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October 28, 2024



Heather Halsey  
Executive Director  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814

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

**Re: Comments on Draft Proposed Decision**

*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05*  
*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Sections C.2.b, C.2.c, C.2.e, C.2.f, C.8.b., C.8.c., C.8.d.i, C.8.d.ii., C.8.d.iii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., C.8.e.vi., C.8.f., C.8.g.i. (first sentence only), C.8.g.ii., C.8.g.iii., C.8.g.v., C.8.g.vi., C.8.g.vii., C.8.h, C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.i., C.10.b.ii., C.10.b.iii., C.10.c., C.10.d.i., C.10.d.ii., C.11.f., and C.12.f., Adopted October 14, 2009 and Effective December 1, 2009*  
*Cities of Dublin and San Jose, and County of Santa Clara, Claimants*

Dear Ms. Halsey:

The County of Santa Clara ("County") files the following comments to the Commission on State Mandates ("Commission") in response to the Draft Proposed Decision ("DPD") on test claim 10-TC-03 ("Test Claim"), concerning California Regional Water Quality Control Board, San Francisco Region ("Regional Board"), Order No. R2-2009-0074 ("Permit"). The Test Claim asserts that numerous provisions of the Permit

Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 2 of 9

impose unfunded mandates on the County and thus require subvention pursuant to article XIII B, section 6 of the California Constitution (“Section 6”).

The DPD proposes to partially approve the Test Claim, finding that many of the Permit provisions require reimbursement. The County agrees with the proposed approval determinations<sup>1</sup> and urges the Commission on State Mandates to adopt these approvals. However, the County respectfully disagrees with the DPD’s recommendations as to provisions C.8.b, C.8.c, C.8.d.i, and C.8.d.ii, for which the DPD found that no reimbursement is necessary. The following comments address these four proposed findings. In short, the County argues that each proposed finding is based on a misapplication of case law concerning the requirement that reimbursable mandates impose a “new program or higher level of service” in the meaning of Section 6.

### **DISCUSSION**

Commission decisions must be supported by substantial evidence. (Gov. Code, § 17559, subd. (b).) Substantial evidence is “of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’ ” (*County of Los Angeles v. Comm’n on State Mandates* (1995) 32 Cal. App. 4th 805, 814, quoting *Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 837, fn. 2.)

Commission regulations establish that “[a]ny relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Cal. Code Regs., tit. 2, § 1187.5, subd. (a).) “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (*Ibid.*)

Section 6 requires reimbursement only for mandates that impose a “new program” or a “higher level of service.” (*Dept. of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 555.) “To determine whether a program imposed by the permit is new, [courts] compare the legal requirements imposed by the new permit with those in effect before the new permit became effective.” (*Id.* at p. 559.) “This is so even though the conditions were designed to satisfy the same standard of performance.” (*Ibid.*)

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<sup>1</sup> As to the County, the DPD determines that the following Permit provisions are reimbursable mandates: C.8.d.iii, C.8.e.vi, C.8.g.ii, C.8.g.vii, C.10.a.i, C.10.a.ii, C.10.a.iii, C.10.b.ii, some of the requirements in C.10.b.iii, C.10.c, some of the requirements in C.10.d.i and C.10.d.ii, C.11.f, and C.12.f. (DPD, at pp. 6-13.)

**A. By mandating financial contributions to the Regional Monitoring Program, Permit provision C.8.b imposes a new program or higher level of service.**

The County sought subvention for Permit provision C.8.b, which mandated permittees to “participate in implementing an Estuary receiving water monitoring program, at a minimum equivalent to the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP), by contributing their fair-share financially on an annual basis.” (Permit, at p. 65.) The Permit explains that “the intent of this provision is for Permittees to continue contributing financially and as stakeholders in such a program as the RMP.” (*Id.* at n.20.)

