



January 8, 2025

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Ms. Colleen Tribby  
City of Dublin  
100 Civic Plaza  
Dublin, CA 94568

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

**Re: Proposed Decision**

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

*California Regional Water Quality Control Board, San Francisco 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.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., and 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., and  
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. Frimann, Mr. Hill, Ms. Maguire, Mr. Newmark, Ms. Olaiya, Ms. Pianca, and  
Ms. Tribby:

The Proposed Decision for the above-captioned matter is enclosed for your review.

**Hearing**

This matter is set for hearing on **Friday, January 24, 2025, at 10:00 a.m., at  
Park Tower, 980 9th Street, Suite 300, Sacramento, California, 95814 and via  
Zoom.**

The Commission is committed to ensuring that its public meetings are accessible to the  
public and that the public has the opportunity to observe the meeting and to participate  
by providing written and verbal comment on Commission matters whether they are  
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want to speak during the hearing and you are in-person, please come to the table for  
the swearing in and to speak when your item is up for hearing. If you are participating

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0074\Correspondence\PDtrans.docx

Ms. Frimann, Mr. Hill, Ms. Maguire, Mr. Newmark, Ms. Olaiya, Ms. Pianca, and Ms. Tribby  
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via Zoom, you must use the "Raise Hand" feature in order for our moderators to know you need to be unmuted.

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Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness plan to testify. Please also include the names of the people who will be speaking and the names and email addresses of the people who will be speaking remotely for inclusion on the witness list so that detailed instructions regarding how to participate as a party in this meeting on Zoom can be provided to them. When calling or emailing, identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you plan to file any written document for Commission member review, please note that Commission staff will include written comments filed at least 15 days in advance of the hearing in the Commissioners' hearing binders. Additionally, staff will transmit written comments filed between 15 and five days prior to a meeting to the Commission members, if possible.

However, comments filed less than five days prior to a meeting will not be included in the Commissioners' hearing binders and a PDF of the document, shall be filed via the Commission's dropbox at <https://www.csm.ca.gov/dropbox.shtml> at least 24-hours prior to the hearing to allow staff time to process and post the document to allow all in-person and remote participants to review it. Commission staff shall provide an electronic copy to the Commission, include an electronic copy in the public hearing binder at the hearing, and post a copy on the Commission's website, and may share the document with the Commission and the public using the "share screen" function. (Cal. Code Regs., tit. 2, § 1181.10(b)(1)(C)).

Ms. Frimann, Mr. Hill, Ms. Maguire, Mr. Newmark, Ms. Olaiya, Ms. Pianca, and Ms. Tribby

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If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

**Special Accommodations**

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Very truly yours,



Juliana F. Gmur  
Executive Director

**ITEM 5**  
**TEST CLAIM**  
**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*

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

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

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**EXECUTIVE SUMMARY**

**Overview**

This Test Claim alleges reimbursable state mandated activities arising from Order No. R2-2009-0074 (test claim permit), issued by the San Francisco Regional Water Quality Control Board (Regional Board), adopted on October 14, 2009, and effective December 1, 2009.<sup>1</sup> The following sections of the test claim permit have been pled by the claimants:

- Sections C.2.b., C.2.c., C.2.e., and C.2.f. of the test claim permit addressing the following municipal maintenance activities (Sidewalk/Plaza Maintenance and Pavement Washing; Bridge and Structure Maintenance and Graffiti Removal; Rural Public Works Construction and Maintenance; and Corporation Yard Maintenance).<sup>2</sup>
- Sections 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., and C.8.h. addressing the following monitoring provisions: Regional Monitoring Program, Status Monitoring, Stressor/Source Identification, BMP Effectiveness Investigation, Geomorphic Project, Pollutants of Concern Monitoring, Long Term Trends Monitoring, Sediment Delivery

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<sup>1</sup> Exhibit A, Test Claim, 10-TC-02, page 266 (Test claim permit).

<sup>2</sup> Exhibit C, Test Claim, 10-TC-05, pages 27-31.

Estimate/Budget, Citizen Monitoring and Participation, Reporting, and Monitoring Protocols and Data Quality.<sup>3</sup>

- Sections 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, and C.10.d.ii. addressing the following trash provisions: Short Term Trash Load Reduction Plan, Baseline Trash Load and Trash Load Reduction Tracking Method, Minimum Full Trash Capture, Hot Spot Cleanup, Hot Spot Selection, Hot Spot Assessments, Long Term Trash Load Reduction, and Reporting, in an effort to reduce trash loads from MS4s by 40 percent by 2014, 70 percent by 2017, and 100 percent by 2022.<sup>4</sup>
- Sections C.11.f. and C.12.f. addressing Mercury and PCB Diversion Studies.<sup>5</sup>

Prior to the adoption of the test claim permit, the Regional Board adopted four countywide jurisdictional permits for Alameda, Santa Clara, San Mateo, and Contra Costa and the cities and co-permittee special districts within those counties and one jurisdictional permit for the Fairfield-Suisun area located in Solano County.<sup>6</sup> U.S. EPA issued the prior permit for the City of Vallejo and Vallejo Sanitary District which is also located in Solano County.<sup>7</sup>

The test claim permit merges the stormwater requirements for the six urban areas which include four counties and a portion of Solano County, 64 municipalities, and eight special districts, into one NPDES permit for the following 76 copermitees:

- Alameda permittees include the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (Unincorporated area), the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District.
- Santa Clara permittees include the Cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara,

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<sup>3</sup> Exhibit A, Test Claim, 10-TC-02, pages 29-45; Exhibit B, Test Claim, 10-TC-03, pages 25-37; and Exhibit C, Test Claim, 10-TC-05, pages 31-36.

<sup>4</sup> Exhibit A, Test Claim, 10-TC-02, pages 45-52; Exhibit B, Test Claim, 10-TC-03, pages 38-44; Exhibit C, Test Claim, 10-TC-05, pages 44-51.

<sup>5</sup> Exhibit A, Test Claim, 10-TC-02, pages 52-54; Exhibit B, Test Claim, 10-TC-03, pages 45-47; Exhibit C, Test Claim, 10-TC-05, pages 51-53.

<sup>6</sup> Exhibit A, Test Claim, 10-TC-02, page 280 (Fact Sheet); Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1849 et seq. (Attachment 53, Order R2-2003-0021, Alameda), pages 1943 et al. (Attachment 55, Order 99-059, San Mateo), and pages 2072 et seq. (Attachment 60, Order No. 01-124, Santa Clara); Exhibit BB (27), Order R2-2003-0034 (Fairfield Suisun); and Exhibit BB (25), Order 99-058 (Contra Costa).

<sup>7</sup> Exhibit A, Test Claim, 10-TC-02, page 150 (Test claim permit).

Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County.

- Fairfield-Suisun permittees include the Cities of Fairfield and Suisun City, and Fairfield-Suisun Sewer District.
- Contra Costa permittees include the Cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District.
- San Mateo permittees include the Cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District and San Mateo County.
- Vallejo permittees include the City of Vallejo and the Vallejo Sanitary District.<sup>8</sup>

As described below, staff recommends the Commission partially approve this Test Claim from December 1, 2009, through December 31, 2017, only. Reimbursement is denied beginning January 1, 2018, because there are no costs mandated by the state pursuant to Government Code section 17556(d).

### **Procedural History**

The test claim permit became effective on December 1, 2009.<sup>9</sup> On October 13, 2010, the City of Alameda filed Test Claim 10-TC-02, which was revised September 26, 2017.<sup>10</sup> On May 2, 2011, the City of Alameda added the County of Alameda; the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro, Union City; and the Alameda County Flood Control and Water Conservation District, Zone 7, as co-claimants in Test Claim 10-TC-02. On October 14, 2010, the County of Santa Clara filed Test Claim 10-TC-03, which was revised on July 18, 2017.<sup>11</sup> From October 12, 2010, through October 18, 2010, Declarations were filed by interested parties in San Mateo County and Alameda County supporting these Test Claims.<sup>12</sup> On November 30, 2011, the City of San Jose filed Test Claim 10-TC-05, which was revised on July 18, 2017.<sup>13</sup> These

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<sup>8</sup> Exhibit A, Test Claim, 10-TC-02, page 150 (Test claim permit).

<sup>9</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit).

<sup>10</sup> Exhibit A, Test Claim, 10-TC-02.

<sup>11</sup> Exhibit B, Test Claim, 10-TC-03.

<sup>12</sup> Exhibit D, Declarations of Interested Parties in San Mateo County; Exhibit E, Declarations of Interested Parties in Alameda County.

<sup>13</sup> Exhibit C, Test Claim, 10-TC-05.

Test Claims were deemed complete in November and December 2010 and were consolidated on September 21, 2016.

On January 5, 2011, and February 3, 2011, the Regional Board filed a request for an extension of time to file comments on the Test Claims, which were approved for good cause. On May 17, 2011, the Department of Finance and the Regional Board filed comments on all three Test Claims.<sup>14</sup> The claimants requested an extension of time to file rebuttal comments in June and July 2011, which were approved for good cause. Rebuttal comments were filed by the claimants on September 15 and 16, 2011.<sup>15</sup>

On January 29, 2014, the California Supreme Court granted review of *Department of Finance v. Commission on State Mandates*, Case No. S214855, on the issue of whether the stormwater requirements were state or federal mandates. On June 15, 2016, Commission staff issued a letter requesting the official administrative record of the Regional Board and the State Water Resources Control Board on the test claim permit. On August 29, 2016, the California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. S214855.<sup>16</sup> On August 30, 2016, the Regional Board filed the administrative record on the test claim permit in two parts.<sup>17</sup>

On September 21, 2016, Commission staff issued its Request for Additional Briefing regarding the Supreme Court's decision, Notice of Consolidation, and Notice of Tentative Hearing Date. The parties filed responses to this request on December 19 and 20, 2016.<sup>18</sup>

On December 2, 2016, Commission staff issued a Request for Additional Evidence and Briefing regarding the provisions in Section C.2. of the test claim permit. On December 20, 2016, the Regional Board filed a response to the request, and a request

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<sup>14</sup> Exhibits F, Finance's Comments on the Test Claim, 10-TC-02; Exhibit G, Finance's Comments on the Test Claim, 10-TC-03; Exhibit H, Finance's Comments on the Test Claim, 10-TC-05; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05.

<sup>15</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03; Exhibit K, Claimant's Rebuttal Comments, 10-TC-02; Exhibit L, Claimant's Rebuttal Comments, 10-TC-05.

<sup>16</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.

<sup>17</sup> Because of the enormous size of this record, the administrative record on the test claim permit cannot reasonably be included as an exhibit. However, the entirety of the administrative record is available on the Commission's website on the matter page for this test claim: <https://www.csm.ca.gov/matters/10-TC-01-02-03-05.shtml>

<sup>18</sup> Exhibit M, Claimant's (County of Santa Clara's) Response to the Request for Additional Briefing; Exhibit N, Claimants' (Cities of Alameda's and Brisbane's) Response to the Request for Additional Briefing; Exhibit O, Claimant's (City of San Jose's) Response to the Request for Additional Briefing; Exhibit P, Regional Board's Response to the Request for Additional Briefing; Exhibit Q, Finance's Response to the Request for Additional Briefing.

for an extension of time to file additional comments and a postponement of the hearing, which were granted for good cause.<sup>19</sup> On January 5 and 6, 2017, the claimants filed comments on the Regional Board's response to the request for additional briefing.<sup>20</sup> On February 16, 2017, the Regional Board requested another extension of time to respond to the request for additional evidence and briefing, which the claimants objected to, and the request was approved for good cause. On March 23, 2017, the Regional Board filed comments on the request for additional evidence and briefing<sup>21</sup> and four volumes of documents.<sup>22</sup>

On July 11, 2017, Commission staff issued a request for the Reports of Waste Discharge (ROWDs). On July 13, 2017, the Regional Board filed a response to the request for the ROWDs.<sup>23</sup>

On July 9, 2024, Commission staff issued the Draft Proposed Decision for comment.<sup>24</sup> After the parties requested extensions of time to file comments on the Draft Proposed Decision and a postponement of the hearing on July 16 and 26, 2024, which were approved for good cause, the parties filed comments on the Draft Proposed Decision on October 28, 2024.<sup>25</sup>

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<sup>19</sup> Exhibit R, Regional Board's Response to the Request for Additional Evidence and Briefing.

<sup>20</sup> Exhibit S, Claimants' (Alameda County's, San Mateo County's, and Santa Clara County's) Comments on the Response to Request for Additional Briefing; Exhibit T, Claimant's (City of San Jose's) Comments on the Response to the Request for Additional Briefing.

<sup>21</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing.

<sup>22</sup> Because of the enormous size of this record, the four volumes of documents cannot reasonably be included as an exhibit. However, the entirety of the administrative record, including the four volumes filed by the Regional Board, are available on the Commission's website on the matter page for this test claim:

<https://www.csm.ca.gov/matters/10-TC-01-02-03-05.shtml>

<sup>23</sup> Exhibit V, Regional Board's Response to the Request for Reports of Waste Discharge.

<sup>24</sup> Exhibit W, Draft Proposed Decision.

<sup>25</sup> Exhibit X, Claimant's (City of Dublin) and the Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision; Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision; Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision; Exhibit AA, Water Boards' Comments on the Draft Proposed Decision.



## **Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class may participate in the test claim process and are bound by the final decision of the Commission for that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>26</sup>

## **Claims**

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Was the Test Claim timely filed?	Government Code section 17551 provides 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 later." <sup>27</sup>  The test claim permit was adopted by the Regional Board on October 14, 2009	<i>Timely filed</i> - The three claims were timely filed within one year of the effective date of the test claim permit. <sup>29</sup>  Because the claims were filed in October and November 2010, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2009. However, since the test claim permit has a later effective date,

<sup>26</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>27</sup> Government Code section 17551(c) (Stats. 2007, ch. 329).

<sup>29</sup> Exhibit A, Test Claim, 10-TC-02, page 1; Exhibit B, Test Claim, 10-TC-03, page 1; and Exhibit C, Test Claim, 10-TC-05, page 1.

Issue	Description	Staff Recommendation
	<p>and became effective on December 1, 2009.<sup>28</sup></p> <p>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.”</p>	<p>the potential period of reimbursement for this claim begins on the permit’s effective date of December 1, 2009.</p>
<p>Do Sections C.2.b., C.2.c., C.2.e., and C.2.f., which address municipal maintenance activities, impose a reimbursable state-mandated program?</p>	<p>Sections C.2.b., C.2.c., C.2.e., and C.2.f. impose certain requirements and Best Management Practices (BMPs) for sidewalk and plaza maintenance and pavement washing; bridge and structural maintenance and graffiti removal; rural road public works construction and maintenance; and corporation yard maintenance.</p>	<p><i>Denied</i> - The requirements do not mandate a new program or higher level of service.</p> <p>The requirements imposed by these sections are not mandated by the state but are triggered by the underlying local decision to construct, expand, or improve municipal facilities and infrastructure. When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required for activities later imposed by the state.<sup>30</sup></p> <p>Moreover, the requirements are not new when compared to the prior permits and stormwater management plans, which were made enforceable by the prior permits, and in the case of</p>

<sup>28</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit).

<sup>30</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

Issue	Description	Staff Recommendation
		the requirements associated with corporation yard maintenance, the requirements are not unique to government.
Do Sections 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., and C.8.h., which address the monitoring requirements, impose a reimbursable state-mandated program?	These sections address the following monitoring provisions: Regional Monitoring Program (RMP), Status Monitoring, Stressor/Source Identification, BMP Effectiveness Investigation, Geomorphic Project, Pollutants of Concern Monitoring, Long Term Trends Monitoring, Sediment Delivery Estimate/Budget, Citizen Monitoring and Participation, Reporting, and Monitoring Protocols and Data Quality.	<p><i>Partially approve</i> - The following requirements are new, and mandate a new program or higher level of service:</p> <ul style="list-style-type: none"> <li>• Encourage citizen monitoring and participation and report on the efforts as required by Section C.8.f. are new <i>for the Vallejo permittees only</i>.</li> <li>• The requirement in Section C.8.d.iii. to conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report identified in Section C.8.g.v., is new for all permittees.</li> <li>• The requirement in Section C.8.e.vi., to develop a design for a robust sediment delivery estimate/sediment budget in local tributaries is also new for all permittees.</li> <li>• The following monitoring reporting and notice requirements imposed by Sections C.8.g.ii. and C.8.g.vii. are new for all permittees: maintaining</li> </ul>

Issue	Description	Staff Recommendation
		<p>an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute; submitting an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report; and notifying stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.</p> <p>These activities impose costs mandated by the state from December 1, 2009, through December 31, 2017. Beginning January 1, 2018, reimbursement is denied because there are no costs mandated by the state;</p>

Issue	Description	Staff Recommendation
		<p>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).<sup>31</sup></p> <p>The remaining requirements to financially contribute to the RMP; conduct status monitoring, pollutants of concern monitoring, and long-term monitoring, and identify the pollutant and the source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE); investigate the effectiveness of one treatment control BMP; and report on this monitoring, are not new requirements, but were imposed by the claimants' prior permits, stormwater management and monitoring plans, and federal law. Thus, Sections C.8.b., C.8.c., C.8.h., C.8.d.i., C.8.d.ii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., and the reporting requirements <i>related to this monitoring</i> in Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi., do not impose a new program or higher</p>

<sup>31</sup> Government Code sections 57350 and 57351 (SB 231); *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

Issue	Description	Staff Recommendation
		<p>level of service and are denied.</p> <p>In addition, the requirement in C.8.g.v. to include “a budget summary for each monitoring requirement and recommendations for future monitoring in the Integrated Monitoring Report are not new but are required by federal law.<sup>32</sup> Thus, this activity does not mandate a new program or higher level of service and are denied.</p>
<p>Do Sections 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., and C.10.d.i., C.10.d.ii., which address the trash reduction requirements, impose a reimbursable state-mandated program?</p>	<p>These sections address the following trash provisions: Short Term Trash Load Reduction Plan, Baseline Trash Load and Trash Load Reduction Tracking Method, Minimum Full Trash Capture, Hot Spot Cleanup, Hot Spot Selection, Hot Spot Assessments, Long Term Trash Load Reduction Plan, and Reporting, all in an effort to reduce trash loads from MS4s by 40 percent by 2014, 70 percent by 2017, and 100 percent by 2022.</p>	<p><i>Partially approve</i> - The required activities associated with the Short Term Trash Load Reduction Plan (Section C.10.a.i.), the Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii), Minimum Full Trash Capture (Section C.10.a.iii.), submitting selected Trash Hot Spots to the Regional Board by July 1, 2010 (C.10.b.ii.), and the Long Term Trash Load Reduction Plan (Section C.10.c.) are new for all the permittees. In addition, some of the requirements to comply with the Hot Spot Assessments (Section C.10.b.iii.) and Reporting (C.10.d.i., ii.) are new for <i>some</i> of the permittees, but not all.</p>

<sup>32</sup> Code of Federal Regulations, title 40, sections 122.26(d)(1)(vi) and 122.26(d)(2)(vi); Code of Federal Regulations, title 40, section 122.42(c).

Issue	Description	Staff Recommendation
		<p>These new activities constitute state-mandated new programs or higher levels of service, and impose costs mandated by the state from December 1, 2009, through December 31, 2017. Beginning January 1, 2018, reimbursement is denied because there are no costs mandated by the state; 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).<sup>33</sup></p> <p>The remaining requirements in Sections C.10.b.i. and C.10.b.ii. to select and clean trash hot spots, are not new, but are required by existing federal law which prohibits non-stormwater discharges such as trash and requires controls to reduce the discharge of trash to the MEP;<sup>34</sup> prior permits; and stormwater management plans, and therefore do not mandate a new program or higher level of service.</p>
Do Sections C.11.f. and C.12.f., which address mercury and PCB pilot	Sections C.11.f. and C.12.f. require the permittees to implement pilot programs to	<i>Approve</i> - The requirements imposed by Sections C.11.f. and C.12.f. are new,

<sup>33</sup> Government Code sections 57350 and 57351 (SB 231); *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

<sup>34</sup> United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

Issue	Description	Staff Recommendation
studies, impose a reimbursable state-mandated program?	evaluate the reduction in mercury and PCB levels by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works (POTWs). The permittees are also required to quantify and report the amount of mercury and PCB levels reduced as a result of the pilot studies.	constitute state-mandated new programs or higher levels of service, and impose costs mandated by the state from December 1, 2009, through December 31, 2017. Beginning January 1, 2018, reimbursement is denied because there are no costs mandated by the state; 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). <sup>35</sup>

### **Staff Analysis**

#### **A. The Test Claim Was Timely Filed With a Potential Period of Reimbursement Beginning December 1, 2009.**

Government Code section 17551 provides 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 later.”<sup>36</sup> The three Test Claims were timely filed within one year of the effective date of the test claim permit and have a potential period of reimbursement beginning December 1, 2009.<sup>37</sup> Because the claims were filed in October and November 2010, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2009. However, since the test claim permit has a later effective date, the potential period of reimbursement for these consolidated Test Claims begins on the permit’s effective date, or December 1, 2009.

<sup>35</sup> Government Code sections 57350 and 57351 (SB 231); *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

<sup>36</sup> Government Code section 17551(c) (Stats. 2007, ch. 329).

<sup>37</sup> Exhibit A, Test Claim, 10-TC-02, page 1; Exhibit B, Test Claim, 10-TC-03, page 1; and Exhibit C, Test Claim, 10-TC-05, page 1.



**B. Some of the Permit Provisions Impose a State-Mandated New Program or Higher Level of Service.**

As explained herein, each of the prior permits incorporated by reference and made enforceable the permittees' approved stormwater management plans, annual reports, and annual work plans.<sup>38</sup> The claimants contend stormwater management plans should not be considered prior law because the plans "could have been abandoned" by the permittees.<sup>39</sup> However, each of the prior permits are final quasi-judicial decisions that were binding on the parties as prior law, and the stormwater management plans, work plans, and the updates were made enforceable provisions of the prior permits.<sup>40</sup> The permittees could not, as suggested by the claimants, simply disregard those plans. All changes and updates were required to be approved by the executive officer of the Regional Board or Regional Board itself. And, as indicated by the Regional Board, the stormwater management plans have been enforced by the Regional Board, including assessing civil liability penalties for failing to comply.<sup>41</sup>

Section C.2. of the test claim permit lays out a series of requirements and best management practices (BMPs) to control and reduce non-stormwater and polluted stormwater discharges to the storm drains during the operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure.<sup>42</sup> The City of San Jose's Test Claim (10-TC-05) pleads Sections C.2.b., C.2.c., C.2.e., and C.2.f., which impose certain requirements and BMPs for sidewalk and plaza maintenance and pavement washing; bridge and structural maintenance and graffiti removal; rural road public works construction and maintenance; and corporation yard maintenance.<sup>43</sup> Staff finds the requirements imposed by these sections are not mandated by the state, but are triggered by the underlying local decision to construct, expand, or improve municipal facilities and infrastructure.<sup>44</sup> When local government elects to participate in the

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<sup>38</sup> Exhibit A, Test Claim, 10-TC-02, page 282 (Fact Sheet).

<sup>39</sup> Exhibit L, Claimant's Rebuttal Comments, 10-TC-05, page 5.

<sup>40</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>41</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, pages 13-17; Exhibit BB (34), Order R2-2011-0039, Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order, pages 7-9 (allegations Alameda County violated its permit and failed to comply with the performance standards in its stormwater quality management plan by discharging sediment-laden stormwater and polluted non-stormwater).

<sup>42</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2).

<sup>43</sup> Exhibit C, Test Claim, 10-TC-05, pages 27-31.

<sup>44</sup> For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its

underlying program, then reimbursement under article XIII B, section 6 is not required for requirements later imposed by the state.<sup>45</sup> Moreover, the requirements are not new when compared to the prior permits and stormwater management plans, and in the case of the requirements associated with corporation yard maintenance, the requirements are not unique to government and do not provide a governmental service to the public. Therefore, sections C.2.b., C.2.c., C.2.e., and C.2.f., do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 and are not eligible for reimbursement.

Section C.8. contains the monitoring sections of the test claim permit, and the claimants contend the following requirements are new and impose a reimbursable state-mandated program:

- 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. (Section C.8.b.)
- Conduct status monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.c., C.8.h., and C.8.d.i.)
- Investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control. (Section C.8.d.ii.)

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inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 (“When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use”); Streets and Highways Code section 1800 et seq. (“The legislative body of any city may do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway.”); and Streets and Highways Code section 1801 (“The legislative body of any city may close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or may make provision for carrying such street or highway over, under, or to a connection with the freeway, and may do any and all necessary work on such street or highway.”).

<sup>45</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

- Conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report. (Section C.8.d.iii.)
- Conduct pollutants of concern monitoring. (Sections C.8.e.i., C.8.e.iii., C.8.e.iv., and C.8.e.v.)
- Conduct long term monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.e.ii, C.8.e.iii., and C.8.d.i.)
- Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages” by July 1, 2011, and implement the study by July 1, 2012. (Section C.8.e.vi.)
- Encourage citizen monitoring and participation and report on the efforts. (Section C.8.f.) The purpose of this section is to support current and future creek stewardship efforts by providing a framework for citizens and permittees to share their collective knowledge of creek conditions; and encourage permittees to use and report data collected by creek groups and other third-parties when the data are of acceptable quality.<sup>46</sup>
- Report on the monitoring, using the standard report content requirements and the data accessibility requirements, in the Electronic Status Monitoring Data Report, Urban Creeks Monitoring Report, and Integrated Monitoring Report. (Sections 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.).<sup>47</sup>

Staff finds participating and financially contributing to the RMP; conducting status monitoring, pollutants of concern monitoring, and long-term monitoring, and identifying the pollutant and the source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE); investigating the effectiveness of one treatment control BMP; and reporting on this monitoring in the annual Urban Creeks Monitoring Report and Integrated Monitoring Report, are not new requirements, but were imposed by the claimants’ prior permits, stormwater management and monitoring plans, and federal law. Thus, the requirements imposed by Sections C.8.b., C.8.c., C.8.h., C.8.d.i., C.8.d.ii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., and the reporting requirements related to this monitoring in Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi., which may result in increased costs, do not impose a new program or higher level of service and are not eligible for reimbursement.<sup>48</sup>

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<sup>46</sup> Exhibit A, Test Claim 10-TC-02, pages 338-339 (Fact Sheet).

<sup>47</sup> Exhibit A, Test Claim 10-TC-02, pages 29-45; Exhibit B, Test Claim, 10-TC-03, pages 25-37; Exhibit C, Test Claim, 10-TC-05, pages 31-43.

<sup>48</sup> Increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates*

Section C.8.g.v. also requires the Integrated Monitoring Report due March 15, 2014, to include “a budget summary for each monitoring requirement and recommendations for future monitoring. This report will be part of the next Report of Waste Discharge for the reissuance of this Permit.”<sup>49</sup> These requirements are not new. Under existing federal law, applications for an MS4 NPDES stormwater permit require the permittee to identify “the budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs” and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the requirements of the program, including the monitoring program, for each fiscal year to be covered by the permit.<sup>50</sup> Applications are also required to include a proposed management program including recommendations for monitoring.<sup>51</sup> Federal law also requires annual reports identify annual expenditures and budget for the year, proposed changes to the programs established in the permit, and any necessary revisions.<sup>52</sup>

In addition, encouraging citizen monitoring and participation and reporting on the efforts as required by Section C.8.f. are not new for the Alameda, Santa Clara, Fairfield Suisun, San Mateo, and Contra Costa permittees, since their prior stormwater management plans and monitoring plans required these activities. However, the requirements imposed by Section C.8.f. are new for the Vallejo permittees. Vallejo’s prior stormwater management plan contains a section on public information and participation, which states the “District shall review the progress of the Monitoring Committee and WARC [the Watershed Assessment Resource Center Council] to determine the feasibility of establishing a citizen based monitoring program for the City of Vallejo.”<sup>53</sup> However, there was no prior requirement for the Vallejo permittees to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and report on these outreach activities. Thus, the requirements are new for the Vallejo permittees.

The Commission further finds the requirement in Section C.8.d.iii. to conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report required by Section C.8.g.v., is new. In addition, the requirement in

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*(Kern High School Dist.)* (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.)

<sup>49</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

<sup>50</sup> Code of Federal Regulations, title 40, sections 122.26(d)(1)(vi) and 122.26(d)(2)(vi).

<sup>51</sup> Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(A)(5) and 122.26(d)(2)(iv)(C).

<sup>52</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>53</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 69.

Section C.8.e.vi., to develop a design for a robust sediment delivery estimate/sediment budget in local tributaries is new for all permittees. Finally, the following monitoring reporting and notice requirements imposed by Sections C.8.g.ii. and C.8.g.vii. are new for all permittees:

- Maintain an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>54</sup>
- Submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>55</sup> This electronic report is required in addition to the Urban Creeks Monitoring and Integrated Monitoring Reports, which are not new.
- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>56</sup>

The Regional Board exercised its discretion when imposing these new requirements and there is no evidence these requirements “are the *only means* by which the [federal] ‘maximum extent practicable (MEP)’ standard can be met.”<sup>57</sup> “That the . . . Regional Board found the permit requirements were ‘necessary’ to meet the standard establishes only that the . . . Regional Board exercised its discretion.”<sup>58</sup> Thus, the requirements are mandates imposed by the state. Moreover, the new requirements are unique to government and carry out the governmental function of providing a service to the public.<sup>59</sup> The monitoring requirements, data, and results are used to “focus actions to reduce pollutant loadings to comply with applicable WLAs [wasteload allocations], and protect and enhance the beneficial uses of the receiving waters in the Permittees’

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<sup>54</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>55</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>56</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>57</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>58</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

<sup>59</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *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, 557-558.

jurisdictions and the San Francisco Bay.”<sup>60</sup> In addition, the Electronic Status Monitoring Data Report and the requirements associated with that, enhance public awareness and help facilitate analysis of the data.<sup>61</sup>

Section C.10 of the test claim permit imposes the following requirements to reduce trash loads from MS4s by 40 percent by 2014, 70 percent by 2017, and 100 percent by 2022:<sup>62</sup>

- Short-Term Trash Load Reduction Plan (Section 10.a.i.). Each permittee is required to submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012, to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.<sup>63</sup>
- Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). Each permittee, working collaboratively or individually, is required to determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Regional Board by February 1, 2012, along with documentation of the methodology used to determine the load level. Each permittee is also required to submit a progress report by February 1, 2011, indicating whether it is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>64</sup>
- Minimum Full Trash Capture (Section C.10.a.iii.). Except as specified, permittees are required to install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions.<sup>65</sup>
- Trash Hot Spots (Section 10.b.i., ii., iii.). The Permittees are required to clean up selected Trash Hot Spots to a level of “no visual impact” at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length. The minimum number of trash hot spots per permittee is identified in Attachment J of the test claim permit. The permittees shall submit the selected trash hot spots to the Regional Board by July 1, 2010. The Permittees are required to quantify the volume of material

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<sup>60</sup> Exhibit A, Test Claim, 10-TC-02, page 332 (Fact Sheet).

<sup>61</sup> Exhibit A, Test Claim, 10-TC-02, page 339 (Fact Sheet).

<sup>62</sup> Exhibit A, Test Claim, 10-TC-02, pages 45-52; Exhibit B, Test Claim, 10-TC-03, pages 38-44; Exhibit C, Test Claim, 10-TC-05, pages 44-51.

<sup>63</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>64</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>65</sup> Exhibit A, Test Claim, 10-TC-02, pages 410 et al. (Test claim permit, Attachment J).

removed from each trash hot spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after cleanup of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>66</sup>

- Long Term Trash Load Reduction Plan (Section 10.c.). Each Permittee is required to submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2014, to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>67</sup>
- Reporting (Section 10.d.i., ii.). In each Annual Report, each permittee is required to provide a summary of its trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action. Beginning with the 2012 Annual Report, each Permittee shall also report its percent annual trash load reduction relative to its Baseline Trash Load.<sup>68</sup>

Staff finds the required activities associated with the Short Term Trash Load Reduction Plan (Section C.10.a.i.), the Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.), Minimum Full Trash Capture (Section C.10.a.iii.), to submit selected Trash Hot Spots to the Regional Board by July 1, 2010 (C.10.b.ii.), and to prepare the Long Term Trash Load Reduction Plan (Section C.10.c.) are new for all the permittees. Staff also finds some of the Hot Spot Assessments (Section C.10.b.iii.) and Reporting requirements (C.10.d.i., ii.) are new for *some* of the permittees, but not all, as detailed in the Conclusion. The remaining requirements in Sections C.10.b.i., and C.10.b.ii., to select and clean trash hot spots, are *not* new, but are required by existing federal law which prohibits non-stormwater discharges such as trash and requires controls to reduce the discharge of trash to the MEP;<sup>69</sup> prior permits; and stormwater management plans. Staff further finds the new required activities are mandated by the state and impose a new program or higher level of service. Federal law does not require these new activities, nor is there evidence complying with these new activities is the only means by which the federal MEP standard can be met. The new trash load reduction requirements are mandated at the discretion of the Regional Board and are

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<sup>66</sup> Exhibit A, Test Claim, 10-TC-02, pages 234-235 (Test claim permit, Section C.10.b.).

<sup>67</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

<sup>68</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i., ii.).

<sup>69</sup> United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

not mandated by federal law and, thus, impose a state-mandated program.<sup>70</sup> Moreover, the requirements are unique to government and provide a governmental service to the public.<sup>71</sup> As indicated in the Fact Sheet, trash has a significant impact on the environment and controlling trash is one of the priorities of the test claim permit.<sup>72</sup> Thus, the new requirements impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Sections C.11.f. and C.12.f. of the test claim permit require the permittees to implement pilot programs to evaluate the reduction in mercury and PCB levels by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works (“POTWs”).<sup>73</sup> The permittees are also required to quantify and report the amount of mercury and PCB levels reduced as a result of the pilot studies.<sup>74</sup> These sections were included in the test claim permit to implement previously approved TMDLs requiring a reduction of mercury and PCB loads in the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.”<sup>75</sup> The activities required by Sections C.11.f. and C.12.f. are new. The prior permits required the permittees to monitor for pollutants, implement BMPs of their choosing to control the discharge of pollutants to the MEP, and prohibited the discharge of stormwater that causes or contributes to a violation of water quality standards.<sup>76</sup> In addition, most of the prior permits required the permittees to have a control program, reduction plan, or to submit a technical report specifically for mercury and PCBs to

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<sup>70</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

<sup>71</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *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.

<sup>72</sup> Exhibit A, Test Claim, 10-TC-02, pages 345-346 (Fact Sheet).

<sup>73</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f. and C.12.f.).

<sup>74</sup> Exhibit A, Test Claim, 10-TC-02, pages 241, 249 (Test claim permit, Sections C.11.f.iii. and C.12.f.iii.).

<sup>75</sup> Exhibit A, Test Claim, 10-TC-02, pages 240, 248 (Test claim permit, Sections C.11.f.i., C.12.f.i.).

