



State Water Resources Control Board

October 28, 2024



VIA DROP BOX

Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

COMMENTS OF THE STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION ON THE DRAFT PROPOSED DECISION

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, 10-TC-02, 10-TC-03, and 10-TC-05

Dear Ms. Halsey:

The State Water Resources Control Board (State Water Board) and California Regional Water Quality Control Board, San Francisco Bay Region (San Francisco Bay Water Board) (together, Water Boards) have reviewed the Draft Proposed Decision for Test Claims 10-TC-02, 10-TC-03, and 10-TC-05 issued by the Commission on State Mandates (Commission) on July 9, 2024. The Water Boards appreciate the thorough analysis of Commission staff. We generally concur with the conclusions that would deny reimbursement for challenged provisions in San Francisco Bay Water Board Order No. R2-2009-0074 (test claim permit) but do not agree with the conclusions finding that some of the challenged provisions constitute reimbursable state-mandated new programs or higher levels of service. We maintain the arguments in our comments on the test claims and supplemental briefings with respect to the latter.¹

¹ The Water Boards acknowledge that some of our arguments regarding the “maximum extent practicable” standard predate *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749. We do not maintain those arguments that are clearly in conflict with that decision.

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

The Water Boards submit the following comments on the conclusions for certain permit provisions in the Draft Proposed Decision and on permittees' fee authority.

I. Comments on Test Claim Permit Provisions

A. Trash Requirements

Section C.10 of the test claim permit includes requirements for permittees to reduce trash loads. In the Draft Proposed Decision, Commission staff conclude that the requirements to submit a Short-Term Trash Load Reduction Plan (Section C.10.a.i), determine and submit a baseline trash load and trash load reduction tracking method (Section C.10.a.ii), submit a Long-Term Trash Load Reduction Plan (Section C.10.c), and submit selected trash hot spots (Section C.10.b.ii), and parts of the requirements to conduct hot spot assessments (Section C.10.b.iii) and report on trash in annual reports and retain supporting records (Sections C.10.d.i. and C.10.d.ii) are unfunded state mandates subject to subvention.² Based on the Water Boards' previous arguments and the discussion below, the Water Boards ask the Commission staff to reconsider this conclusion and find that none of these trash requirements are reimbursable state mandates.³

1. The requirements to submit Short-Term and Long-Term Trash Load Reduction Plans are not new

Commission staff correctly conclude that the requirements to select hotspots and clean up trash along creeks and shorelines under Sections C.10.b.i and ii are not new. In reaching this conclusion, Commission staff explained—

[F]ederal law prohibits non-stormwater illicit discharges, such as trash, and requires the implementation of [best management practices (BMPs)] to control trash in stormwater to meet water quality standards, . . .

In addition, the 1995 [Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan)] contained the following narrative [water quality objective⁴] for trash: "waters shall not contain floating material, including solids, liquids, foam and scum, in concentrations that cause nuisance or adversely affect beneficial uses."

² See Proposed Draft Decision, pp. 380–83.

³ Commission staff also conclude that the requirement to install and maintain a mandatory minimum number of full trash capture devices (Section C.10.a.ii) is an unfunded state mandate, except for certain population-based permittees and for full trash capture devices installed prior to the effective date of the test claim permit. (Proposed Draft Decision, pp. 353–54.) The Water Boards do not agree that any part of this requirement is an unfunded state mandate. We maintain the arguments in our comments on the test claims and the supplemental briefings with regard to this requirement.

⁴ The Draft Proposed Decision refers to the water quality objective as an "effluent limit." (Draft Proposed Decision, p. 307.)

All prior permits had discharge prohibitions and receiving water limitations to comply with federal law and the Basin Plan, which stated “the Permittees shall, within their respective jurisdiction, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into the storm drain systems and watercourses.” The prior permits further said “the discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State: a. Floating, suspended or deposited macroscopic particulate matter, or foam; b. Bottom deposits or aquatic growth; c. Alterations of temperature, turbidity, or apparent color beyond present natural background levels; d. Visible, floating, suspended or deposited oil or other products of petroleum origin; and e. Substances present in concentrations or quantities which will cause deleterious effects on aquatic biota, wildlife, or wildfowl, or which render any of these unfit for human consumption.”