Before the Permit, the permittees were subject to National Pollutant Discharge Elimination System (NPDES) Permit No. CAS029718, issued by Regional Board Order No. 01-024 on April 21, 2001 (“Prior Permit”).<sup>2</sup> The Prior Permit included no legal requirement to contribute financially to the RMP. Rather, permittees had a choice to either “continue to participate in the RMP,” which comprises the “collection and analysis of data,” or “submit and implement an acceptable alternative monitoring plan.” (Prior Permit, at p. 9.) Mandating the provision of financial resources to the RMP is not synonymous with “collection and analysis of data” or the submission of “an acceptable alternative monitoring plan.” The Permit’s financial contribution requirement is new.

The DPD asserts that “the requirement to contribute a fair share to the RMP, or an equivalent program, is not new, but was required by prior orders and permits.” (DPD, at p. 186.) The DPD refers first to a 1992 Regional Board resolution that required its Executive Officer to “work with the selected dischargers to prepare an implementation plan for the RMP” and “report to the Regional Board . . . on the status of the implementation of the RMP including cost sharing and institutional arrangements.” (DPD, at p. 187, quoting Res. 92-043.) The DPD then cites a 1992 memorandum of understanding between the Regional Board and the entity that would later become the San Francisco Estuary Institute. (DPD, at p. 187.) This memorandum provided that the Regional Board would ensure the financial participation of individual permittees. (*Ibid.*) Last, the DPD cites the Regional Board’s 2007 Basin Plan, which reported that permittees “fund the RMP as a requirement of their permits.” (*Id.* at p. 188.) The DPD thus concludes that the financial contribution requirement is not a new program or higher level of service.

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<sup>2</sup> Order No. 01-124 was subsequently amended by Order No. 01-119 on October 17, 2001, and Order No. R2-2005-0035 on July 20, 2005. Neither of these amendments is relevant to the Test Claim or DPD, as the amendments added requirements to provision C.3 (concerning new development and significant redevelopment), which was not raised in the Test Claim.

Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 4 of 9

The County disagrees with the DPD's finding as to C.8.b for two reasons. First, the DPD does not "compare the legal requirements imposed by the new permit with those in effect before the new permit became effective." (*Dept. of Finance, supra*, 85 Cal.App.5th at p. 559.) The relevant legal requirements are those in effect immediately preceding the new requirements. (*Id.* at pp. 559-560 [noting "the challenged permit conditions . . . compared to the prior permit].) Neither a permittee's voluntary participation in a program, a Regional Board directive to its staff, nor an MOU between the Regional Board and a nonprofit constitutes the Prior Permit, which merely offered RMP participation as a possible option, and certainly did not require financial contributions to the RMP.

Moreover, no legal requirements other than those in the Prior Permit were "in effect before the new permit became effective." The Prior Permit superseded earlier permits that allegedly imposed requirements on the permittees. (Order No. 01-024 at p. 11.) Because the Prior Permit is the only relevant order as to legal requirements in effect immediately prior to the Permit, any other past legal requirements are irrelevant.

Second, the DPD does not cite any evidence to support its assertion that the permittees had any prior legal requirement to financially support the RMP. No source cited by the DPD imposes a legal requirement on the permittees to fund the RMP. The 1992 Regional Board resolution imposed no requirement on the permittees to fund the RMP. It only required the Executive Director to report on cost-sharing arrangements. Similarly, the Regional Board's 1992 MOU with the San Francisco Estuary Institute's predecessor did not impose any legal requirement on the permittees, and there is no mention of how the Regional Board would ensure the financial participation of permittees.

Nor did the language in the 2007 Basin Plan impose any legal requirement on the permittees. The 2007 Basin Plan's reference to a supposed legal requirement for funding the RMP is inadequate hearsay evidence. Commission regulations underscore that hearsay evidence may only supplement other evidence and "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Cal. Code Regs., tit. 2, § 1187.5, subd. (a).) Here, 2007 Basin Plan is hearsay "offered to prove the truth of the matter stated," or the existence of a prior legal requirement. (Evid. Code, § 1200, subd. (a).) It would not be admissible under even the official records exception, which requires that the "writing was made at or near the time of the act, condition, or event." (Evid. Code, § 1280, subd. (a).) The 2007 Basin Plan was adopted years after the Prior Permit, and still more years after the purported inception of the financial contribution requirement.