<sup>76</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A, B, and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B., and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.



address the impairment of the waterbodies caused by these pollutants.<sup>77</sup> However, the prior permits did not require the permittees to implement pilot projects to divert dry weather and first flush stormwater flows to POTWs to reduce the flow of PCBs and mercury to receiving waters. Thus, the requirements in Sections C.11.f. and C.12.f. are new. Staff also finds the requirements are mandated by the state. The Regional Board exercised a true choice in imposing this requirement, in addition to the pollutants of concern monitoring requirements imposed by Section C.8.e., which in that provision made it clear that the monitoring for mercury and PCBs “is not sufficient to determine progress toward achieving TMDL load allocations. Progress toward achieving load allocations will be accomplished [in part] by assessing loads avoided resulting from treatment . . . .”<sup>78</sup>

The Regional Board argues, however, the new requirements imposed by Sections C.11.f and C.12.f. do not constitute a new program or higher level of service because the requirements are not unique to government since both public and private entities are required to comply with the mercury and PCB TMDLs and are issued NPDES permits.<sup>79</sup> The Regional Board is correct that the mercury and PCB TMDLs impose wasteload allocations on MS4 stormwater dischargers and municipal and industrial wastewater dischargers, requiring reductions in their discharges of these pollutants.<sup>80</sup> However, the specific requirements imposed by Sections C.11.f. and C.12.f. to conduct pilot diversion studies for mercury and PCBs in stormwater are uniquely imposed on local agency permittees. Even if a court agrees with the Regional Board that the requirements are not unique to government, the new requirement to conduct pilot diversion studies for mercury and PCBs in stormwater carries out the governmental function of providing a service to the public.<sup>81</sup> The waters in the San Francisco Bay were impaired for mercury and PCBs, both of which threaten the health of humans. The purpose of the diversion studies is to reduce the discharge of these pollutants to the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff

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<sup>77</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1887-1888, 1889-1890 (Attachment 53, Order R2-2003-0021), page 1950 (Attachment 55, Order 99-059), and pages 2092-2093, 2095-2096 (Attachment 60, Order 01-024); Exhibit BB (28), Order R2-2004-0059, page 6; Exhibit BB (27), Order R2-2003-0034, pages 40-41, 43-44.

<sup>78</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit); *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

<sup>79</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>80</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, pages 13-17; Exhibit BB (33), Order R2-2008-0012, PCB TMDL, pages 7, 8, 10.

<sup>81</sup> *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.

diversion projects in subsequent permit terms.”<sup>82</sup> As the courts have explained, the new requirements impose a new program or higher level of service when they are mandates to perform specific actions designed to reduce the discharge of pollutants in stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.<sup>83</sup>

**C. There Are Costs Mandated by the State for the New State-Mandated Activities from December 16, 2009, Through December 31, 2017. Beginning January 1, 2018, There Are No Costs Mandated by the State Pursuant to Government Code Section 17556(d).**

Finally, there are costs mandated by the state for the new state-mandated activities from December 1, 2009, through December 31, 2017 only, and beginning January 1, 2018, there are no costs mandated by the state and reimbursement is denied pursuant to Government Code section 17556(d) as follows:

- The claimants have filed declarations under penalty of perjury stating they incurred increased costs exceeding \$1,000, as required by Government Code sections 17514 and 17564, and used their local “proceeds of taxes” to comply with the new state-mandated activities.<sup>84</sup>

There are also publicly available documents that show some of the claimants have adopted stormwater fees to cover the costs to comply with NPDES permits. For example, in 1994, Alameda County adopted Ordinance O-94-36 which provided for an annual fee, levied against property owners in the unincorporated area of Alameda County, to fund the activities associated with NPDES permit requirements.<sup>85</sup> The City of San Jose, in 2011, also adopted Resolution No. 75857, imposing a property-related stormwater fee.<sup>86</sup> And the Vallejo Sanitation and Flood Control District has levied a property-related stormwater fee.<sup>87</sup> The record also shows the City of Dublin and the County of Santa Clara received grant funding from state and federal sources to purchase and install trash

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<sup>82</sup> Exhibit A, Test Claim, 10-TC-02, pages 237, 240, 244, 248 (Test claim permit, Sections C.11., C.11.f.i., C.12., C.12.f.i.).

<sup>83</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

<sup>84</sup> Exhibit A, Test Claim, 10-TC-02, pages 55-56, 66 (Declaration of Shannon Young); Exhibit C, Test Claim, 10-TC-05, pages 52-53, 60 et seq. (Amended Declaration of Chris Sommers).

<sup>85</sup> Exhibit BB (3), Alameda Clean Water Protection Fee, page 4.

<sup>86</sup> Exhibit BB (13), City of San Jose Stormwater Fees, pages 1-2.

<sup>87</sup> Exhibit BB (50), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10.

capture devices in response to Section C.10. of the test claim permit.<sup>88</sup> Reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," then reimbursement under section 6 is not required.<sup>89</sup>

There is no evidence in the Test Claim record, however, showing the claimants used fee or grant revenue to pay for all the mandated activities here. And the State has not filed any evidence rebutting the claimants' assertion they used proceeds of taxes to pay for the new state-mandated activities.

Thus, there is substantial evidence in the record, as required by Government Code section 17559, the claimants incurred increased costs exceeding \$1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.<sup>90</sup>

- The claimants have constitutional and statutory authority to charge property-related fees for the new requirements.<sup>91</sup> However, from December 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, Government Code section 17556(d) does not apply. 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

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<sup>88</sup> Exhibit A, Test Claim, 10-TC-02, pages 57-58; Exhibit B, Test Claim, 10-TC-03, page 50.

<sup>89</sup> *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."]. See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

<sup>90</sup> Government Code sections 17514, 17564.

<sup>91</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561; California Constitution, article XI, section 7; Health and Safety Code section 5471; Government Code sections 38902, 53750 et seq.

meaning of Government Code section 17556(d).<sup>92</sup> Thus, there are costs mandated by the state from December 1, 2009, through December 31, 2017, for the new state-mandated requirements.

- Beginning January 1, 2018, and based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (SB 231, 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 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).<sup>93</sup>

### **Conclusion**

Staff recommends the Commission partially approve this Test Claim and find the following activities constitute a reimbursable state-mandated program from December 1, 2009, through December 31, 2017, only:

#### Geomorphic Study

- Permittees shall select a waterbody/reach, preferably one containing significant fish and wildlife resources, and conduct one of the following projects within each county, except only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:
  - (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or
  - (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or
  - (3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:
    - Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.

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<sup>92</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

<sup>93</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

- Contributing drainage area.
- Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
- Best available information on average annual rainfall in the study area.
- Report selected geomorphic project results in the Integrated Monitoring Report.<sup>94</sup>

Sediment Delivery Estimate/Budget

- Permittees shall develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012.<sup>95</sup>

Citizen Monitoring and Participation, which is Reimbursable for the City of Vallejo and Vallejo Sanitary District only:

- Encourage Citizen Monitoring.
- In developing Monitoring Projects and evaluating Status & Trends data, make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
- Demonstrate annually the permittee has encouraged citizen and stakeholder observations and reporting of waterbody conditions. Report on these outreach efforts in the annual Urban Creeks Monitoring Report.<sup>96</sup>

Monitoring Reporting and Notice

- Permittees shall maintain an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>97</sup>
- Permittees shall submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on

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<sup>94</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222 (Test claim permit, Sections C.8.d.iii.).

<sup>95</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

<sup>96</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.f.).

<sup>97</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>98</sup>

- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>99</sup>

### Trash

- 1) Short-Term Trash Load Reduction Plan (Section C.10.a.i.). All permittees, except for flood management agencies, shall submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe the following:
  - Control measures and best management practices, including any trash reduction ordinances, currently being implemented and the current level of implementation.
  - Additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.
  - The Plan shall also “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>100</sup>
- 2) Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). All permittees, except for flood management agencies, shall comply with the following new requirements:
  - Determine the baseline trash load from its MS4.
  - Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:
    - Documentation of the methodology used to determine the load level.
    - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
    - The submittal shall account for the drainage areas of a Permittee’s jurisdiction associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area

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<sup>98</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>99</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>100</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

characteristics used to derive the total baseline trash load level for each Permittee.

- Submit a progress report by February 1, 2011, indicating whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>101</sup>
- 3) Minimum Full Trash Capture (Section C.10.a.iii.). Except as provided below, all permittees shall comply with the following requirements:
- Install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions. The scope of this requirement is as follows:
    - A full capture system or device is “any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area”.
    - The mandatory minimum number of full trash capture devices for each permittee is identified in Attachment J to the test claim permit, Tables 10-1 and 10-2. However, if the sum of the areas that generate trash loads determined pursuant to Section C.10.a.ii. is a smaller acreage than the required trash capture acreage, the minimum full trash capture requirement is reduced to the smaller acreage for the population-based permittee.<sup>102</sup>

The requirements to install and maintain full trash capture devices **does not apply:**

- To a population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000.<sup>103</sup>
- To full trash capture devices installed by a permittee *before* the effective date of the test claim permit, which may be counted towards the minimum number of full trash capture devices identified in Attachment J, provided the device meets the permit’s definition of a full trash capture device.<sup>104</sup>

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<sup>101</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>102</sup> Exhibit A, Test Claim, 10-TC-02, pages 234, 411 et seq., and 415 et seq. (Test claim permit, Section C.10.a.iii., Attachment J, Tables 10-1, 10-2).

<sup>103</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>104</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.); Code of Federal Regulations, title 40, section 122.41(e).

4) Trash Hot Spots (C.10.b.ii and iii.)

- The permittees shall each submit selected Trash Hot Spots to the Regional Board by July 1, 2010. (Section C.10.b.ii.)<sup>105</sup>
- Hot Spot Assessments. (Section C.10.b.iii.)

The San Mateo and Fairfield-Suisun permittees shall comply with the following new requirements:

- Identify the dominant types of trash (e.g., glass, plastics, paper) removed.
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Contra Costa permittees shall comply with the following new requirement:

- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Vallejo permittees shall comply with the following new requirements:

- Quantify the volume of material removed from each trash hot spot cleanup.
- Identify the dominant types of trash removed (e.g., glass, plastics, paper).
- Document the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.<sup>106</sup>

- 5) Long-Term Trash Load Reduction Plan (Section C.10.c.). All permittees, except for flood management agencies, shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe the control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>107</sup>

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<sup>105</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.ii.).

<sup>106</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.iii.).

<sup>107</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).



6) Reporting and Document Retention (Sections C.10.d.i and C.10.d.ii)

The Fairfield-Suisun, San Mateo, and Vallejo permittees shall comply with the following new requirement:

- In each annual report, report on the dominant types of trash removed and retain these records.<sup>108</sup>

All permittees shall comply with the following new requirements:

- In each Annual Report, provide total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected* pursuant to Section C.10.b. and retain these records.<sup>109</sup>
- Beginning with the 2012 annual report, report the percent annual trash load reduction relative to the permittee's baseline trash load.<sup>110</sup>

Mercury and PCB Diversion Studies

- Permittees shall conduct feasibility evaluations for mercury and PCBs by selecting five stormwater pump stations and five alternates for each pollutant and evaluate drainage characteristics and the feasibility of diverting flows of each to the sanitary sewer. The feasibility evaluations shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.
- From these feasibility evaluations, select five pump stations and five alternates for the pilot diversion studies for each pollutant. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.
- Implement flow diversion of mercury and PCBs to the sanitary sewer at five pilot pump stations.
- As part of the pilot studies, the permittees shall monitor, measure, and report mercury and PCBs load reduction.
- Report the following information to the Regional Board:

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<sup>108</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>109</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>110</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i.).

- Summarize the results of the feasibility evaluations in the 2010 Annual Report. The reports shall include the selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies; time schedules for conducting the pilot studies; and a proposed method for distributing mercury load reductions to participating wastewater and stormwater agencies.
- Report annually on the status of the pilot studies in each subsequent annual report.
- Include in the March 15, 2014 Integrated Monitoring Report, the following information for each study: evaluation of pilot programs effectiveness, mercury and PCBs loads reduced, and updated feasibility evaluation procedures to guide future diversion project selection.<sup>111</sup>

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, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

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

**Staff Recommendation**

Staff recommends the Commission adopt the Proposed Decision to partially approve the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

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<sup>111</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f., C.12.f.).

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

**IN RE TEST CLAIM**

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.,<sup>112</sup> Adopted October 14, 2009 and Effective December 1, 2009

Test Claim 10-TC-02, Filed on October 13, 2010<sup>113</sup>

Test Claim 10-TC-03, Filed on October 14, 2010<sup>114</sup>

Test Claim 10-TC-05, Filed on November 30, 2010<sup>115</sup>

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

Case Nos.: 10-TC-02, 10-TC-03, and 10-TC-05

*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R9-2009-0074*

DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

*(Adopted January 24, 2025)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 24, 2025. [Witness list will be included in the adopted Decision.]

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<sup>112</sup> Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only the sections indicated in this caption have been properly pled.

<sup>113</sup> Test Claim 10-TC-02 was revised on September 26, 2017.

<sup>114</sup> Test Claim 10-TC-03 was revised on July 18, 2017.

<sup>115</sup> Test Claim 10-TC-05 was revised on July 18, 2017.

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/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Shannon Clark, Representative of the Director of the Governor’s Office of Land Use and Climate Innovation	
Deborah Gallegos, Representative of the State Controller	
Karen Greene Ross, Public Member	
Renee Nash, School District Board Member	
William Pahland, Representative of the State Treasurer, Vice Chairperson	
Michelle Perrault, Representative of the Director of the Department of Finance, Chairperson	

### **Summary of the Findings**

These consolidated Test Claims allege reimbursable state mandated activities arising from Order No. R9-2009-0074 (test claim permit), adopted by the San Francisco Regional Water Quality Control Board (Regional Board) on October 14, 2009, and effective on December 1, 2009.<sup>116</sup> The claimants have properly pled the following sections of the test claim permit, alleging these sections impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Sections C.2.b., C.2.c., C.2.e., C.2.f. (Municipal Maintenance Activities);
- Sections 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., and C.8.h. (Monitoring);
- Sections 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. (Trash Reduction); and
- Sections C.11.f., and C.12.f. (Mercury and PCB Special Studies).

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<sup>116</sup> Exhibit A, Test Claim, 10-TC-02, page 266 (Test claim permit). All page number citations refer to the PDF page numbers.

The claims were timely filed within one year of the effective date of the test claim permit and have a potential period of reimbursement beginning December 1, 2009.<sup>117</sup>

Prior to the adoption of the test claim permit, the Regional Board adopted four countywide jurisdictional permits for Alameda, Santa Clara, San Mateo, and Contra Costa and the cities and co-permittee special districts within those counties, and one jurisdictional permit for the Fairfield-Suisun area located in Solano County,<sup>118</sup> and U.S. EPA issued the prior permit for the City of Vallejo and Vallejo Sanitary District which is also located in Solano County.<sup>119</sup> As explained herein, each of the prior permits incorporated by reference and made enforceable the permittees' approved stormwater management plans, annual reports, and annual work plans.<sup>120</sup> The claimants contend stormwater management plans should not be considered prior law because the plans "could have been abandoned" by the permittees.<sup>121</sup> However, each of the prior permits are final quasi-judicial decisions that were binding on the parties as prior law, and the stormwater management plans, work plans, and the updates were made enforceable provisions of the prior permits.<sup>122</sup> The permittees could not, as suggested by the claimants, simply disregard those plans. All changes and updates were required to be approved by the executive officer of the Regional Board or Regional Board itself. And, as indicated by the Regional Board, the stormwater management plans have been enforced by the Regional Board, including assessing civil liability penalties for failing to comply.<sup>123</sup>

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<sup>117</sup> Government Code sections 17551, 17557(e); Exhibit A, Test Claim, 10-TC-02, page 1; Exhibit B, Test Claim, 10-TC-03, page 1; and Exhibit C, Test Claim, 10-TC-05, page 1.

<sup>118</sup> Exhibit A, Test Claim, 10-TC-02, page 280 (Fact Sheet); Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1849 et seq. (Attachment 53, Order R2-2003-0021, Alameda), pages 1943 et al. (Attachment 55, Order 99-059, San Mateo), and pages 2072 et seq. (Attachment 60, Order No. 01-124, Santa Clara); Exhibit BB (27), Order R2-2003-0034 (Fairfield Suisun); and Exhibit BB (25), Order 99-058 (Contra Costa).

<sup>119</sup> Exhibit A, Test Claim, 10-TC-02, page 150 (Test claim permit).

<sup>120</sup> Exhibit A, Test Claim, 10-TC-02, page 282 (Fact Sheet).

<sup>121</sup> Exhibit L, Claimant's Rebuttal Comments, 10-TC-05, page 5.

<sup>122</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>123</sup> Exhibit U, Regional Board Response to the Request for Additional Evidence and Briefing, pages 13-17; Exhibit BB (34), Order R2-2011-0039, Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order, pages 7-9 (allegations that Alameda County violated its permit and failed to comply with the performance standards in its stormwater quality management plan by discharging sediment-laden stormwater and polluted non-stormwater).

Section C.2. of the test claim permit lays out a series of requirements and best management practices (BMPs) to control and reduce non-stormwater and polluted stormwater discharges to the storm drains during the operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure.<sup>124</sup> The City of San Jose’s Test Claim (10-TC-05) pleads Sections C.2.b., C.2.c., C.2.e., and C.2.f., which impose certain requirements and BMPs for sidewalk and plaza maintenance and pavement washing; bridge and structural maintenance and graffiti removal; rural road public works construction and maintenance; and corporation yard maintenance.<sup>125</sup> The Commission finds the requirements imposed by these sections are not mandated by the state, but are triggered by the underlying local decision to construct, expand, or improve municipal facilities and infrastructure.<sup>126</sup> When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required for requirements later imposed by the state.<sup>127</sup> Moreover, the requirements are not new when compared to the prior permits and stormwater management plans, and in the case of the requirements associated with corporation yard maintenance, the requirements are not unique to government and do not provide a governmental service to the public. Therefore, Sections C.2.b., C.2.c., C.2.e., and C.2.f., do not mandate a

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<sup>124</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2).

<sup>125</sup> Exhibit C, Test Claim, 10-TC-05, pages 27-31.

<sup>126</sup> For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 (“When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use”); Streets and Highways Code section 1800 et seq. (“The legislative body of any city may do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway.”); and Streets and Highways Code section 1801 (“The legislative body of any city may close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or may make provision for carrying such street or highway over, under, or to a connection with the freeway, and may do any and all necessary work on such street or highway.”).

<sup>127</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

new program or higher level of service within the meaning of article XIII B, section 6 and are not eligible for reimbursement.

Section C.8. contains the monitoring sections of the test claim permit, and the claimants contend the following requirements are new and impose a reimbursable state-mandated program:

- 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. (Section C.8.b.)
- Conduct status monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.c., C.8.h., and C.8.d.i.)
- Investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control. (Section C.8.d.ii.)
- Conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report. (Section C.8.d.iii.)
- Conduct pollutants of concern monitoring. (Sections C.8.e.i., C.8.e.iii., C.8.e.iv., and C.8.e.v.)
- Conduct long term monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.e.ii, C.8.e.iii., and C.8.d.i.)
- Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages” by July 1, 2011, and implement the study by July 1, 2012. (Section C.8.e.vi.)
- Encourage citizen monitoring and participation and report on the efforts. (Section C.8.f.). The purpose of this section is to support current and future creek stewardship efforts by providing a framework for citizens and permittees to share their collective knowledge of creek conditions; and encourage permittees to use and report data collected by creek groups and other third-parties when the data are of acceptable quality.<sup>128</sup>
- Report on the monitoring, using the standard report content requirements and the data accessibility requirements, in the Electronic Status Monitoring Data Report,

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<sup>128</sup> Exhibit A, Test Claim, 10-TC-02, pages 338-339 (Fact Sheet).

Urban Creeks Monitoring Report, and Integrated Monitoring Report. (Sections 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.).<sup>129</sup>

The Commission finds participating and financially contributing to the RMP; conducting status monitoring, pollutants of concern monitoring, and long-term monitoring, and identifying the pollutant and the source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE); investigating the effectiveness of one treatment control BMP; and reporting on this monitoring in the annual Urban Creeks Monitoring Report and Integrated Monitoring Report, are not new requirements, but were imposed by the claimants' prior permits, stormwater management and monitoring plans, and federal law. Thus, the requirements imposed by Sections C.8.b., C.8.c., C.8.h., C.8.d.i., C.8.d.ii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., and the reporting requirements related to this monitoring in Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi., which may result in increased costs, do not impose a new program or higher level of service and are not eligible for reimbursement.<sup>130</sup>

Section C.8.g.v. also requires the Integrated Monitoring Report due March 15, 2014, to include "a budget summary for each monitoring requirement and recommendations for future monitoring. This report will be part of the next Report of Waste Discharge for the reissuance of this Permit."<sup>131</sup> These requirements are not new. Under existing federal law, applications for an MS4 NPDES stormwater permit require the permittee to identify "the budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs" and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the requirements of the program, including the monitoring program, for each fiscal year to be covered by the permit.<sup>132</sup> Applications are also required to include a proposed management program including recommendations for monitoring.<sup>133</sup> Federal law also requires annual reports that identify annual expenditures and budget for the

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<sup>129</sup> Exhibit A, Test Claim, 10-TC-02, pages 29-45; Exhibit B, Test Claim, 10-TC-03, pages 25-37; Exhibit C, Test Claim, 10-TC-05, pages 31-43.

<sup>130</sup> Increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.)

<sup>131</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

<sup>132</sup> Code of Federal Regulations, title 40, sections 122.26(d)(1)(vi) and 122.26(d)(2)(vi).

<sup>133</sup> Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(A)(5) and 122.26(d)(2)(iv)(C).



year, proposed changes to the programs established in the permit, and any necessary revisions.<sup>134</sup>

In addition, encouraging citizen monitoring and participation and reporting on the efforts as required by Section C.8.f. are not new for the Alameda, Santa Clara, Fairfield Suisun, San Mateo, and Contra Costa permittees, since their prior stormwater management plans and monitoring plans required these activities. However, the requirements imposed by Section C.8.f. are new for the Vallejo permittees. Vallejo's prior stormwater management plan was made enforceable by the prior permit issued by U.S. EPA,<sup>135</sup> and contains a section on public information and participation, which states the "District shall review the progress of the Monitoring Committee and WARC [the Watershed Assessment Resource Center Council] to determine the feasibility of establishing a citizen based monitoring program for the City of Vallejo."<sup>136</sup> However, there was no prior requirement for the Vallejo permittees to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and report on these outreach activities. Thus, the requirements are new for the Vallejo permittees.

The Commission further finds the requirement in Section C.8.d.iii. to conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report identified in Section C.8.g.v., is new. In addition, the requirement in Section C.8.e.vi., to develop a design for a robust sediment delivery estimate/sediment budget in local tributaries is new for all permittees. Finally, the following monitoring reporting and notice requirements imposed by Sections C.8.g.ii. and C.8.g.vii. are new for all permittees:

- Maintain an information management system that will support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>137</sup>
- Submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>138</sup> This

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<sup>134</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>135</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 3, 8.

<sup>136</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 69.

<sup>137</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>138</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

electronic report is required in addition to the Urban Creeks Monitoring and Integrated Monitoring Reports, which are not new.

- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>139</sup>

The Regional Board exercised its discretion when imposing these new requirements and there is no evidence these requirements “are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be met.”<sup>140</sup> “That the . . . Regional Board found the permit requirements were ‘necessary’ to meet the standard establishes only that the . . . Regional Board exercised its discretion.”<sup>141</sup> Thus, the requirements are mandates imposed by the state. Moreover, the new requirements are unique to government and carry out the governmental function of providing a service to the public.<sup>142</sup> The monitoring requirements, data, and results are used to “focus actions to reduce pollutant loadings to comply with applicable WLAs [wasteload allocations], and protect and enhance the beneficial uses of the receiving waters in the Permittees’ jurisdictions and the San Francisco Bay.”<sup>143</sup> In addition, the Electronic Status Monitoring Data Report and the requirements associated with that, enhance public awareness and help facilitate analysis of the data.<sup>144</sup>

Section C.10. of the test claim permit imposes the following requirements to reduce trash loads from MS4s by 40 percent by 2014, 70 percent by 2017, and 100 percent by 2022:<sup>145</sup>

- Short-Term Trash Load Reduction Plan (Section 10.a.i.). Each permittee is required to submit a Short-Term Trash Load Reduction Plan, including an

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<sup>139</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>140</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>141</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

<sup>142</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *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.

<sup>143</sup> Exhibit A, Test Claim, 10-TC-02, page 332 (Fact Sheet).

<sup>144</sup> Exhibit A, Test Claim, 10-TC-02, page 339 (Fact Sheet).

<sup>145</sup> Exhibit A, Test Claim, 10-TC-02, pages 45-52; Exhibit B, Test Claim, 10-TC-03, pages 38-44; Exhibit C, Test Claim, 10-TC-05, pages 44-51.

implementation schedule, to the Regional Board by February 1, 2012, to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.<sup>146</sup>

- Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). Each permittee, working collaboratively or individually, is required to determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Regional Board by February 1, 2012, along with documentation of the methodology used to determine the load level. Each permittee is also required to submit a progress report by February 1, 2011, indicating whether it is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>147</sup>
- Minimum Full Trash Capture (Section C.10.a.iii.). Except as specified, permittees are required to install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions.<sup>148</sup>
- Trash Hot Spots (Section 10.b.i., ii., iii.). The Permittees are required to clean up selected Trash Hot Spots to a level of “no visual impact” at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length. The minimum number of trash hot spots per permittee is identified in Attachment J of the test claim permit. The permittees shall submit the selected trash hot spots to the Regional Board by July 1, 2010. The Permittees are required to quantify the volume of material removed from each trash hot spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after cleanup of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>149</sup>
- Long Term Trash Load Reduction Plan (Section 10.c.). Each Permittee is required to submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2014, to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>150</sup>

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<sup>146</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>147</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>148</sup> Exhibit A, Test Claim, 10-TC-02, pages 410 et al. (Test claim permit, Attachment J).

<sup>149</sup> Exhibit A, Test Claim, 10-TC-02, pages 234-235 (Test claim permit, Section C.10.b.).

<sup>150</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

- Reporting (Section 10.d.i., ii.). In each Annual Report, each permittee is required to provide a summary of its trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action. Beginning with the 2012 Annual Report, each Permittee shall also report its percent annual trash load reduction relative to its Baseline Trash Load.<sup>151</sup>

The Commission finds the required activities associated with the Short Term Trash Load Reduction Plan (Section C.10.a.i.), the Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.), Minimum Full Trash Capture (Section C.10.a.iii.), submitting selected Trash Hot Spots to the Regional Board by July 1, 2010 (C.10.b.ii.), and the Long Term Trash Load Reduction Plan (Section C.10.c.) are new for all the permittees. The Commission also finds some of the Hot Spot Assessments (Section C.10.b.iii.) and Reporting requirements (C.10.d.i., ii.) are new for *some* of the permittees, but not all, as detailed in the conclusion. The remaining requirements in Sections C.10.b.i. and C.10.b.ii. to select and clean trash hot spots, are *not* new, but are required by existing federal law which prohibits non-stormwater discharges such as trash and requires controls to reduce the discharge of trash to the MEP,<sup>152</sup> prior permits; and stormwater management plans. The Commission further finds the new required activities are mandated by the state and impose a new program or higher level of service. Federal law does not require these new activities, nor is there evidence complying with these new activities is the only means by which the federal MEP standard can be met. The new trash load reduction requirements are mandated at the discretion of the Regional Board and are not mandated by federal law and, thus, impose a state-mandated program.<sup>153</sup> Moreover, the requirements are unique to government and provide a governmental service to the public.<sup>154</sup> As indicated in the Fact Sheet, trash has a significant impact on the environment and controlling trash is one of the priorities of the test claim permit.<sup>155</sup> Thus, the new requirements impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Sections C.11.f. and C.12.f. of the test claim permit require the permittees to implement pilot programs to evaluate the reduction in mercury and PCB levels by diverting dry

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<sup>151</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i., ii.).

<sup>152</sup> United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

<sup>153</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

<sup>154</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *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.

<sup>155</sup> Exhibit A, Test Claim, 10-TC-02, pages 345-346 (Fact Sheet).

weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works (POTWs).<sup>156</sup> The permittees are also required to quantify and report the amount of mercury and PCB levels reduced as a result of the pilot studies.<sup>157</sup> These sections were included in the test claim permit to implement previously approved TMDLs that require a reduction of mercury and PCB loads in the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.”<sup>158</sup> The activities required by Sections C.11.f. and C.12.f. are new. The prior permits required the permittees to monitor for pollutants, implement BMPs of their choosing to control the discharge of pollutants to the MEP, and prohibited the discharge of stormwater that causes or contributes to a violation of water quality standards.<sup>159</sup> In addition, most of the prior permits required the permittees to have a control program, reduction plan, or to submit a technical report specifically for mercury and PCBs to address the impairment of the waterbodies caused by these pollutants.<sup>160</sup> However, the prior permits did not require the permittees to implement pilot projects to divert dry weather and first flush stormwater flows to POTWs to reduce the flow of PCBs and mercury to receiving waters. Thus, the requirements in Sections C.11.f. and C.12.f. are new. The Commission also finds the requirements are mandated by the state. The Regional Board exercised a true choice in imposing this requirement, in addition to the pollutants of concern monitoring requirements imposed by Section C.8.e., which that provision made it clear the monitoring for mercury and PCBs “is not sufficient to determine progress toward achieving TMDL load allocations. Progress toward

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<sup>156</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f. and C.12.f.).

<sup>157</sup> Exhibit A, Test Claim, 10-TC-02, pages 241, 249 (Test claim permit, Sections C.11.f.iii. and C.12.f.iii.).

<sup>158</sup> Exhibit A, Test Claim, 10-TC-02, pages 240, 248 (Test claim permit, Sections C.11.f.i., C.12.f.i.).

<sup>159</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A, B, and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B. and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>160</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1887-1888, 1889-1890 (Attachment 53, Order R2-2003-0021), page 1950 (Attachment 55, Order 99-059), and pages 2092-2093, 2095-2096 (Attachment 60, Order 01-024); Exhibit BB (28), Order R2-2004-0059, page 6; Exhibit BB (27), Order R2-2003-0034, pages 40-41, 43-44.

achieving load allocations will be accomplished [in part] by assessing loads avoided resulting from treatment . . . .”<sup>161</sup>

The Regional Board argues, however, the new requirements imposed by Sections C.11.f. and C.12.f. do not constitute a new program or higher level of service because the requirements are not unique to government since both public and private entities are required to comply with the mercury and PCB TMDLs and are issued NPDES permits.<sup>162</sup> The Regional Board is correct the mercury and PCB TMDLs impose wasteload allocations on MS4 stormwater dischargers and municipal and industrial wastewater dischargers, requiring reductions in their discharges of these pollutants.<sup>163</sup> However, the specific requirements imposed by Sections C.11.f. and C.12.f. to conduct pilot diversion studies for mercury and PCBs in stormwater are uniquely imposed on the local agency permittees. Even if a court agrees with the Regional Board that the requirements are not unique to government, the new requirement to conduct pilot diversion studies for mercury and PCBs in stormwater carries out the governmental function of providing services to the public.<sup>164</sup> The waters in the San Francisco Bay were impaired for mercury and PCBs, both of which threaten the health of humans. The purpose of the diversion studies is to reduce the discharge of these pollutants to the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.”<sup>165</sup> As the courts have explained, the new requirements impose a new program or higher level of service when they are mandates to perform specific actions designed to reduce the discharge of pollutants in stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.<sup>166</sup>

Finally, there are costs mandated by the state for the new state-mandated activities (which are specifically listed in the Conclusion) from December 1, 2009, through December 31, 2017 only, and beginning January 1, 2018, there are no costs mandated

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<sup>161</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit); *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

<sup>162</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>163</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, pages 13-17; Exhibit BB (33), Order R2-2008-0012, PCB TMDL, pages 7, 8, 10.

<sup>164</sup> *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.

<sup>165</sup> Exhibit A, Test Claim, 10-TC-02, pages 237, 240, 244, 248 (Test claim permit, Sections C.11., C.11.f.i., C.12., C.12.f.i.).

<sup>166</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

by the state and reimbursement is denied pursuant to Government Code section 17556(d) as follows:

- The claimants have filed declarations under penalty of perjury stating they incurred increased costs exceeding \$1,000, as required by Government Code sections 17514 and 17564, and used their local “proceeds of taxes” to comply with the new state-mandated activities.<sup>167</sup>

There are also publicly available documents showing some of the claimants have adopted stormwater fees to cover the costs to comply with NPDES permits. For example, in 1994, Alameda County adopted Ordinance O-94-36 which provided for an annual fee, levied against property owners in the unincorporated area of Alameda County, to fund the activities associated with NPDES permit requirements.<sup>168</sup> The City of San Jose, in 2011, also adopted Resolution No. 75857, imposing a property-related stormwater fee.<sup>169</sup> And the Vallejo Sanitation and Flood Control District has levied a property-related stormwater fee.<sup>170</sup> The record also shows the City of Dublin and the County of Santa Clara received grant funding from state and federal sources to purchase and install trash capture devices in response to Section C.10. of the test claim permit.<sup>171</sup> Reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants’ proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local “proceeds of taxes,” then reimbursement under section 6 is not required.<sup>172</sup>

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<sup>167</sup> Exhibit A, Test Claim, 10-TC-02, pages 55-56, 66 (Declaration of Shannon Young); Exhibit C, Test Claim 10-TC-05, pages 52-53, 60 et seq. (Amended Declaration of Chris Sommers).

<sup>168</sup> Exhibit BB (3), Alameda Clean Water Protection Fee, page 4.

<sup>169</sup> Exhibit BB (13), City of San Jose Stormwater Fees, pages 1-2.

<sup>170</sup> Exhibit BB (50), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10.

<sup>171</sup> Exhibit A, Test Claim, 10-TC-02, pages 57-58; Exhibit B, Test Claim, 10-TC-03, page 50.

<sup>172</sup> *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.”]. See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

There is no evidence in the record, however, showing the claimants used fee or grant revenue to pay for all the mandated activities here. And the State has not filed any evidence rebutting the claimants' assertion proceeds of taxes were used to pay for the new state-mandated activities.

Thus, there is substantial evidence in the record, as required by Government Code section 17559, the claimants incurred increased costs exceeding \$1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.<sup>173</sup>

- The claimants have constitutional and statutory authority to charge property-related fees for the new requirements.<sup>174</sup> However, from December 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, Government Code section 17556(d) does not apply. 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).<sup>175</sup> Thus, there are costs mandated by the state from December 1, 2009, through December 31, 2017, for the new state-mandated requirements.
- Beginning January 1, 2018, and based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (SB 231, 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 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).<sup>176</sup>

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<sup>173</sup> Government Code sections 17514, 17564.

<sup>174</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561; California Constitution, article XI, section 7; Health and Safety Code section 5471; Government Code sections 38902, 53750 et seq.

<sup>175</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

<sup>176</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.



