 2022, page 1.

The Commission finds that the claimants do not have the authority to levy fees within the meaning Government Code section 17556(d) when voter approval of the fee is required and, thus, from June 1, 2009 through December 31, 2017, there are costs mandated by the state for Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. However, once SB 231 becomes effective on January 1, 2018, and defines the exception to the voter approval requirement to include stormwater, then only the voter protest provisions of article XIII D apply. Pursuant to the court's ruling in *Paradise Irrigation District*, the claimants have fee authority sufficient to cover the costs of any state-mandated activities within the meaning of Government Code section 17556(d) when the law allows for voter protest of new or increased fees and, thus, there are no costs mandated by the state beginning January 1, 2018.

i. *The voter protest and approval requirements of article XIII D for property-related fees and SB 231*

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.'"[1065] 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.[1066]

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

[1065] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 (citing Cal. Const., art. XIII D, § 3).

[1066] California Constitution, article XIII D, section 4(a).

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 protests…and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.[1067]

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.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.[1068]

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.[1069]

[1067] California Constitution, article XIII D, section 4(c; d; e).

[1068] California Constitution, article XIII D, section 6(b).

[1069] Compare California Constitution, article XIII D, section 6(a)(1-2) with article XIII D, section 4(a). See also, *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 196 Cal.Rptr3d 171 (review granted) ("Had the voters wished in 1996 to require express notification to owners of their nullification rights, or to prescribe a mechanism for the exercise of those rights, they were more than capable of doing so, as they demonstrated in the parallel provisions governing assessments.").

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.[1070] This section is discussed further below, but for charges other than for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, but are subject only to the voter protest provisions of article XIII D.

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.[1071] 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.[1072]

After Proposition 218 came *Apartment Ass'n of Los Angeles County, Richmond*, and *Bighorn-Desert View*.[1073] In each of these cases the Court narrowly construed the procedural and substantive limitations of article XIII D. In *Apartment Ass'n*, 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*…"[1074] The Court held that Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only "when they burden landowners as *landowners*."[1075] 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.[1076]

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; i.e., 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

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[1070] California Constitution, article XIII D, section 6(c).

[1071] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

[1072] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

[1073] *Apartment Ass'n 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, and *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205.

[1074] California Constitution, article XIII D, sections 2(e); 3 (emphasis added); *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-842.

[1075] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 (emphasis in original).

[1076] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

article XIII D.[1077] The Court also found that the charge was to be imposed on applicants for new service, rather than users receiving service through existing connections, and that that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.[1078] 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."[1079]

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,[1080] 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."[1081] 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

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[1077] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

[1078] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

[1079] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

[1080] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

[1081] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.[1082]

In 2002, the Sixth District Court of Appeal in *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 (which the parties refer to as "*City of Salinas*") held that "sewer," for purposes of the voter approval exemption in article XIII D does *not* include storm sewers or storm drains.[1083] *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.[1084] 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."[1085] 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 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.[1086] 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."[1087]

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.[1088] 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 . .

[1082] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

[1083] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[1084] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[1085] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[1086] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1087] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

[1088] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

. 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 accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.[1089]

In 2019, the Third District Court of Appeal issued its decision in *Paradise Irrigation District* (a challenge to the Commission's Decision in *Water Conservation,* 10-TC-12/12-TC-01), which held, in the context of water services, that the voter protest requirements of Proposition 218 do not divest local agencies of their authority to impose fees sufficient as a matter of law pursuant to Government Code section 17556(d) and, thus, when even when the voter protest provisions apply, there are no costs mandated by the state.[1090] 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.*[1091]

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

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[1089] Government Code section 53751(f).