The need for primary evidence of a legal requirement is not an exercise in splitting hairs. Citation to authority is necessary to parse the meaning of a mandatory duty. (See *Hacala v. Bird Rides, Inc.* (2023) 90 Cal. App. 5th 292, 305 [explaining that

Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 5 of 9

whether a permit: “creates a mandatory duty is a question of law” that courts decide via “statutory interpretation”].) Indeed, the actual legal language is the “most important guide” in determining whether “a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function.” (*Id.* at p. 306.) This principle is foundational to Section 6, as courts routinely assess whether “executive action uses mandatory language that ‘require[s]’ or ‘command[s]’ a local entity to participate in a program or service.” (*Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.) The Basin Plan did not.

The County urges the Commission to reject the draft analysis in the DPD as to provision C.8.b. because the Permit imposed a new legal requirement on the permittees to comply with a new program within the meaning of Section 6. Accordingly, the County is entitled to reimbursement for its mandated financial contributions to the RMP.

**B. By expanding the number of monitoring sites and parameters, and by intensifying the level of monitoring needed, provision C.8.c imposes a new program or higher level of service.**

Provision C.8.c requires permittees to conduct annual status monitoring in local receiving waters using sampling site frequencies and methods specified in the Permit. Compared to the workplans submitted under the Prior Permit, C.8.c expands the number of monitoring sites and parameters. The Permit added 20 additional sites per year to algal bioassessments, 23 additional sites per year for chlorine samples, 8 additional sites per year for temperature samples, 7 additional sites per year for other nutrients and similar parameters, and 6 additional sites per year to stream surveys. (Test Claim, at p. 13, comparing Permit, at pp. 65-71 with Prior Permit, at pp. 18-19.) In addition, C.8.c required permittees to use expanded Surface Ambient Monitoring Program (SWAMP) protocols. (Permit, at pp. 65-71.) Compared to the legal requirements in the Prior Permit, the expanded SWAMP protocols require, on average, nearly double the site monitoring activities and personnel. (Test Claim, at pp. 22-23.)

The DPD asserts that Permit provision C.8.c does not require subvention because it does not mandate a new program or higher level of service. (DPD, at p. 192.) Without responding to the new requirements related to additional sites and expanded protocols, the DPD notes that Santa Clara’s 2004 Revised Multi-Year Monitoring Plan also includes screening level indicators for general water quality and rapid bioassessment, among others, as well as monitoring requirements for temperature and nutrients.” (DPD, at pp. 205-206.) The DPD also asserts that the Prior Permit authorized the Regional Board to impose additional monitoring requirements if the permittees reported exceedances of water quality standards or water quality objectives. (*Id.* at p. 208.)

This type of reasoning was previously rejected in *Department of Finance*. The DPD analysis is tantamount to the conclusion that C.8.c does not impose a new program or higher level of service because the Prior Permit was designed to satisfy the same standard of performance and could have imposed the same duties as the Permit to meet the same high level permit requirement.

But “[t]o determine whether a program imposed by the permit is new, [courts] compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. . . [citations omitted]. This is so even though the conditions were designed to satisfy the same standard of performance.” (*Department of Finance, supra*, 85 Cal.App.5th at pp. 581-582.) In that case, which concerned the County of San Diego’s 2007 NPDES permit, the State argued that the challenged provision was not new “because it does not increase permittees’ underlying obligation to eliminate or reduce the discharge of pollutants from their municipal separate storm sewer systems (“MS4s”) to the maximum extent practicable. Rather, the condition ensures compliance with the same standard that has applied since 1990 when permittees obtained their first permit.” (*Id.* at p. 581.)

The court rejected this argument: “Section 6, however, does not turn on whether the underlying obligation to abate pollution remains the same.” (*Id.* at pp. 581-582.) Instead, courts must evaluate the “specific conditions” that the State imposes using “its discretionary authority with each permit.” (*Id.* at p. 582.) Even if those “specific conditions” are “designed to satisfy the same level of performance,” they may still impose a new program or a higher level of service for the purposes of Section 6. (See *id.*)

The County’s Test Claim and its subsequent rebuttal to the Regional Board’s comments demonstrate the additional requirements and enhanced level of service that provision C.8.c imposes was in excess of the Prior Permit. (Test Claim, at pp. 13, 22-23.) Because the Permit’s legal requirements in C.8.c impose a new program or higher level of service compared to the Prior Permit, the County is entitled to reimbursement and urges the Commission to reconsider the DPD’s analysis of this provision.