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**COMMISSION FINDINGS**

**I. Chronology**

- 12/01/2009 The test claim permit, San Francisco Regional Water Quality Control Board, Order No. R2-2009-0074 was adopted on October 14, 2009, and became effective on December 1, 2009.<sup>177</sup>
- 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, adopted July 31, 2009, which addressed Los Angeles Regional Water Quality Control Board Order No. 01-182, NPDES Permit CAS004001.
- 10/11/2010 The County of San Mateo filed Test Claim 10-TC-01, which was withdrawn and dismissed on November 22, 2017.
- 10/13/2010 The City of Alameda filed Test Claim 10-TC-02, which was revised September 26, 2017.<sup>178</sup>
- 10/14/2010 The County of Santa Clara filed Test Claim 10-TC-03, which was revised July 18, 2017.<sup>179</sup>

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<sup>177</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit).

<sup>178</sup> Exhibit A, Test Claim, 10-TC-02.

<sup>179</sup> Exhibit B, Test Claim, 10-TC-03.

10/12/2010-10/18/2010	Interested parties located in San Mateo County filed declarations. <sup>180</sup>
10/14/2010	Interested parties located in Alameda County filed declarations. <sup>181</sup>
11/15/2010	Commission staff issued Notice of Complete Test Claim Filing and Schedule for Comments (10-TC-03).
11/18/2010	Commission staff issued Notice of Complete Test Claim Filing and Schedule for Comments (10-TC-02).
11/30/2010	The City of San Jose filed Test Claim 10-TC-05, which was revised on July 18, 2017. <sup>182</sup>
11/30/2010	The Regional Board filed a request for extension of time to file comments on Test Claims 10-TC-02 and 10-TC-03, which was approved for good cause.
12/12/2010	Commission staff issued Notice of Complete Test Claim Filing and Schedule for Comments (10-TC-05).
12/14/2010	The City of Alameda filed a notice of change of representation.
01/05/2011	The Regional Board filed a request for extension of time to file comments on Test Claim 10-TC-05, which was approved for good cause.
01/22/2011	Claimants in 10-TC-02 filed a letter objecting to the Regional Board's request for extension of time to submit comments
02/03/2011	The Regional Board filed a request for extension of time to file comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, which was approved for good cause.
05/02/2011	City of Alameda filed designation of co-claimants (County of Alameda; the Cities of Albany, Berkley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro, Union City; the Alameda County Flood Control and Water Conservation District, Zone 7) in 10-TC-02.
05/17/2011	The Department of Finance filed comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05. <sup>183</sup>

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<sup>180</sup> Exhibit D, Declarations of Interested Parties in San Mateo County.

<sup>181</sup> Exhibit E, Declarations of Interested Parties in Alameda County.

<sup>182</sup> Exhibit C, Test Claim, 10-TC-05.

<sup>183</sup> Exhibit F, Finance's Comments on the Test Claim, 10-TC-02; Exhibit G, Finance's Comments on the Test Claim, 10-TC-03; Exhibit H, Finance's Comments on Test Claim, 10-TC-05.

05/17/2011 The Regional Board filed comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05.<sup>184</sup>

05/19/2011 Commission staff issued Notice of New Rebuttal Comment Period on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05.

06/20/2011-07/11/2011 Claimants filed requests for extension of time to file rebuttal comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, which were approved for good cause.

09/15/2011 Claimants filed rebuttal comments on Test Claim 10-TC-03.<sup>185</sup>

09/16/2011 Claimants filed rebuttal comments on Test Claims 10-TC-02 and 10-TC-05.<sup>186</sup>

12/22/2011 Claimants in Test Claim 10-TC-02 filed letter regarding timeline to hear the claim and request their Test Claim be given priority.

10/16/2013 The Court of Appeal for the Second District issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. B237153 (Los Angeles County Superior Court Case No. BS130730).

01/29/2014 The California Supreme Court granted review of *Department of Finance v. Commission on State Mandates*, Case No. S214855 (2nd Dist. Court of Appeal Case No. B237153; Los Angeles County Superior Court Case No. BS130730).

06/15/2016 Commission staff issued a letter requesting the official administrative record of the Regional Board and the State Water Resources Control Board on the test claim permit.

06/30/2016 City of San Jose filed a notice of change of representation.

07/29/2016 The Regional Board filed a request for an extension of time to file the administrative record on the test claim permit, which was granted for good cause.

08/29/2016 The California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. S214855.

08/30/2016 The Regional Board filed the administrative record on the test claim permit in two parts.<sup>187</sup>

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<sup>184</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05.

<sup>185</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03.

<sup>186</sup> Exhibit K, Claimant's Rebuttal Comments, 10-TC-02; Exhibit L, Claimant's Rebuttal Comments, 10-TC-05.

<sup>187</sup> Because of the enormous size of this record, the administrative record on the test claim permit cannot reasonably be included as an exhibit. However, the entirety of the

- 09/21/2016 Commission staff issued Request for Additional Briefing regarding the Supreme Court's decision, Notice of Consolidation, and Notice of Tentative Hearing Date.
- 09/23/2016 The Regional Board filed a request for extension of time to file comments in response to the request for additional briefing, which was partially approved for good cause, and a request for postponement of hearing, which was denied.
- 12/01/2016 The County of Santa Clara filed a notice of change in representation.
- 12/02/2016 Commission staff issued a Request for Additional Evidence and Briefing regarding the provisions in Section C.2. of the test claim permit.
- 12/19/2016 Claimant County of Santa Clara filed a response to the request for additional briefing (regarding the Supreme Court's Decision).<sup>188</sup>
- 12/20/2016 Claimants Cities of Alameda and Brisbane filed a response to the request for additional briefing (regarding the Supreme Court's Decision).<sup>189</sup>
- 12/20/2016 Claimant City of San Jose filed a response to the request for additional briefing (regarding the Supreme Court Decision).<sup>190</sup>
- 12/20/2016 The Regional Board filed a response to the request for additional briefing (regarding the Supreme Court's Decision).<sup>191</sup>
- 12/20/2016 Department of Finance filed a response to the request for additional briefing (regarding the Supreme Court's Decision).<sup>192</sup>
- 12/20/2016 The Regional Board filed a response to the request for additional evidence and briefing (regarding the provisions in Section C.2. of the test claim permit), and a request for an extension of time to file

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administrative record is available on the Commission's website on the matter page for this test claim: <https://www.csm.ca.gov/matters/10-TC-01-02-03-05.shtml>

<sup>188</sup> Exhibit M, Claimant's (County of Santa Clara's) Response to the Request for Additional Briefing.

<sup>189</sup> Exhibit N, Claimants' (Cities of Alameda's and Brisbane's) Response to the Request for Additional Briefing.

<sup>190</sup> Exhibit O, Claimant's (City of San Jose's) Response to the Request for Additional Briefing.

<sup>191</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing.

<sup>192</sup> Exhibit Q, Finance's Response to the Request for Additional Briefing.

additional comments and a postponement of the hearing, which were granted for good cause.<sup>193</sup>

- 01/05/2017 Claimants (Alameda County Claimants, San Mateo County Claimants, and the County of Santa Clara) filed comments on the Regional Board's response to request for additional briefing.<sup>194</sup>
- 01/6/2017 Claimant City of San Jose filed comments on the Regional Board's response to request for additional briefing.<sup>195</sup>
- 02/16/2017 The Regional Board filed a request for an extension of time to respond to the request for additional evidence and briefing regarding the provisions in Section C.2. of the test claim permit.
- 02/17/2017 Claimants (the Counties of Santa Clara, San Mateo, and Alameda, and the City of San Jose) filed comments objecting to the Regional Boards' request for extension of time to request for additional evidence and briefing regarding the provisions in Section C.2. of the test claim permit.
- 02/21/2017 Commission staff approved for good cause the Regional Board's request for an extension of time to respond to request for additional evidence and briefing regarding the provisions in Section C.2. of the test claim permit.
- 03/23/2017 The Regional Board filed a response to the request for additional evidence and briefing regarding the provisions in Section C.2. of the test claim permit,<sup>196</sup> and four volumes of documents.<sup>197</sup>
- 04/19/2017 Commission staff issued Notice of Incomplete Joint Test Claim Filing.
- 05/9/2017 and 05/11/2017 Claimants (City of San Jose, County of Santa Clara, and the Cities of Alameda and Brisbane) filed requests for extensions of time to

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<sup>193</sup> Exhibit R, Regional Board's Response to the Request for Additional Evidence and Briefing.

<sup>194</sup> Exhibit S, Claimants' (Alameda County's, San Mateo County's, and Santa Clara County's) Comments on the Response to the Request for Additional Briefing.

<sup>195</sup> Exhibit T, Claimant's (City of San Jose's) Comments on the Response to the Request for Additional Briefing.

<sup>196</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing.

<sup>197</sup> Because of the enormous size of this record, the four volumes of documents cannot reasonably be included as an exhibit. However, the entirety of the administrative record, including the four volumes filed by the Regional Board, are available on the Commission's website on the matter page for this test claim:

<https://www.csm.ca.gov/matters/10-TC-01-02-03-05.shtml>

respond to the Notice of Incomplete Joint Test Claim Filing, which were partially approved for good cause, and a request for postponement of the hearing, which was approved for good cause.

- 07/10/2017 Claimant Cities of Alameda and Brisbane filed a request for an extension of time to respond to the Notice of Incomplete Joint Test Claim Filing and for postponement of hearing, which were approved for good cause.
- 07/11/2017 Commission staff issued a request for the Reports of Waste Discharge (ROWDs).
- 07/13/2017 The Regional Board filed a response to the request for Reports of Waste Discharge (ROWDs).<sup>198</sup>
- 07/18/2017 Claimants County of Santa Clara and City of San Jose filed response to the Notice of Incomplete Joint Test Claim Filing.
- 08/21/2017 Claimants Counties of Alameda and San Mateo filed a request for an extension of time to respond to the Notice of Incomplete Joint Test Claim Filing, which was approved for good cause.
- 09/26/2017 Claimants Counties of Alameda and San Mateo filed a request to withdraw Test Claim 10-TC-01.
- 09/26/2017 Claimant City of Dublin filed a response to the Notice of Incomplete Joint Test Claim Filing.
- 11/22/2017 Commission staff issued Notice of Withdrawal of Test Claim 10-TC-01, Withdrawal of Co-Claimants and Replacement of Lead Claimant for Test Claim 10-TC-02, Complete Filing of Consolidated Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, Renaming of Matter, and Tentative Hearing Date.
- 12/11/2019 Claimant County of Santa Clara filed a Notice of Change of Representation.
- 07/09/2024 Commission staff issued the Draft Proposed Decision.<sup>199</sup>
- 07/10/2024 Claimant City of San Jose filed a Notice of Change of Representation.
- 07/16/2024 The Water Boards filed a Request for Extension of Time and Postponement of Hearing, which was partially approved for good cause.
- 07/26/2024 The Water Boards filed a Stipulation of the Parties to Waive Procedural Requirements.

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<sup>198</sup> Exhibit V, Regional Board's Response to Request for Reports of Waste Discharge.

<sup>199</sup> Exhibit W, Draft Proposed Decision.



- 07/30/2024 Commission staff issued Notice of Waiver of Procedural Requirements, Extension Request Approval, and Postponement of Hearing.
- 10/28/2024 Claimant City of Dublin and the Alameda Countywide Clean Water Program filed comments on the Draft Proposed Decision.<sup>200</sup>
- 10/28/2024 Claimant City of San Jose filed comments on the Draft Proposed Decision.<sup>201</sup>
- 10/28/2024 Claimant County of Santa Clara filed comments on the Draft Proposed Decision.<sup>202</sup>
- 10/28/2024 The Water Boards filed comments on the Draft Proposed Decision.<sup>203</sup>
- 11/21/2024 Claimant County of Santa Clara filed a Notice of Change of Representation.

## 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 following history details the evolution of the federal law and implementing regulations applicable to the case at hand. The bottom line is CWA's stated goal is to *eliminate* the discharge of pollutants into the nation's waters by 1985.<sup>204</sup> *"This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act."*<sup>205</sup> The CWA utilizes a permit program 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, 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.

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<sup>200</sup> Exhibit X, Claimant's (City of Dublin) and the Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision.

<sup>201</sup> Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision.

<sup>202</sup> Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision.

<sup>203</sup> Exhibit AA, Water Boards' Comments on the Draft Proposed Decision.

<sup>204</sup> United States Code, title 33, section 1251(a)(1).

<sup>205</sup> *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371 (emphasis added).

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.”<sup>206</sup> This prohibition survives in the current United States Code today, qualified by more recent provisions of law authorizing the issuance of discharge permits with specified restrictions to ensure 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.<sup>207</sup>

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.”<sup>208</sup> 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.”<sup>209</sup>

Up until 1972, many states had “water quality standards” attempting 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, 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 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

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<sup>206</sup> United States Code, title 33, section 401 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152).

<sup>207</sup> See United States Code, title 33, sections 1311-1342 (CWA 301(a) and 402); Code of Federal Regulations, title 40, section 131.12.

<sup>208</sup> Exhibit BB (45), U.S. EPA, Advanced Notice of Proposed Rule Making (Federal Register Vol. 63, No. 129, July 7, 1998), <https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf> (accessed on December 15, 2017), page 4.

<sup>209</sup> Exhibit BB (45), U.S. EPA, Advanced Notice of Proposed Rule Making (Federal Register Vol. 63, No. 129, July 7, 1998), <https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf> (accessed on December 15, 2017).

commercial activity” and have not been identified “as a significant contributor of pollution.”<sup>210</sup> 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 EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and doing so contravened the Legislature’s intent.<sup>211</sup> The Act prohibits “the discharge of any pollutant by any person” without an NPDES permit.<sup>212</sup> The term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from *any* point source.”<sup>213</sup> 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.<sup>214</sup> 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.”<sup>215</sup> Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies.<sup>216</sup> 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

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<sup>210</sup> Code of Federal Regulations, title 40, sections 124.5 and 124.11 (30 FR 18003, July 5, 1973).

<sup>211</sup> *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).

<sup>212</sup> United States Code, title 33, section 1311(a).

<sup>213</sup> United States Code, title 33, section 1362(12)(A) (emphasis added).

<sup>214</sup> United States Code, title 33, section 1362(14).

<sup>215</sup> See Code of Federal Regulations, title 40, section 122.26(b)(13) and Exhibit BB (47), U.S. EPA, NPDES Stormwater Program, Problems with Stormwater Pollution, <https://www.epa.gov/npdes/npdes-stormwater-program> (accessed on August 10, 2017).

<sup>216</sup> Exhibit BB (48), U.S. EPA, NPDES Stormwater Program, Stormwater Discharges from Municipal Sources, <https://www.epa.gov/npdes/stormwater-discharges-municipal-sources> (accessed on December 2, 2022), page 3.

from industrial and sewage sources.” [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.<sup>217</sup>

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.<sup>218</sup> “This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act.”<sup>219</sup>

MS4s are thus established point sources subject to the CWA’s NPDES permitting requirements.<sup>220</sup>

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

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<sup>217</sup> *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 Code of Federal Regulations, title 40, parts. 9, 122, 123, and 124)).

<sup>218</sup> United States Code, title 33, section 1251(a)(1).

<sup>219</sup> *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371.

<sup>220</sup> *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.

not later than 1991 or 1993, depending on the size of the population served by the MS4.<sup>221</sup>

Generally, NPDES permits issued under the CWA must “contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people’s health” and specifies “an acceptable level of a pollutant or pollutant parameter in a discharge.”<sup>222</sup>

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<sup>223</sup> deems appropriate for the control of such pollutants.<sup>224</sup> 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<sup>225</sup> than those already contained in their discharge permits, except in certain narrowly defined circumstances.<sup>226</sup>

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,

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<sup>221</sup> United States Code, title 33, section 1342(p)(2)-(4); *Natural Res. Def. Council v. U.S. EPA*, 966 F.2d 1292, 1296.

<sup>222</sup> Exhibit BB (46), U.S. EPA, NPDES Permit Basics, <https://www.epa.gov/npdes/npdes-permit-basics> (accessed on July 17, 2020).

<sup>223</sup> 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.

<sup>224</sup> 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)).

<sup>225</sup> 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).

<sup>226</sup> 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).

1314.) “[W]ater quality standards” are, in general, promulgated by the States and establish the desired condition of a waterway. (See § 1313.) These standards supplement effluent limitations “so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.” (*EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).)<sup>227</sup>

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, in addition to generally applicable provisions of the CWA and its implementing regulations and other state and federal environmental laws, apply to the permit at issue in this Test Claim.

## **B. Key Definitions**

### **1. Water Quality Standards**

A “water quality standard” defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.<sup>228</sup> 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.<sup>229</sup> A TMDL is a regulatory term in the CWA, describing a plan for restoring impaired waters that identifies the maximum amount of a pollutant 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 existing high quality waters be maintained to the maximum extent possible unless certain findings are made.<sup>230</sup>

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

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<sup>227</sup> *Arkansas v. Oklahoma* (1992) 503 U.S. 91, pages 101-102.

<sup>228</sup> Code of Federal Regulations, title 40, part 131.2.

<sup>229</sup> Code of Federal Regulations, title 40, part 130.7(b)(3).

<sup>230</sup> Code of Federal Regulations, title 40, part 131.12.

specific pollutant concentrations.<sup>231</sup> When water quality criteria are met, water quality will generally protect the designated use.”<sup>232</sup> Federal regulations state the purpose of a water quality standard as follows:

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). “Serve the purposes of the Act” (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.<sup>233</sup>

With respect to standard-setting for bodies of water, section 1313(a) of the United States Code provides existing water quality standards may remain in effect unless the standards are not consistent with the CWA, and 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.<sup>234</sup> 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

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<sup>231</sup> *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1403.

<sup>232</sup> Code of Federal Regulations, title 40, section 131.3(b).

<sup>233</sup> Code of Federal Regulations, title 40, section 131.2.

<sup>234</sup> United States Code, title 33, section 1313(a), note that section 1313 was last amended by 114 Statutes 870, effective October 10, 2000.

other purposes, and also taking into consideration their use and value for navigation.<sup>235</sup>

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.<sup>236</sup>

## 2. Total Maximum Daily Loads (TMDLs)

Section 303(d) of the CWA, codified at United States Code, title 33, section 1313(d), requires each state “identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard applicable to such waters.” The identification of waters not meeting water quality standards is called an “impairment” finding, and the priority ranking is known as the “303(d) list.”<sup>237</sup> 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.”<sup>238</sup>

After the waters are ranked, federal law requires “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.”<sup>239</sup> 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.<sup>240</sup>

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,”

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<sup>235</sup> United States Code, title 33, section 1313(c)(2)(A), effective October 10, 2000.

<sup>236</sup> 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.”)

<sup>237</sup> 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.

<sup>238</sup> United States Code, title 33, section 1313(d)(1)(A).

<sup>239</sup> Code of Federal Regulations, title 40, part 130.7(c)(1).

<sup>240</sup> Code of Federal Regulations, title 40, part 130.2.



and the Administrator “shall either approve or disapprove such identification and load not later than thirty days after the date of submission.”<sup>241</sup> 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.<sup>242</sup> 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].”<sup>243</sup> 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.”<sup>244</sup>

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.”<sup>245</sup> And, for new sources or discharges, the limitations must ensure the source or discharge will not cause or contribute to the violation of water quality standards and will not violate the TMDL.<sup>246</sup>

### **3. Municipal Separate Storm Sewer System (MS4)**

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

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<sup>241</sup> 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.

<sup>242</sup> 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.

<sup>243</sup> United States Code, title 33, section 1313(d)(2).

<sup>244</sup> United States Code, title 33, section 1313(d-e).

<sup>245</sup> Code of Federal Regulations, title 40, section 122.44(d)(1)(i), emphasis added.

<sup>246</sup> Code of Federal Regulations, title 40, section 122.4(i). See also Code of Federal Regulations, title 40, section 130.2(i); *Friends of Pinto Creek v. EPA* (9th Cir.2007) 504 F.3d 1007, 1011 (“A TMDL specifies the maximum amount of a particular pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.”).

#### **4. Best Management Practices (BMPs)**

The acronym "BMP" is short for Best Management Practice. In the context of water quality, BMPs are methods, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and non-point source discharges including 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 Antidegradation Policy**

When a TMDL has not been established, however, a permit may be issued provided 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.<sup>247</sup>

##### **2. Requirement to Effectively Prohibit Non-Stormwater Discharges**

CWA section 402(p)(3)(B)(ii) requires 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 "the Administrator may, after opportunity for public hearing, issue a permit for the discharge

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<sup>247</sup> 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 "In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters"; and Code of Federal Regulations, title 40, section 122.44(d)(1), which states that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."

of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title.”<sup>248</sup> Section 1342 further provides states may submit a plan to administer the NPDES permit program, and 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.”<sup>249</sup>

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.<sup>250</sup> In addition, NPDES permits are generally prohibited, with some exceptions, from containing effluent limitations “less stringent than the comparable effluent limitations in the previous permit.”<sup>251</sup> 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.<sup>252</sup>

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

#### **5. National Toxics Rule (NTR)**

For the 14 states that did not timely adopt numeric criteria as required, U.S. EPA promulgated the National Toxics Rule (NTR) on December 22, 1992.<sup>253</sup> 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

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<sup>248</sup> United States Code, title 33, section 1342(a)(1).

<sup>249</sup> United States Code, title 33, section 1342(a)(5); (b).

<sup>250</sup> United States Code, title 33, section 1342(b)(1).

<sup>251</sup> United States Code, title 33, section 1342(o).

<sup>252</sup> Code of Federal Regulations, title 40, section 122.44(d).

<sup>253</sup> Exhibit BB (21), Federal Register, Volume 57, Number 246 (NTR), page 142.

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 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.<sup>254</sup> The Administrator determined this rule was a necessary and important component for the implementation of CWA section 303(c)(2)(B) in California.

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

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

And:

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

#### **D. The California Water Pollution Control Program**

##### **1. Porter-Cologne**

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).<sup>255</sup> 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

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<sup>254</sup> Exhibit BB (22), Federal Register, Volume 65, Number 97 (CTR), page 7.

<sup>255</sup> Water Code section 13020 (Stats. 1969, ch. 482).

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.<sup>256</sup>

The state water pollution control program was again modified, beginning in 1972, to 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.”<sup>257</sup>

Section 13160 provides 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.”<sup>258</sup> Section 13001 describes the state and regional boards as being “the principal state agencies with primary responsibility for the coordination and control of water quality.”

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the CWA, employs a combination of water quality standards and point source pollution controls.<sup>259</sup>

Under Porter Cologne, the nine regional boards’ primary regulatory tools are the water quality control plans, also known as basin plans.<sup>260</sup> These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative

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<sup>256</sup> Water Code section 13000 (Stats. 1969, ch. 482).

<sup>257</sup> *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.*

<sup>258</sup> Water Code section 13160 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats 1976, ch. 596).

<sup>259</sup> Water Code section 13142 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1979, ch. 947; Stats. 1995, ch. 28).

<sup>260</sup> Water Code sections 13240-13247.

Procedure Act with a specialized process,<sup>261</sup> 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.<sup>262</sup>

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.”<sup>263</sup> Section 13241 provides 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.” :

- (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 be 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.<sup>264</sup>

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.”<sup>265</sup> In addition, section 13243 permits a

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<sup>261</sup> Water Code sections 11352–11354.

<sup>262</sup> Water Code section 13050(j), see also section 13241.

<sup>263</sup> 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)).

<sup>264</sup> Water Code section 13241 (Stats. 1969, ch. 482; Stats. 1979, ch. 947; Stats. 1991, ch. 187 (AB 673)).

<sup>265</sup> 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.

regional board to define “certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”<sup>266</sup>

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.”<sup>267</sup> 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 the regional boards “need not authorize the utilization of the full waste assimilation capacities of the receiving waters,” and 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 “[a]ll discharges of waste into waters of the state are privileges, not rights.”<sup>268</sup> 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].”<sup>269</sup> In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit “if a discharge is to waters of both California and the United States.”

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

California was the first state authorized to issue its own pollutant discharge permits. (Citations omitted.) Shortly after the CWA’s enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was “in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act].” (*Ibid.*) The Legislature provided that Chapter 5.5 be “construed to ensure consistency” with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements “ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality

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1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247); Stats. 1995, ch. 847 (SB 206); Stats. 1996 ch. 1023 (SB 1497)).

<sup>266</sup> Water Code section 13243 (Stats. 1969, ch. 482).

<sup>267</sup> Water Code section 13374 (Stats. 1972, ch. 1256).

<sup>268</sup> 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)).

<sup>269</sup> Water Code section 13377 (Stats. 1972, ch. 1256; Stats. 1978, ch. 746).

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.*)<sup>270</sup>

## **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

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<sup>270</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757.



WHEREAS water quality control policies have been and are being adopted for waters of the State; and

WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;

NOW, THEREFORE, BE IT RESOLVED:

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 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 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 section 40 Code of Federal Regulations part 131.12. It states "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.”<sup>271</sup>

#### **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 “[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 “[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 on July 6, 1972, and as applicable to this test claim, has amended it in 1978, 1983, 1988, 1990, 1997, 2001, 2005, and 2009.<sup>272</sup>

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<sup>271</sup> Exhibit BB (41), State Water Resources Control Board Administrative Procedures Update 90-004, page 4.

<sup>272</sup> 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).

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

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

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 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).<sup>273</sup> There are 126 chemicals on the federal CTR<sup>274</sup> 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

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<sup>273</sup> Code of Federal Regulations, title 40, Part 131, May 18, 2000.

<sup>274</sup> See Code of Federal Regulations, title 40, Part 131, May 18, 2000.

- 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 implementation to achieve water quality objectives.<sup>275</sup> 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.<sup>276</sup>

The relevant Basin Plans for this Test Claim were adopted by the Regional Board in 1995 and 2007 and are included in the record for these consolidated Test Claims.<sup>277</sup>

#### **E. The History of the Test Claim Permit**

The test claim permit, Order No. R2-2009-0074, was issued to permittees in the following county-wide urban areas: Alameda, Contra Costa, San Mateo, Santa Clara, and portions of Solano County (i.e. Fairfield-Suisun, and Vallejo).<sup>278</sup>

Prior to the adoption of the test claim permit, the Regional Board issued four countywide jurisdictional permits for Alameda, Santa Clara, San Mateo, and Contra Costa and the cities and co-permittee special districts within those counties and one jurisdictional permit for the Fairfield-Suisun area located in Solano County<sup>279</sup> and U.S. EPA issued the prior permit for the City of Vallejo and Vallejo Sanitary District which is also located in Solano County.<sup>280</sup> The local agencies under the prior Regional Board permits “chose to collaborate in countywide groups, to pool resources and expertise, and share information, public outreach and monitoring costs, among other tasks.”<sup>281</sup> The prior permits for these six regional areas are as follows:

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<sup>275</sup> Water Code section 13241.

<sup>276</sup> Water Code section 13245; Title 33, United States Code, section 1313(c)(1).

<sup>277</sup> Exhibit BB (6), Basin Plan 1995; Exhibit BB (7), Basin Plan 2007.

<sup>278</sup> Exhibit A, Test Claim, 10-TC-02, page 150 (Test claim permit).

<sup>279</sup> Exhibit A, Test Claim, 10-TC-02, page 280 (Fact Sheet); Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1849 et seq. (Attachment 53, Order R2-2003-0021, Alameda), pages 1943 et al. (Attachment 55, Order 99-059, San Mateo), and pages 2072 et seq. (Attachment 60, Order No. 01-124, Santa Clara); Exhibit BB (27), Order R2-2003-0034 (Fairfield Suisun); and Exhibit BB (25), Order 99-058 (Contra Costa).

<sup>280</sup> Exhibit A, Test Claim, 10-TC-02, page 150 (Test claim permit).

<sup>281</sup> Exhibit A, Test Claim, 10-TC-02, page 280 (Fact Sheet).

- The Alameda County permittees (the cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (Unincorporated area), the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, which joined together to form the Alameda Countywide Clean Water Program) were subject to Order No. R2-2003-0021, adopted on February 19, 2003.<sup>282</sup> That prior permit, in Section C.3.f., was amended by R2-2007-0025 on March 14, 2007, to add provisions relating to a Hydromodification Management Plan for new development and significant redevelopment.<sup>283</sup> The claimants are not seeking reimbursement for any activities relating to development or the implementation of the Hydromodification Management Plan as required by the test claim permit and, thus, the amendments made in R2-2007-2005 are not further addressed in this Decision.
- The Santa Clara permittees (the cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, which joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program) were subject to Order No. 01-184, adopted on April 2001.<sup>284</sup> Order No. 01-124 was amended by Order No. 01-119 on October 17, 2001, and Order No. R2-2005-0035 on July 20, 2005, to add requirements to Section C.3. regarding new development and significant redevelopment, which are not at issue in this claim.<sup>285</sup> Thus, the amendments made by Orders 01-119 and R2-2005-0035 are not further addressed in this Decision.
- The Fairfield-Suisun permittees (the cities of Fairfield and Suisun City, and Fairfield-Suisun Sewer District) which joined together to form the Fairfield-Suisun Urban Runoff Management Program) were subject to Order No. R2-2003-0034, adopted on April 16, 2003.<sup>286</sup> Order No. R2-2003-0034 was amended by R2-

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<sup>282</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1849 et seq. (Attachment 53, Order R2-2003-0021).

<sup>283</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1932-1935 (Attachment 54, Order R2-2007-0025); Exhibit BB (18), Fact Sheet for 2007 Amendments to Permits for Alameda, Fairfield, and San Mateo Adding Hydromodification Plan Requirements.

<sup>284</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2072 et seq. (Attachment 60, Order No. 01-124).

<sup>285</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2136-2143 (Attachment 62, Order R2-2005-0035).

<sup>286</sup> Exhibit BB (27), Order R2-2003-0034, page 45.

2007-0026 on March 14, 2007, to add provisions relating to a Hydromodification Management Plan for new development and significant redevelopment.<sup>287</sup>

- The Contra Costa permittees (the cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District, which joined together to form the Contra Costa Clean Water Program) were subject to Order No. 99-058, adopted on July 21, 1999.<sup>288</sup> That permit was amended by Order No. R2-2003-0022 on February 19, 2003, which added Section C.3. regarding new development and significant redevelopment.<sup>289</sup> In 2003, the San Francisco Superior Court issued its *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* decision, which found the Contra Costa stormwater permit (Order No. 99-058) did not include a monitoring program and must be amended to specify required monitoring, including type, interval, and frequency sufficient to yield data which are representative of the monitored activity; modifications to the Stormwater Management Plan must go through a public notice and comment process unless the modification is minor; and the Regional Board, not the Executive Director, must approve substantive modifications to the Plan.<sup>290</sup> In 2004, the Regional Board amended the permit in response to the *Baykeeper* decision with Order R2-2004-0059, which rescinds and vacates any and all past administrative changes to the Plan that were not subject to a public process or Regional Board action under the prior permit, as the Court held changes to the Plan must be subjected to the public notice and comment and the Executive Officer may not approve amendments to the Permit, which would include the Plan.<sup>291</sup> The Regional Board also issued Order R2-2004-0061, which took previous amendments to the permit originally approved by the Executive Director and invalidated by the *Baykeeper* decision, and validated them by having them go through a public notice and comment process and approved by the Regional Board.<sup>292</sup> The last amendment to the Contra Costa stormwater permit was Order R2-2006-0050, which amended the changes to the hydromodification program

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<sup>287</sup> Exhibit BB (18), Fact Sheet for 2007 Amendments to Permits for Alameda, Fairfield, and San Mateo Adding Hydromodification Plan Requirements.

<sup>288</sup> Exhibit BB (25), Order 99-058, page 14.

<sup>289</sup> Exhibit BB (26), Order R2-2003-0022, page 22.

<sup>290</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>291</sup> Exhibit BB (28), Order No. R2-2004-0059.

<sup>292</sup> Exhibit BB (29), Order No. R2-2004-0061.

requirements for new development and significant redevelopment from Order R2-2003-0022.<sup>293</sup> The claimants are not seeking reimbursement for any activities relating to development or the implementation of the Hydromodification Management Plan as required by the test claim permit and, thus, the amendments made in R2-2003-0022 and R2-2006-0050 are not further addressed in this Decision.

- The San Mateo permittees (the cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District and San Mateo County have joined together to form the San Mateo Countywide Water Pollution Prevention Program) were subject to Order No. 99-059, adopted on July 21, 1999.<sup>294</sup> That permit was amended by Order No. R2-2003-0023 on February 19, 2003, which added Section C.3. regarding new development and significant redevelopment.<sup>295</sup> In 2003, the San Francisco Superior Court issued its *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* decision, which found the Contra Costa stormwater permit (Order No. 99-059) did not include a monitoring program and must be amended to specify required monitoring, including type, interval, and frequency sufficient to yield data which are representative of the monitored activity; modifications to the Stormwater Management Plan must go through a public notice and comment process unless the modification is minor; and the Regional Board, not the Executive Director, must approve substantive modifications to the Plan.<sup>296</sup> In 2004, the Regional Board amended the permit in response to the *Baykeeper* decision with Order R2-2004-0060, which rescinds and vacates any and all past administrative changes to the Plan made under the terms of the Permit not subject to a public process or Regional Board action, as the Court held changes to the Plan must be subjected to the public notice and comment and the Executive Officer may not approve amendments to the Permit, which would include the Plan.<sup>297</sup> The Regional

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<sup>293</sup> Exhibit BB (30), Order No. R2-2006-0050.

<sup>294</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1943 et al. (Attachment 55, Order 99-059).

<sup>295</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1964 et al. (Attachment 56, Order R2-2003-0023).

<sup>296</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>297</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1993 et al. (Attachment 57, Order R2-2004-0060).

Board also issued Order R2-2004-0062, which took previous amendments to the permit originally approved by the Executive Director and invalidated by the *Baykeeper* decision, and validated them by having them go through a public notice and comment process and approved by the Regional Board.<sup>298</sup> The last amendment to the San Mateo stormwater permit was Order R2-2007-0027, which amended the changes to the hydromodification program requirements for new development and significant redevelopment from Order R2-2003-0023.<sup>299</sup> The claimants are not seeking reimbursement for any activities relating to development or the implementation of the Hydromodification Management Plan as required by the test claim permit and, thus, the amendments made in R2-2003-0023 and R2-2007-0027 are not further addressed in this Decision.

- The City of Vallejo and the Vallejo Sanitary District were subject to the stormwater permit issued by the U.S. EPA, EPA Permit No. CAS612006, adopted on April 27, 1999, and became effective on May 30, 1999.<sup>300</sup>

The Fact Sheet for the test claim permit explains detailed stormwater management plans prepared by the permittees were separate documents incorporated by reference into the prior permits, and the test claim permit now merges those plans into one document applicable to all permittees.

In the previous permit issuances, the detailed actions to be implemented by the Permittees were contained in Stormwater Management Plans, which were separate from the NPDES permits, and incorporated by reference. Because those plans were legally an integral part of the permits and were subject to complete public notice, review and comment, this permit reissuance incorporates those plan level details in the permit, thus merging the Permittees' stormwater management plans into the permit in one document. This Permit specifies the actions necessary to reduce the discharge of pollutants in stormwater to the maximum extent practicable, in a manner designed to achieve compliance with water quality standards and objectives, and effectively prohibit non-stormwater discharges into municipal storm drain systems and watercourses within the Permittees' jurisdictions. This set of specific actions is equivalent to the requirements that in past permit cycles were included in a separate stormwater management plan for each Permittee or countywide group of Permittees.