Additionally, each permittee’s prior permit required when discharges cause an exceedance of an applicable water quality standard, the permittee shall notify the Regional Board and submit a report on the BMPs that are currently being implemented and additional BMPs and monitoring that will be implemented to prevent or reduce the pollutants that are causing or contributing to the exceedance in water quality standards.

Thus, with these basic rules established in prior law, the requirement to select hotspots and clean up trash along creeks and shorelines, as required by Sections C.10.b.i. and C.10.b.ii., are not new.⁵

The Draft Proposed Decision goes on to “confirm” that the requirements were not new by looking at the permittees’ prior stormwater management plan,⁶ but did not need to do so to reach its conclusion that the hot-spot requirements were not new.

Applying Commission staff’s rationale laid out above, the requirements to submit Short-Term and Long-Term Trash Load Reduction Plans are not new. The permittees were not meeting water quality objectives related to trash and the discharge of trash was adversely affecting beneficial uses.⁷ The Short-Term and Long-Term Trash Reduction Plans required by the test claim permit simply mandated that permittees do what they were required to do under their previous permits: report on BMPs and identify additional BMPs that they will implement to prevent or reduce trash loads that were causing or contributing to exceedances of trash-related water quality standards. While the trash load reduction plans are required to meet targets to reduce trash loads by 40%, 70%, and ultimately 100%, the targets do not impose a new program or higher level of service. Under existing law—namely, the prohibition on the discharge of non-stormwater

⁵ Draft Proposed Decision, pp. 306–08 (fns. omitted).

⁶ Draft Proposed Decision, pp. 308–11

⁷ Test Claim Permit, Fact Sheet, p. I-72 (Draft Proposed Decision, Exhibit A, Test Claim, 10-TC-02, filed Oct. 13, 2010, p. 346).

and the 1975 Basin Plan prohibition on the discharge of “rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or any place where they would contact or where they would eventually be transported to surface waters”⁸—permittees were already prohibited from discharging trash. The reduction targets in the plans provide permittees with an extended timeline to comply with the prohibitions on the discharge of trash required under existing law.

The requirements to submit a baseline trash load and trash load reduction tracking method, assess trash spots, and report on trash load reductions are not new monitoring requirements.

In finding that status monitoring requirements under Sections C.8.c, C.8.h, and C.8.d.i were not new requirements, Commission staff state—

Federal law has long required NPDES permits include conditions to achieve water quality standards and objectives, including monitoring requirements sufficient to ensure water quality standards are met. * * *

All prior permits required compliance with water quality standards and objectives and imposed monitoring requirements to ensure water quality standards were met as required by federal law. Specifically, the prior permits contain discharge prohibitions and receiving water limitations that required the permittees to effectively prohibit the discharge of non-stormwater into the storm drain systems and required discharges shall not cause or contribute to a violation of any applicable water quality standard or objective for the receiving waters in the region. * * *

To ensure compliance with these water quality objectives, all prior permits had monitoring requirements to 1) assess the existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters; 2) identify potential sources of pollutants in stormwater discharge; and 3) evaluate the effectiveness of representative stormwater pollution prevention or control measures. And all permittees were required to conduct monitoring activities using physical, chemical, and biological parameters and indicators. * * *

All prior permits required if an exceedance of water quality standards or water quality objectives persisted notwithstanding the implementation of their management plans, then the discharger “*shall assure compliance with the discharge prohibitions and receiving water limitations*” by notifying and submitting a report to the Regional Board describing the BMPs

⁸ Basin Plan, Table 4-1, Prohibition No. 7 (Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, Attachment 31, pp. 608–09); see also Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, p. 48.

currently used and the additional BMPs that will be implemented to prevent or reduce any pollutants causing or contributing to an exceedance of water quality standards. Following approval of the report, the permittees had to revise their management plan and monitoring program to incorporate the approved modified control measures and “*any additional monitoring required*” and implement those plans and programs. These procedures had to be repeated if exceedances continued and the Regional Board or EPA required additional control measures and BMPs.