**C. By heightening monitoring requirements, provision C.8.d.i and C.8.d.ii impose new programs or higher levels of service.**

Provision C.8.d.i requires permittees to conduct site-specific studies to study the stressor or source of stress to water bodies. (DPD, at pp. 71-72.) Those studies should either follow the guidance for Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (*Id.* at p. 71.) In short, if a TRE does not identify the stressor or source, permittees are to use TIE. (*Ibid.*) Where permittees identify such a source, the Permit requires implementing “one or more controls” and continued monitoring. (*Id.* at p. 71.)

Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 7 of 9

The Prior Permit outlined the previous legal requirements regarding stressor/source identification in provision C.1, which required notification only when the permittee discovered that it was a source of the exceedance in water quality standards. (Prior Permit, at pp. 12-13.) In these circumstances, the Prior Permit required permittees to submit a report to the Regional Board describing best management practices (BMPs) that were being implemented and those planned for later implementation to prevent or reduce the pollutants tied to the exceedance. (*Id.* at p. 13.) Accordingly, the Permit imposes a new program or higher level of service because it requires investigating problems in receiving waters without regard to whether the permittee's MS4 caused or contributed to an exceedance.

Provision C.8.d.ii requires permittees to investigate the effectiveness of BMPs for "stormwater treatment or hydrograph modification control." (Permit, at p. 71.) Under the Prior Permit, permittees could evaluate the effectiveness of BMPs for *any* prevention or control measures, such as street sweeping or restrictions on plastic bags, which would have been sufficient under the old permit. (Prior Permit, at pp. 18-19.) The Permit therefore narrows Permittees' broad discretion to a choice between two options.

The DPD asserts that provisions C.8.d.i and C.8.d.ii do not impose new programs or higher levels of service. First, the DPD points to the 1995 Basin Plan and Santa Clara's 1997 Stormwater Management Plan, as proof that both required monitoring following exceedances, as well as TIE and TRE methods. (DPD, at pp. 209-210.) The DPD then asserts that "[a]ll prior permits required the permittees to comply with the discharge prohibitions and receiving water limitations . . . through the timely implementation of BMPs and control measures designed to meet water quality standards." (DPD, at p. 216.) For this reason, the DPD concludes that "the requirement to investigate the effectiveness of BMPs, including stormwater treatment controls, is not new." (*Id.* at p. 217.) Lastly, the DPD states that "the requirement in Section C.8.d.ii of the test claim permit to investigate the effectiveness of just one BMP . . . does not increase the level of service, but limits the level of service compared to prior law." (*Id.* at p. 218.)

The County disagrees with the DPD's determinations regarding C.8.d.i and C.8.d.ii because, again, the DPD fails to apply the proper legal standard. The DPD erroneously argues that the Permit requirements are mere specifications of prior orders, meaning that C.8.d.i and C.8.d.ii satisfy the same standard. For the reasons described above, even if those "specific conditions" are "designed to satisfy the same level of performance," they still impose a new program or a higher level of service for the purposes of Section 6. (See *Dept. of Finance, supra*, 85 Cal.App.5th at p. 582.)

The Test Claim adequately demonstrates that the specifications imposed by the Permit increased the level of service to its monitoring efforts vis-à-vis the Prior Permit.

Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 8 of 9

Where source/stressor monitoring under the Prior Permit was limited under provision C.1 (only notification was required, and then only when the permittee discovered it was causing a violation), the Permit requires investigating problems in receiving waters without regard to whether the permittee's MS4 caused or contributed to an exceedance of water quality standards. And where the Prior Permit allowed permittees to evaluate the effectiveness of BMPs for any prevention or control measures, such as street sweeping or restrictions on plastic bags, the Permit requires investigating the effectiveness of BMPs for "stormwater treatment or hydrograph modification control." In addition to increasing the level of service by specifying new conditions to satisfy the same level of performance, the Test Claim established that these new conditions also increase costs for the County. (Test Claim, at pp. 14-15; Sommers Decl., Ex. A, at p. 1.)