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<sup>298</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2016-2018 (Attachment 58, Order R2-2004-0062).

<sup>299</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2063-2067 (Attachment 59, Order R2-2007-0027).

<sup>300</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 1.



With this permit reissuance, that level of specific compliance detail is integrated into permit language and is not a separate document.<sup>301</sup>

The following sections of the test claim permit have been pled by the claimants in this consolidated claim:

- Sections C.2.b., C.2.c., C.2.e., and C.2.f. of the test claim permit addressing the following municipal maintenance activities (Sidewalk/Plaza Maintenance and Pavement Washing; Bridge and Structure Maintenance and Graffiti Removal; Rural Public Works Construction and Maintenance; and Corporation Yard Maintenance).<sup>302</sup>
- Sections 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., and C.8.h. addressing the following monitoring provisions: Regional Monitoring Program, Status Monitoring, Stressor/Source Identification, BMP Effectiveness Investigation, Geomorphic Project, Pollutants of Concern Monitoring, Long Term Trends Monitoring, Sediment Delivery Estimate/Budget, Citizen Monitoring and Participation, Reporting, and Monitoring Protocols and Data Quality.<sup>303</sup>
- Sections 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., and C.10.d.ii., addressing the following trash provisions: Short Term Trash Load Reduction Plan, Baseline Trash Load and Trash Load Reduction Tracking Method, Minimum Full Trash Capture, Hot Spot Cleanup, Hot Spot Selection, Hot Spot Assessments, Long Term Trash Load Reduction, and Reporting.<sup>304</sup>
- Sections C.11.f. and C.12.f. addressing Mercury and PCB Diversion Studies.<sup>305</sup>

### **III. Positions of the Parties**

#### **A. Claimants' Position**

The claimants allege the sections of the permit pled in this Test Claim impose reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution. The claimants contend the test claim permit mandates new programs or higher levels of service with respect to municipal facilities, monitoring, trash

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<sup>301</sup> Exhibit A, Test Claim, 10-TC-02, page 282 (Fact Sheet).

<sup>302</sup> Exhibit C, Test Claim, 10-TC-05, pages 27-31.

<sup>303</sup> Exhibit A, Test Claim, 10-TC-02, pages 29-45; Exhibit B, Test Claim, 10-TC-03, pages 25-37; and Exhibit C, Test Claim, 10-TC-05, pages 31-36.

<sup>304</sup> Exhibit A, Test Claim, 10-TC-02, pages 45-52; Exhibit B, Test Claim, 10-TC-03, pages 38-44; Exhibit C, Test Claim, 10-TC-05, pages 44-51.

<sup>305</sup> Exhibit A, Test Claim, 10-TC-02, pages 52-54; Exhibit B, Test Claim, 10-TC-03, pages 45-47; Exhibit C, Test Claim, 10-TC-05, pages 51-53.

reduction, and diversion studies, which represent obligations the claimants did not have under their prior permits. Each requirement is “stricter and more specific than is required under federal law” and “[t]hese new mandates have imposed or will impose significant financial burdens on” claimants. In addition, the claimants allege they have no authority, or “inadequate” authority, to recover their costs through the imposition of fees because of the voter approval requirements of Proposition 218.<sup>306</sup>

Test Claim 10-TC-02 includes a declaration showing aggregate actual costs for years one and two of the permit to implement monitoring, trash, and mercury and PCB diversion activities totaling \$39,398, with the City of Dublin’s share of cost totaling \$13,631.<sup>307</sup> Test Claim 10-TC-03 includes a declaration from Chris Sommers who served as the watershed monitoring and assessment coordinator for the Santa Clara Valley Urban Runoff Pollution Prevention Program stating the aggregate actual costs for the Santa Clara Valley Program’s implementation of monitoring, trash, and mercury and PCB diversion activities totaled \$7,490,605.<sup>308</sup> Mr. Sommer’s declaration further states “I am not aware of any dedicated state or federal funds, or of any other non-local agency funds, that were available to pay for these increased costs.”<sup>309</sup> And Test Claim 10-TC-05 identifies costs for fiscal years 2009-2010 and 2010-2011 of \$990,436 which is supported by a declaration from Chris Sommers supporting the assertion, and also declaring “I am not aware of any dedicated state or federal funds, or of any other non-local agency funds, that were available to pay for these increased costs.”<sup>310</sup>

The County of Santa Clara, the Cities of Dublin and San Jose, and the Alameda Countywide Clean Water Program (interested person) filed the following comments on the Draft Proposed Decision:

- The City of San Jose asserts that claimants are practically compelled and thus mandated by the state to comply with the requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f., which address various municipal maintenance requirements. The claimant alleges that public entities do not voluntarily participate in a program when they construct, expand, or maintain public property and, thus, the downstream requirements are mandated by the state.<sup>311</sup>

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<sup>306</sup> Exhibit A, Test Claim, 10-TC-02, page 19, 26-28; Exhibit B, Test Claim, 10-TC-03, pages 15, 22-24; Exhibit C, Test Claim, 10-TC-05, pages 16, 31.

<sup>307</sup> Exhibit A, Test Claim, 10-TC-02, pages 55-56, 66 (Declaration of Shannon Young).

<sup>308</sup> Exhibit B, Test Claim, 10-TC-03, pages 48, 58 (Declaration of Chris Sommers).

<sup>309</sup> Exhibit B, Test Claim, 10-TC-03, page 61 (Declaration of Chris Sommers).

<sup>310</sup> Exhibit C, Test Claim, 10-TC-05, pages 52-53, 60 et seq. (Amended Declaration of Chris Sommers).

<sup>311</sup> Exhibit Y, Claimant’s (City of San Jose’s) Comments on the Draft Proposed Decision, pages 3-5.

The City of San Jose also realleges that the requirements in Sections C.2.b., C.2.c., C.2.e., and C.2.f. are new and impose a new program or higher level of service because the permit removes the permittees' ability to determine what is and how to comply with the maximum extent practicable (MEP) standard, and to develop and implement the appropriate best management practices (BMPs) to reduce or control pollution.<sup>312</sup>

- The County of Santa Clara contends there is no evidence that prior law required the permittees to provide financial contributions to the Regional Monitoring Program (RMP) or an equivalent program and, thus, this requirement in Section C.8.b. of the test claim permit is new and imposes a new program or higher level of service.<sup>313</sup>

The County further realleges that the status monitoring requirements imposed by Section C.8.c., C.8.h., and C.8.d.i. and the requirement in Section C.8.d.ii., to investigate the effectiveness of one stormwater treatment or hydrograph modification BMP or control during the term of the permit, are new and increase the level of service provided by the public and, therefore impose a new program or higher level of service.<sup>314</sup>

- The City of Dublin and the Alameda Countywide Clean Water Program contend the fee authority exception to costs mandated by the state in Government Code section 17556(d) does not apply to the monitoring (Section C.8.), trash (Section C.10.), and mercury and PCB diversion study requirements (Sections C.11.f. and C.12.f.) because the Water Boards and the Department of Finance have not met their burden of proof, in accordance with the *Department of Finance* case, to show that a fee meets the substantive requirements of article XIII D, section 6(b) and would not exceed the proportional cost of the service attributable to the parcel, the service is actually used by or immediately available to the property owner, and that the fee would not be imposed to the public at large.<sup>315</sup>

#### **B. San Francisco Bay Regional Water Quality Control Board and the State Water Resources Control Board (Regional Board or Water Boards)**

The Regional Board contends reimbursement is not required under article XIII B, section 6 of the California Constitution. The Regional Board raises specific

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<sup>312</sup> Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision, pages 5-7.

<sup>313</sup> Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, pages 3-5.

<sup>314</sup> Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, pages 6-7.

<sup>315</sup> Exhibit X, Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, pages 1-18, citing to *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546.

arguments with respect to the permit provisions pled, which are summarized in each section below, but generally argues as follows:

The Permit as a whole, including the challenged provisions, is mandated on the local governments by federal law. The federal mandate applies to many dischargers of storm water, both public and private, and is not unique to local governments. The federal mandate requires that the Permit be issued to the local governments; it is not a question of "shifting" the costs from the state to the local governments. The specific requirements challenged are consistent with the minimum requirements of federal law. Even if the Permit were to be interpreted to as going beyond federal law, any additional state requirements for each requirement are *de minimis*. Finally, they are not subject to reimbursement because the Claimants have the ability to comply with these requirements through charges and fees, and are not required to raise taxes.<sup>316</sup>

The Regional Board also contends "the Claimants have not established that the challenged Provisions impose new programs or higher levels of service. Many of the Provisions are very similar to those in Claimants' prior permits or to those in plans that Claimants' prior permits required that they implement. Other activities, even if not previously required, are already being carried out by some of the Permittees."<sup>317</sup>

The Regional Board also argues the test claim permit does not impose a new program or higher level of service because the provisions are not unique to government and do not provide a governmental service to the public:

None of the challenged provisions is subject to reimbursement because the Permit does not involve requirements imposed uniquely upon local government. Reimbursement to local agencies is required only 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. Laws of general application are not entitled to subvention. [Fn. omitted.] The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required. [Fn. omitted.] Compliance with NPDES permits, and specifically with storm water permits, is required of private industry as well. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that

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<sup>316</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2.

<sup>317</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 16.

operate MS4s, including state, Tribal and federal facilities; local government is not singled out.

The NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. Those permits are actually more stringent than municipal permits because federal law requires that they meet technology-based standards by including numeric effluent limitations, and that they include more stringent water quality-based effluent limitations ("WQBELs") to ensure compliance with water quality standards in receiving waters. [Fn. omitted.] Even where construction or industrial permits impose WQBELs in the form of BMP-based requirements, the BMPs must be designed to attain water quality standards, whether attainment is "practicable" or not.<sup>318</sup>

The Regional Board also argues the claimants have not exhausted their administrative remedies by appealing to the State Water Board before filing a test claim with the Commission.<sup>319</sup>

In response to the request for additional briefing following the issuance of the Supreme Court's first mandate decision on stormwater in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, where the court found the permit provisions issued by the Los Angeles Regional Water Quality Control Board were mandated by the state and not by federal law, the Regional Board asserted the facts here are distinguishable as follows:

Unlike the LA Permit, the San Francisco Bay Regional Water Board's municipal regional stormwater permit (MRP) included findings that the permit was based entirely on federal law and the permit terms were "necessary" to meet MEP. The Supreme Court noted the absence of these findings in the LA Permit and further opined that such findings would be entitled to deference. (*Department of Finance, v. Comm'n on State Mandates, supra*, 1 Cal.5th at p. 768.) In addition, the Supreme Court's primary focus was the construction of MEP. It did not evaluate any of the following legal questions or factually distinct circumstances:

1. "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." (*Id.* at

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<sup>318</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 24.

<sup>319</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 25.

p. 768.) Such findings are “case specific, based among other things on factual circumstances. (*Ibid.*, fn. 15.)

2. The LA permittees and Los Angeles Water Board agreed that each of the three challenged requirements were a new program or higher level of service (*Department of Finance v. Comm’n on State Mandates, supra*, 1 Cal.5th at p. 762) and none were contained in previous permits. (*Id.* at pp. 760-61.)

3. There was no evaluation of whether the contested provisions were required under a Total Maximum Daily Load (TMDL) or other federal mandate.

4. None of the three requirements evaluated by the Supreme Court were terms U.S. EPA included in any EPA-issued MS4 NPDES permits. (*Id.* at pp. 761 and 771-72.)

5. The Supreme Court did not evaluate whether the local government had the authority to levy fees or assessments pursuant to Government Code section 17556, subdivision(d). (*Id.* at p. 761 [acknowledging that the Commission found that the local governments were not entitled to reimbursement because they had authority to levy fees to pay for the required inspections, an issue the Supreme Court did not review].)

6. The Supreme Court did not consider an exceptions [sic] to unfunded state mandates, where stormwater capture and discharge requirements are generally applicable and do not impose “unique” obligations on municipal entities.

7. The Supreme Court did not evaluate the permittees’ voluntary participation in the NPDES program.<sup>320</sup>

The Regional Board and the State Water Resources Control Board (“Water Boards”) filed the following comments on the Draft Proposed Decision:

- The requirement to submit Short Term and Long-Term Trash Load Reduction Plans pursuant to Sections C.10.a.i. and C.10.c. are not new. “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 [when water quality standards are not being met and beneficial uses are affected]: 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.”<sup>321</sup>

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<sup>320</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 1-2.

<sup>321</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 3.

- The requirements to submit a baseline trash load and trash load reduction tracking method, assess trash spots, and report on trash load reductions pursuant to Sections C.10.a.ii. and C.10.b. implement the Short-Term and Long-Term Trash Load Reduction Plans and are not new monitoring requirements, but fall within the prior requirements to meet water quality standards, receiving water limitations, and discharge prohibitions. Under the prior permits, if an exceedance occurred, permittees were required to report to the Regional Board the additional BMPs and monitoring to be used to prevent or reduce any pollutants causing or contributing to an exceedance of water quality standards.<sup>322</sup>
- The costs associated with submitting selected hot spots to the Regional Board and retaining supporting records for trash load reductions actions pursuant to Sections C.10.b. and C.10.d. are de minimis and should not be subject to reimbursement pursuant to *San Diego Unified School Dist. v. Commission on State Mandates*.<sup>323</sup>
- The pilot projects required by Sections C.11.f. and C.12.f. to implement the mercury and PCB TMDLs by diverting dry weather and first-flush stormwater flows to sanitary sewers and monitor and report on the reductions in PCB and mercury loads, are mandated by federal law. “[T]he "true choice" analysis [fn. omitted] 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 [in 40 C.F.R. section 122.44(d)(1)(vii)(B)] 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.”<sup>324</sup>
- 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, pursuant to Section C.8.g.ii., are not reimbursable. These provisions address how data that is federally required is to be maintained and submitted, and the costs are de minimis.

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<sup>322</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 4-5.

<sup>323</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 5-6.

<sup>324</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 6-8.

Therefore, pursuant to the court’s holding in *San Diego Unified School Dist. v. Commission on State Mandates*, subvention is not required.<sup>325</sup>

- There are no costs mandated by the state when voter approval is required by Proposition 218.<sup>326</sup> “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. [Fn. omitted.] 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.”<sup>327</sup>
- Reimbursement for any activity should end on December 31, 2015, when the test claim permit was terminated and superseded by Order R2-2015-0049, effective January 1, 2016.<sup>328</sup>

### **C. Department of Finance**

The Department of Finance contends the permit provisions do not constitute a state-mandated new program or higher level of service for the following reasons:

- The test claim permit and its provisions are federal mandates, required by federal law.
- The detailed provisions of the test claim permit do not exceed federal law even though the provisions may not be explicitly stated in the federal Clean Water Act. Stormwater permits follow an iterative process whereby each successive permit becomes more refined and expanded as needed to meet water quality standards, and the reduction in pollutant discharges is required by federal law to meet effluent limitation guidelines. The provisions pled in the test claim are necessary to comply with federal law.
- The Regional Board is an administrator of federal law and has not imposed a reimbursable state mandate that exceeds federal law. Because federal law requires specific provisions in a permit, and the permit was issued consistent with federal requirements, the permit is a federal mandate.

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<sup>325</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 8-9.

<sup>326</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 9-11.

<sup>327</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 10.

<sup>328</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 11-12. Order No. R2-2015-0049 is the subject of a separate Test Claim, *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, 16-TC-03*, <https://www.csm.ca.gov/matters/16-TC-03.shtml> (accessed on November 4, 2024).



- The permit provisions are not unique to government. Private dischargers have similar requirements as public dischargers to comply with the Clean Water Act.<sup>329</sup>

Finance also contends there are no costs mandated by the state, since the claimants have fee authority sufficient as a matter of law to pay for the required activities pursuant to Government Code section 17556(d), even when voter approval is required by the California Constitution:

Finance believes claimants do have fee authority undiminished by Propositions 218 and 26. Notably, Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes (Art. XIII C, § 1, subd. (e)(7)). Further, claimants have authority to impose property-related fees under their police powers 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. Local 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.<sup>330</sup>

Finance did not file any comments on the Draft Proposed Decision.

#### **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.”<sup>331</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>332</sup>

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

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<sup>329</sup> Exhibit F, Finance’s Comments on the Test Claim, 10-TC-02, pages 1-3; Exhibit G, Finance’s Comments on the Test Claim, 10-TC-03, pages 1-3; Exhibit H, Finance’s Comments on Test Claim, 10-TC-05, pages 1-3.

<sup>330</sup> Exhibit Q, Finance’s Response to the Request for Additional Briefing, page 1.

<sup>331</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>332</sup> *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.<sup>333</sup>
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.<sup>334</sup>
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.<sup>335</sup>
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.<sup>336</sup>

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>337</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>338</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>339</sup>

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<sup>333</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>334</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56.

<sup>335</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>336</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

<sup>337</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

<sup>338</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>339</sup> *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].

## **A. The Commission Has Jurisdiction Over This Test Claim.**

### **1. The Test Claims Were Timely Filed and Have a Potential Period of Reimbursement Beginning December 1, 2009.**

Government Code section 17551 provides 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 later.”<sup>340</sup>

The test claim permit was adopted on October 14, 2009, and became effective on December 1, 2009.<sup>341</sup> All three test claims were timely filed within 12 months of December 1, 2009. Test Claim 10-TC-02 was filed on October 13, 2010.<sup>342</sup> Test Claim 10-TC-03 was filed on October 14, 2010.<sup>343</sup> And Test Claim 10-TC-05 was filed on November 30, 2010.<sup>344</sup>

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 Claims were filed in October and November 2010, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2009. 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 December 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 the claimants have failed to exhaust administrative remedies since the claimants should have appealed their permits to the State Water Board, which has the jurisdiction to determine if permit conditions exceed minimum federal requirements. Thus, the Regional Board argues “the Test Claims constitute an impermissible collateral attack on the Permit.”<sup>345</sup>

The Board’s argument is unfounded. The Commission has exclusive jurisdiction to determine whether a statute or executive order imposes a reimbursable state-mandated

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<sup>340</sup> Government Code section 17551(c) (Stats. 2007, ch. 329).

<sup>341</sup> Exhibit A, Test Claim, 10-TC-02, page 266 (Test claim permit).

<sup>342</sup> Exhibit A, Test Claim, 10-TC-02, page 1.

<sup>343</sup> Exhibit B, Test Claim, 10-TC-03, page 1.

<sup>344</sup> Exhibit C, Test Claim, 10-TC-05, page 1.

<sup>345</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 25.

program, and the Test Claims do not constitute a collateral attack on the test claim permit.<sup>346</sup>

In *Department of Finance v. Commission on State Mandates*, the Supreme Court explained “The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims and created the Commission to adjudicate them.”<sup>347</sup> The Court distinguished between challenging the substance of a stormwater permit and seeking reimbursement under article XIII B, section 6 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; *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.)

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.

¶...¶

Moreover, the policies supporting article XIII B of the California Constitution and section 6 would be undermined if the Commission were

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<sup>346</sup> 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.

<sup>347</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 759.

required to defer to the Regional Board on the federal mandate question.<sup>348</sup>

Thus, the Commission's role is 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."<sup>349</sup>

Therefore, the claimants are not required to exhaust administrative remedies with the State Water Board before filing a Test Claim with the Commission.

**3. The Regional Board's General Argument that Reimbursement Should Be Denied Because the Permittees Have Discretion to Contain or Divert Stormwater to a Publicly-Owned Treatment Work (POTW) and Are Not Legally Required to Discharge Stormwater to the Waters of the United States, Is Not Correct as a Matter of Law.**

The Regional Board argues reimbursement is not required under article XIII B, section 6 because there is no requirement in the law that a municipality discharge via storm sewers or directly into waters of the United States.<sup>350</sup> "As noted in the 2011 Response, 'While the Permittees cannot control the weather, they do have the discretion to require on-site containment of stormwater runoff or to convey their stormwater to a publicly owned treatment works.'"<sup>351</sup>

The Regional Board is correct that the permittees may contain or divert stormwater runoff to a Publicly-Owned Treatment Work (POTW). Statutes enacted by the Legislature in 2021 provide authority for local stormwater agencies and wastewater agencies to enter into agreements to divert stormwater and dry weather runoff from the stormwater system to a wastewater collection or treatment system.<sup>352</sup>

However, even if the permittees are able to contain or divert stormwater runoff to a POTW, they are still required by federal law to obtain an NPDES permit. The CWA requires stormwater permits for discharges from an MS4 serving a population of

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<sup>348</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768-769.

<sup>349</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

<sup>350</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 16-17; Exhibit P, Regional Board's Response to the Request for Additional Briefing, pages 24-25.

<sup>351</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 24.

<sup>352</sup> Water Code sections 13910 et seq. (Stats. 2021, ch. 241), providing authority for municipal wastewater agencies to enter into voluntary agreements for stormwater projects, including capture and treatment, where cost effective and regionally suitable. (Wat. Code, § 13910(d).)

100,000 or more, regardless of their options for compliance.<sup>353</sup> Moreover, the courts have found even though a permittee is required to propose a management program, which may contain provisions for diversion and treatment of stormwater runoff, it is ultimately the Regional Board that determines which conditions or requirements to include in the permit.<sup>354</sup>

Moreover, similar arguments have been made by the State in the past and have been rejected by the courts. In the 2021 *Department of Finance* decision issued by the Second District Court of Appeal, the State argued the inspection and trash requirements imposed by the Los Angeles Regional Water Quality Control Board were not state mandates “because the local governments applied for the permit to operate their stormwater drainage systems and “chose a management permit rather than a numeric end-of-pipe permit.” That is, although the local governments could arguably have applied for a permit simply mandating particular effluent limits on discharges — a so-called end-of-pipe permit — they elected to apply for a “management permit,” which imposes requirements designed to reduce the discharge of pollutants to the maximum extent practicable.”<sup>355</sup> The court disagreed, finding the local governments “did not voluntarily participate in applying for a permit to operate their stormwater drainage systems; they were required to do so under state and federal law and the challenged requirements were mandated by the Regional Board.”<sup>356</sup>

In the 2022 *Department of Finance* decision issued by the Third District Court of Appeal, the State argued the permit issued by the San Diego Regional Water Quality Control Board does not require permittees to operate an MS4. [. . . but] [i]f they choose to operate one, they must mitigate pollutant discharges, like all other polluters.”<sup>357</sup> The court disagreed, finding as follows:

Here, the alternative to not obtaining an NPDES permit was for permittees not to provide a stormwater drainage system. If permittees chose to operate an MS4, they were required by the State to obtain a permit. (33 U.S.C. § 1342 (p)(2)(C), (D).) While permittees at some point in the past chose to provide a stormwater drainage system, “[t]he drainage of a city in

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<sup>353</sup> United States Code, title 33, section 1342(p).

<sup>354</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 561; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

<sup>355</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

<sup>356</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 561.

<sup>357</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 557.

the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.” (*New Orleans Gaslight Co. v. Drainage Com. of New Orleans* (1905) 197 U.S. 453, 460, 25 S.Ct. 471, 49 L.Ed. 831.) In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all. It is “so far beyond the realm of practical reality” that it left permittees “without discretion” not to obtain a permit. (*City of Sacramento, supra*, 50 Cal.3d at p. 74, 266 Cal.Rptr. 139, 785 P.2d 522.) Permittees were thus compelled as a practical matter to obtain an NPDES permit and fulfill the permit’s conditions. Permittees “ [did] not voluntarily participate’ in applying for a permit to operate their stormwater drainage systems; they were required to do so under state and federal law and the challenged requirements were mandated by the Regional Board.” (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at p. 561, 273 Cal.Rptr.3d 619).<sup>358</sup>

Thus, the global argument that reimbursement should be denied because the permittees have options to contain or divert stormwater instead of discharging stormwater to the waters of the United States is not correct as a matter of law. As the courts have done, this Decision will instead address each section of the permit pled to determine whether it meets the elements required for reimbursement under article XIII B, section 6 of the California Constitution.

#### **4. The Requirements Pled in the Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the Six Prior Permits and the Documents Made Enforceable by Those Permits, to Determine if the Activities Required by the Test Claim Permit Are New.**

The claimants contend the test claim permit imposes a new program or higher level of service because the permit requires the claimants to spend “considerably more money for the new programs or higher levels of service at issue.”<sup>359</sup> Citing to Government Code section 17564 (which provides no test claim or reimbursement claim shall be filed unless the claim exceeds \$1,000), the claimants state, “the Commission must decide whether the new permit imposes a new program or higher level of service that requires the test claimant to expend more than \$1,000.00 than was previously required.”<sup>360</sup>

The courts have held, however, “simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting

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<sup>358</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

<sup>359</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 15; See also Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, page 18.

<sup>360</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 15; See also Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, page 18.

‘service to the public’ under article XIII B, section 6, and Government Code section 17514.”<sup>361</sup> Rather, as explained below, all of the elements required under article XIII B, section 6 must be met, including that the activity or duty imposed by the permit is newly required and mandated by the state when compared to prior law.

Under the CWA, the term of an NPDES permit is five years.<sup>362</sup> 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.<sup>363</sup> California’s regulations provide 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.<sup>364</sup> Thus, there was no gap in time between the six prior permits and the test claim permit.

The courts have found NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.<sup>365</sup> 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.<sup>366</sup> This was the case in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546. There, the court found installing and maintaining trash receptacles at transit stops and performing certain inspections, as required by that stormwater permit, were *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

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<sup>361</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

<sup>362</sup> United States Code, title 33, section 1342(b).

<sup>363</sup> Code of Federal Regulations, title 40, section 122.6(d).

<sup>364</sup> California Code of Regulations, title 23, section 2235.4.

<sup>365</sup> *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.

<sup>366</sup> 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.



meaning of section 6 because it was not required prior to the Regional Board’s issuance of the permit”).<sup>367</sup>

Other examples include *Lucia Mar Unified School Dist.*, which addressed a 1981 test claim statute requiring local school districts to pay the cost of educating pupils in state schools for the severely handicapped — costs the state had previously paid in full until the 1981 statute became effective.<sup>368</sup> The court held 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.*”<sup>369</sup> The same analysis was applied in *County of San Diego*, where the court found 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.<sup>370</sup> In *City of San Jose*, the court addressed a 1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.<sup>371</sup> The court denied the city’s claim for reimbursement, finding the costs were not shifted by the state since “*at the time [the 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.*”<sup>372</sup> In *San Diego Unified School District*, the court determined the required activities imposed by 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 test claim statutes].*”<sup>373</sup>

Accordingly, the requirements pled in the test claim permit are compared to prior law, including the six prior permits, to determine if the requirements in the test claim permit are new. Furthermore, as explained herein, each of the prior permits incorporated by reference *and made enforceable* the permittees’ approved stormwater management

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<sup>367</sup> *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

<sup>368</sup> *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

<sup>369</sup> *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

<sup>370</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

<sup>371</sup> *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

<sup>372</sup> *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

<sup>373</sup> *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.

plans, annual reports, and annual work plans.<sup>374</sup> Specifically, the prior permit governing the Alameda permittees (Order R2-2003-0021) contained the following findings and provisions:

- Alameda’s 2001-2008 Stormwater Quality Management Plan, including the Performance Standards in the plan, are incorporated in the Permit by reference and enforceable as such, and are considered enforceable components of this Order.<sup>375</sup> The Plan had to include several components, including a plan for monitoring and special studies.<sup>376</sup>
- The performance standards in Alameda’s 2001-2008 Stormwater Quality Management Plan “represent the baseline level of effort required of each of the Permittees.”<sup>377</sup>
- Changes and updates to control measures, Best Management Practices, and Performance Standards will be documented in the Annual Report and, following Regional Board approval, will be considered part of the Management Plan and an enforceable component of this Order.<sup>378</sup>
- The permittees “shall implement the Management Plan, and shall subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1. through C.11 of this Order.”<sup>379</sup>
- The Permittees shall incorporate newly developed or updated Performance Standards, acceptable to the Executive Officer, into applicable annual revisions to the Management Plan and adhere to implementation of the new/ revised Performance Standards. Following the addition or revision of a Performance

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<sup>374</sup> Exhibit A, Test Claim, 10-TC-02, page 282 (Fact Sheet).

<sup>375</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1853 (Attachment 53, Order R2-2003-0021, Finding 10).

<sup>376</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1853 (Attachment 53, Order R2-2003-0021, Finding 11).

<sup>377</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1853 (Attachment 53, Order R2-2003-0021, Finding 9).

<sup>378</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1854 (Attachment 53, Order R2-2003-0021, Finding 15).

<sup>379</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1867 (Attachment 53, Order R2-2003-0021, Section C.2.a.).

Standard, acceptable to the Executive Officer, the Permittees for which the Performance Standard is applicable shall adhere to its implementation.<sup>380</sup>

- In either the Annual Reports or the Workplans, the Permittees shall propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer. The Workplans and Updates shall be deemed to be final and incorporated into the Management Plan and this Order as of June 1 unless previously determined to be unacceptable by the Executive Officer.<sup>381</sup>

The prior permit governing the Santa Clara permittees (Order 01-124) contained the following findings and provisions:

- The 1997 Urban Runoff Management Plan describes the framework for management of stormwater discharges during the term of the permit. The Plan had to contain several components, including plans for monitoring and Performance Standards. Performance Standards represent the baseline level of effort required of each Discharger and are contained in Appendix A of the 1997 Management Plan.<sup>382</sup>
- The Program and the Dischargers will on a continuous basis conduct and document peer review and evaluation of each relevant element of each Dischargers program and revise activities, control measures, Best Management Practices (BMPs) and Performance Standards. These changes will be documented in the Annual Report “and will be considered an enforceable component of this Order.”<sup>383</sup>
- The Dischargers shall comply with Discharge Prohibition A and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions to reduce pollutants in the discharge in accordance with the Management Plan and other requirements of this permit, including any modifications.<sup>384</sup>

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<sup>380</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1867-1868 (Attachment 53, Order R2-2003-0021, Section C.2.a. and b.).

<sup>381</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1881-1882 (Attachment 53, Order R2-2003-0021, Section 7.a.).

<sup>382</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074 (Attachment 60, Order 01-124, Findings 6, 7).

<sup>383</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2075 (Attachment 60, Order 01-124, Finding 8).

<sup>384</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2083-2084 (Attachment 60, Order 01-124, Section C.1.).

- The Dischargers shall implement the Management Plan, and shall, through its continuous improvement process, subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1 through C.10 of this Order.<sup>385</sup>
- The Dischargers shall incorporate newly developed or updated Performance Standards, acceptable to the Executive Officer, into applicable annual revisions to the Management Plan and adhere to implementation of the new/revised Performance Standards. Following the addition or revision of a Performance Standard, acceptable to the Executive Officer, the Dischargers for which the Performance Standard is applicable shall adhere to its implementation.<sup>386</sup>
- In each Annual Report, the Dischargers may propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer.<sup>387</sup>
- By March 1 of the year following the submission of each Annual Report, the Dischargers shall submit draft Workplans that describe the proposed implementation of the Management Plan and the Watersheds 2000 Vision Statement for the next fiscal year. The Workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer.<sup>388</sup>

The prior permit governing the Fairfield-Suisun permittees (Order R2-2003-0034) contained the following findings and provisions:

- The Management Plan (Storm Water Management Plan: FY 1999-2000 to FY 2004-2005), including the performance goals, is incorporated in the Permit by reference and enforceable as such, and is considered an enforceable component of this Order.<sup>389</sup> Performance goals are defined as the level of implementation

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<sup>385</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2084-2085 (Attachment 60, Order 01-124, Section C.2.a.).

<sup>386</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2085 (Attachment 60, Order 01-124, Section C.2.b.).

<sup>387</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2087 (Attachment 60, Order 01-124, Section C.6.a.).

<sup>388</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2089 (Attachment 60, Order 01-124, Section C.6.b.).

<sup>389</sup> Exhibit BB (27), Order R2-2003-0034, page 5 (Finding 10).

necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable.<sup>390</sup>

- The Permittees shall incorporate newly developed or updated performance goals, acceptable to the Executive Officer, into applicable annual revisions to the Management Plan and adhere to implementation of any new or revised performance goals. Following the addition or revision of a performance goal, acceptable to the Executive Officer, the Permittees for which the performance goal is applicable shall adhere to its implementation.<sup>391</sup>
- In the Annual Reports, the Permittees shall propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer.<sup>392</sup>

The prior permit adopted by U.S. EPA governing the Vallejo permittees (Order CAS612006) contained the following findings and provisions:

- The permittee shall implement in its entirety the “Vallejo Sanitation and Flood Control District Storm Water Management Plan.” All storm water pollution control measures identified in the SWMP [stormwater management plan] shall be implemented, including existing and proposed measures, and any modifications to the SWMP made during the term of this permit. Proposed control measures shall be implemented in accordance with the implementation schedules provided in the SWMP, with the effective date of the permit serving, at a minimum, as the starting date for the implementation schedule.<sup>393</sup>
- The permittee shall comply with the discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in the discharges “in accordance with the SWMP and other requirements of this permit including any modifications.”<sup>394</sup>

The prior permits for San Mateo (99-059) and Contra Costa (99-058) contained the following provisions, making their stormwater management plans (San Mateo Stormwater Management Plan July 1998-June 2003 and the Contra Costa Stormwater Management Plan 1999-2004) and work plans enforceable components of the prior permits:

- The stormwater management plan and modifications or revisions to the plan that are approved in accordance with Provisions . . . of this Order [allowing the Executive Officer to approve minor changes to the plan], and future work plans to

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<sup>390</sup> Exhibit BB (27), Order R2-2003-0034, page 19 (Section C.2.a.).

<sup>391</sup> Exhibit BB (27), Order R2-2003-0034, pages 19-20 (Section C.2.b.).

<sup>392</sup> Exhibit BB (27), Order R2-2003-0034, page 35 (Section C.6.a.).

<sup>393</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 3, 8.

<sup>394</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 4.

be submitted in accordance with the plan and Provision C.5. of this Order “are an integral and enforceable component of this Order.”<sup>395</sup>

- “Stormwater Management Plan: The Dischargers [i.e., permittees] shall implement BMPs to reduce pollutants in stormwater discharges to the maximum extent practicable. The Plan shall serve as the framework for identification, assignment, and implementation of BMPs.” The Dischargers shall immediately begin implementing the Plan and shall subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable.<sup>396</sup>
- “Performance Standards represent the level of effort required of each Discharger in the Plan and have been included in the Plan as best management practices (BMPs). The specification of Performance Standards as BMPs also simplifies the task of determining if a Discharger is putting forth a level of effort which will control pollutants in stormwater discharges to the maximum extent practicable.”<sup>397</sup>
- The annual work plans shall be submitted with the annual report, which shall be enforceable under the permit unless determined to be unacceptable by the Executive Officer.<sup>398</sup>

The San Mateo and Contra Costa permits were challenged in *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527.<sup>399</sup> The court found the provisions in the permits that allowed the Executive Officer to approve changes and substantive revisions to the stormwater management plans, without notice or an opportunity for public comment, were

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<sup>395</sup> San Mateo (Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1944-1945 (Attachment 55, Order 99-059, Findings 6-7); Exhibit BB (25), Order 99-058, page 3 (Findings 6-7).