Furthermore, the prior permits required all permittees identify the pollutant and the source of the pollutant to comply with the receiving water limitations “to prevent or reduce any pollutants that are causing or contributing to an exceedance of water quality standards.”⁹

Trash is a pollutant of concern and permittees were not complying with the receiving water limitations in previous permits.¹⁰ The requirements to submit a baseline trash load and trash load reduction tracking method, assess trash spots, and report on trash load reductions are monitoring requirements needed to ensure water quality standards are met and include additional monitoring required to implement the Short-Term and Long-Term Trash Load Reduction Plans. They do not impose a new program or higher level of service. Furthermore, identifying the sources of trash (as required for the hot spot assessments) was a specific requirement for monitoring under previous permits.¹¹

Consistent with Commission’s staff rationale for finding that other challenged monitoring provisions are not new, the Water Boards ask Commission staff to revise the Draft Proposed Decision to find that the requirements to submit a Short-Term Trash Load Reduction Plan (Section C.10.a.i), determine and submit a baseline trash load and trash load reduction tracking method (Section C.10.a.ii), submit a Long-Term Trash Load Reduction Plan (Section C.10.c), conduct hot spot assessments (Section C.10.b.iii), and report on trash in annual reports and retain supporting records (in part) (Sections C.10.d.i. and C.10.d.ii) do not constitute a new program or higher level of service and thus are not reimbursable state mandates.

2. Costs associated with the submittal of selected hot spots and retention of trash load reduction records are de minimis

The requirements to submit selected hot spots to the San Francisco Bay Water Board and retain supporting records for trash load reductions actions are not monitoring

⁹ Draft Proposed Decision, pp. 201, 203–04, 208–09 (fns. omitted) (original italics).

¹⁰ Draft Proposed Decision, p. 286; Test Claim Permit, Fact Sheet, p. I-72 (Draft Proposed Decision, Exhibit A, Test Claim, 10-TC-02, filed Oct. 13, 2010, p. 346).

¹¹ See Draft Proposed Decision, p. 203.

requirements, but any costs associated with these requirements are de minimis and should not be subject to reimbursement.¹²

B. Pilot Projects Implementing San Francisco Bay Polychlorinated Biphenyls (PCBs) and Mercury Total Maximum Daily Loads (TMDLs)

Sections C.11.f and C.12.f require permittees to implement five pilot projects to divert dry weather and first-flush stormwater flows to sanitary sewers and monitor and report on the reductions in PCB and mercury loads. The San Francisco Bay Water Board included these requirements to implement the San Francisco Bay PCBs and Mercury TMDLs as required by federal law. In the Draft Proposed Decision, Commission staff conclude that the pilot projects required by Sections C.11.f and C.12.f are reimbursable state mandates and not federal mandates. We maintain our assertion that the requirements in Sections C.11.f and C.12.f are federal mandates.¹³

Section 303(d) of the Clean Water Act requires states to develop TMDLs for impaired waterbodies.¹⁴ In California, TMDLs are generally developed by a regional water quality control board and subject to approval by the State Water Board, the California Office of Administrative Law, and the U.S. Environmental Protection Agency (EPA). After U.S. EPA approves a TMDL, the Water Boards must include water quality-based effluent limitations in NPDES permits that are “consistent with the assumptions and requirements of any available [EPA-approved] wasteload allocations.”¹⁵ The federal requirement in 40 C.F.R. section 122.44(d)(1)(vii)(B) is independent from and more restrictive than the “maximum extent practicable” (MEP) standard that the California Supreme Court considered in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.¹⁶ Section 122.44(d)(1)(vii)(B) compels permitting authorities to include water quality-based effluent limitations and these limits must be consistent with the assumptions and requirements of applicable wasteload allocations. Water quality-based effluent limitations for MS4 permits may be expressed as BMPs or similar

¹² See discussion of *San Diego Unified School District v. Commission on State Mandates* at pp. 8–9, *post*.

¹³ See Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, pp. 12–14, 56–59; Exhibit P, San Francisco Bay Water Board Response to the Request for Additional Briefing, filed December 20, 2016, pp. 8–9, 24. The Water Boards also maintain their previous arguments that the requirements are not new or unique to local government.

¹⁴ 33 U.S.C. 1313(d).