Accordingly, the County requests that Commission not accept the DPD's determinations as to provisions C.8.d.i and C.8.d.ii, and instead find that both provisions constitute new programs or higher levels of service for which subvention is necessary.

### **CONCLUSION**

Although the County respectfully disagrees with the DPD as to provisions C.8.b, C.8.C, C.8.d.i, and C.8.d.ii, it agrees with the DPD's analysis that other provisions that demonstrate the need for subvention under Section 6. Therefore, the County requests that the Commission direct the revision of the DPD to reverse the determinations under C.8.b, C.8.C, C.8.d.i, and C.8.d.ii.

Last, this proceeding illustrates the challenges facing the test claim process and the urgent need for the State to ensure the Commission has sufficient staff and additional resources needed to timely process test claims. Government Code section 17553, subdivision (a)(2), requires that the Commission adopt a statewide cost estimate "within 12 months after receipt of a test claim." The County filed its Test Claim on October 14, 2010, and revised it on July 18, 2017. On November 21, 2017, the Commission certified as complete the consolidated test claims 10-TC-02, 10-TC-03, and 10-TC-05, and set a hearing date for July 27, 2018. The Draft Proposed Decision was issued on July 9, 2024, and set for hearing on January 24, 2025. the Commission certified as complete the consolidated claims more than six years ago and received the County's Test Claim more than 14 years ago. The County has all the while been charged with implementing the new mandates in the Permit without compensation.

In addition to offending the statutory timeline, such a delay inevitably compromises the efficiency of the test claim process, as every institution involved faces either staff turnover or the need to recall nuances from more than a decade ago. Although the County is grateful to the hardworking staff of the Commission, these delays do not faithfully discharge the State's obligations under Section 6.



Letter to: Commission on State Mandates  
Re: Comments on Draft Proposed Decision, 10-TC-03  
Date: October 28, 2024  
Page 9 of 9

Certification

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or based on information and belief and that I am authorized and competent to do so.

Very truly yours,  
TONY LOPRESTI  
County Counsel



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ELIZABETH G. PIANCA  
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## DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 29, 2024, I served the:

- **Current Mailing List dated September 26, 2024**
- **Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision filed October 28, 2024**
- **Claimant's (City of San Jose) Comments on the Draft Proposed Decision filed October 28, 2024**
- **Claimant's (County of Santa Clara) Comments on Draft Proposed Decision filed October 28, 2024**
- **Water Boards' Comments on Draft Proposed Decision filed October 28, 2024**

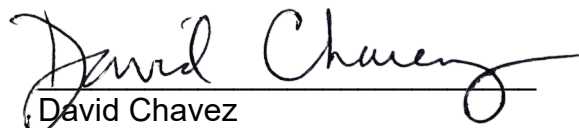
*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05*

*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Sections C.2.b, C.2.c, C.2.e, C.2.f, C.8.b., C.8.c., C.8.d.i, C.8.d.ii., C.8.d.iii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., C.8.e.vi., C.8.f., C.8.g.i. (first sentence only), C.8.g.ii., C.8.g.iii., C.8.g.v., C.8.g.vi., C.8.g.vii., C.8.h, C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.i., C.10.b.ii., C.10.b.iii., C.10.c., C.10.d.i., C.10.d.ii., C.11.f., and C.12.f., Adopted October 14, 2009 and Effective December 1, 2009*

*Cities of Dublin and San Jose, and County of Santa Clara, Claimants*

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 29, 2024 at Sacramento, California.



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## COMMISSION ON STATE MANDATES

### Mailing List

**Last Updated:** 9/26/24

**Claim Number:** 10-TC-02, 10-TC-03, and 10-TC-05

California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions

**Matter:** C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d, C.8.e.i, ii, and vi, C.8.f, C.8.g, C.8.h, C.10.a, C.10.b, C.10.c, C.10.d, C.11.f, and C.12.f

**Claimants:** City of Dublin  
City of San Jose  
County of Santa Clara

### 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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