<sup>396</sup> San Mateo (Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1950-1951 (Attachment 55, Order 99-059, Section C.3.); Exhibit BB (25), Order 99-058, page 9 (Section C.3.).

<sup>397</sup> San Mateo (Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1945,1951 (Attachment 55, Order 99-059, Finding 8, Section C.4.); Exhibit BB (25), Order 99-058, pages 3, 9 (Finding 8, Section C.4.).

<sup>398</sup> San Mateo (Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1951-1951 (Attachment 55, Order 99-059, Sections C.6., C.7.); Exhibit BB (25), Order 99-058, page 10 (Sections C.6., C.7.).

<sup>399</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527.)

unlawful.<sup>400</sup> A writ of mandate was issued requiring the Regional Board to modify the permits in accordance with its decision, which the Regional Board did in a series of permit amendments. Specifically, Orders R2-2004-0059 (Contra Costa) and R2-2004-0060 (San Mateo), which were adopted on July 21, 2004, rescinded and vacated past administrative changes to the stormwater management plans that were not subject to a public process or Regional Board action and adopted the permittees' monitoring plans as part of the permit.<sup>401</sup> Orders R2-2004-0061 (Contra Costa) and R2-2004-0062 (San Mateo), which were also adopted on July 21, 2004, approved and adopted the modifications to the stormwater management plans that were previously pending with, or approved by the Executive Officer.<sup>402</sup>

It is important to note the stormwater management plans incorporated by reference into the prior permits for San Mateo and Contra Costa (San Mateo Stormwater Management Plan July 1998-June 2003 and the Contra Costa Stormwater Management Plan 1999-2004) were not set aside by the court, but were upheld as follows:

**Petitioner's Fourth Cause of Action Fails.** Petitioner failed to address this cause of action . . . in its opening brief. Even if this claim had been raised, it still would have failed as a matter of law. Petitioner asserts that the Permits do not establish standards which reduce pollutants to the maximum extent practicable (MEP). Petitioner argues that the Permits rely on an iterative process whereby standards will be determined in the future, instead of being part of the Permit as approved. Petitioner cites to sections C.3 and C.4 of the Permits to illustrate its argument. Petitioner, however, selectively quotes from these sections and fails to acknowledge that, in both provisions, MEP standards are set forth by referring to the Stormwater Management Plan, which is incorporated into the Permits. For example C.3. states the Dischargers "shall implement BMPs referred to as Performance Standards in the Plan, to reduce pollutants in stormwater discharges to the maximum extent practicable." These are established standards designed to reduce pollutants to the MEP and which are part of the Permits as approved. Both C.3 and C.4 do allow and

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<sup>400</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, pages 1340-1342 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527), and page 1994 (Attachment 57, Order 2004-0060 (Finding 4)); Exhibit BB (28), Order 2004-0059, page 2.

<sup>401</sup> Exhibit BB (28), Order R2-2004-0059, pages 5, 7-8; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1994, 1996 (Attachment 57, Order R2-2004-0060).

<sup>402</sup> Exhibit BB (29), Order R2-2004-0061, pages 5-6; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2017-2018 (Attachment 58, Order R2, 2004-0062).

provide for future modifications and improvements in the standards, but this is not a failure to establish any standards at the time the Permits were approved.<sup>403</sup>

In addition, each of the prior permits made the permittees' monitoring plans enforceable.<sup>404</sup>

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<sup>403</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1340-1341 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>404</sup> Santa Clara's prior permit, in Section C.7., required the monitoring plan and the annual monitoring plans to be submitted and acceptable to the Executive Officer of the Regional Board, which, following approval, "shall be implemented." In addition, by March 1 of the year following the submittal of the annual report, the permittees were required to submit workplans, which had to include "alternative monitoring activities as required by Provision C.7." "The workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer." (Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2087, 2089-2090 (Attachment 60, Order 01-024).

Alameda's prior permit (Order R2-2003-0021) required that the monitoring plans be approved by the executive officer and that any updates to the plan "shall be deemed to be final and incorporated into the Management Plan . . . unless determined to be unacceptable by the Executive Officer." The Management Plan was "incorporated in the Permit by reference and enforceable as such, and is considered an enforceable component of this Order." (Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1853, 1883, 1885 (Attachment 53, Order R2-2003-0021)).

Fairfield Suisun's prior permit required that the monitoring plan be acceptable to the Executive Officer of the Regional Board and any updates to the monitoring plan shall be included in the annual report, which were made an enforceable part of the permit; ("In the Annual Reports, the Permittees shall propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer . . ."). (Exhibit BB (27), Order R2-2003-0034, pages 35, 38).

San Mateo's 2003 permit attaches the monitoring plan as Attachment A and provides that "[t]his amendment will add the Monitoring Requirements to the Permit, as required by the Court [in *Baykeeper*]." (Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1994 (Attachment 57, Order R2-2004-0060, Finding 6).



Despite the plain language of the prior permits and the court's order in *Baykeeper*, the claimants contend the stormwater management plans should not be considered prior law because the plans "could have been abandoned" by the permittees as follows:

The Water Board errs by comparing the requirements of the New Permit to the practices that San Jose adopted in the 2004 Urban Runoff Management Plan. [Fn. omitted.] Although the Management Plan contains many provisions similar to those in the New Permit, the City could have abandoned the practices set forth in it and adopted different ones in a subsequent Management Plan if appropriate alternatives were found. [Fn. omitted.] Unlike the 2004 Management Plan, the New Permit codifies specific actions that the City must take from now on.<sup>405</sup>

However, each of the prior permits are final quasi-judicial decisions that were binding on the parties as prior law, and the stormwater management plans, work plans, monitoring plans, and the updates were made enforceable provisions of the prior permits.<sup>406</sup> The permittees could not, as suggested by the claimants, simply disregard those plans. All changes and updates were required to be approved by the executive officer or Regional Board. And, as indicated by the Regional Board, the stormwater management plans have been enforced by the Regional Board, including assessing civil liability penalties for failing to comply.<sup>407</sup>

Therefore, the requirements pled in the test claim permit are compared to the law in effect immediately before the adoption of the test claim permit, including the six prior

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Contra Costa's prior permit attaches the monitoring plan as Attachment A and provides that "[t]his amendment will add the Monitoring Requirements to the Permit, as required by the Court [in *Baykeeper*]." (Exhibit BB (28), R2-2004-0059, page 2 (Finding 6)).

Vallejo's prior permit stated: "The permittee shall implement the storm water monitoring program described in the documents listed in Part I.D.12 of this permit," and "The 'storm water monitoring program' consists of . . . Storm water monitoring program described in section 8 of the document entitled 'Vallejo Sanitation and Flood Control District Storm Water Management Plan' as updated in section 4 of the supplemental Part 2 permit application submitted to Region 9 on August 13, 1998." (Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8).

<sup>405</sup> Exhibit L, Claimant's Rebuttal Comments, 10-TC-05, page 5.

<sup>406</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>407</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, pages 13-17; Exhibit BB (34), Order R2-2011-0039, Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order, pages 7-9 (allegations Alameda County violated its permit and failed to comply with the performance standards in its stormwater quality management plan by discharging sediment-laden stormwater and polluted non-stormwater).

permits and the documents made enforceable by those permits, to determine if the activities required by the test claim permit are new.

**B. Some of the Permit Provisions Impose a State-Mandated New Program or Higher Level of Service.**

**1. Sections C.2.b., C.2.c., C.2.e., and C.2.f., Addressing Municipal Maintenance Activities, Do Not Mandate a New Program or Higher Level of Service.**

Section C.2. of the test claim permit lays out a series of requirements and best management practices (BMPs) to control and reduce non-stormwater and polluted stormwater discharges to the storm drains during the operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure.<sup>408</sup> The City of San Jose's Test Claim (10-TC-05) pleads Sections C.2.b., C.2.c., C.2.e., and C.2.f., which impose certain requirements and BMPs for sidewalk and plaza maintenance and pavement washing; bridge and structural maintenance and graffiti removal; rural road public works construction and maintenance; and corporation yard maintenance.<sup>409</sup> The claimant argues the test claim permit mandates new, detailed BMPs, rather than allow the permittees to develop performance standards with input from their own community and, thus, Sections C.2.b., C.2.c., C.2.e., and C.2.f. mandate a new program or higher level of service.<sup>410</sup>

The Regional Board argues the requirements in Sections C.2.b., C.2.c., C.2.e., and C.2.f. are not new, but were required by the permittees' local stormwater management plans, annual reports, and annual work plans, which were approved and required to be implemented by the prior permits.<sup>411</sup>

The Commission finds the activities required by Sections C.2.b., C.2.c., C.2.e., and C.2.f. of the test claim permit are not new and do not mandate a new program or higher level of service.

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<sup>408</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2).

<sup>409</sup> Exhibit C, Test Claim, 10-TC-05, pages 27-31.

<sup>410</sup> Exhibit C, Test Claim, 10-TC-05, pages 28-29; Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision, pages 3-7.

<sup>411</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, page 3.

- a. Federal law requires local government permittees to identify controls, including best management practices, to reduce the discharge of pollutants from their municipal facilities and requires the permittees to prohibit non-stormwater discharges into the storm sewers.

For purposes of background, the CWA prohibits the discharge of any pollutant into the waters of the United States from any point source without a permit.<sup>412</sup> To comply with this prohibition, the CWA requires NPDES permits shall require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including best 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.<sup>413</sup> The CWA also requires permittees to effectively prohibit illicit, non-stormwater discharges into storm sewers in order to meet water quality standards.<sup>414</sup>

Applications for an NPDES permit require “[a] description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented.”<sup>415</sup>

The application shall also contain a proposed management program to reduce the discharge of pollutants to the MEP using best management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.<sup>416</sup> The proposed management program shall contain a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas discharged from the MS4 to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

- A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers.
- 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 municipal storm sewer systems.

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<sup>412</sup> United States Code, title 33, section 1311(a).

<sup>413</sup> United States Code, title 33, section 1342(P)(3)(B)(ii).

<sup>414</sup> United States Code, title 33, section 1342(P)(3)(B)(iii).

<sup>415</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(v)(A).

<sup>416</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

- A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible.
- 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 other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.<sup>417</sup>

NPDES permits are required to include limitations to “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”<sup>418</sup>

Federal law also requires the permittee to have existing legal authority to control stormwater discharges and prohibit illicit discharges to the MS4.<sup>419</sup>

And federal law requires each permittee to submit an annual report to the Regional Board, which shall include the status of implementing the components of the storm water management program that are established as permit conditions; proposed changes to the stormwater management programs, and the identification of water quality improvements or degradation.<sup>420</sup>

Thus, federal law requires local government permittees to identify controls, including best management practices, to reduce the discharge of pollutants from their municipal facilities and requires the permittees to prohibit non-stormwater discharges into the storm sewers.

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<sup>417</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A).

<sup>418</sup> Code of Federal Regulations, title 40, section 122.44(d)(1)(i).

<sup>419</sup> Code of Federal Regulations, title 40, section 122.26(d)(1), (d)(2).

<sup>420</sup> United States Code, title 33, section 1342(a)(2) (“The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.”); Code of Federal Regulations, title 40, section 122.42(c).

- b. The requirements in Sections C.2.b., C.2.c., C.2.e., and C.2.f. of the test claim permit do not constitute a state-mandated new program or higher level of service.

Section C.2. addresses the operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure developed by local government.<sup>421</sup> As explained below, the requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f. do not constitute a state-mandated program, are not new, and some requirements are not unique to government and do not provide a governmental service to the public. Therefore, Sections C.2.b., C.2.c., C.2.e., and C.2.f. do not mandate a new program or higher level of service.

- i. *The requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f. are not mandated by the state but are triggered by the voluntary decisions of local government to develop and maintain municipal facilities and infrastructure.*

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.<sup>422</sup> When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.<sup>423</sup>

Thus, the issue is whether the underlying decision of the claimants to develop and maintain municipal facilities and infrastructure is mandated by the state or is a discretionary decision of local government. Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning of article XIII B, section 6.<sup>424</sup>

The courts have identified two distinct theories for determining whether a program is compelled or mandated by the state: legal compulsion and practical compulsion.<sup>425</sup> In the recent case of *Coast Community College Dist. v. Commission on State Mandates*

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<sup>421</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.).

<sup>422</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731.

<sup>423</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

<sup>424</sup> *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1365-1366.

<sup>425</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

(2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service... Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.

Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.<sup>426</sup>

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“[P]ractical compulsion,” [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.<sup>427</sup>

And in *Coast Community College Dist.*, the California Supreme Court rejected the conclusion that local government is legally compelled to comply with a test claim statute or executive order when the statute or executive order applies to the agency’s underlying core functions.<sup>428</sup> Legal compulsion is present only when the local entity has a mandatory, legally enforceable duty to obey.<sup>429</sup>

Thus, in the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show 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

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<sup>426</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, internal quotation marks and citations omitted.

<sup>427</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

<sup>428</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

<sup>429</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

state.<sup>430</sup> Substantial evidence in the record is required to make a finding of practical compulsion.<sup>431</sup>

State law does not impose a legal obligation on local agencies to construct, expand, or improve municipal facilities and infrastructure; instead, state law provides local government the authority and discretion to do so.<sup>432</sup> Thus, all costs incurred by a permittee to comply with Section C.2. of the test claim permit can be analogized to *City of Merced v. State* (1984) 153 Cal.App.3d 777. In *City of Merced*, the statute at issue required a local government, when exercising the power of eminent domain to acquire property for public use, to compensate a business owner for the loss of business goodwill as part of compensating for the property subject to the taking.<sup>433</sup> 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.<sup>434</sup>

Similarly, in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)*, the statute at issue required certain local school committees to comply

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<sup>430</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

<sup>431</sup> *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.

<sup>432</sup> For example, see Government Code section 23004 (counties may purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code section 37111 (“When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it may adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use”); Streets and Highways Code section 1800 (“The legislative body of any city may do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway.”); and Streets and Highways Code section 1801 (“The legislative body of any city may close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or may make provision for carrying such street or highway over, under, or to a connection with the freeway, and may do any and all necessary work on such street or highway.”).

<sup>433</sup> *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

<sup>434</sup> *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

with notice and agenda requirements in conducting their public meetings.<sup>435</sup> There, the court rejected the claimants' assertion that they had been legally compelled to incur notice and agenda costs, and hence were entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled.<sup>436</sup> 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.<sup>437</sup> 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."<sup>438</sup> However, the court held that "[c]ontrary to the situation that we described in *City of Sacramento v. State* (1990) 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."<sup>439</sup>

Nor is there any evidence in the record that local agencies are practically compelled to develop, construct, repair, or maintain municipal facilities and infrastructure, and that if they fail to do so, they would be subject to "certain and severe...penalties" such as "double...taxation" or other "draconian" consequences, as required by the court in *Department of Finance v. Commission on State Mandates (POBRA)*.<sup>440</sup> The

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<sup>435</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 732.

<sup>436</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731.

<sup>437</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744-745.

<sup>438</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 753.

<sup>439</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74 (The "certain and severe...penalties" and "double...taxation" referred to the situation in *City of Sacramento* in which the state was compelled, by the potential loss of *both* federal tax credits *and* subsidies provided to businesses statewide, to impose mandatory unemployment insurance coverage on public agencies consistent with a change in federal law.).

<sup>440</sup> *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).



Commission's regulations require that all written representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief.<sup>441</sup>

The City of San Jose contends, however, the permittees are practically compelled and thus mandated by the state to comply with the requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f. since public entities do not voluntarily participate in a program when they construct, expand, or maintain public property and, thus, the downstream requirements are mandated by the state. The City of San Jose alleges that cities and counties have a Constitutional right to "establish, purchase, and operate public works" to furnish residents with "light, water, power, heat, transportation, or means of communication." Thus, construction and maintenance of public works is an essential function of local government and necessary for public health, safety, and welfare. Relying on a finding in the 2022 *Department of Finance* case, that local governments are practically compelled to provide storm drainage systems, the claimants allege that deciding not to provide new public works or maintain existing ones is "so far beyond practical reality" that public entities are compelled to act.<sup>442</sup>

At issue before the court in the 2022 *Department of Finance* case was whether the County of San Diego and cities within the San Diego region, as operators of municipal separate storm sewer systems (MS4s), which are operated exclusively by government entities, were entitled to reimbursement for the requirements imposed in a NPDES stormwater permit.<sup>443</sup> The State argued the permit did not require local government to operate an MS4 and, thus, compliance with the permit did not constitute a program within the meaning of article XIII B, section 6.<sup>444</sup> The court found that the decision to obtain a permit was not truly voluntary because local government could not decide to opt-out of providing a stormwater drainage system ("In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all) and therefore the local government permittees were practically

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<sup>441</sup> California Code of Regulations, title 2, sections 1183.1(e), 1187.5(b).

<sup>442</sup> Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision, pages 3-5, citing *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558, and article XI, section 9(a) of the California Constitution, which states the following: "A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent."

<sup>443</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 555.

<sup>444</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 557.

compelled to obtain a permit.<sup>445</sup> The court made that decision without any evidence in the record, but the finding was expressly limited to stormwater drainage systems and the court determined that not providing a stormwater drainage system is no alternative at all.

While permittees at some point in the past chose to provide a stormwater drainage system, “[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.” (*New Orleans Gaslight Co. v. Drainage Com. of New Orleans* (1905) 197 U.S. 453, 460, 25 S.Ct. 471, 49 L.Ed. 831.) In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all. It is “so far beyond the realm of practical reality” that it left permittees “without discretion” not to obtain a permit.<sup>446</sup>

That holding may hold true for certain municipal projects, like stormwater drainage systems, as indicated by the court. However, local discretion for public projects is broad, as reflected by the court’s decision in *City of Merced*.<sup>447</sup> Without any evidence or showing in the record that a specific project “is one of the most important purposes” for which local government authority can be exercised and that it is “so far beyond the realm of practical reality” for local government not to have a particular municipal project, the Commission cannot make a finding of practical compulsion in the abstract or with respect to all municipal properties and facilities.

Accordingly, based on this record, the Commission finds that the downstream requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f. are not mandated by the state.

Moreover, even if a court were to disagree with this mandate finding, the requirements imposed by Sections C.2.b., C.2.c., C.2.e., and C.2.f. are not new, but were required by prior law and the permittees’ management plans that were made enforceable by the prior permits and some requirements are not unique to government and do not provide a governmental service to the public. Thus, the requirements do not impose a new

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<sup>445</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

<sup>446</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

<sup>447</sup> See also, California Constitution, article XI, section 7, which states: “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;” and *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737 (“This inherent local police power [in article XI, section 7] includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction’s borders.”).

program or higher level of service and, thus, reimbursement is denied for these activities.

- ii. *The requirements imposed by Section C.2.b., Sidewalk/Plaza Maintenance and Pavement Washing, are not new and do not impose a new program or higher level of service.*

Provision C.2.b. of the test claim permit imposes the following requirements:

- The permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.<sup>448</sup>
- The permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program.<sup>449</sup> The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted to do so).<sup>450</sup>
- The permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.<sup>451</sup>
- The permittees shall report on implementation of and compliance with these BMPs in their Annual Report.<sup>452</sup>

The City of San Jose contends these requirements are new because the permit removes the permittees' ability to determine what is and how to comply with the maximum extent practicable (MEP) standard and to develop and implement the appropriate best management practices (BMPs) to reduce or control pollution.<sup>453</sup>

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<sup>448</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.).

<sup>449</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.).

<sup>450</sup> Exhibit BB (8), BASMAA Mobile Cleaner Brochure <http://www.cccleanwater.org/pdfs/MobileCleanerBrochure.pdf> (accessed November 8, 2023).

<sup>451</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.).

<sup>452</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test claim permit, Section C.2.b.).

<sup>453</sup> Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision, pages 5-7.

The Regional Board contends these requirements are not new but were in the permittees' previous stormwater management plans that were made enforceable by the prior permits. In addition, the Regional Board argues that the requirements are the same as those in the 1993 CASQA Stormwater Municipal Best Practices Handbook.<sup>454</sup>

The Commission finds the requirements in Section C.2.b. are not new for any of the permittees. The permittees were required by their local stormwater management plans to perform the same activities and those requirements were made enforceable by their prior permits as described below.

### Santa Clara

The prior permit issued to the Santa Clara permittees (Order 01-124) imposed the following receiving water limitations and discharge prohibitions on the permittees:

- 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:
  - Floating, suspended, or deposited macroscopic particulate matter, or foam;
  - Bottom deposits or aquatic growth;
  - Alteration of temperature, turbidity, or apparent color beyond present natural background levels;
  - Visible, floating, suspended, or deposited oil or other products of petroleum origin; or
  - Substances present in concentrations or quantities which will cause deleterious effects on aquatic biota, wildlife, or waterfowl, or which render any of these unfit for human consumption.
- The discharge shall not cause or contribute to a violation of any applicable water quality standard for receiving waters contained in the Regional Board Basin Plan.<sup>455</sup>

The prior permit required the permittees to comply with the receiving water limitations and discharge prohibitions by implementing control measures and BMPs to reduce pollutants in the discharge to the MEP in accordance with their Management Plan.<sup>456</sup> The Management Plan consisted of the "Program's 1997 Urban Runoff Management Plan, the Dischargers' updated Urban Runoff Management Plans, the Program's

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<sup>454</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, page 43.

<sup>455</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2083 (Attachment 60, Order 01-124, Sections A. and B.).

<sup>456</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2083-2085 (Attachment 60, Order 01-024, Sections C.1. and C.2.).

Watershed 2000 Vision statement, the Dischargers' updated Memorandum of Agreement and Bylaws for Program Funding and Management, and the Program's and Dischargers' Annual Reports for FY 1999/00 and Workplans for FY 2000/01.”<sup>457</sup> The intent of the Management Plan was to reduce the discharge of pollutants in stormwater to the MEP and in a manner designed to achieve water quality standards and objectives, and effectively prohibit non-stormwater discharges into the municipal storm drain systems.<sup>458</sup> In addition, the “Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs.”<sup>459</sup>

The Management Plan contained model performance standards, which “represented the baseline level of effort required of each of the Dischargers.”<sup>460</sup> Each permittee’s urban runoff management plan was required to incorporate the model performance standards or modify them to suit local conditions if they justified why the modification was necessary.<sup>461</sup> The permittees’ program was subject to continuous review and improvement of control measures, BMPs, and performance standards, which had to be documented in their annual reports and were “considered an enforceable component of this Order.”<sup>462</sup>

The Dischargers shall implement the Management Plan, and shall, through its continuous improvement process, subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1 through C.10 of this Order.<sup>463</sup>

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<sup>457</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074 (Attachment 60, Order 01-024, Finding 6).

<sup>458</sup> Exhibit I, Regional Board’s Comments on Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074 (Attachment 60, Order 01-024, Finding 6).

<sup>459</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2074, 2084-2085 (Attachment 60, Order 01-024, Finding 7 and Section C.2.).

<sup>460</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2074 (Attachment 60, Order 01-024, Finding 7).

<sup>461</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2074 (Attachment 60, Order 01-024, Finding 7); Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 41.

<sup>462</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2075 (Attachment 60, Order 01-024, Finding 8).

<sup>463</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2084-2085 (Attachment 60, Order 01-024, Section C.2.a.).

The model performance standards for Public Streets, Roads and Highways, and for Public Facilities required “[e]ach municipal agency will implement best management practices (BMPs) for the street, road, and highway operation and maintenance . . . activities that it is responsible for conducting, in order to reduce pollutants in storm water to the maximum extent practicable and eliminate illicit discharges.”<sup>464</sup> The 1997 Santa Clara Valley Urban Runoff Management Plan required each municipal agency develop and implement a process for ensuring that any contractor that it employs to conduct street, road, and highway maintenance activities uses the appropriate BMPs adopted by the agency, and that other parties conducting street, road, and highway maintenance activities within the municipal agency’s jurisdiction implement BMPs to reduce pollutants in stormwater to the MEP and eliminate illicit discharges.<sup>465</sup>

As indicated above, the test claim permit requires the permittees to implement BMPs, including those in the BASMAA’s Mobile Surface Cleaner Program, for pavement washing and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.<sup>466</sup> The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted to do so).<sup>467</sup> The 1997 Santa Clara Valley Urban Runoff Management Plan required the permittees to perform the same activities as follows:

- Define the street sweeping program and set priorities for sweeping frequency based on factors such as traffic volume, land use, proximity to watercourses, and field observations of material accumulation.<sup>468</sup>
- Provide proper containment and placement for the temporary storage of material removed from streets to prevent discharges of pollutants to surface waters or groundwater. Do not store swept material near creeks or sensitive habitats.<sup>469</sup>

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<sup>464</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 176, 191 et seq.

<sup>465</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 176.

<sup>466</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test claim permit, Section C.2.b.i.).

<sup>467</sup> Exhibit BB (8), BASMAA Mobile Cleaner Brochure <http://www.cccleanwater.org/pdfs/MobileCleanerBrochure.pdf> (accessed November 8, 2023).

<sup>468</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 191.

<sup>469</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192.

- When materials are saturated with water, dewatering will be done in an area that does not drain to the storm drains or creeks.<sup>470</sup>
- Provide proper disposal of street sweeping material.<sup>471</sup>
- Evaluate the need for wet cleaning or flushing on a case-by-case basis and where possible, substitute dry methods.<sup>472</sup>
- Where absolutely necessary to use water to clean streets, collect the resulting washwater and dispose of it in the sanitary sewer (after contacting the local wastewater treatment agency for permission to discharge to the sanitary sewer and information on any pretreatment requirements for the discharge). Collect the washwater using methods such as: (a) plug catch basin outlets or cover storm drains before flushing, and pump out all collected washwater, or (b) allow washwater to flow into the storm drain and collect it downstream at a storm drain clean out or manhole.<sup>473</sup>
- Use dry methods (e.g., sweeping or vacuuming) whenever practical to clean sidewalks and plazas rather than hosing, pressure washing, or steam cleaning.<sup>474</sup>
- If water must be used to clean sidewalks or plazas, implement BMPs in the “Bay Area Stormwater Management Agencies Associations” *Pollution From Surface Cleaning*” to reduce soap, oil and other pollutants in stormwater to the MEP and eliminate illicit discharges.<sup>475</sup>

The test claim permit also requires the permittees to coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.<sup>476</sup> The 1997 Santa Clara Valley Urban Runoff Management Plan required the permittees to perform the same activities as follows:

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<sup>470</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192.

<sup>471</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192.

<sup>472</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192.

<sup>473</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 193.

<sup>474</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 197.

<sup>475</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 197. See also, pages 216-220 for “The Bay Area Stormwater Management Agencies Associations *Pollution From Surface Cleaning*.”

<sup>476</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test claim permit, Section C.2.b.i.).

- Contact the local wastewater treatment agency for permission to discharge to the sanitary sewer and information on any pretreatment requirements for the discharge.<sup>477</sup>
- Clean sweepers at a wash rack with a sump that discharges to the sanitary sewer or to a recycling system.<sup>478</sup>

Finally, Provision C.2.b. of the test claim permit requires the permittees to report on the implementation of and compliance with these BMPs in their Annual Report.<sup>479</sup> The 1997 Santa Clara Valley Urban Runoff Management Plan imposed the same requirement: “As part of the annual reporting process, each co-permittee will review and evaluate the effectiveness of its BMPs in achieving the goals of reducing pollutants in storm water to the maximum extent practicable and eliminating illicit discharges. The review and evaluation will include input from municipal maintenance staff that implement the BMPs.”<sup>480</sup>

The 2004 Santa Clara Urban Runoff Management Plan contains the same requirements.<sup>481</sup>

And the City of San Jose’s Urban Runoff Management Plan indicates that the City implemented the model performance standards included in the 1997 Santa Clara Valley Urban Runoff Management Plan.

Section C.2. pursuant to NPDES Permit CA S029718, requires the City to submit, to the Executive Officer of the Water Board, a program element that identifies control measures to reduce pollutants in stormwater discharges from Public Streets, Roads, and Highways Operations and Maintenance. “Model” Performance Standards were developed by SCVURPPP [Santa Clara Valley Urban Runoff Pollution Prevention Plan], including provisions to routinely remove pollutants from City streets via street sweeping operations, as well as to control pollutants from regular operation and maintenance activities by carefully controlling water runoff from work activities and spills.

The City has been implementing Public Streets, Roads and Highways model BMPs and SOPs from the SCVURPPP Performance Standards as part of ongoing permit compliance efforts. These measures and their

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<sup>477</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192, footnote 2, and page 193, footnote 1.

<sup>478</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 192.

<sup>479</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test claim permit, Section C.2.b.).

<sup>480</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 176.

<sup>481</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5934-5936, 5940 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).



associated work plans are designed to provide measurable and systematic approach to ensure compliance with the letter and intent of the permit.<sup>482</sup>

As indicated above, these requirements represented “the baseline level of effort” required of each permittee under the prior permit and, thus, it can be presumed that each permittee in Santa Clara County subject to Order 01-024 complied with these requirements.<sup>483</sup>

Therefore, the requirements in Provision C.2.b. of the test claim permit are not new with respect to the Santa Clara permittees.

### Alameda

The prior permit issued to the Alameda County permittees (R2-2003-0021) incorporated by reference and made enforceable the 2001-2008 Alameda Countywide Stormwater Management Plan, including the performance standards identified in the plan, “which represent the baseline level of effort required of each of the Permittees.”<sup>484</sup> The prior permit also made enforceable and part of the Management Plan “changes and updates to control measures, Best Management Practices, and Performance Standards . . . documented in the Annual Report” following Regional Board approval.

The Program and the Permittees are committed to a process of evaluating the effectiveness and improving the Performance Standards and plans contained in the Management Plan, which includes seeking new opportunities to control stormwater pollution and to protect beneficial uses. Changes and updates to control measures, Best Management Practices, and Performance Standards will be documented in the Annual Report and, following Regional Board approval, will be considered part of the Management Plan and an enforceable component of this Order.<sup>485</sup>

The permittees were required to implement the Management Plan to meet the receiving water limitations and discharge prohibitions, which required the permittees to “effectively prohibit the discharge of non-stormwater (materials other than stormwater) into the storm drain systems and watercourses” and to implement control measures to reduce

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<sup>482</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2523 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>483</sup> Evidence Code section 664 (“It is presumed that official duty has been regularly performed”).

<sup>484</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1853 (Attachment 53, Order R2-2003-0021, Findings 9 and 10).

<sup>485</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1854-1855 (Attachment 53, Order R2-2003-0021, Findings 15, 17).

pollutants in stormwater discharges to ensure water quality standards in receiving waters are met.<sup>486</sup>

The prior permit required the permittees to implement the municipal maintenance performance standards set forth in the Management Plan.<sup>487</sup> The prior permit explained that the work of municipal maintenance personnel is vital to minimize stormwater pollution, because personnel work directly on municipal storm drains and other municipal facilities, such as roads, parking lots, sidewalks, parks, and landscaping, and inspect and clean storm drain drop inlets as follows:

Provision C.5 requires the Permittees to implement the municipal maintenance Performance Standards as set forth in the Management Plan, including, but not limited to, activities as described below. The work of municipal maintenance personnel is vital to minimize stormwater pollution, because personnel work directly on municipal storm drains and other municipal facilities (e.g., roads, parking lots, sidewalks, parks, landscaping, etc.). Through work such as inspecting and cleaning storm drain drop inlets and pipes and appropriately conducting municipal construction and maintenance activities upstream of the storm drain, municipal maintenance personnel are directly responsible for preventing and removing pollutants from the storm drain. Maintenance personnel also play an important role in educating the public and in reporting and cleaning up illicit discharges.<sup>488</sup>

And the Management Plan required the following baseline performance standards:

- Each agency will ensure proper handling and disposal of material removed from streets and storm drainage facilities to prevent discharges of pollutants to surface waters or groundwater, and incorporate those standards into municipal contract specifications.<sup>489</sup>
- Each municipality will utilize, as appropriate, the Street Cleaning BMPs to maximize pollutant removal during sweeping activities. When purchasing new

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<sup>486</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867, 1881 (Attachment 53, Order R2-2003-0021, Sections A, B, C.2. and C.5.).

<sup>487</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021, Section C.5.).

<sup>488</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1861 (Attachment 53, Order R2-2003-0021, Finding 43).

<sup>489</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2418 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

sweepers, each municipality will review alternative equipment and new technologies to maximize pollutant removal.<sup>490</sup>

- When cleaning storm drainage facilities, each agency will remove the maximum amount of material at the nearest access point to minimize discharges to watercourses.<sup>491</sup>
- Each agency will clean all vehicles/equipment on designated wash pad areas or off-site if needed so washwater drains to the sanitary sewer or is recycled.<sup>492</sup>
- Each agency will ensure that all washwater drains to the sanitary sewer or recycling system when washing vehicles or equipment.<sup>493</sup>
- When there is an illicit discharge, agency staff will meet with the responsible party to discuss methods of eliminating the illicit discharge, including disposal options, recycling and “possible discharge to the sanitary sewer, as appropriate.”<sup>494</sup>

The 2003-2004 Annual Report submitted by the permittees identifies the “Best Management Practices for Mobile Cleaning Activities” published by the Alameda Countywide Clean Water Program for transportation-related washing; surface cleaning, including sidewalks, plazas, driveways, parking garages, and service stations; and mobile pet care, which was given to municipal staff.<sup>495</sup> The BMP brochure states the goal is keep only rain in the storm drain; “[k]eep pollutants from 1) contacting rain and;

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<sup>490</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2419 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>491</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2421 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>492</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2423 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>493</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2423 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>494</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2433 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>495</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, pages 18 (“Conducted outreach to municipal staff through bimonthly meetings of the Maintenance Subcommittee.”), 25 (“Printed BMP Brochure for distribution to Municipal Staff”, 311-315 (BMPs for Mobile Cleaning Activities)).

2) being dumped, blown, swept, washed, or poured into storm drains.”<sup>496</sup> The brochure lists many BMPs for several different types of situations, but the BMPs for sidewalks, plazas, drive-throughs, service stations, and garages are as follows:

- Sweep, collect, and dispose of debris. Dry clean oil spots and dispose of absorbent in trash. Place oil-absorbent boom around the storm drain.<sup>497</sup>
- If soap is used for areas that are not frequently cleaned, seal storm drains, then sweep, collect, and dispose of debris. Dry clean oil spots and dispose of absorbent “legally”. The washwater is then discharged to the sanitary sewer after approval.<sup>498</sup> “Discharge to sanitary sewer” means the following:
  - . . . discharge into sink, toilet, or sanitary system clean out.*Approval of the wastewater agency is needed* and may require:
  - compliance with local regulations or limits; initial sampling;
  - installation of pretreatment equipment; payment of connection fee;
  - and/or obtaining a wastewater discharge permit.<sup>499</sup>

The remaining BMPs for transportation-related and other municipal maintenance activities are similar, require protection of the storm drain in order to prevent the discharge of polluted wash water and non-stormwater to the storm drains, a dry clean-up first, and then discharge of the wash water to the sanitary sewer once approval is obtained or to the landscaping.<sup>500</sup>

The prior permit made updates to the BMPs identified in the annual report “part of the Management Plan and an enforceable component of this Order” following approval by the Regional Board.<sup>501</sup> There is no evidence in the record these BMPs were not approved.