[1090] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1091] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

authority."[1092] 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."[1093] 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."[1094] However, the court said, "[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."[1095] 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.[1096] 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."[1097] 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."[1098] 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."[1099] Thus, the court found that

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[1092] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1093] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1094] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1095] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1096] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

[1097] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[1098] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1099] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

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 issue in *Department of Finance v. Commission on State Mandates* (Case No. C092139) and upheld the Commission's findings in *Discharge of Stormwater Runoff*, 07-TC-09, which addressed an NPDES stormwater permit issued by the San Diego Regional Water Quality Control Board.[1100] That case became final on March 2, 2023, after the California Supreme Court denied review..[1101]

In *Discharge of Stormwater Runoff*, 07-TC-09, the Commission found that the permit imposed new state-mandated activities relating to the public education program, activities and collaboration required to develop watershed and regional urban runoff management programs, and activities required to comply with the permit's program effectiveness assessment. The Commission also found that the claimants had the fee authority under their constitutional police powers (Cal. Const., art. XI, § 7), and several statutory provisions, but that authority was subject to the voter approval requirement of article XIII D, section 6. The Commission found that local agencies do not have sufficient fee authority within the meaning of Government Code section 17556(d) when voter approval of the fee is constitutionally required. The Commission based the finding on several cases, including *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1352, 1358-1359, which as stated above, held that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's voter-approval exemption for "sewer" or "water" services. The Commission also distinguished *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, finding that the voting requirement in Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. The Commission concluded that without voter approval, the local agency lacks the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program, and approved reimbursement for those activities subject to potential offsetting revenues.

ii. *The Commission is required to presume that SB 231 is constitutional, and there is no indication in the law that SB 231 is clarifying of existing law or was intended to be applied retroactively and, thus, SB 231 applies prospectively beginning January 1, 2018.*

As indicated above, the *City of Salinas* case held that 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.

[1100] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.

[1101] *Department of Finance v. Commission on State Mandates*, Case No. S277832, filed December 22, 2022, review denied March 2, 2023.

However, in 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to overrule the 2002 *City of Salinas* case and define "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D.[1102] SB 231 became effective January 1, 2018.

The claimants contend that SB 231 is unconstitutional, should not be applied to this Test Claim, and that all fees are therefore subject to the voter approval provisions of article XIII D.[1103]

The Department of Finance, on the other hand, asserts that SB 231, exempting stormwater fees from the voter approval requirements, applies to the full period of reimbursement:

> . . . because SB 231 was a clear overruling of the wrongly-decided *City of Salinas* case, the Commission should also find that from the beginning of the potential period of reimbursement the voter approval requirement did not apply to claimants and therefore did not impede their fee authority.[1104]

The Commission is required to presume that the statutes amended by SB 231 are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional (as requested by the claimants). Article III, section 3.5 states in relevant part the following:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> [¶]

However, further analysis is required to address Finance's argument that the statutes enacted by SB 231 in 2017 to define "sewer" to include "stormwater sewers," apply to the beginning period of reimbursement, June 1, 2009. For the reasons below, the Commission finds that SB 231 operates prospectively beginning January 1, 2018.

The courts have found that a statute that merely clarifies existing law, rather than changes the law, can properly be applied to transactions predating the clarification since the clarification describes what the law has always been.[1105] Such clarifications typically occur when the Legislature promptly reacts soon after a controversy regarding interpretation arises:

[1102] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

[1103] Exhibit M, Claimants' Comments on the Draft Proposed Decision, filed November 4, 2022, page 33; see also pages 41-48.

[1104] Exhibit O, Finance's Comments on the Draft Proposed Decision, filed November 4, 2022, page 1.

[1105] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

> One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change- rebutting the presumption of substantial change.[1106]

There is no indication that the Legislature was trying to clarify an issue of interpretation regarding the word "sewer" when it enacted SB 231, 21 years after Proposition 218 was adopted and 15 years after *City of Salinas* was decided. Proposition 218 was enacted in 1996, and separately lists "sewers" and "drainage systems" in article XIII D, section 5, but only exempts sewers from the voter approval requirements in article XIII D, section 6. In 1997 and 1998, the Legislature enacted and amended the Proposition 218 Omnibus Implementation Act in Government Code sections 53750 et seq. to implement and interpret Proposition 218, but did not define "sewer" in the Act at all.[1107] Section 53750 did define "[d]rainage system" as "any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for *other types of water drainage*," but did not equate sewers to mean water drainage.[1108] In 2002, the *City of Salinas* case construed 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.[1109] Statutes 2002, chapter 395 amended the Proposition 218 Omnibus Implementation Act, but "sewer" was again not defined.[1110] In 2017, SB 231 amended Government Code section 53750 to define "sewer" for the first time in subdivision (k) to include both systems for sanitary and drainage purposes, including for stormwater, as follows:

> "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

[1106] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[1107] Government Code section 53750, as added by Statutes 1997, chapter 38.

[1108] Government Code section 53750(d), as added by Statutes 1997, chapter 38, and amended by Statutes 1998, chapter 876.

[1109] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1110] Government Code section 53750, as amended by Statutes 2002, chapter 395.

Thus, SB 231 for the first time defines "sewer" and reverses the City of Salinas decision by clearly including stormwater drainage systems within the definition - thereby expanding the exemption from the voter approval requirement to impose or increase fees to now include property-related fees for stormwater.

However, SB 231 contains no express statement that it is clarifying existing law; it simply states an intent to overrule *City of Salinas*.[1111] "[A]lthough the Legislature may amend a statute to overrule a judicial decision, doing so *changes* the law . . . ."[1112] In addition, a new law can operate retroactively when it changes the legal consequences of past events, unless due process considerations prevent it.[1113] However, there is a strong presumption that Senate Bill 231 operates prospectively. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."[1114] "[U]nless there is an 'express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'"[1115] A statute that is ambiguous with respect to retroactive application is to be construed to operate prospectively.[1116] SB 231 contains no express statement that the Legislature intended the bill to apply retroactively. The strongest statement of retroactive intent is in Government Code section 53751(l), which states that the Legislature "*reaffirms and reiterates* that the definition found in Section 230.5 of the Public Utilities Code is the definition of 'sewer' or 'sewer service' that should be used in the Proposition 218 Omnibus Implementation Act." However, as indicated above, the Legislature never had before declared, affirmed, or iterated the meaning of "sewer" in the Proposition 218 Implementation Act before SB 231 was enacted. Where the statement that the Legislature reaffirmed and reiterated a prior position is erroneous, especially when the new legislation changed the law, the statement is insufficient to establish a clear expression of retroactive intent.[1117]

[1111] Government Code section 53751(f).

[1112] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473-474.

[1113] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 229.

[1114] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

[1115] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244; *Myers v. Philip Morris Companies, Inc.* (2002 28 Cal.4th 828, 841.

[1116] *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 320-321, fn. 45.

[1117] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475-476 [erroneous statement that an amendment merely declared existing law where it actually changed the law was insufficient to overcome the strong presumption against retroactivity].

See also, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840 ("[T]he first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past.... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent

Accordingly, the Commission finds that SB 231 operates prospectively beginning January 1, 2018.

iii. *From June 1, 2009, through December 31, 2017, when voter approval of property-related stormwater fees is required, there are costs mandated by the state for the new activities mandated by Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit. Beginning January 1, 2018, when stormwater fees are exempt from the voter approval requirement, there are no costs mandated by the state.*

As indicated above, once SB 231 becomes effective on January 1, 2018, and defines the exception to the voter approval requirement to include stormwater, then only the voter protest provisions of article XIII D apply to property-related fees for stormwater. Pursuant to the court's ruling in *Paradise Irrigation District*, the claimants have fee authority sufficient to cover the costs of any state-mandated activities within the meaning of Government Code section 17556(d) when the law allows for voter protest of new or increased fees and, thus, there are no costs mandated by the state for Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, beginning January 1, 2018.