¹⁵ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁶ The Water Boards acknowledge that the same controls that are put in place to meet the MEP technology-based standard may also support achievement of water quality-based effluent limitations that are consistent with the assumptions and requirements of the TMDL wasteload allocation, but the legal basis and mandatory nature of the requirements are different.

requirements that are consistent with the TMDL, rather than as numeric effluent limitations.¹⁷

The assumptions and requirements of the applicable wasteload allocations are described in the TMDLs—which include comprehensive implementation plans that provide the procedural framework to achieve wasteload allocations—and the staff reports that support the development of the TMDLs. The implementation plans for the PCB and Mercury TMDLs provide that wasteload allocations for municipal stormwater discharges will be achieved within 20 years through the implementation of BMPs and control measures required in NPDES permits. Such control measures are inclusive of pilot studies.¹⁸

¹⁷ U.S. EPA Guidance current at the time of the issuance of the test claim permit recommended BMP-based water quality-based effluent limitations in lieu of numeric water quality-based effluent limitations:

Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Effluent limitations to control the discharge of pollutants generally are expressed in numerical form. However, in light of 33 U.S.C. §1342(p)(3)(B)(iii), EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits. See Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 FR 43761 (Aug. 26, 1996).

(Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, U.S. EPA, Nov. 22, 2002 [Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, Attachment 99, p. 6038]; see also Commission Decision on Test Claim 09-TC-03 [“The definition of ‘effluent limitation’ in the CWA ‘does not specify that a limitation must be numeric,’] [quoting *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104].)

¹⁸ See San Francisco Bay Mercury TMDL, Basin Plan, ch. 7.2.2.6 (Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, Attachment 31, pp. 590–91) (“The NPDES permits for urban runoff management agencies shall require the implementation of best management practices and control measures designed to achieve the [wasteload] allocations or accomplish the load reductions derived from the allocations. . . . Requirements in each permit issued or reissued and applicable for the term of the permit shall be based on an updated assessment of control measures intended to reduce pollutants in stormwater runoff to the maximum extent practicable and remain consistent with the section of this chapter titled ‘Surface Water Protection and Management—Point Source Control—Stormwater Discharges.’”); San Francisco Bay PCBs TMDL, Basin Plan, ch. 7.2.3.6 (Draft Proposed Decision, Exhibit I, San Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, Attachment 31, pp. 608–09) (“In the first five-year permit term, *stormwater permittees will be required to implement control measures on a pilot scale to determine their effectiveness and technical feasibility*. In the second permit term, stormwater permittees will be required to implement effective control measures, that will not cause significant adverse environmental impacts, in strategic locations, and to develop a plan to fully implement control measures that will result in attainment of allocations, including an analysis of costs, efficiency of control measures and an identification of any significant environmental impacts. Subsequent permits will include requirements and a schedule to implement technically feasible, effective and cost efficient control measures to attain allocations. * * * Routing of urban stormwater runoff through municipal wastewater treatment facilities may be an efficient means of reducing PCBs, and other particle-associated contaminant loads to the Bay.”) (italics added). See also Draft Proposed Decision, Exhibit I, San

As mandated by federal law, the San Francisco Bay Water Board included narrative water quality-based effluent limitations in Sections C.11 and C.12 of the test claim permit that are consistent with the assumptions and requirements of the applicable wasteload allocations in the PCBs and Mercury TMDLs. The pilot-scale control measures required by Sections C.11.f and C.12.f are water quality-based effluent limitations that restrict the quantities of PCBs and mercury discharged from MS4s to waters of the U.S.¹⁹

The Commission's application of the "true choice" analysis²⁰ to these TMDL-related provisions in the test claim permit fails to acknowledge that the MEP technology-based standard for stormwater discharges and the independent standard requiring consistency with wasteload allocations are rooted in different federal requirements. Any choice in the latter scenario is constrained by the specific language of the federal regulation and its reference to the U.S. EPA-approved wasteload allocations. The San Francisco Bay Water Board was mandated by federal law to include water quality-based effluent limitations in the test claim permit, whether numeric or narrative. The TMDL implementation plans establish a set of controls constituting BMP-based effluent limitations that are consistent with the assumptions and requirements of the wasteload allocations. Incorporating those controls into the permit as narrative, BMP-based water-quality based effluent limitations does not constitute a "true choice."²¹

C. Electronic Reporting

Any costs associated with maintaining an information management system that will support the electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network and submitting monitoring data electronically (C.8.g.ii) are not subject to subvention. These provisions direct permittees as to how data that is federally required to be maintained and submitted must be maintained and submitted.

Francisco Bay Water Board Comments on the Test Claims, 10-TC-02, 10-TC-03, 10-TC-05, filed May 17, 2011, pp. 57–59 (describing the relevant portions of the PCBs and Mercury TMDLs and the staff report for the PCBs TMDL). To be consistent with the assumptions and requirements of the PCBs TMDL implementation plan the San Francisco Bay Water Board was required to implement control measures on a pilot scale in the test claim permit. Although the implementation plan for the Mercury TMDL does not specifically mention pilot projects, it does provide for the "assessment of control measures." Pilot projects are essentially assessments of control measures. Moreover, the pilot projects required under Sections C.11.f and C.12.f address both mercury and PCBs and do not require distinct pilot projects.