Moreover, since these BMPs became part of the Management Plan and represented “the baseline level of effort” required of each permittee under the prior permit, it can be

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<sup>496</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, page 312.

<sup>497</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, page 312.

<sup>498</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, page 312.

<sup>499</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, page 315, emphasis added.

<sup>500</sup> Exhibit BB (4), Alameda Countywide Clean Water Program Annual Report 2003-2004, pages 313-315.

<sup>501</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1854-1855 (Attachment 53, Order R2-2003-0021, Findings 15, 17).

presumed each permittee in Alameda County subject to Order R2-2003-0021 complied with these requirements.<sup>502</sup>

Therefore, the Commission finds the activities required by Provision C.2.b. of the test claim permit are not new for the Alameda County permittees.

### Contra Costa

The prior permit issued to the Contra Costa permittees (Order 99-058) incorporated by reference and made enforceable the Stormwater Management Plan prepared by the Contra Costa Clean Water Program, including the performance standards identified in the plan, “which represent the level of effort required of each Discharger.”<sup>503</sup> Findings 7 through 9 state the following:

7. The Plan and modifications or revisions to the Plan that are approved in accordance with Provision C.11 and C.12 of this Order, and the Annual Format to be submitted in accordance with the Plan and Provision C.5 of this Order are an integral and enforceable component of this Order.
8. Performance Standards represent the level of effort required of each Discharger in the Plan and have been included in the Plan as best management practices (BMPs). The specification of Performance Standards as BMPs also simplifies the task of determining if a Discharger is putting forth a level of effort which will control pollutants in stormwater discharges to the maximum extent practicable.
9. Each Discharger is individually responsible for adopting and enforcing ordinances, implementing assigned BMPs to prevent and reduce pollutants in stormwater and providing funds for capital, operation, and maintenance expenditures necessary to implement such BMPs for the storm drain system that it owns and/or operates. Assigned BMPs to be implemented by each Discharger are listed as Performance Standards in the Plan. Enforcement actions concerning this Order will, whenever necessary, be pursued only against the individual Discharger(s) responsible for specific violations of this Order.<sup>504</sup>

Provisions C.3. and C.4. of the prior permit required the permittees to implement BMPs identified in the Management Plan to reduce pollutants in stormwater discharges to the MEP and to prohibit non-stormwater discharges. “The Dischargers shall begin implementing forthwith the Plan and shall subsequently demonstrate its effectiveness

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<sup>502</sup> Evidence Code section 664 (“It is presumed that official duty has been regularly performed”).

<sup>503</sup> Exhibit BB (25), Order 99-058, pages 1 and 3 (Findings 1, 7, and 8); Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004.

<sup>504</sup> Exhibit BB (25), Order 99-058, page 3.

and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1. through C.14 of this Order.”<sup>505</sup>

Provision C.5. then required the permittees to submit an annual report documenting the status of the Program’s activities during the previous year, an assessment of the effectiveness of the program, and any modifications to the Management Plan.<sup>506</sup> Modifications, including any performance standards or BMPs proposed in the Annual Report became enforceable under the prior permit, unless determined to be unacceptable by the executive officer: “In each Annual Report, the Dischargers may propose pertinent updates, improvements, or revisions to the Plan, which shall be complied with under this Order unless disapproved by the Executive Officer or acted upon in accordance with Provision C.11.”<sup>507</sup> As indicated above, the prior permit was challenged in *Baykeeper*, but the court found the incorporation of the original Management Plan into Order 99-058 was legally acceptable.<sup>508</sup>

As indicated above, the test claim permit requires the permittees to implement BMPs, including those in the BASMAA’s Mobile Surface Cleaner Program, for pavement washing and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.<sup>509</sup> The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted

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<sup>505</sup> Exhibit BB (25), Order 99-058, page 8.

<sup>506</sup> Exhibit BB (25), Order 99-058, page 10.

<sup>507</sup> Exhibit BB (25), Order 99-058, page 10.

<sup>508</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527). The court in *Baykeeper* also found since the Management Plan was an integral part of the permit, any modifications to the plan had to be approved by the Regional Board, after public notice and comment, and not by the executive officer. Pursuant to the court’s writ, Order R2-2004-0059 invalidated the modifications approved by the executive officer, and brought those changes to the Regional Board, which approved the modifications in R2-2004-0061. The changes, however, did not address the issues raised by Provision C.2.b. of the test claim permit. Exhibit BB (28), Order R2-2004-0059; Exhibit BB (29), Order R2-2004-0061.

<sup>509</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.).

to do so).<sup>510</sup> Although Contra Costa's Stormwater Management Plan does not expressly identify the BASMAA Mobile Surface Cleaner Program by name, it did impose the same BMP requirements as minimum performance standards, as follows:

- MUNI-19: Each agency will ensure proper handling and disposal of materials removed from streets to prevent discharges of pollutants to surface waters or groundwater.<sup>511</sup>
- MUNI-26: When sweeping over storm drain inlets, each agency will prevent pushing debris into the inlet.<sup>512</sup>
- MUNI 37: Instead of flushing streets and allowing water to drain into storm drain inlets when sweeping narrow streets where it is difficult to use a street sweeper or vacuum, each agency will:
  - A. Encourage residents to maintain streets by removing leaves, litter, etc.,
  - B. If flushing streets or sidewalks, the agency will protect the storm drain inlet. And remove materials using vacuum equipment or by some other appropriate means to remove residual material and water to the maximum extent practicable.<sup>513</sup>
- MUNI-53: Each agency will take reasonable and practicable measures to protect (such as tarps in work areas, sand bags, booms or barriers around stormwater inlets) the storm drain inlets prior to removing graffiti from . . . sidewalks, . . . needing graffiti abatement. The agencies will sweep up afterwards by sweeping or vacuuming thoroughly, and/or by using oil absorbent and properly disposing of the absorbent.<sup>514</sup>
- MUNI-54: No agency will discharge debris, cleaning compound waste, paint waste, or wash water containing cleaning compounds to the storm drain.<sup>515</sup>
- MUNI.55: Each agency will direct runoff from all types of sand blasting and high-pressure water (no cleaning agents) washing activities into a landscaped or dirt area. If a landscaped area is not available, each agency will filter runoff

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<sup>510</sup> Exhibit BB (8), BASMAA Mobile Cleaner Brochure <http://www.cccleanwater.org/pdfs/MobileCleanerBrochure.pdf> (accessed November 8, 2023).

<sup>511</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 74.

<sup>512</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 76.

<sup>513</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 79.

<sup>514</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 82.

<sup>515</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

through an appropriate filtering device (e.g., coarse sand bags or filter fabric to keep sand, particles, and debris out of storm drain).<sup>516</sup>

- MUNI 60: Each agency will dispose of cleaning compounds in accordance with the corporation yard's Stormwater Pollution Prevention Plan (SWPPP).<sup>517</sup>
- MUNI 79: Each agency will clean up all spills and leaks from other equipment and work site areas using “dry” methods” (absorbent materials and/or rags). The agency will properly dispose of absorbent materials and rags. If spills occur on dirt areas, the agency will dig up and remove contaminated soil properly in a timely basis.<sup>518</sup>
- MUNI 84: With respect to agency equipment clean-up and storage, agencies will use approved collection methods and “dispose of recycled waste materials at an appropriate waste facility.”<sup>519</sup>
- MUNI-97: Each agency will wash vehicles and equipment whether on-site or off-site so wash water drains to the sanitary sewer or is recycled. Each agency will ensure the on-site wash pad area and sump are large enough so that all wash water drains to the sanitary sewer or recycling system. The agency will regrade the area, if necessary, or install dikes to control wash water.<sup>520</sup>
- MUNI-119: Each agency will drain and replace motor oil and other fluids in a covered shop area. If fluids are changed outdoors, the agency will designate an area where there are no connections to storm drains or the sanitary sewer and where spills can be easily swept up.<sup>521</sup>
- MUNI-120: Each agency will periodically dry sweep the area.<sup>522</sup>

In addition, the annual report submitted by the Contra Costa Clean Water Program for fiscal year 2005-2006 attaches the BASMAA Mobile Surface Cleaner Program brochure referenced in the test claim permit, to show how to legally dispose of wash water down the sanitary sewer system if permitted to do so.<sup>523</sup> Thus, these activities are not new.

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<sup>516</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

<sup>517</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 84.

<sup>518</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 87.

<sup>519</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 87.

<sup>520</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 89.

<sup>521</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 93.

<sup>522</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 93.

<sup>523</sup> Exhibit BB (14), Contra Costa 2005-2006 Annual Report (Excerpts), pages 13, 17.



Since these BMPs became part of the Management Plan and represented “the level of effort required of each Discharger,”<sup>524</sup> it can be presumed each permittee in Contra Costa subject to Order 99-058 complied with these requirements.<sup>525</sup> The parties have not identified any evidence rebutting this presumption.

Provision C.2.b. of the test claim permit also requires the permittees to report on the implementation of and compliance with these BMPs in their Annual Report.<sup>526</sup> The prior permit imposed the same requirement. Provision C.5. of the prior permit required the permittees to submit an annual report documenting the status of the Program’s activities during the previous year and an assessment of the effectiveness of the program.<sup>527</sup>

Accordingly, the Commission finds the requirements in Provision C.2.b. of the test claim permit are not new with respect to the Contra Costa permittees.

### San Mateo

San Mateo County permittees joined together to form the San Mateo Countywide Stormwater Pollution Prevention Program (STOPPP, later SMCSPPP)<sup>528</sup> and created a Stormwater Management Plan.<sup>529</sup> The prior permit, Order 99-059, incorporated the Stormwater Management Plan and its amendments as enforceable components of the Prior Permit. Section 7 of the prior permit read:

The Plan and modifications or revisions to the Plan that are approved in accordance with Provision C.13 and C.14 of this Order, and future fiscal year Program Work Plans to be submitted in accordance with the Plan and Provision C.5 of this Order and are an integral and enforceable component of this Order.<sup>530</sup>

The prior permit required the permittees to submit annual reports “documenting the status of the Program’s and the Dischargers’ activities during the previous fiscal

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<sup>524</sup> Exhibit BB (25), Order 99-058, pages 1 and 3 (Findings 1, 7, and 8).

<sup>525</sup> Evidence Code section 664 (“It is presumed that official duty has been regularly performed”).

<sup>526</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 159-160 (Test claim permit, Section C.2.b.).

<sup>527</sup> Exhibit BB (25), Order 99-058, page 10.

<sup>528</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1943 (Attachment 55, Order No. 99-059, Finding 1).

<sup>529</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1944-1945 (Attachment 55, Order No. 99-059, Finding 6).

<sup>530</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1945 (Attachment 55, Order No. 99-059, Finding 7).

year.”<sup>531</sup> “In each Annual Report, the Dischargers may propose pertinent updates, improvements, or revisions to the Plan, which shall be complied with under this Order unless disapproved by the Executive Officer or acted upon in accordance with Provisions C.15.”<sup>532</sup>

The prior permit, Order 99-059, was at issue in *Baykeeper* and the court found modifications to San Mateo’s stormwater plan had to be approved by the Regional Board, after public notice and comment, and not by the executive officer.<sup>533</sup> Pursuant to the court’s writ, Order R2-2004-0060 invalidated the modifications previously approved by the executive officer, and brought those changes to the Regional Board, which approved the modifications in R2-2004-0062, including the approval of San Mateo’s Pollutant Prevention and Control Measures Plan, dated June 29, 2001 and revised January 20, 2004, which is attached to the Order, and which made the modifications enforceable components of the prior permit.<sup>534</sup> San Mateo’s Pollutant Prevention and Control Measures Plan requires the following BMPs with respect to surface cleaners:

- Sidewalks and Plazas - All soapy washwater used to clean sidewalks and plazas must be discharged to the sanitary sewer system or landscaping. Debris must be collected and disposed of prior to washing. This BMP does not apply to an area where there has been an oil or hazardous chemical spill. If surface cleaning is conducted without the use of soap and no oil or hazardous material/waste is present, all washwater may go to the storm drain. If the sidewalk or plaza contains light oil, dry clean oil spots with absorbents such as kitty litter, vermiculite, sand, or absorbent mats prior to cleaning. Collect and dispose of the debris.
- Drive-throughs, Driveways, Parking Garages, Service Stations- If these areas contain excess oil deposits, the procedure for cleaning, with or without soap, is as follows: (1) seal the storm drains; (2) collect and dispose of debris; (3) dry clean oil spots with absorbents; (4) pump wash water to a sanitary sewer system after obtaining permission from the sanitary sewer's owner.
- Building Exterior Walls - If soap is used, water must be discharged to the sanitary sewer system after obtaining permission from the sewer's owner. When washing

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<sup>531</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>532</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>533</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>534</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2016-2018 (Attachment 58, Order R2-2004-0062).

glass or steel buildings without the use of soap, washwater should be directed to unpaved surface/landscaped areas. If you are not using soap to clean a building that has been painted after 1978, wash water may be directed to unpaved landscaping. If you are cleaning buildings painted with lead-based paints or mercury-additive paints, all storm drains must be sealed and washwater must be pumped to a collection tank. The wastewater and sludge may have to be disposed of as hazardous waste.<sup>535</sup>

The plan also provides:

All STOPPP municipalities will follow the BMPs for surface cleaning that they conduct. STOPPP will support workshops/seminars for workers in surface cleaning industry to ensure that they have a clear understanding of the requirements. STOPPP will request that employers train/inform new employees about BMPs. STOPPP will distribute educational flyers prepared by BASMAA or others that update workers on any changes in the BMPs or laws.<sup>536</sup>

These are the same activities required by Section C.2.b. of the test claim permit and, therefore, the following activities are *not* new with respect to the San Mateo permittees:

- The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.
- The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted to do so).
- The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from

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<sup>535</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2047 (Attachment 58, Order R2-2004-0062 [Attachment, San Mateo Countywide Stormwater Pollution Prevention Program, June 29, 2001 (revised January 20, 2004)]).

<sup>536</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2047 (Attachment 58, Order R2-2004-0062, [Attachment, San Mateo Countywide Stormwater Pollution Prevention Program, June 29, 2001 (revised January 20, 2004)]).

these activities provided that appropriate approvals and pretreatment standards are met.<sup>537</sup>

In addition, Section C.2.b. of the test claim permit requires the permittees to report on implementation of and compliance with these BMPs in their Annual Report.<sup>538</sup> That requirement is not new. As indicated above, the prior permit, Order 99-059, required the permittees to submit annual reports “documenting the status of the Program’s and the Dischargers’ activities during the previous fiscal year.”<sup>539</sup>

### Fairfield/Suisun

The prior permit for the City of Fairfield, Suisun City, and the Fairfield-Suisun Sewer District, Order No. R2-2003-0034, explains these entities joined together to form the Fairfield-Suisun Urban Runoff Management Program (FSURMP).<sup>540</sup> The permittees, through FSURMP, created a Storm Water Management Plan for fiscal years 1999-2000 to 2004-2005.<sup>541</sup> The stormwater management plan, including performance goals that include “baseline components to be accomplished,” were incorporated into the permit and became an enforceable component of the prior permit.<sup>542</sup>

Section C.2.b. of the test claim permit requires the following activities:

- The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.
- The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted to do so).

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<sup>537</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.); Exhibit BB (8), BASMAA Mobile Cleaner Brochure [http://www.cccleanwater.org/\\_pdfs/MobileCleanerBrochure.pdf](http://www.cccleanwater.org/_pdfs/MobileCleanerBrochure.pdf) (accessed November 8, 2023).

<sup>538</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test claim permit, Section C.2.b.).

<sup>539</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>540</sup> Exhibit BB (27), Order R2-2003-0034, Finding 2, page 4.

<sup>541</sup> Exhibit BB (27), Order R2-2003-0034, Finding 7, page 5.

<sup>542</sup> Exhibit BB (27), Order R2-2003-0034, Finding 10, page 5; Provision 2, page 19.

- The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.
- The Permittees shall report on implementation of and compliance with these BMPs in their Annual Report.<sup>543</sup>

These activities are not new for the Fairfield permittees. The Fairfield Suisun fiscal year 1999-2000 through 2004-2005 stormwater management plan, made enforceable by the prior permit, indicates the Fairfield permittees use BASMAA's mobile cleaners outreach program for "mobile washers that clean building exteriors, sidewalks, drive-through lanes, plazas and parking areas."<sup>544</sup> The BMPs for sidewalk and plaza maintenance cleaning require the use of dry methods, and if water must be used, the permittees were required to use the BMPs from BASMAA's surface cleaner brochure as follows:

Use dry methods (e.g., sweeping or vacuuming) whenever practical to clean sidewalks and plazas rather than hosing, pressure washing, or steam cleaning. Clean up spills as specified in Section VII. If water must be used to clean sidewalks or plazas, implement the BMPs in the Bay Area Stormwater Management Agencies Association's Pollution From Surface Cleaning, to reduce soap, oil and other pollutants in stormwater to the maximum extent practicable and eliminate illicit discharges.<sup>545</sup>

The 2007 stormwater management plan, which is also enforceable under the prior permit, imposes the same requirements, including the implementation of the BMPs in BASMAA's Mobile Surface Cleaner Program:

### III. SIDEWALK/PLAZA MAINTENANCE

#### A. Cleaning

1. Use dry methods (e.g., sweeping or vacuuming) whenever practical to clean sidewalks and plazas rather than hosing, pressure washing, or steam cleaning.
2. Clean up spills as specified in Section VII.

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<sup>543</sup> Exhibit A, Test Claim, 10-TC-02, pages 159-160 (Test Claim permit, Section C.2.b.); Exhibit BB (8), BASMAA Mobile Cleaner Brochure <http://www.cccleanwater.org/pdfs/MobileCleanerBrochure.pdf> (accessed November 8, 2023).

<sup>544</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 54.

<sup>545</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 95.

3. If water must be used to clean sidewalks or plazas, implement the BMPs in the Bay Area Stormwater Management Agencies Association's Pollution From Surface Cleaning, to reduce soap, oil and other pollutants in stormwater to the maximum extent practicable and eliminate illicit discharges.<sup>546</sup>

Furthermore, the requirement in the test claim permit to report on implementation of and compliance with these BMPs in their annual report is not new. The prior permit required the permittees “shall implement the Management Plan, and shall subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable . . . .”<sup>547</sup> The prior permit also provided “[c]hanges and updates to control measures, Best Management Practices (BMPs) and performance goals will be documented in the Annual Report and following Regional Board approval will be considered part of the Management Plan and an enforceable component of this Order.”<sup>548</sup>

### Vallejo

U.S. EPA issued the prior permit for the City of Vallejo and the Vallejo Sanitary District (EPA Permit No. CAS612006) on April 27, 1999, which became effective on May 30, 1999, for the discharge of stormwater runoff from storm drains and watercourses within the Vallejo Permittees’ jurisdictions.<sup>549</sup> The permit identifies standard federal NPDES permit provisions, including the following: “Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.”<sup>550</sup> In addition, the prior permit made Vallejo’s stormwater management plan enforceable as follows:

The permittee shall implement in its entirety the proposed storm water management program (SWMP) described in the documents listed in Part I.D.11 of this permit. All storm water pollution control measures identified in the SWMP shall be implemented, including existing and proposed measures, and any modifications to the SWMP made during the term of this permit, including those made in accordance with Part I.A.5.c of this permit. Proposed control measures shall be implemented in accordance with the implementation schedules provided in the SWMP, with the

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<sup>546</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 103.

<sup>547</sup> Exhibit BB (27), Order R2-2003-0034, Provision 2, page 19.

<sup>548</sup> Exhibit BB (27), Order R2-2003-0034, Finding 15, page 6; Section C.2, pages 19-20.

<sup>549</sup> Exhibit A, Test Claim, 10-TC-02, page 153 (Test claim permit, Finding 7); Exhibit BB (43), U.S. EPA Permit No. CAS612006.

<sup>550</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 21.

effective date of the permit serving, at a minimum, as the starting date for the implementation schedule.<sup>551</sup>

Part I.D.11, which is referenced above, defines the stormwater management program as the “Vallejo Sanitation and Flood Control District Storm Water Management Plan” submitted on August 13, 1998.<sup>552</sup> The plan indicates the District owns and operates the sanitary sewer collection system and related facilities, and as the owner and operator of all public drainage facilities within the City of Vallejo, the District is responsible for maintaining the storm drain system.<sup>553</sup> Vallejo’s stormwater management plan contains the following BMPs:

- Cleaning, Maintenance, and Processing Control [with respect to industrial and commercial projects] – Areas used for washing, steam cleaning, maintenance, repair or processing shall have impermeable surfaces and containment berms, roof covers, recycled water wash facilities, or discharge to the sanitary sewer (must meet discharge limitations).<sup>554</sup>
- Swales or Sand Filters – Drainage from all paved surfaces, including streets, parking lots, driveways, commercial drive-through areas, and roofs shall be routed through swales, buffer strips or sand filters prior to discharge to the storm drain system. Roof downspout systems may be alternatively used to treat roof drainage. For large parking lots (to be determined by new development committee), sand filters or equivalent BMPs shall be installed (proposal shall include a plan for inspection and periodic cleaning).<sup>555</sup>
- It is the District’s policy to minimize or eliminate the use of chemical plant control agents for all maintenance practices. Maintenance is performed through the use of mechanical methods such as mowing or cutting. This practice prevents stream bank erosion and enhances the removal of solids in runoff prior to entering the ditches.<sup>556</sup>
- Water and solid materials removed from catch basins are deposited at the District’s wastewater treatment plant. The treatment plant treats the water and fine sediments that are carried along with it; the remaining solid materials (silt,

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<sup>551</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 3, paragraph 3.

<sup>552</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 8.

<sup>553</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 58.

<sup>554</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, pages 34-35.

<sup>555</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 36.

<sup>556</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 61.

plastics, aluminum cans, wood, leaves, etc.) are collected and disposed of at a sanitary landfill. Solids materials removed from ditches (silt, trash, vegetation, etc.) are brought to the District's wastewater treatment plant and allowed to dry before being hauled away to be disposed of at the sanitary landfill.<sup>557</sup>

Vallejo's stormwater management plan further provides "All other applicable source control BMPs described in the California Stormwater Industrial Activity BMP Handbook shall be implemented."<sup>558</sup> At the time the Vallejo permit was adopted, the 1993 California Stormwater BMP Handbook identified the following BMPs for pavement washing and cleaning sidewalks and plazas:

1. Sweep and dispose trash (dry clean only).
2. For vehicle leaks, restaurant/grocery alleys, follow this 3-step process:
  - a. Clean up leaks with rags or absorbents.
  - b. Sweep using granular absorbent material (cat litter).
  - c. Mop and dispose of mop-water to sanitary sewer (or collect rinsewater and pump to sanitary sewer)
3. Use rinsewater; no soap discharged to storm drain.<sup>559</sup>

And the plan requires District personnel "shall be actively involved in the BASMAA PIP [public information and participation] Committee, the Regional Board's Pollution Prevention Group, and the North Bay Source Control Group."<sup>560</sup>

Thus, the following activities required by Section C.2.b. of the test claim permit are not new for the Vallejo permittees:

- The Permittees shall implement, and require to be implemented, BMPs for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning, which prohibit the discharge of polluted wash water and non-stormwater to storm drains.
- The Permittees shall implement the BMPs included in BASMAA's Mobile Surface Cleaner Program. The BMPs in the BASMAA Mobile Surface Cleaner Program include the following: 1) dry clean-up first (remove dirt and other debris with a vacuum before washing the area); and 2) collect wash water (cover the

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<sup>557</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 61.

<sup>558</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 35.

<sup>559</sup> Exhibit BB (1), 1993 California Stormwater BMP Handbook, page 100.

<sup>560</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 69.



storm drains to keep the wash water from entering, clean the area with little or no soap and collect the wash water to dispose down the sanitary sewer system if permitted to do so).

- The Permittees shall coordinate with sanitary sewer agencies to determine if disposal to the sanitary sewer is available for the wastewater generated from these activities provided that appropriate approvals and pretreatment standards are met.<sup>561</sup>

In addition, the requirement in Section C.2.b.ii. to report on the implementation of and compliance with these BMPs in the annual report is not new with respect to the Vallejo permittees.<sup>562</sup> The prior permit issued by U.S. EPA required an annual report “on the status of implementing the components of the SWMP required by the permit.”<sup>563</sup>

*iii. The requirements imposed by Section C.2.c., Bridge and Structure Maintenance and Graffiti Removal, are not new and do not impose a new program or higher level of service.*

Section C.2.c. of the test claim permit imposes the following requirements on the permittees:

- The permittees shall implement appropriate BMPs to prevent polluted stormwater and non-stormwater discharges from bridges and structural maintenance activities directly over water or into storm drains.<sup>564</sup>
- The permittees shall implement BMPs for graffiti removal that prevent non-stormwater and wash water discharges into storm drains.<sup>565</sup>

When implementing these BMPs, the permittees are required to do the following:

- The permittees shall prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses.<sup>566</sup>
- The permittees shall protect nearby storm drain inlets before removing graffiti from walls, signs, sidewalks or other structures. The permittees shall prevent any

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<sup>561</sup> Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.b.i.); Exhibit BB (8), BASMAA Mobile Cleaner Brochure <http://www.cccleanwater.org/pdfs/MobileCleanerBrochure.pdf> (accessed November 8, 2023).

<sup>562</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.b.ii.)

<sup>563</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5.

<sup>564</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.i.(1)).

<sup>565</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.i.(2)).

<sup>566</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test Claim permit, Section C.2.c.ii.(1)).

discharge of debris, cleaning compound waste, paint waste or wash water due to graffiti removal from entering storm drains or watercourses.<sup>567</sup>

- The permittees shall determine the proper disposal method for wastes generated from these activities.
- The permittees shall train their employees and/or specify in contracts about these proper capture and disposal methods for the wastes generated.<sup>568</sup>

Finally, the test claim permit requires the permittees to report on the implementation of and compliance with the bridge and structural maintenance and graffiti removal BMPs in their Annual Report.<sup>569</sup>

The City of San Jose contends these requirements are new because the permit removes the permittees' ability to determine what is and how to comply with the maximum extent practicable (MEP) standard and to develop and implement the appropriate best management practices (BMPs) to reduce or control pollution.<sup>570</sup>

The Regional Board argues these requirements are not new, were required by the permittees' prior permits, and included in several BMP handbooks used by the permittees (the CASQA Municipal BMP Handbook; the BASMAA brochure *Pollution from Surface Cleaning* (1996); and the BASMAA 1995 *Blueprint for a Clean Bay – Best Management Practices to Prevent Stormwater Pollution from Construction-Related Activities*).<sup>571</sup>

Most of the requirements imposed by Section C.2.c. were required by existing federal law. As indicated above, federal law prohibits the discharge of *any* pollutant, including debris, cleaning compound waste, paint waste or wash water due to graffiti removal, into the waters of the United States from any point source without a permit.<sup>572</sup> To comply with this prohibition, the CWA requires controls to reduce the discharge of pollutants to the MEP.<sup>573</sup> The CWA also requires permittees to effectively prohibit non-stormwater discharges into storm sewers.<sup>574</sup> The permittees are also federally required

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<sup>567</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test Claim permit, Section C.2.c.ii.(2)).

<sup>568</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test Claim permit, Section C.2.c.ii.(3)).

<sup>569</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test Claim permit, Section C.2.c.iii.).

<sup>570</sup> Exhibit Y, Claimant's (City of San Jose's) Comments on the Draft Proposed Decision, pages 5-7.

<sup>571</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, pages 60-64.

<sup>572</sup> United States Code, title 33, section 1311(a).

<sup>573</sup> United States Code, title 33, section 1342(P)(3)(B)(ii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

<sup>574</sup> United States Code, title 33, section 1342(P)(3)(B)(iii).

to have existing legal authority to control stormwater discharges and prohibit illicit discharges to the MS4.<sup>575</sup> And federal law requires each permittee to submit an annual report to the Regional Board, which shall include the status of implementing the components of the storm water management program that are established as permit conditions.<sup>576</sup>

Thus, the following requirements in Section C.2.c. of the test claim permit are already required by federal law and are not new:

- Implement appropriate BMPs to prevent polluted stormwater and non-stormwater discharges from bridges and structural maintenance activities directly over water or into storm drains.<sup>577</sup>
- Implement BMPs for graffiti removal that prevent non-stormwater and wash water discharges into storm drains.<sup>578</sup>
- Prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses.<sup>579</sup>
- Protect nearby storm drain inlets before removing graffiti from walls, signs, sidewalks or other structures. The permittees shall prevent any discharge of debris, cleaning compound waste, paint waste or wash water due to graffiti removal from entering storm drains or watercourses.<sup>580</sup>
- Report on the implementation of and compliance with the bridge and structural maintenance and graffiti removal BMPs in their Annual Report.<sup>581</sup>

Moreover, these activities and the remaining requirements to determine the proper disposal method for wastes generated and to train employees “and/or”<sup>582</sup> specify in

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<sup>575</sup> Code of Federal Regulations, title 40, section 122.26(d)(1), (d)(2).

<sup>576</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>577</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.i.(1)).

<sup>578</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.i.(2)).

<sup>579</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.ii.(1)).

<sup>580</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.ii.(2)).

<sup>581</sup> Exhibit A, Test Claim, 10-TC-02, page 160 (Test claim permit, Section C.2.c.iii.).

<sup>582</sup> Section C.2.c.iii. of the test claim permit requires “The permittees shall train their employees **and/or** specify in contracts about these proper capture and disposal methods for the wastes generated.” Exhibit A, Test Claim, 10-TC-02, page 160, emphasis added. The phrase “and/or” has been determined to be vague and ambiguous in some cases because it is not clear if the language requires both be done, or only one. See, for example, *Sperry v. Tammany* (1951) 106 Cal.App.2d 694, 696 (title of car when in two names separated by “and/or”; ambiguous); *In re Bell* (1942) 19

contracts about these proper capture and disposal methods for the wastes generated, are not new when compared to the permittees' prior permits and stormwater management plans.

### Santa Clara

The requirements imposed by Section C.2.c. of the test claim permit are not new for the Santa Clara County permittees. The 1997 Santa Clara Valley Urban Runoff Management Plan, which was made enforceable by the prior permit and established the baseline requirements for all permittees,<sup>583</sup> required the following BMPs with respect to bridge and structure maintenance and graffiti removal:

#### IV. BRIDGE AND STRUCTURE MAINTENANCE

##### 1. Painting and Paint Removal

- Transport paint and materials to and from job sites in containers with secure lids and tied down to the transport vehicle.
- Do not transfer or load paint near storm drain inlets or watercourses.
- Test and inspect spray equipment prior to starting to paint. Tighten all hoses and connections and do not overfill paint container.
- Where there is significant risk of a spill reaching storm drains, plug nearby storm drain inlets prior to starting painting and remove plugs when job is completed.

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Cal.2d 488, 499 (charging document alleging various acts separated by “and/or” ambiguous when some of the acts are validly proscribed and others are not). However, the words have to be construed in context, keeping in mind the purpose of the provision and the other statutory sections that relate to the same subject. *People v. Valencia* (2017) 3 Cal.5th 347, 357-358. Here, the purpose of this section, and all of the provisions in Section C.2., is “to ensure development and implementation of appropriate BMPs by all Permittees to control and reduce non-stormwater discharges and polluted stormwater to storm drains and watercourses during operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure.” Exhibit A, Test Claim, 10-TC-02, page 159 (Test claim permit, Section C.2.) Thus, if the bridge or structure maintenance in a permittee’s jurisdiction is performed by the permittee’s employees, then training is required. If the bridge or structure maintenance is contracted out, then the capture and disposal methods are required to be included in the contract. If these functions are performed by both employees and contractors, then the permittee is required to train their employees *and* specify in contracts the proper capture and disposal methods for the waste generated.

<sup>583</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074, 2083-2085 (Attachment 60, Order 01-124, Findings 6, 7, Sections C.1. and C.2.).

- Clean up spills immediately, using methods outlined in Section VII.
- Capture all clean-up water, and dispose of properly.
- If sand blasting is used to remove paint, cover nearby storm drain inlets prior to starting work. Use plywood, canvas, nylon netting, or similar material to contain abrasive and foreign materials and dust within work areas. Meter sand to use the least amount to do the job. Sweep and vacuum up sand and blast materials and recycle or dispose of materials properly.
- If the bridge crosses a watercourse, perform work on a maintenance traveler or platform, or use suspended netting or traps to capture paint, rust, paint removing agents, or other materials, to prevent discharge of materials to surface waters. Dredging (with proper permits) may be necessary to recover solid materials that do fall into the watercourse.

## 2. Repair Work

- Prevent concrete, steel, wood, metal parts, tools, or other work materials from entering the storm drains or watercourses.
- Thoroughly clean up the job site when the repair work is completed.
- Refer to section II, *Street/Road/Highway/Repair and Maintenance*, for BMPs regard repair and maintenance of a paved bridge deck.

Section II, *Street/Road/Highway/Repair and Maintenance*, identifies the BMPs for asphalt and concrete removal, concrete installation and repair, and patching and resurfacing. For all work, the BMPs require the permittees to take measures to protect the nearby storm drain inlets and adjacent watercourse; sweep up materials to avoid contact with rainfall and stormwater runoff; and recycle as much material as possible and properly dispose of nonrecyclable materials.<sup>584</sup>

## 3. Graffiti Removal

- When graffiti is removed by painting over, implement the BMPs in Section IV.1., *Painting and Paint Removal*, above.

Section IV.1. prohibits the permittees from transferring or loading paint near storm drain inlets or watercourses; requires the permittees to plug nearby storm drain inlets before starting to paint, and capture all clean-up water and dispose of properly; and capture paint, rust, paint

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<sup>584</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 194-195.

removing agents, or other materials by using a watercourse, netting, or traps to prevent the discharge of materials to surface waters.<sup>585</sup>

- Protect nearby storm drain inlets (using tarps in work areas, sand bags, and/or booms or barriers around inlets) prior to removing graffiti from walls, signs, sidewalks, or other structures needing graffiti abatement. Clean up afterwards by sweeping or vacuuming thoroughly, and/or by using absorbent and properly disposing of the absorbent.
- Prevent any discharge of debris, cleaning compound waste, paint waste, or washwater containing cleaning compounds to storm drains or watercourses. Direct runoff from sand blasting and high pressure washing (with no cleaning agents) into a landscaped or dirt area. If a landscaped area is not available, filter runoff through an appropriate filtering device (e.g., filter fabric) to keep sand, particles, and debris out of storm drains.
- If a graffiti abatement method generates washwater containing a cleaning compound (such as high pressure washing with a cleaning compound), plug nearby storm drains and vacuum/pump washwater to the sanitary sewer. Consider using a waterless chemical cleaning method for graffiti removal (e.g., gels or spray compounds).
- Avoid graffiti abatement activities during a rainstorm. If rains occur during graffiti abatement activities unexpectedly, take appropriate action to minimize the impact on storm water quality (e.g., divert runoff around work areas).<sup>586</sup>

Thus, the prior permit already required the permittees to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determine the proper disposal method for wastes generated from these activities as required by Section C.2.c. of the test claim permit and these activities are not newly imposed on the Santa Clara permittees.