However, until January 1, 2018, the Commission is required by law to follow the *City of Salinas* decision,[1118] which holds that stormwater does not fall within the exception to the voter approval requirement and, thus, the voters must approve any new or increased stormwater fees.[1119]

There remains an issue whether Government Code section 17556(d) applies when voter approval is required by article XIII D for any costs incurred for the new state-mandated activities to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, comply with the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies, from June 1, 2009, the beginning date of the potential period of reimbursement, to December 31, 2017 (before SB 231 was enacted).

The Water Boards contend that:

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rights ... unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [internal citations and quotations omitted]); *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 469 (holding that under fundamental principles of separation of powers, the legislative branch of government may amend a statute to say something different than a court ruling, but if it does so, it changes the law and the statutes, as amended, applies prospectively).

[1118] *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

[1119] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

- A voter approval requirement does not divest claimants of legal authority to impose fees. The court's reasoning with respect to the voter protest provisions in *Paradise Irrigation District* (where the voter protest requirement were construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority) apply equally when voter approval is required.[1120]
- Even if the Commission finds that the voter approval requirements divest the claimants of their fee authority, the Commission should require the claimants to show they attempted, but failed, to establish the fees due to the voter approval provisions before reimbursement is required.

> If claimants fail to even attempt to secure voter approval, such as by never bringing a fee proposal to their voters in the first place, they cannot demonstrate that the voter approval provision was an obstacle to imposing necessary fees. Any other conclusion results in the inequitable situation in which local agencies may decline to seek voter approval for a necessary fee instead choosing to seek reimbursement from the state based on the assertion that the agency lacks fee authority sufficient as a matter of law under Government Code section 17556, subdivision (d).[1121]

The Department of Finance also urges the Commission to find that the claimants have fee authority sufficient as a matter of law to cover the costs of the mandated activities pursuant to Government Code section 17556(d).[1122]

The voter approval provisions are materially different than the voter protest provisions when it comes to a local agency's fee authority under Government Code section 17556(d). In *Paradise Irrigation District*, the water and irrigation districts had the statutory authority to impose fees for water service improvements, subject only to the voter protest provisions of article XIII D. The court held that the protest procedures did not divest the districts of their fee authority. Rather, the protest procedures created a power-sharing arrangement similar to that in *Bighorn* where presumably voters would appropriately consider the state-mandated requirements imposed on the districts.[1123] 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.[1124] "[T]he *possibility* of a protest under article XIII D, section 6,

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[1120] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 5-7.

[1121] Exhibit N, Water Boards' Comments on the Draft Proposed Decision, filed November 4, 2022, pages 7-8.

[1122] Exhibit O, Finance's Comments on the Draft Proposed Decision, filed November 4, 2022, page 1.

[1123] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1124] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

does not eviscerate [the districts'] ability to raise fees to comply with the [Water] Conservation Act."[1125] Thus, under the voter protest provisions, local agencies have the authority to levy a fee unless there is a majority protest.

With the voter approval requirements, however, a local agency has no authority to establish or increase fees unless the fee is first approved by an affirmative majority vote of affected parcel owners. Thus, for property-related fees subject to voter approval, there is no power sharing arrangement like there is for fees subject only to the voters' possible protest. Rather, article XIII D limits the claimants' police power and statutory authority to impose the fee. Therefore, the claimants do not have the authority to impose fees sufficient as a matter of law to cover the costs of the new activities mandated by Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 of the test claim permit within the meaning of article XIII B, section 6 from June 1, 2009, through December 31, 2017.

This conclusion is further supported by 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."[1126] Like articles XIII A and XIII B, the voter approval requirements in article XIII D impose limits on local government authority to raise revenues to pay for new state-mandated requirements and, therefore, requires subvention within the meaning of article XIII B, section 6.