¹⁹ The term "effluent limitation" means 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. (33 U.S.C. § 1362(11).)

²⁰ Draft Proposed Decision, pp 345–46; see also *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

²¹ The choice between a numeric and narrative water quality-based effluent limitation is also not a "true choice" that results in a state mandate but a binary determination specifically set out in a federal regulation and thus mandated by federal law.

In *San Diego Unified School District v. Commission on State Mandates*, the school district challenged two statutes: Education Code sections 48918 and 48915.²² Section 48918 declared the right of a student to an expulsion hearing and set forth procedures for the hearing.²³ The parties agreed that the statute implemented federal due process law, but the district argued that the statute's requirements for notice, right of inspection, and recording requirements exceeded federal due process requirements.²⁴ The Supreme Court found that the requirements that exceeded federal law were "designed to make the federal law enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights" and did not significantly increase the cost of compliance.²⁵ The court ultimately held that "challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."²⁶

Consistent with *San Diego Unified School District*, Commission staff should revise the Draft Proposed Decision to find that the de minimis costs of reporting requirements under Sections C.8.g.ii are procedural requirements that direct the permittees how to maintain information required to be maintained under federal law and how to submit monitoring reports that are required by federal law²⁷—they are part and parcel of the federal mandates and should not be subject to subvention.

II. Permittees Have Fee Authority for Any Mandated Costs

The Draft Proposed Decision discusses local agency constitutional and statutory authorities to raise fees, including what courts have found to constitute sufficient fee authority as a legal matter within the meaning of Government Code section 17556, subdivision (d).²⁸ The Water Boards agree with the Draft Proposed Decision's conclusion that permittees have sufficient fee authority based on *Paradise Irrigation District* (2019) 33 Cal.App.5th 174 and the Legislature's enactment of Government Code sections 57350 and 57351 for costs incurred beginning January 1, 2018. Notwithstanding *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 (*2022 Department of Finance*), the Water Boards maintain that the

²² *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 868.

²³ *Id.* at p. 868.

²⁴ *Id.* at p. 885.

²⁵ *Id.* at p. 889.

²⁶ *Id.* at p. 890.

²⁷ See 40 C.F.R. §§ 122.41(j)(2) (requiring retention of monitoring information records for a period of at least three years); 122.44(i)(2) (requiring reports on monitoring results on a case-by-case basis dependent on the nature and effect of the discharge but no less than once a year) (but see 122.44(i)(5) [providing an exception to the annual reporting minimum]), 122.48(c) (requiring permits to specify the applicable reporting requirements for monitoring results); see also Draft Proposed Decision, p. 276.

²⁸ Draft Proposed Decision, pp. 366–78.

rationale in *Paradise Irrigation District* applies to voter approval requirements and permittees have sufficient fee authority for all costs. To the extent that the Commission is limited by the *2022 Department of Finance* decision and can only find fee authority beginning January 1, 2018, any reimbursable costs under the test claim permit should only be allowed through December 31, 2015.

A. The permittees have sufficient fee authority even where voter approval is required

The Water Boards disagree with the holding in the *2022 Department of Finance* decision and the conclusion in the Draft Proposed Decision that permittees lack fee authority for costs incurred *prior* to 2018 due to Proposition 218's voter approval provisions.²⁹ The Water Boards maintain that permittees had sufficient fee authority as a legal matter under Government Code section 17556(d) for the entire test claim period and are not entitled to reimbursement for any costs. California courts have consistently held that fee authority is purely a question of legal authorization.³⁰ “[F]actual considerations of practicality” do not defeat a local agency’s fee authority.³¹ Even where Proposition 218 requires voter approval provision for fees to pay for specific state mandates, the permittees still have fee authority and expenditures for mandates are not reimbursable.