In addition, the requirements to train employees and specify in contracts the proper capture and disposal methods for the waste generated are not new. The 1997 stormwater management plan required each permittee to:

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<sup>585</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 199.

<sup>586</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 199-200.

- Develop and implement a process for ensuring that any contractor that it employs to conduct street, road, and highway O&M activities uses the appropriate BMPs adopted by the agency.
- Provide training on an annual basis to its municipal staff in the use of appropriate BMPs. The agency will also provide a mechanism for obtaining feedback from its municipal staff on the implementation and effectiveness of the BMPs.<sup>587</sup>

The 1997 stormwater management plan also required the permittees to maintain the legal authority to implement the performance standards identified above, and included the following suggested language to be included in contracts:

The Contractor shall take all measures necessary to prevent pollutants from entering storm drains or watercourses. For the purpose of eliminating storm water pollution, the contractor shall implement effective Best Management Practices (BMPs). BMPs include general good housekeeping practices, appropriate scheduling of activities, operational practices, maintenance procedures and other measures to prevent the discharge of pollutants directly or indirectly to the storm drain system. These BMPs shall be maintained for the duration of the Contractor's work. The Contractor shall also be responsible for the proper disposal of all waste materials, including waste generated by the implementation of BMPs.

The following BMPs shall be implemented to prevent storm water pollution: (add appropriate BMPs . . . here).<sup>588</sup>

Finally, the requirement in Section C.2.c. of the test claim permit to report on the implementation of and compliance with the bridge and structural maintenance and graffiti removal BMPs in their annual report is not new. The 1997 Santa Clara Valley Urban Runoff Management Plan imposed the same requirement: "As part of the annual reporting process, each co-permittee will review and evaluate the effectiveness of its BMPs in achieving the goals of reducing pollutants in storm water to the maximum extent practicable and eliminating illicit discharges. The review and evaluation will include input from municipal maintenance staff that implement the BMPs."<sup>589</sup>

And, as indicated above, the City of San Jose's Urban Runoff Management Plan indicates the City implemented the model performance standards included in the 1997 Santa Clara Valley Urban Runoff Management Plan.

Section C.2. pursuant to NPDES Permit CA S029718, requires the City to submit, to the Executive Officer of the Water Board, a program element that identifies control measures to reduce pollutants in stormwater

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<sup>587</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 176.

<sup>588</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 185.

<sup>589</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 176.

discharges from Public Streets, Roads, and Highways Operations and Maintenance. “Model” Performance Standards were developed by SCVURPPP [Santa Clara Valley Urban Runoff Pollution Prevention Plan], including provisions to routinely remove pollutants from City streets via street sweeping operations, as well as to control pollutants from regular operation and maintenance activities by carefully controlling water runoff from work activities and spills.

The City has been implementing Public Streets, Roads and Highways model BMPs and SOPs from the SCVURPPP Performance Standards as part of ongoing permit compliance efforts. These measures and their associated work plans are designed to provide measurable and systematic approach to ensure compliance with the letter and intent of the permit.<sup>590</sup>

The performance standards and BMP requirements represented “the baseline level of effort” required of each permittee under the prior permit and, thus, it can be presumed each permittee in Santa Clara County subject to Order 01-024 complied with these requirements.<sup>591</sup>

Therefore, the requirements in Provision C.2.c. of the test claim permit are not new with respect to the Santa Clara permittees.

### Alameda

The prior permit issued to the Alameda County permittees (R2-2003-0021) incorporated by reference and made enforceable the 2001-2008 Alameda Countywide Stormwater Management Plan, including the performance standards identified in the plan, “which represent the baseline level of effort required of each of the Permittees.”<sup>592</sup> The permittees were required to implement the Management Plan to meet the receiving water limitations and discharge prohibitions, which required the permittees to “effectively prohibit the discharge of non-stormwater (materials other than stormwater) into the storm drain systems and watercourses” and to implement control measures to reduce

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<sup>590</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2523 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>591</sup> Evidence Code section 664 (“It is presumed that official duty has been regularly performed”).

<sup>592</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1853 (Attachment 53, Order R2-2003-0021, Findings 9 and 10).



pollutants in stormwater discharges to ensure water quality standards in receiving waters are met.<sup>593</sup>

Alameda's stormwater management plan required the following:

- Each agency will use, as appropriate, the Road Repair BMPs for protecting storm drain inlets prior to patching and resurfacing activities. The road repair BMPs require the permittees to “recycle used motor oil, diesel oil, concrete, broken asphalt, etc. whenever possible.”
- Agencies will not stockpile materials in streets, gutter areas or near storm drain inlets or creeks unless these areas are protected.
- Agencies will never wash excess material from exposed aggregate concrete or similar treatments into a street or storm drain inlet. Each agency will designate an unpaved area for clean up and proper disposal of excess materials.<sup>594</sup>

For graffiti removal, the stormwater management plan says “See graffiti removal BMPs in the Municipal Maintenance BMP Manual.”<sup>595</sup> The CASQA Municipal BMP Handbook identifies the following graffiti removal BMPs:

- Schedule graffiti removal activities for dry weather.
- Protect nearby storm drain inlets prior to removing graffiti from walls, signs, sidewalks, or other structures needing graffiti abatement. Clean up afterwards by sweeping or vacuuming thoroughly, and by using absorbent by properly disposing of the absorbent.
- When graffiti is removed by painting over, implement the procedures under Painting and Paint Removal.
- Direct runoff from sandblasting and high pressure washing (with no cleaning agents) into a landscaped or dirt area. If such an area is not available, filter runoff through an appropriate filtering device (e.g. filter fabric) to keep sand, particles, and debris out of the storm drains.

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<sup>593</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867, 1881 (Attachment 53, Order R2-2003-0021, Sections A., B., C.2., and C.5.).

<sup>594</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2425 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>595</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2426 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

- If a graffiti abatement method generates wash water containing a cleaning compound (such as high pressure washing with a cleaning compound), plug nearby storm drains and vacuum/pump wash water to the sanitary sewer.
- Consider using a waterless and non-toxic chemical cleaning method for graffiti removal (e.g. gels or spray compounds).<sup>596</sup>

Thus, the prior permit already required the permittees to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determining the proper disposal method for wastes generated from these activities as required by Section C.2.c. of the test claim permit and these activities are not newly imposed on the Alameda permittees.

In addition, the requirements to train employees and specify in contracts the proper capture and disposal methods are not new. The prior permit required employee training as follows:

Employee training programs shall inform all personnel responsible for implementing the SWPP [stormwater pollution prevention plan] Plan. Training should address spill response, good housekeeping, and material management practices. New employee and refresher training schedules should be identified.<sup>597</sup>

The 2001-2008 Alameda Countywide Stormwater Management Plan, made enforceable by the prior permit,<sup>598</sup> also required municipal maintenance employee training as follows:

- Each agency will train employees and contractors in the use of the Spill Response Performance Standards as appropriate.
- Each agency will ensure proper handling and disposal of material removed from streets and storm drainage facilities to prevent discharges of pollutants to surface waters or groundwater.

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<sup>596</sup> Exhibit BB (10), CASQA 2003 Stormwater Municipal BMP Handbook, page 127. This handbook was referenced by the Regional Water Board in their comments on Section C.2.c. of the test claim permit at Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, pages 61-62. There is no indication in the record of another municipal maintenance BMP manual.

<sup>597</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1898 (Attachment 53, Order R2-2003-0021, Standard Provisions and Reporting Requirements).

<sup>598</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1867 (Attachment 53, Order R2-2003-0021, Section C.2.).

- Each agency will dispose of excess chemicals at an Alameda County Household Hazardous Waste Facility or other approved disposal location (or recycle the chemical).
- Each agency will properly dispose of or recycle used solvents/chemicals.<sup>599</sup>

The stormwater management plan also notes annual training for municipal maintenance staff was conducted.<sup>600</sup>

And the 2001-2008 Alameda Countywide Stormwater Management Plan required the performance standards, including those for the proper capture and disposal methods, to be included in all contracts as follows:

- Each agency shall incorporate the municipal maintenance performance standards into municipal contract specifications.
- Each agency shall provide volunteers and contractors with educational material describing the Municipal Maintenance Performance Standards as appropriate.<sup>601</sup>

Moreover, since these BMPs became part of the Management Plan and represented “the baseline level of effort” required of each permittee under the prior permit, it can be presumed each permittee in Alameda County subject to Order R2-2003-0021 complied with these requirements.<sup>602</sup> Thus, these activities are not new.

Finally, the requirement in Section C.2.c. of the test claim permit to report on the implementation of and compliance with the bridge and structural maintenance and graffiti removal BMPs in their annual report is not new. The prior permit contains the following reporting requirements:

- The permittees shall submit an Annual Report to the Regional Board by September 15 of each year, documenting the status of the Program’s and the Permittees’ activities during the previous fiscal year, including the result of a

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<sup>599</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2418 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>600</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2385 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>601</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2418 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>602</sup> Evidence Code section 664 (“It is presumed that official duty has been regularly performed”).

qualitative assessment of activities implemented by the Permittees, and the performance of tasks contained in the Management Plan.<sup>603</sup>

- By 100 days from the adoption of this order and on March 1st of each year thereafter, the Permittees shall submit draft Workplans and Updates that describe the proposed implementation of the Management Plan for the next fiscal year, which shall consider the status of implementation of current year activities and actions of the Permittees, problems encountered, and proposed solutions, and shall address any comments received from the Executive Officer on the previous year's Annual Report.<sup>604</sup>

Therefore, Section C.2.c. of the test claim permit is not new for the Alameda County permittees.

### Contra Costa

The prior permit issued to the Contra Costa permittees (Order 99-058) incorporated by reference and made enforceable the Stormwater Management Plan prepared by the Contra Costa Clean Water Program, including the performance standards identified in the plan, "which represent the level of effort required of each Discharger."<sup>605</sup> Findings 7 through 9 state the following:

7. The Plan and modifications or revisions to the Plan that are approved in accordance with Provision C.11 and C.12 of this Order, and the Annual Format to be submitted in accordance with the Plan and Provision C.5 of this Order are an integral and enforceable component of this Order.
8. Performance Standards represent the level of effort required of each Discharger in the Plan and have been included in the Plan as best management practices (BMPs). The specification of Performance Standards as BMPs also simplifies the task of determining if a Discharger is putting forth a level of effort which will control pollutants in stormwater discharges to the maximum extent practicable.
9. Each Discharger is individually responsible for adopting and enforcing ordinances, implementing assigned BMPs to prevent and reduce pollutants in stormwater and providing funds for capital, operation, and maintenance expenditures necessary to implement such BMPs for the storm drain system that it owns and/or operates. Assigned BMPs to be

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<sup>603</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1881-1882 (Attachment 53, Order R2-2003-0021, Section C.7.a.).

<sup>604</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1883 (Attachment 53, Order R2-2003-0021, Section C.7.b.).

<sup>605</sup> Exhibit BB (25), Order 99-058, pages 1 and 3 (Findings 1, 7, and 8); Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004.

implemented by each Discharger are listed as Performance Standards in the Plan. Enforcement actions concerning this Order will, whenever necessary, be pursued only against the individual Discharger(s) responsible for specific violations of this Order.<sup>606</sup>

Provisions C.3. and C.4. of the prior permit required the permittees to implement BMPs identified in the Management Plan in order to reduce pollutants in stormwater discharges to the MEP and to prohibit non-stormwater discharges. “The Dischargers shall begin implementing forthwith the Plan and shall subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1. through C.14 of this Order.”<sup>607</sup>

The Contra Costa Stormwater Management Plan 1999-2004 requires the following BMPs:

- MUNI-53: Each agency will take reasonable and practicable measures to protect (such as tarps in work areas, sand bags, booms or barriers around stormwater inlets) the storm drain inlets prior to removing graffiti from walls, signs, sidewalks, or other structures needing graffiti abatement. The agencies will sweep up afterwards by sweeping or vacuuming thoroughly, and/or by using oil absorbent and properly disposing of the absorbent.<sup>608</sup>
- MUNI-54: No agency will discharge debris, cleaning compound waste, paint waste, or wash water containing cleaning compounds to the storm drain.<sup>609</sup>
- MUNI-55: Each agency will direct runoff from all types of sand blasting and high pressure water (no cleaning agents) washing activities into a landscaped or dirt area. If a landscaped area is not available, each agency will filter runoff through an appropriate filtering device (e.g., coarse sand bags or filter fabric to keep sand, particles, and debris out of storm drain).<sup>610</sup>
- MUNI-56: Each agency will avoid conducting graffiti abatement activities during a rainstorm. If it rains during graffiti abatement activities unexpectedly. Each agency will take appropriate action to minimize the impact on the quality of stormwater (e.g.; divert runoff around work areas).<sup>611</sup>

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<sup>606</sup> Exhibit BB (25), Order 99-058, page 3.

<sup>607</sup> Exhibit BB (25), Order 99-058, page 8.

<sup>608</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 82.

<sup>609</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

<sup>610</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

<sup>611</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

- MUNI 60: Each agency will dispose of cleaning compounds in accordance with the corporation yard's Stormwater Pollution Prevention Plan (SWPPP).<sup>612</sup>
- MUNI 62: Each agency choosing a graffiti abatement method that generates a wash water containing a cleaning compound (such as high pressure washing with a cleaning compound) will protect storm drains and dispose of materials properly.<sup>613</sup>

Thus, the prior permit already required the permittees to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determine the proper disposal method for wastes generated from these activities as required by Section C.2.c. of the test claim permit and these activities are not newly imposed on the Contra Costa permittees.

Moreover, the requirement in Section C.2.c. of the test claim permit that the permittees shall train their employees and specify in contracts the proper capture and disposal methods for the wastes generated, is not new for the Contra Costa permittees. Their management plan, made enforceable by the prior permit, expressly required the following:

- MUNI 57: Each agency will train employees and volunteers conducting graffiti abatement in using these performance standards. Each agency will incorporate these performance standards into agency contract specifications. Each agency will provide volunteers and contractors conducting graffiti abatement with education material describing the graffiti abatement performance standards.<sup>614</sup>

In addition, the annual reporting requirements imposed by Section C.2.c. are not new for the Contra Costa permittees. Provision C.5. of the prior permit required the permittees to submit an annual report by September 1st of each year documenting the status of the Program's activities during the previous year, the performance of the tasks contained in the stormwater management plan, an assessment of the effectiveness of the program, and any modifications to the Management Plan.<sup>615</sup>

Therefore, Section C.2.c. of the test claim permit is not new for the Contra Costa permittees.

### San Mateo

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<sup>612</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 84.

<sup>613</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 84.

<sup>614</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 83.

<sup>615</sup> Exhibit BB (25), Order 99-058, page 10.

San Mateo's prior permit, Order 99-059, incorporated the stormwater management plan, its amendments, and work plans as enforceable components of the Prior Permit. Finding 7 of the Prior Permit read:

The Plan and modifications or revisions to the Plan that are approved in accordance with Provision C.13 and C.14 of this Order, and future fiscal year Program Work Plans to be submitted in accordance with the Plan and Provision C.5 of this Order and are an integral and enforceable component of this Order.<sup>616</sup>

The prior permit also required the submission of annual reports which can contain proposed "updates, improvements, or revisions" which become binding. The prior permit required the permittees to submit annual reports "documenting the status of the Program's and the Dischargers' activities during the previous fiscal year."<sup>617</sup> "In each Annual Report, the Dischargers may propose pertinent updates, improvements, or revisions to the Plan, which shall be complied with under this Order unless disapproved by the Executive Officer or acted upon in accordance with Provisions C.15."<sup>618</sup>

The prior permit, Order 99-059, was at issue in *Baykeeper* and the court found any modifications to San Mateo's stormwater plan had to be approved by the Regional Board, after public notice and comment, and not by the executive officer.<sup>619</sup> Pursuant to the court's writ, Order R2-2004-0060 invalidated the modifications previously approved by the executive officer, and brought those changes to the Regional Board, which approved the modifications in R2-2004-0062, including the approval of San Mateo's Pollutant Prevention and Control Measures Plan, dated June 29, 2001 and revised January 20, 2004, which is attached to the Order, and which made the modifications enforceable components of the prior permit.<sup>620</sup> San Mateo's Pollutant Prevention and Control Measures Plan requires the following:

Building Exterior Walls - If soap is used, water must be discharged to the sanitary sewer system after obtaining permission from the sewer's owner. When washing glass or steel buildings without the use of soap, washwater

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<sup>616</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1943 (Attachment 55, Order No. 99-059, Finding 7).

<sup>617</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>618</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>619</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>620</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2016-2018 (Attachment 58, Order R2-2004-0062).

should be directed to unpaved surface/landscaped areas. If you are not using soap to clean a building that has been painted after 1978, washwater may be directed to unpaved landscaping. If you are cleaning buildings painted with lead-based paints or mercury-additive paints, all storm drains must be sealed and washwater must be pumped to a collection tank. The wastewater and sludge may have to be disposed of as hazardous waste.<sup>621</sup>

That plan further required the permittees to:

- Control runoff that is transporting trash or debris with appropriate measures. Use berm, dam, or temporary grates to prevent runoff from flowing through solid waste and picking up pollutants.<sup>622</sup>
- Store material removed from storm drainage facilities on a concrete pad or other type of impermeable material, unless conditions only permit storage on a previous surface, e.g. remote rural areas. During storm events, cover with impermeable material and contain runoff. Drain wastewater to the sanitary sewer or filter out pollutants or allow to evaporate to prevent discharges to the storm drain system. Dispose of the material at an appropriate facility.<sup>623</sup>

San Mateo's Stormwater Management Plan for April 2004 through June 2010, which the Regional Board states was in effect at the time the test claim permit was adopted,<sup>624</sup> contains the same requirements for building exterior walls.<sup>625</sup> The April 2004-June 2010 plan also contains the following BMPs for road repair and maintenance:

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<sup>621</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2047 (Attachment 58, Order R2-2004-0062 [Attachment, San Mateo Countywide Stormwater Pollution Prevention Program, June 29, 2001 (revised January 20, 2004)]).

<sup>622</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2053 (Attachment 58, Order R2-2004-0062 [Attachment, San Mateo Countywide Stormwater Pollution Prevention Program, June 29, 2001 (revised January 20, 2004)]).

<sup>623</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2055 (Attachment 58, Order R2-2004-0062 [Attachment, San Mateo Countywide Stormwater Pollution Prevention Program, June 29, 2001 (revised January 20, 2004)]).

<sup>624</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, page 67.

<sup>625</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3984 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).



- Take measures to protect the storm drain inlets prior to asphalt breaking or concrete-sawing operations (e.g. place sand bags or filtering barrier around inlets). Clean afterwards by sweeping up as much material as possible.
- After breaking up old pavement, remove and recycle as much as possible to avoid contact with rainfall and storm water runoff.
- Cover and seal manholes and storm drain inlets before applying seal coat, slurry seal, etc.
- Never wash excess material from exposed aggregate concrete or similar treatments into a street or storm drain inlet. Designate an unpaved area for clean up and proper disposal of excess materials.
- Contain and clean up waste materials and dispose of them properly when signing and striping.<sup>626</sup>

In addition, County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual contains specific BMPs for the repair of bridges:

Materials used in the maintenance or repair of bridges, such as paint, solvents and mortar, shall be prevented from spilling into any storm drain facility or water body. Overspray of paint onto vegetation or into flowing water shall be avoided. Any material which accidentally falls into a storm drain or water body shall be promptly removed in the least destructive manner possible. Where removal is not possible because the material is borne away by flowing water, the spill shall be immediately reported to the Road Maintenance Manager for further action.

Deck drains and scuppers over streams shall be blocked off prior to pressure washing, sandblasting or scraping of bridge structures.<sup>627</sup>

Thus, the prior permit already required the permittees to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determine the proper disposal method for wastes generated from these activities as required by Section C.2.c. of the test claim permit and these activities are not newly imposed on the San Mateo permittees.

Moreover, the requirement in Section C.2.c. of the test claim permit, that the permittees shall train their employees on the proper capture and disposal methods for the wastes

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<sup>626</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4003 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>627</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 42.

generated, is not new for the San Mateo permittees. San Mateo's Stormwater Management Plan for April 2004 through June 2010 requires the permittees to:

- Train employees in using these performance standards. At least one staff meeting will be held annually to educate road repair and maintenance personnel about these performance standards.<sup>628</sup>

And San Mateo's 2004 Maintenance Standards Manual describes similar training requirements for permittee employees.<sup>629</sup>

The 2004 Maintenance Standards Manual further provides "[t]he *Contractor* shall use dry cleanup methods (absorbent materials, cat litter, and/or rags) whenever possible. If water must be used, the Contractor will be required to collect the water and spilled fluids and dispose of it as hazardous waste. Spilled fluids shall not be allowed to soak into the ground or enter into any watercourse."<sup>630</sup> Thus, the requirement in Section C.2.c. to specify the proper capture and disposal methods is not new.

Finally, the annual reporting requirements imposed by Section C.2.c. are not new for the San Mateo permittees. As indicated above, the prior permit required the submission of annual reports "documenting the status of the Program's and the Dischargers' activities during the previous fiscal year," including an assessment of the "performance of tasks contained in the Plan."<sup>631</sup>

#### Fairfield/Suisun

The prior permit for the City of Fairfield, Suisun City, and the Fairfield-Suisun Sewer District, Order No. R2-2003-0034, explains these entities joined together to form the Fairfield-Suisun Urban Runoff Management Program (FSURMP).<sup>632</sup> The permittees, through FSURMP, created a Storm Water Management Plan for fiscal years 1999-2000 to 2004-2005.<sup>633</sup> The stormwater management plan, which includes performance goals and "baseline components to be accomplished," were incorporated into the permit and became an enforceable component of the prior permit.<sup>634</sup>

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<sup>628</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4003 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>629</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 172.

<sup>630</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 111, emphasis added.

<sup>631</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.).

<sup>632</sup> Exhibit BB (27), Order R2-2003-0034, Finding 2, page 4.

<sup>633</sup> Exhibit BB (27), Order R2-2003-0034, Finding 7, page 5.

<sup>634</sup> Exhibit BB (27), Order R2-2003-0034, Finding 10, page 5; Provision 2, page 19.

The Fairfield-Suisun's 1999-2000 to 2004-2005 stormwater management plan required the following BMPs for bridge and structure maintenance:

A. Painting and Paint Removal

1. Transport paint and materials to and from job sites in containers with secure lids and tied down to the transport vehicle.
2. Do not transfer or load paint near storm drain inlets or watercourses.
3. Test and inspect spray equipment prior to starting to paint. Tighten all hoses and connections and do not overfill paint container.
4. Where there is significant risk of a spill reaching storm drains, plug nearby storm drain inlets prior to starting painting and remove plugs when job is completed.
5. Clean up spills immediately, using methods outlined in Section VII.
6. Capture all clean-up water, and dispose of properly.
7. If sand blasting is used to remove paint, cover nearby storm drain inlets prior to starting work. Use plywood, canvas, nylon netting, or similar material to contain abrasive and foreign materials and dust within work areas. Meter sand to use the least amount to do the job. Sweep and vacuum up sand and blast materials and recycle or dispose of materials properly.
8. If the bridge crosses a watercourse, perform work on a maintenance traveler or platform, or use suspended netting or traps to capture paint, rust, paint removing agents, or other materials, to prevent discharge of materials to surface waters. Dredging (with proper permits) may be necessary to recover solid materials that do fall into the watercourse.<sup>635</sup>

The plan also required the following BMPs for repair work:

B. Repair Work

1. Prevent concrete, steel, wood, metal parts, tools, or other work materials from entering storm drains or watercourses.
2. Thoroughly clean up the job site when the repair work is completed.
3. Refer to BMPs regarding maintenance and repair of paved bridge decks.<sup>636</sup>

And the plan required the following graffiti removal BMPs:

C. Graffiti Removal

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<sup>635</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, pages 96-97.

<sup>636</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 97.

1. When graffiti is removed by painting over, implement the BMPs in Section IV.A., Painting and Paint Removal.
2. Protect nearby storm drain inlets (using tarps in work areas, sand bags, and/or booms or barriers around inlets) prior to removing graffiti from walls, signs, sidewalks, or other structures needing graffiti abatement. Clean up afterwards by sweeping or vacuuming thoroughly, and/or by using absorbent and properly disposing of the absorbent.
3. Prevent any discharge of debris, cleaning compound waste, paint waste, or washwater containing cleaning compounds to storm drains or watercourses.
4. Direct runoff from sand blasting and high pressure washing (with no cleaning agents) into a landscaped or dirt area. If a landscaped area is not available, filter runoff through an appropriate filtering device (e.g., filter fabric) to keep sand, particles, and debris out of storm drains.
5. If a graffiti abatement method generates washwater containing a cleaning compound (such as high pressure washing with a cleaning compound), plug nearby storm drains and vacuum/pump washwater to the sanitary sewer.
6. Consider using a waterless chemical cleaning method for graffiti removal (e.g., gels or spray compounds).
7. Avoid graffiti abatement activities during a rain storm. If rains occur during graffiti abatement activities unexpectedly, take appropriate action to minimize the impact on storm water quality (e.g., divert runoff around work areas).<sup>637</sup>

Fairfield-Suisun's 2007 stormwater management plan contained the same requirements.<sup>638</sup>

Thus, the prior permit already required the permittees to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determine the proper disposal method for wastes generated from these activities as required by Section C.2.c. of the test claim permit and these activities are not newly imposed on the Fairfield-Suisun permittees.

Moreover, the requirement in Section C.2.c. of the test claim permit that the permittees shall train their employees on the proper capture and disposal methods for the wastes generated, is not new for the Fairfield-Suisun permittees. Their 1999-2000 to 2004-2005 management plan, made enforceable by the prior permit, states the "District and Cities' meet periodically to review and modify BMPs and will perform outreach activities

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<sup>637</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, pages 97-98.

<sup>638</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 105-107.

to educate field staff as needed.”<sup>639</sup> Municipal maintenance staff are also required to be trained to inspect for illicit discharges discovered during routine maintenance work.<sup>640</sup> They are also required to train maintenance personnel “so they understand the benefits to water quality of street cleaning in removing materials from streets.”<sup>641</sup> The 2007 stormwater management plan also required tasks to educate maintenance field employees and meet with employees quarterly.<sup>642</sup>

In addition, the requirement in Section C.2.c. to specify in contracts the proper capture and disposal methods for the waste generated is not new with respect to the Fairfield-Suisun permittees. Their 2007 stormwater management plan indicates the Fairfield-Suisun Sewer District acts as the lead agency for the NPDES permit compliance.<sup>643</sup> It has an ordinance, which states the following: “Where best management practice guidelines or requirements have been adopted by the Agency or any other governmental entity with jurisdiction, every person undertaking such activity or operation defined in the best management practice, or owning or operating a facility subject to such practice, shall comply with the requirements on guidelines.”<sup>644</sup> Thus, contractors are responsible for complying with the BMPs, including the proper capture and disposal methods of waste, pursuant to the District’s ordinance.

Finally, the annual reporting requirements imposed by Section C.2.c. are not new for the Fairfield-Suisun permittees. The prior permit required the permittees to submit an annual report to the Regional Board by November 1 of each year, documenting the status of the activities and the performance of tasks contained in the management plan.<sup>645</sup>

### Vallejo

U.S. EPA issued the prior permit for the City of Vallejo for the discharge of stormwater runoff from storm drains and watercourses.<sup>646</sup> This prior permit made Vallejo’s

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<sup>639</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 85.

<sup>640</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 86.

<sup>641</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 92.

<sup>642</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 92-93.

<sup>643</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 13.

<sup>644</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 200.

<sup>645</sup> Exhibit BB (27), Order R2-2003-0034, page 35.

<sup>646</sup> Exhibit A, Test Claim, 10-TC-02, page 153 (Test claim permit, Finding 7, page 5); Exhibit BB (43), U.S. EPA Permit No. CAS612006.

stormwater management plan enforceable.<sup>647</sup> Part I.D.11 of the prior permit defines the stormwater management program as the “Vallejo Sanitation and Flood Control District Storm Water Management Plan” submitted on August 13, 1998, which requires the following activities:<sup>648</sup>

- All public agency projects are subject to the following source control BMPs.<sup>649</sup>
  - Proper construction materials and construction waste storage, handling and disposal practices shall be followed to prevent the discharge of pollutants to the storm drain system. Proper vehicle and equipment cleaning, fueling, and maintenance practices shall be followed (includes secondary containment of stored fuel, lubricants, etc.).<sup>650</sup>
  - Construction site operators shall control and prevent the discharge of all potential pollutants, including, but not limited to, pesticides, petroleum products, nutrients, solid wastes, and construction chemicals that are stored or used on-site during construction.<sup>651</sup>
  - Construction site operators shall prepare a contingency plan in the event of unexpected rain or BMP failure including, but not limited to an immediate response plan, storing extra or alternative BMP materials on-site (stakes, hay bales, filters cloth, etc.).<sup>652</sup>
  - Cleaning, Maintenance, and Processing Control – Areas used for washing, steam cleaning, maintenance, repair or processing shall have impermeable surfaces and containment berms, roof covers, recycled water wash facilities, or discharge to the sanitary sewer (must meet discharge limitations).<sup>653</sup>

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<sup>647</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 3, paragraph 3.

<sup>648</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 8.

<sup>649</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 35 (“All public agency projects are subject to the source control BMPs described above. Larger public agency projects are also subject to BMPs in Tiers 2 and 3 as applicable.”).

<sup>650</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 31.

<sup>651</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 31.

<sup>652</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 31.

<sup>653</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 34.

- Roads and Highways – Shall implement appropriate landscape controls, minimize use of chemical stabilizers and growth inhibitors, implement a street sweeping and debris removal program, maintain retaining walls and pavement, and properly operate and maintain runoff facilities.<sup>654</sup>
- Water and solid materials removed from catch basins are deposited at the District’s wastewater treatment plant. The treatment plant treats the water and fine sediments that are carried along with it; the remaining solid materials (silt, plastics, aluminum cans, wood, leaves, etc.) are collected and disposed of at a sanitary landfill. Solids materials removed from ditches (silt, trash, vegetation, etc.) are brought to the District’s wastewater treatment plant and allowed to dry before being hauled away to be disposed of at the sanitary landfill.

Vallejo’s stormwater management plan further provided “[a]ll other applicable source control BMPs described in the California Stormwater Industrial Activity BMP Handbook shall be implemented.”<sup>655</sup> At the time the Vallejo permit was adopted, the 1993 California Stormwater BMP Handbook identified the following BMPs:

- If painting requires scraping or sand blasting of the existing surface, use a drop cloth to collect most of the chips. Dispose the residue properly. If the paint contains lead or tributyl tin, it is considered a hazardous waste. Refer to the waste management BMPs in this chapter for more information.<sup>656</sup>
- For cleaning building exteriors with high pressure water, prevent entry into storm drain, wash onto dirt area, and collect and discharge to sanitary sewer.<sup>657</sup>
- For cleaning building exteriors with hazardous waste, use dry cleaning methods, and contain and dispose of wash water as hazardous waste.<sup>658</sup>

Thus, the above BMPs required by Vallejo’s prior permit and stormwater management plan applied to the maintenance of all municipal buildings and facilities and impose the same requirements as Section C.2.c. of the test claim permit to prevent all debris from entering storm drains or water courses, protect nearby storm drain inlets from pollutants, and determine the proper disposal method for wastes generated from these activities.

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<sup>654</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 35.

<sup>655</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 35.

<sup>656</sup> Exhibit BB (1), 1993 California Stormwater BMP Handbook, page 72.

<sup>657</sup> Exhibit BB (1), 1993 California Stormwater BMP Handbook, page 97.

<sup>658</sup> Exhibit BB (1), 1993 California Stormwater BMP Handbook, page 97.

Vallejo's stormwater management plan also refers to the "California Storm Water Municipal BMP Handbook."<sup>659</sup> In 2003, CASQA issued the Stormwater Municipal BMP Handbook, which further identifies the following BMPs specifically for graffiti removal from walls, sidewalks, and structures:

- Schedule graffiti removal activities for dry weather.
- Protect nearby storm drain inlets prior to removing graffiti from walls, signs, sidewalks, or other structures needing graffiti abatement. Clean up afterwards by sweeping or vacuuming thoroughly and using absorbent and properly disposing of absorbent.
- When graffiti is removed by painting over, implement the procedures under Painting and Paint Removal above.
- Direct runoff from sandblasting and high pressure washing (with no cleaning agents) into a landscaped or dirt area. If such an area is not available, filter runoff through an appropriate filtering device (e.g. filter fabric) to keep sand, particles, and debris out of storm drains.
- If graffiti abatement method generates wash water containing a cleaning compound, . . . plug nearby storm drains vacuum/pump wash water to the sanitary sewer.
- Consider using a waterless or non-toxic chemical cleaning method for graffiti removal (e.g. gels or spray compounds).<sup>660</sup>

Thus, the requirements imposed by the test claim permit to prevent all debris, including structural materials and coating debris, such as paint chips, or other debris and pollutants generated in bridge and structure maintenance or graffiti removal from entering storm drains or water courses, protect nearby storm drain inlets before removing graffiti, and determine the proper disposal method for wastes generated from these activities, are not new for the Vallejo permittees.

Moreover, the requirement in Section C.2.c. of the test claim permit that the permittees shall train their employees on the proper capture and disposal methods for the wastes generated, is not new for the Vallejo permittees. Vallejo provides training for all "individuals responsible for" permit compliance as follows:

## 12. Training

Individuals responsible for SWPPP preparation, implementation, and permit compliance shall be appropriately trained, and the SWPPP shall document all training. This includes those personnel responsible for installation, inspection, maintenance, and repair of BMPs. Those

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<sup>659</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 37.

<sup>660</sup> Exhibit BB (10), CASQA 2003 Stormwater Municipal BMP Handbook, page 127.



responsible for overseeing, revising, and amending the SWPPP shall also document their training. Training should be both formal and informal, occur on an ongoing basis when it is appropriate and convenient, and should include training/workshops offered by the SWRCB, RWQCB, or other locally recognized agencies or professional organizations.<sup>661</sup>

In addition, the stormwater management plan requires the Vallejo Sanitation and Flood Control District to ensure compliance with its ordinances.<sup>662</sup> Thus, between the training of all individuals and the requirement to ensure compliance with its ordinances, the Commission finds the requirement to specify the proper capture and disposal methods of waste with contractors was required by the prior permit and is not new.