Moreover, the question whether Government Code section 17556(d) applies is a pure question of law and is not controlled by whether an agency has "tried and failed" to impose a fee, as asserted by the Water Boards. The "try and fail" suggestion was rejected by the court in *Paradise Irrigation District* as follows:

> We adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact. (*Ibid.*) Fee authority is a matter governed by statute rather than by factual considerations of practicality.
>
> The corollary of our continued adherence to the rule articulated in *Connell, supra,* [citation omitted] is that fee authority is not controlled by whether the Water and Irrigation Districts have "tried and failed" to levy fees. We decline to adopt the trial court's try-and-fail approach that suggests the Water and Irrigation Districts may become entitled to subvention despite their continuing statutory authority to levy fees upon showing a district's water customers with majority voting power defeated the proposed levy. As noted above, *Bighorn* instructs that we presume voters will give appropriate consideration and deference to proposals of fees by the boards of the Water and Irrigation Districts. (*Bighorn*, *supra*, [citation omitted].) Statutory authorization to levy fees – rather than practical

[1125] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1126] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

considerations – conclusively determines whether the Water and Irrigation Districts are entitled to subvention.[1127]

Accordingly, the Commission finds that the claimants do not have the authority to levy fees within the meaning Government Code section 17556(d) when voter approval of the fee is required and, thus, from June 1, 2009 through December 31, 2017, there are costs mandated by the state for the Sections XVIII.8-9, XIII.1, XIII.4, XIII.7, and XI.4 to submit a proposed Cooperative Watershed Program to comply with the selenium TMDL, to develop a constituent-specific source control plan to comply with the San Gabriel metals TMDL, the new mandated public education activities, and the mandate to develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that the following activities constitute a reimbursable state-mandated program from June 1, 2009, through December 31, 2017 only:

- Submit a proposed Cooperative Watershed Program that will fulfill applicable requirements of the selenium TMDL implementation plan within 24 months of adoption of the test claim permit, or one month after approval of the Regional Board selenium TMDLs by OAL, whichever is later. (Section XVIII.B.8.)[1128]
- Develop a "constituent-specific source control plan" for copper, lead, and zinc, including a monitoring program, to ensure compliance" with WLAs for dry and wet weather runoff, which were derived from the 2007 San Gabriel River Metals TMDL jointly developed by the Los Angeles Water Board and U.S. EPA. (Section XVIII.B.9.)[1129]
- Public education program:
    - By July 1, 2012, the one-time activity to complete a public awareness survey to determine the effectiveness of the current public and business education strategy, and to include the findings of the survey and any proposed changes to the current program in the annual report for 2011-2012. (Section XIII.1.)[1130]
    - Permittees shall administer individual or regional workshops for each of the specified sectors (manufacturing facilities; mobile service industry; commercial, distribution, and retail sales industry; residential/commercial landscape construction and service

[1127] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1128] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.8].

[1129] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 343 [Order No. R8-2009-0030, Section XVIII.B.9].

[1130] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.1].

industry; residential and commercial construction industry; and residential and community activities) by July 1, 2010 and annually thereafter. (Section XIII.4.)[1131]

- The principal permittee, in collaboration with the co-permittees, shall develop and implement a mechanism for public participation in the updating and implementation of DAMPs, WQMP guidance, and Fact Sheets for "various activities." The public shall be informed of the availability of these documents through public notices in local newspapers, County or city websites, local libraries, city halls, or courthouses. (Section XIII.7.)[1132]

- Within 18 months of adoption, develop a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies. (Section XI.4.)[1133]

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

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes, shall be identified and deducted from any claim submitted for reimbursement.

All other sections, activities, and costs pled in the Test Claim are denied.

[1131] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 332 [Order No. R8-2009-0030, Section XIII.4].

[1132] Exhibit A, Joint Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 333 [Order No. R8-2009-0030, Section XIII.7].

[1133] Exhibit A, Test Claim filed June 30, 2010, and revised December 19, 2016, and January 3, 2017, page 316-317 [Order No. R8-2009-0030, Section XI.4].

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 March 24, 2023, I served the:

- **Decision adopted March 24, 2023**

  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and, XVIII, Adopted May 22, 2009, 09-TC-03
  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 March 24, 2023 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/9/23

Claim Number: 09-TC-03

Matter: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and, XVIII, Adopted May 22, 2009

Claimants: City of Anaheim
City of Brea
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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