In *Paradise Irrigation, supra*, the court of appeal considered whether the majority protest procedure added by Proposition 218 deprived local agencies of authority to impose fees for water service.³² California Constitution, Article XIII D, section 6(a), requires a local agency to identify parcels subject to a new fee, calculate the fee amount, and provide notice to affected property owners.³³ If a majority of the property owners submit written protests against the fee, the fee may not be imposed.³⁴

The *Paradise Irrigation* court held that the “majority protest procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority.”³⁵ It explained that, when considering how voter powers affect the ability of local governments to impose fees, courts “presume local voters will give appropriate consideration and deference to state mandated requirements”³⁶ “Although this power-sharing arrangement has the potential for

²⁹ Draft Proposed Decision, pp. 374–76.

³⁰ *Connell v. Superior Court* (1997) 59, Cal.App.4th 382, 401 [holding that the focus under Government Code section 17556 is whether a local agency has “authority, i.e., the right or power, to levy fees sufficient to cover the costs:]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.

³¹ *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

³² *Id.* at p. 182.

³³ Cal. Const., art. XIII D, § 6, subd. (a), par. (1).

³⁴ Cal. Const., art. XIII D, § 6, subd. (a), par. (2).

³⁵ *Paradise Irrigation, supra*, 33 Cal.App.5th at p. 182.

³⁶ *Id.* at p. 194, citing *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220.

conflict, we must presume that both sides will act reasonably and in good faith.”³⁷ Further, the fact that, “as a matter of practical reality, the majority protest procedure allows water customers to defeat the District’s authority to levy fees” was not dispositive; “the inquiry into fee authority constitutes an issue of law rather than a question of fact.”³⁸

The *Paradise Irrigation* court did not consider whether a local agency has fee authority as a legal matter where fees or assessments are subject to voter approval requirements. However, the court’s reasoning should apply with equal force where Proposition 218 requires pre-approval by a majority vote of the affected property owners (or, alternatively, by a two-thirds vote of the electorate). That the governing body of a municipality (e.g., County Board of Supervisors or City Council) and the affected property owners who elected that body share power to impose fees does not mean claimants are deprived of fee authority under Government Code section 17556. And the fact that property owners in claimants’ local jurisdictions could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not undermine claimants’ police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee.

In *2022 Department of Finance*, the State Water Board and the San Diego Water Board argued that the court should extend the reasoning in *Paradise Irrigation* to Proposition 218 pre-approval requirements. The Third District Court of Appeal did not agree.³⁹ Other districts are not bound by the Third District Court of Appeal’s decision and could decide differently,⁴⁰ as could the California Supreme Court. As such, the Water Boards maintain their arguments on this issue.

- B. Reimbursable costs for any activities determined to be a state-mandated new program or higher level of service should only be allowed through December 31, 2015

Based on the reasoning in *Paradise Irrigation* and *2022 Department of Finance*, Commission staff conclude that the activities identified as a state-mandated program are reimbursable from December 1, 2009, through December 31, 2017. Any reimbursable activities under the test claim permit, however, should only run through December 31, 2015. The San Francisco Bay Water Board adopted Order No. R2-2015-

³⁷ *Id.* at p. 192.

³⁸ *Id.*, at p. 195, citing *Connell, supra*, 59 Cal.App.4th at p. 401.

³⁹ See *2022 Department of Finance*, 85 Cal.App.5th at pp. 577–81.

⁴⁰ See, e.g., *People v. Kisling* (2014) 223 Cal.App.4th 544, 547–48, quoting *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1489, fn. 10 (“ “[T]here is no “horizontal stare decisis” within the Court of Appeal.” ’ ”).

0049, which terminated and superseded the test claim permit as of January 1, 2016.⁴¹ As such, the Draft Proposed Decision should be revised to limit the scope of the reimbursable period to December 1, 2009, through December 31, 2015.

III. Conclusion

The Water Boards ask the Commission to reconsider its conclusions in the Draft Proposed Decision described above and make the limited changes requested by the Water Boards.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Sablan', with a long horizontal flourish extending to the right.

Teresita J. Sablan
Attorney IV

cc: Service List [via Commission Drop Box]

⁴¹ See San Francisco Bay Water Board Order R2-2015-0049, pp. 4–5 (available on the San Francisco Bay Water Board's website at <https://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2015/R2-2015-0049.pdf>).

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**

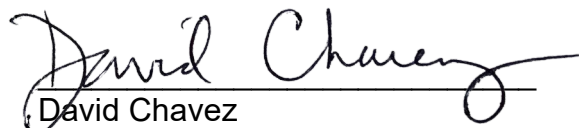
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05

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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