Finally, the requirement in Section C.2.c. to report on the implementation of and compliance with the bridge and structural maintenance and graffiti removal BMPs in their annual report is not new with respect to the Vallejo permittees. The prior permit issued by U.S. EPA required an annual report “on the status of implementing the components of the SWMP required by the permit.”<sup>663</sup>

- iv. The requirements imposed by Section C.2.e., Rural Road and Public Works Construction and Maintenance, do not impose a state-mandated program because rural roads are voluntarily accepted into the municipal system and the requirements are not new and, thus, do not impose a new program or higher level of service.*

Section C.2.e. requires “[t]he Permittees shall implement and require contractors to implement BMPs for erosion and sediment control during and after construction for maintenance activities on rural roads, particularly in or adjacent to stream channels or wetlands.”<sup>664</sup> For purposes of Section C.2.e., “rural means any watershed or portion thereof that is developed with large lot home sites, such as one acre or larger, or with primarily agricultural, grazing or open space uses.”<sup>665</sup> To implement Section C.2.e., permittees are required to first obtain the necessary permits before construction or maintenance work begins near creeks and wetlands, develop and implement BMPs for erosion and sediment control (where they do not already exist), develop and implement training and technical assistance resources, develop and implement an inspection program to maintain rural roads, and report on the implementation and compliance with the BMPs in the annual report as follows:

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<sup>661</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 53.

<sup>662</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 27.

<sup>663</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5.

<sup>664</sup> Exhibit A, Test Claim, 10-TC-02, page 161 (Test claim permit, Section C.2.e.i.).

<sup>665</sup> Exhibit A, Test Claim, 10-TC-02, page 161 (Test claim permit, Section C.2.e.i.).

- The Permittees shall notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands.<sup>666</sup>
- The Permittees shall develop, *where they do not already exist*, and implement BMPs for erosion and sediment control measures during construction and maintenance activities on rural roads, including developing and implementing appropriate training and technical assistance resources for rural public works activities, by April 1, 2010.<sup>667</sup> The following BMPs, which minimize impacts on streams and wetlands in the course of rural road and public works maintenance and construction activities, shall be developed and implemented:
  - (a) Road design, construction, maintenance, and repairs in rural areas that prevent and control road-related erosion and sediment transport;
  - (b) Identification and prioritization of rural road maintenance on the basis of soil erosion potential, slope steepness, and stream habitat resources;
  - (c) Construction of roads and culverts that do not impact creek functions. New or replaced culverts shall not create a migratory fish passage barrier, where migratory fish are present, or lead to stream instability;
  - (d) Development and implementation of an inspection program to maintain rural roads' structural integrity and prevent impacts on water quality;
  - (e) Maintenance of rural roads adjacent to streams and riparian habitat to reduce erosion, replace damaging shotgun culverts and excessive erosion;
  - (f) Re-grading of unpaved rural roads to slope outward where consistent with road engineering safety standards, and installation of water bars as appropriate; and
  - (g) Replacement of existing culverts or design of new culverts or bridge crossings shall use measures to reduce erosion, provide fish passage and maintain natural stream geomorphology in a stable manner.<sup>668</sup>
- The Permittees shall develop or incorporate existing training and guidance on permitting requirements for rural public works activities so as to stress the importance of proper planning and construction to avoid water quality impacts.<sup>669</sup>

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<sup>666</sup> Exhibit A, Test Claim, 10-TC-02, page 161 (Test claim permit, Section C.2.e.i.).

<sup>667</sup> Exhibit A, Test Claim, 10-TC-02, page 162 (Test claim permit, Section C.2.e.ii.(1)).

<sup>668</sup> Exhibit A, Test Claim, 10-TC-02, page 162 (Test claim permit, C.2.e.ii.(2)).

<sup>669</sup> Exhibit A, Test Claim, 10-TC-02, page 162 (Test claim permit, Section C.2.e.ii.(3)).

- The Permittees shall provide training incorporating these BMPs to rural public works maintenance staff at least twice within this Permit term.<sup>670</sup>
- The Permittees shall report on the implementation of and compliance with BMPs for the rural public works construction and maintenance activities in their Annual Report, including reporting on increased maintenance in priority areas.<sup>671</sup>

The Commission finds that these activities are not mandated by the state. When the permittees engage in construction of new unpaved roads or maintenance of copermantee-maintained unpaved roads, the costs incurred by a local agency are the result of a local discretionary decision and are not mandated by the state, and therefore, the costs are not eligible for reimbursement.

As indicated above, the California Supreme Court rejected the conclusion that local government is legally compelled to comply with a test claim statute or executive order when the statute or executive order applies to the agency's underlying core functions.<sup>672</sup> Instead, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey.<sup>673</sup> When statutory or regulatory requirements result from an apparently or facially *discretionary* decision, and are therefore not *legally* compelled by the state, they may be *practically* compelled if the failure to act would subject the claimant to "certain and severe...penalties" such as "double...taxation" or other "draconian" consequences.<sup>674</sup> Substantial evidence in the record is required to make a finding of practical compulsion.<sup>675</sup>

Here, the construction and maintenance of roads accepted into the municipal system is entirely voluntary and within the discretion of the local agency. Under existing law, the permittees are only responsible for maintaining roads accepted into either the county road system or the city street system.<sup>676</sup> A road is accepted into the system only

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<sup>670</sup> Exhibit A, Test Claim, 10-TC-02, page 162 (Test claim permit, Section C.2.e.ii.(4)).

<sup>671</sup> Exhibit A, Test Claim, 10-TC-02, page 162 (Test claim permit, Section C.2.e.iii.).

<sup>672</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

<sup>673</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

<sup>674</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 822.

<sup>675</sup> *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.

<sup>676</sup> Streets and Highways Code sections 941(b) and 1806(a); *Kern County v. Edgemont Development Corp.* (1963) 222 Cal.App.2d 874, 878.

through an action by the governing body or its designee.<sup>677</sup> Thus, the term “roads” includes whatever paved or unpaved roads accepted into the permittees’ road system by the voluntary action of the governing body. There is no evidence in the record showing the failure to construct or maintain rural roads would subject local government to “certain and severe...penalties” such as “double...taxation” or other “draconian” consequences, as required for a finding of practical compulsion. And when local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required to comply with downstream requirements imposed by the state, regardless of when the initial decision to participate in the underlying program began.<sup>678</sup> Thus, the requirements imposed by Section C.2.e. are not mandated by the state.

Moreover, the requirements to notify the Water Board, the California Department of Fish and Game, and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands are not new. Fish and Game Code section 1602, as added in 2003, provides “[a]n entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless” the entity first notifies the Department of Fish and Game and pays a fee.<sup>679</sup> The federal CWA and the California Water Code also require a discharger of dredged or fill material to first notify and file an application with the Army Corps of Engineers for a permit and obtain a certification of compliance by the Regional Board.<sup>680</sup>

In addition, even though the City of San Jose contends these requirements are new because the permit removes the permittees’ ability to determine what is and how to comply with the maximum extent practicable (MEP) standard,<sup>681</sup> most of the remaining requirements were imposed by the permittees’ prior stormwater management plans, which were made enforceable by their prior permits as described below, and are therefore not new and do not impose a new program or higher level of service.

### Santa Clara

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<sup>677</sup> Streets and Highways Code sections 941(b) and 1806(a).

<sup>678</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731, 743; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 [“. . . a local entity’s voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.”]

<sup>679</sup> Statutes 2003, chapter 736.

<sup>680</sup> United States Code, title 33, sections 1341, 1344; Water Code section 13396.

<sup>681</sup> Exhibit Y, Claimant’s (City of San Jose’s) Comments on the Draft Proposed Decision, pages 5-7.

The requirements imposed by Section C.2.e. of the test claim permit are not new for the Santa Clara permittees. The prior permit (Order 01-124) required the permittees to comply with the receiving water limitations and discharge prohibitions by implementing control measures and BMPs to reduce pollutants in the discharge to the MEP and eliminate illicit discharges in accordance with their Management Plan.<sup>682</sup> Finding 16 and Section C.5. of the prior permit required the permittees to develop, by June 30, 2002, BMPs and performance standards, annual training and technical assistance needs, and annual reporting requirements for road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion; and environmental permitting for rural public works activities.<sup>683</sup>

Santa Clara's 2004 stormwater management plan states the Santa Clara permittees developed new performance standards for rural public works activities in December 2002, which were approved by the Regional Board on February 18, 2003, as follows:<sup>684</sup>

Rural Public Works Maintenance and Support. During FY 01-02, the Program formed an AHTG and worked with Regional Board staff to develop a new performance standard for rural public works activities. The goal of the Rural Public Works Maintenance and Support Performance Standard is to minimize the water quality impacts resulting from public works maintenance and support activities in rural areas. This performance standard helps Copermittees whose jurisdictions include rural areas to ensure that required control measures are implemented while performing maintenance activities adjacent to streams to prevent the degradation of stream functions. The Performance Standard was approved by the Management Committee on December 20, 2002 and accepted by the Regional Board on February 18, 2003.<sup>685</sup>

The performance standards, which include the requirement to implement BMPs for maintenance activities, seek the appropriate permits before work begins, provide annual training and technical assistance, and conduct inspections, are identified in the 2004 stormwater management plan as follows:

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<sup>682</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2083-2085 (Attachment 60, Order 01-024, Sections C.1. and C.2.).

<sup>683</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2079, 2087 (Attachment 60, Order 01-024, Finding 16 and Section C.5.).

<sup>684</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2075 (Attachment 60, Order 01-024, Finding 8).

<sup>685</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5748 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004); see also, page 2523 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

- 1) The Co-permittee will implement and require contractors to implement appropriate best management practices (BMPs) when performing maintenance activities in or adjacent to a stream channel unless required to do otherwise by emergency flood control procedures. During emergency flood control activities, water quality will be protected to the maximum extent practicable
- 2) The Co-permittee will plan for proper erosion prevention and sediment control measures in designing rural roads.
- 3) During construction, the Co-permittee will inspect the construction site, and maintain construction erosion prevention and sediment control BMPs to ensure that they are working properly and that problems are corrected as soon as they develop.
- 4) Maintenance staff will properly store, use, and dispose of materials, chemicals and wastes during and after the performance of activities. Mechanical equipment will be stored and operated properly as well.
- 5) Co-permittees will provide annual training and technical assistance to maintenance staff in the use of appropriate BMPs.
- 6) Co-permittees will obtain the correct permits for maintenance activities taking place in or adjacent to stream channels. The “correct permits” are “defined on page 14 herein” [which refers to the requirement to notify the Water Board, the California Department of Fish and Game and the U.S. Army Corps of Engineers, where applicable, and obtain appropriate agency permits for rural public works activities before work in or near creeks and wetlands.<sup>686</sup>]
- 7) The Co-permittee will provide outreach materials to contractors, developers, and staff on Rural Public Works Maintenance and Support Activities BMPs and permitting requirements.
- 8) The Co-permittee will evaluate and report on the implementation of the rural public works performance standards as part of the individual Co-permittee annual reports. Annual reporting and inspections are not required under the following special cases: levees that are inspected frequently under another program (i.e. SCVWD levees inspected for flood protection and control) and levees where captured runoff would

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<sup>686</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6004 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

be under another NPDES permit (i.e. City of Sunnyvale treatment pond levees).<sup>687</sup>

The BMPs required by Section C.2.e. are also in the 2004 stormwater management plan and are not new. As indicated above, Section C.2.e. requires the permittees to develop and implement BMPs, “where they do not already exist,” for road design, construction, maintenance of rural roads adjacent to streams and riparian habitat and on the basis of soil erosion potential and slope steepness, and repairs in rural areas that prevent and control road-related erosion and sediment transport; construction or replacement of culverts that do not impact creek functions; development and implementation of an inspection program to maintain rural roads’ structural integrity; and regrading of unpaved rural roads to slope outward. The 2004 stormwater management plan contains the following BMPs for road planning, design, and maintenance to reduce the potential for erosion and sediment delivery:

- Planning and design BMPs for roads and culverts to reduce the potential for erosion and sediment delivery.<sup>688</sup>
- Maintenance BMPs for erosion prevention and sediment control.<sup>689</sup>
- Inspection of drainage facilities, including cross drains, on a regular basis to ensure that sufficient drainage is provided during storm periods, so that runoff diverted onto slopes does not cause erosion.<sup>690</sup>
- Maintenance activities unique to unpaved rural roads, including regular inspections of roads to determine if the road is adequately sloped to drain water from the surface without creating erosion problems, and of culverts.<sup>691</sup>

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<sup>687</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5986 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>688</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6004 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>689</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6001 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>690</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6004 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>691</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6005 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

- BMPs for replacement of culverts.<sup>692</sup>

Finally, the requirement in Section C.2.e. of the test claim permit to report on the implementation of and compliance with BMPs for the rural public works construction and maintenance activities in their Annual Report, including reporting on increased maintenance in priority areas, is not new. The 1997 Santa Clara Valley Urban Runoff Management Plan imposed the same requirement: “As part of the annual reporting process, each co-permittee will review and evaluate the effectiveness of its BMPs in achieving the goals of reducing pollutants in storm water to the maximum extent practicable and eliminating illicit discharges. The review and evaluation will include input from municipal maintenance staff that implement the BMPs.”<sup>693</sup>

Therefore, the activities required by Section C.2.e. of the test claim permit are not new for the Santa Clara permittees, including the City of San Jose.

### Alameda

Similarly, the prior permit issued to the Alameda County permittees (R2-2003-0021), in Finding 44 and Provision C.6., required the permittees to develop performance standards, appropriate training and technical assistance requirements, and annual reporting requirements for road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion, and for environmental permitting for rural public works activities.<sup>694</sup> Alameda’s prior permit also required the permittees to develop education and guidance on permitting requirements for rural public works activities to stress the importance of proper planning and construction.<sup>695</sup>

The prior permit for the Alameda permittees also made enforceable as part of the Management Plan changes and updates to control measures, Best Management Practices, and Performance Standards documented in the Annual Report” following Regional Board approval.<sup>696</sup> The Rural Public Works Maintenance and Support Activities prepared by the Alameda Countywide Clean Water Program to comply with Provision C.6. of the prior permit, dated February 18, 2004, identifies the following

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<sup>692</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 6005 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>693</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 176.

<sup>694</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1861, 1881 (Attachment 53, Order R2-2003-0021, Finding 44 and Section C.6.).

<sup>695</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021, Section C.6.).

<sup>696</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1854-1855 (Attachment 53, Order R2-2003-0021, Findings 15, 17).



performance standards for rural public roads, including obtaining the required permits, conducting inspections, and conducting annual training:

1. Each Agency will determine if rural roads are located within their jurisdiction and evaluate the applicability of these performance standards during the first year of implementation (fiscal year 2004-2005).
2. Each Agency will implement appropriate BMPs when performing maintenance activities in or adjacent to a stream channel unless required to do otherwise by emergency flood control procedures. During emergency flood control activities, water quality will be protected to the maximum extent practicable.
3. Each Agency will plan for proper erosion prevention and sediment control measures when designing rural roads.
4. During road construction, each Agency will inspect the construction site and maintain construction erosion prevention and sediment control BMPs.
5. Each Agency will provide annual training and technical assistance to maintenance staff in the use of appropriate Rural Public Works Maintenance and Support Activities BMPs.
6. Each Agency will obtain the appropriate permits for maintenance activities occurring in or adjacent to stream channels, including from the Regional Board, U.S. Army Corps of Engineers, California Department of Fish and Game, and from the County Flood Control District.
7. Each Agency will provide outreach materials to contractors and staff on Rural Public Works Maintenance and Support Activities BMPs and permitting requirements.
8. Each Agency will evaluate and report on the implementation of the Rural Public Works Maintenance and Support Activities Performance Standards as part of the individual Copermitttee annual reports.<sup>697</sup>

The BMPs required by Section C.2.e. are also identified in the Alameda Countywide Clean Water Program Rural Public Works Maintenance and Support Activities and are not new. As indicated above, Section C.2.e. requires the permittees to develop and implement BMPs, “where they do not already exist,” for road design, construction, maintenance of rural roads adjacent to streams and riparian habitat and on the basis of soil erosion potential and slope steepness, and repairs in rural areas that prevent and control road-related erosion and sediment transport; construction or replacement of culverts that do not impact creek functions; and regrading of unpaved rural roads to slope outward. In this respect, Alameda’s program contains these specific BMPs under the following categories:

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<sup>697</sup> Exhibit BB (5), Alameda Countywide Clean Water Program Rural Public Works Maintenance and Support Activities, dated February 18, 2004, pages 2, 10.

- Streambank stabilization projects.
- Management and removal of large woody debris and live vegetation from stream channels.
- Road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion.
- Road planning and design, including the replacement of culverts.<sup>698</sup>

Finally, the prior permit contains the following reporting requirements:

- The permittees shall submit an Annual Report to the Regional Board by September 15 of each year, documenting the status of the Program's and the Permittees' activities during the previous fiscal year, including the result of a qualitative assessment of activities implemented by the Permittees, and the performance of tasks contained in the Management Plan.<sup>699</sup>
- By 100 days from the adoption of this order and on March 1st of each year thereafter, the Permittees shall submit draft Workplans and Updates that describe the proposed implementation of the Management Plan for the next fiscal year, which shall consider the status of implementation of current year activities and actions of the Permittees, problems encountered, and proposed solutions, and shall address any comments received from the Executive Officer on the previous year's Annual Report.<sup>700</sup>

Therefore, the activities required by Section C.2.e. of the test claim permit are not new for the Alameda permittees.

### San Mateo

San Mateo's prior permit (99-059) specifically required the County of San Mateo and the cities of Half Moon Bay, Menlo Park, Pacifica, Portola Valley, and Woodside (i.e., municipalities with maintenance responsibilities in more rural areas) to jointly develop by June 30, 2000, performance standards, annual training and technical assistance needs, and annual reporting requirements for the following rural public works maintenance and support activities:

- Management and removal of large woody debris and live vegetation from channels.
- Streambank stabilization projects.

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<sup>698</sup> Exhibit BB (5), Alameda Countywide Clean Water Program Rural Public Works Maintenance and Support Activities, dated February 18, 2004, pages 4-13.

<sup>699</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1881-1882 (Attachment 53, Order R2-2003-0021, Section C.7.).

<sup>700</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1883 (Attachment 53, Order R2-2003-0021, Section C.7.b.).

- Road construction, maintenance, and repairs in rural areas to prevent and control road-related erosion.
- Environmental permitting for rural public works activities.<sup>701</sup>

The Stormwater Management Plan, which became enforceable under the prior permit, required the County of San Mateo to “continue to implement the practices described in its detailed maintenance manual titled *Endangered Species and Watershed Protection Program*, Volume 1 Maintenance Standards that includes standards and best management practices for the” rural public works maintenance and support activities bulleted above.<sup>702</sup> The cities of Half Moon Bay, Menlo Park, Pacifica, Portola Valley, and Woodside were directed to use the same BMPs listed in the maintenance manual titled *Endangered Species and Watershed Protection Program*, Volume 1 Maintenance Standards, or similar BMPs.<sup>703</sup>

The County of San Mateo 2004 Maintenance Standards Manual also requires the following:

- Unpaved roads shall be inspected prior to closure and treated with appropriate BMPs to ensure positive drainage and minimal erosion and sedimentation during the closure period. Unpaved roads shall be inspected prior to opening.<sup>704</sup>
- BMPs required for the repair, replacement, maintenance, and installation of unpaved roads to preserve surface drainage characteristics and to minimize road-related sedimentation. Inspections are required at the end of the rainy season, and prior to closure.<sup>705</sup>

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<sup>701</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1953 (Attachment 55, Order 99-059, Section C.9.b.).

<sup>702</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4019-4020 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010); Exhibit BB (17), County of San Mateo Endangered Species and Watershed Protection Program, Volume 1 Maintenance Standards.

<sup>703</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4019-4020 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>704</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 28.

<sup>705</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 34.

- Unpaved park and flood control facility access roads shall be maintained throughout the year. Drainage pathways and culverts shall be monitored and repaired or cleaned as necessary to reduce sedimentation into the waterways.<sup>706</sup>
- Shoulder, turnout, and berm areas disturbed by unpaved road maintenance activities shall be treated.<sup>707</sup>
- New and replacement culverts on all fish-bearing streams shall be designed and constructed to allow fish passage, and be aligned with the existing stream flowline.<sup>708</sup>

In addition, the 2004 Maintenance Standards Manual requires training for all personnel responsible for the design, construction, inspection, and maintenance of public facilities, including introductory training and annual refresher training, and reporting that information in the Annual Report.<sup>709</sup>

Finally, the annual reporting requirements imposed by Section C.2.c. are not new for the San Mateo permittees. As indicated above, the prior permit required the submission of annual reports “documenting the status of the Program’s and the Dischargers’ activities during the previous fiscal year,” including an assessment of the “performance of tasks contained in the Plan.”<sup>710</sup>

Therefore, the requirements imposed by Section C.2.e. of the test claim permit are not new with respect to the San Mateo permittees.

#### Fairfield-Suisun

The requirements imposed by Section C.2.e. are not new for the Fairfield-Suisun permittees. The Fairfield-Suisun permittees created a stormwater management plan for fiscal years 1999-2000 to 2004-2005, which included performance goals and “baseline components to be accomplished” that became an enforceable component of the prior permit.<sup>711</sup> Permittees were required to inspect inlets, culverts, ditches, channels, and watercourses each year; receive training through an outreach workshop on minimizing

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<sup>706</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 35.

<sup>707</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 35.

<sup>708</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, pages 49-50.

<sup>709</sup> Exhibit BB (16), County of San Mateo 2004 Watershed Protection Plan, Maintenance Standards Manual, page 172.

<sup>710</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order No. 99-059, Section C.5.)

<sup>711</sup> Exhibit BB (27), Order R2-2003-0034, Findings 7 and 10, page 5; Section C.2, page 19.

impacts to natural creeks due to maintenance in or near natural creeks, and comply with BMPs for erosion control during maintenance.<sup>712</sup>

Fairfield-Suisun's 2007 stormwater management plan, which was also made enforceable by the prior permit,<sup>713</sup> contained a section on rural roads, which identified the following performance tasks for implementing BMPs, training and outreach materials, obtaining appropriate permits, and annual reporting on the implementation of the rural public works maintenance and support activities performance standards, as follows:

1. Each agency will determine if rural roads are located within their jurisdiction and evaluate the applicability of these performance standards during the first year of implementation.
2. Each agency will implement appropriate BMPs when performing maintenance activities in or adjacent to a stream channel unless required to do otherwise by emergency flood control procedures. During emergency flood control activities, water quality will be protected to the maximum extent practicable.
3. Each agency will plan for proper erosion prevention and sediment control measures when designing rural roads.
4. During rural road construction, each agency will inspect the construction site and maintain construction erosion prevention and sediment control BMPs.
5. Each agency will adequately train maintenance staff in the use of appropriate rural public works maintenance and support activities BMPs.
6. Each agency will obtain the appropriate permits for maintenance activities occurring in or adjacent to stream channels.
7. Each agency will provide outreach materials to appropriate contractors and staff on rural public works maintenance and support activities BMPs and permitting requirements.
8. Each agency will evaluate and report on the implementation of the rural public works maintenance and support activities performance standards as part of the individual co-permittee annual reports.<sup>714</sup>

A long list of BMPs for rural public works maintenance, including for stream bank stabilization projects; road construction, maintenance, and repairs in rural area; maintenance activities unique to unpaved rural roads; environmental permitting and prior notice to the Department of Fish and Game and the U.S. Army Corps of

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<sup>712</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, pages 83, 84, 87, and 98. See also, Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 89.

<sup>713</sup> Exhibit BB (27), Order R2-2003-0034, pages 19-20 (Provision C.2.b.).

<sup>714</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 91.

Engineers; and rural road planning and design are contained in the 2007 stormwater management plan.<sup>715</sup>

Thus, the requirements imposed by Section C.2.e. of the test claim permit are not new with respect to the Fairfield-Suisun permittees.

### Contra Costa and Vallejo

The prior permits issued to the Contra Costa and Vallejo permittees are not as detailed as those summarized above, but they do contain some of the same requirements as those in Section C.2.e., and as indicated above, any new downstream requirements imposed by the test claim permit are not mandated by the state.<sup>716</sup> The prior permit issued to the Contra Costa permittees (Order 99-058) incorporated by reference and made enforceable the Stormwater Management Plan prepared by the Contra Costa Clean Water Program, including the performance standards identified in the plan, “which represent the level of effort required of each Discharger.”<sup>717</sup> The Contra Costa Stormwater Management Plan 1999-2004 requires the permittees to first comply with the regulatory requirements of the Department of Fish and Game and the U.S. Army Corps of Engineers, comply with BMPs, and provide training on road repair and maintenance:

- MUNI-41: Each agency will comply with regulatory requirements of the appropriate agencies (e.g., the California Department of Fish and Game, the U.S. Army Corps of Engineers, etc.).<sup>718</sup>
- MUNI-45: Each agency will minimize desilting activities and disturbances of channel bottoms during the wet season.<sup>719</sup>
- MUNI-46: Each agency will dispose of desilted material properly and will not allow it to re-enter the watercourse after removal to the MEP.<sup>720</sup>
- MUNI-47: Each agency will retain (design approved) low growing vegetation in channel bottoms and slopes to detain runoff, minimize erosion, trap sediment

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<sup>715</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 110-117.

<sup>716</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731, 743; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

<sup>717</sup> Exhibit BB (25), Order 99-058, pages 1, 3, 8 (Findings 1, 7, and 8; Provisions C.3. and C.4.); Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004.

<sup>718</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 80.

<sup>719</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 81.

<sup>720</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 81.

and enhance riparian habitat when evaluating the need to maintain channel design capacity, as appropriate.<sup>721</sup>

- MUNI-63: Each agency will schedule excavation and road maintenance activities for dry weather.<sup>722</sup>
- MUNI-68: Each agency will train employees on road repair and maintenance activities.<sup>723</sup>

Finally, the annual reporting requirements imposed by Section C.2.c. are not new for the Contra Costa permittees. Contra Costa's prior permit required the submission of annual reports "documenting the status of the Program's and the Dischargers' activities during the previous fiscal year," including an assessment of the "performance of tasks contained in the Plan."<sup>724</sup>

The prior permit adopted by U.S. EPA governing the Vallejo permittees (Order CAS612006) required the permittees to implement in its entirety the "Vallejo Sanitation and Flood Control District Storm Water Management Plan" and "any modifications to the SWMP made during the term of this permit."<sup>725</sup> Vallejo's stormwater management plan does not contain a section on rural roads, but it does identify performance tasks and BMPs for all construction and maintenance activities, specifically requiring all projects shall prevent erosion and sedimentation through the use of BMPs that shall be maintained at a frequency that ensures maximum control and removal of pollutants; identifying a list of sediment control BMPs; and requiring training.<sup>726</sup> In addition, the annual reporting requirements imposed by Section C.2.c. are not new for the Vallejo permittees. Vallejo's prior permit and stormwater management plan required the submission of annual reports "documenting the status" of "implementing the components of the SWMP required by the permit," including an assessment of controls.<sup>727</sup>

Accordingly, the Commission finds the requirements imposed by Section C.2.e. do not mandate a new program or higher level of service.

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<sup>721</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 81.

<sup>722</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 84.

<sup>723</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 85.

<sup>724</sup> Exhibit BB (25), Order 99-058, page 10.

<sup>725</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 3, 8.

<sup>726</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, pages 39, 50-53.

<sup>727</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5; Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 68.

- v. *The requirements imposed by Section C.2.f., Corporation Yard Maintenance, are not mandated by the state, are not unique to government, and do not provide a governmental service to the public and, thus, Section C.2.f. does not impose a state-mandated new program or higher level of service.*

Section C.2.f. requires the permittees that have corporation yards not already covered under the State Board's Industrial Stormwater NPDES General Permit, to prepare, implement, and maintain a site-specific Stormwater Pollution Prevention Plan (SWPPP) for their corporation yards that includes plans for municipal vehicle maintenance, heavy equipment and maintenance vehicle parking areas, and material storage facilities to comply with water quality standards. Each plan "shall incorporate all applicable BMPs described in the California Stormwater Quality Associations' Handbook for Municipal Operations and the Caltrans Storm water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda, as appropriate."<sup>728</sup> The SWPPP plan shall be completed by July 1, 2010.<sup>729</sup> Section C.2.f. also identifies several implementation level requirements for BMPs and control measures (dry clean-up, good housekeeping practices, material and waste storage control, and vehicle leak and spill control); inspections of their corporation yards; and reporting on the implementation of SWPPPs, the results of inspections, and any follow-up actions in their Annual Report.<sup>730</sup>

The City of San Jose contends Section C.2.f. requires preparation, implementation, and maintenance of a site specific Stormwater Pollution Prevention Program (SWPPP) for corporate yards.<sup>731</sup> The claimant argues although permittees implemented Stormwater Pollution Prevention Plans (SWPPPs) under the prior permits, the test claim provision now mandates that "each SWPPP shall incorporate all applicable BMPs that are described in the California Stormwater Quality Association's Handbook for Municipal Operations and the Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003, and its addenda, as appropriate," which represents an increased level of service from that which was required under the prior permit.<sup>732</sup>

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<sup>728</sup> Exhibit A, Test Claim, 10-TC-02, page 163 (Test claim permit, Section C.2.f.i.(1) and (2)).

<sup>729</sup> Exhibit A, Test Claim, 10-TC-02, page 163 (Test claim permit, Section C.2.f.i.(3)).

<sup>730</sup> Exhibit A, Test Claim, 10-TC-02, pages 163-164 (Test claim permit, Sections C.2.f.ii., C.2.f.iii.).

<sup>731</sup> Exhibit C, Test Claim, 10-TC-05, pages 30-31.

<sup>732</sup> Exhibit C, Test Claim, 10-TC-05, page 30.



The Regional Board argues Section C.2.f. does not mandate a new program or higher level of service because the requirements are not new and are not unique to local government.<sup>733</sup>

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

Section C.2.f. does *not* apply to all permittees, but only to those permittees who have corporation yards *not* already covered by the State Board's Industrial Stormwater NPDES General Permit. Section C.2.f.i.2. states "[t]he requirements in this provision shall apply only to facilities that are not already covered under the State Board's Industrial Stormwater NPDES General Permit."<sup>734</sup> Thus, for example, the City of Fairfield has a corporation yard that houses the City's buses, is an industrial Notice of Intent (NOI) facility under the State's General Permit and, thus, is not required to comply with Section C.2.f. of the test claim permit.<sup>735</sup>

Federal regulations require stormwater associated with industrial activity that discharges to surface waters or through the MS4s also be regulated by an NPDES permit.<sup>736</sup> The State Water Board first issued the General Permit referred to in Section C.2.f. of the test claim permit on November 19, 1991, to comply with federal law and regulate stormwater discharges and authorized non-stormwater discharges associated with industrial activity, which covers the following types of facilities that are both public and private:<sup>737</sup>

- Facilities subject to stormwater effluent limitations guidelines or new source performance standards.
- Manufacturing facilities.
- Mining/oil and gas facilities.
- Hazardous waste treatment, storage, or disposal facilities.
- Landfills.

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<sup>733</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 64; Exhibit P, Regional Board's Response to the Request for Additional Briefing, pages 22-23.

<sup>734</sup> Exhibit A, Test Claim, 10-TC-02, page 163 (Test claim permit, Section C.2.f.i.(2)); Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 868, et seq. (the State Board's Industrial Stormwater NPDES General Permit, adopted April 17, 2007.)

<sup>735</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 81.

<sup>736</sup> Code of Federal Regulations, title 40, section 122.26(b)(14).

<sup>737</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 871.

- Recycling facilities, such as salvage and automobile yards.
- Transportation facilities that conduct any type of vehicle maintenance, such as fueling, cleaning, repairing.
- “Light industry” facilities where industrial materials, equipment, or activities are exposed to stormwater.<sup>738</sup>

The General Permit covers the facility whether it is primary or auxiliary to the facility operator’s function. “For example, although a school district’s primary function is education, a facility that it operates for vehicle maintenance of school buses is a transportation facility that is covered by this General Permit.”<sup>739</sup>

To receive coverage under the General Permit, the facility operator is required to submit a Notice of Intent (NOI), pay an annual fee to the State Water Board, and prepare a SWPPP that describes the BMPs to control pollutants from the facility from contacting stormwater and non-stormwater discharges.<sup>740</sup> The General Permit states facility operators shall consider BMPs for implementation at the facility that are generally the same as Section C.2.f. of the test claim permit: namely, good housekeeping, regular inspections and maintenance, cover fueling areas, vehicle leak and spill control including the use of dry clean-up measures, and material handling and storage.<sup>741</sup>

The General Permit further provides “Facility operators may request to terminate their coverage under this General Permit by filing a Notice of Termination (NOT) with the Regional Water Board.”<sup>742</sup>

Thus, a permittee with a corporation yard had the discretion to file a notice of intent for coverage under the General Permit, and not have its facility regulated by the test claim permit. In addition, not only is the decision to have a corporation yard within the discretion of the local agency permittee and not mandated by the state, as discussed above, so is the decision to have its facility regulated by Section C.2.f. of the test claim permit. Thus, the requirements in Section C.2.f. are not mandated by the state.

Moreover, these requirements, although now more specifically stated, are not new and do not provide a higher level of service. Federal law prohibits the discharge of material

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<sup>738</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 872; Code of Federal Regulations, title 40, section 122.26(b)(14).

<sup>739</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 871.

<sup>740</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 883.

<sup>741</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 900-901.

<sup>742</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 889.

other than stormwater (i.e., non-stormwater discharges) to the waters of the United States and prohibits discharges containing hazardous substances in stormwater in excess of reportable quantities.<sup>743</sup> As admitted by the claimant, the prior permit required the permittees to have a SWPPP for corporation yards that identifies BMPs to comply with federal law.<sup>744</sup> For example, the 2004 Urban Runoff Management Plan for the City of San Jose identifies their BMPs for corporation yards as follows:

The City owns and operates several Corporation Yards. Municipal facilities are required to comply with stormwater regulations. Efforts to reduce contaminated discharges from City facilities (Corporation Yards) must be similar to those required of private businesses. There are six yards that are assessed annually by ESD for stormwater compliance; three are managed by General Services (GS) and three are managed by the Department of Transportation (DOT). The Corporation Yards are: Central Service Yard (GS), Mabury Yard (DOT), Main Yard (GS), Municipal (or Police) Garage (GS), South Yard (GS), and West Yard (DOT).

In addition to the annual inspection conducted by ESD, GS conducts quarterly hazardous material inspections which include stormwater issues. Each Corporation Yard is required to maintain a Stormwater Pollution Prevention Plan (SWPPP).

ESD also coordinate with various departments to ensure municipal training is conducted in support of the applicable program elements.<sup>745</sup>

Their recommended BMPs for loading areas states the following:

Have debris from catch basins removed on a regular basis. Protect from accidental spillage by placing absorbent booms or covers over the drains or valved inlet inserts if safe and feasible.

If materials are Hazardous, advise local Haz Mat enforcement agency.

Have all dock water diverted to the sanitary sewer or use dry clean methods.<sup>746</sup>

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<sup>743</sup> United States Code, title 33, section 1342(p)(3)(B)(ii); Code of Federal Regulations, title 40, sections 117.3, 302.4.

<sup>744</sup> Exhibit C, Test Claim 10-TC-05, page 30.

<sup>745</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2505 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>746</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2641 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

For outdoor equipment storage, their BMPs required them to inspect all scrap yards, vehicle storage lots, or areas where retired surplus equipment is stored, and drain all automotive fluids before storage.<sup>747</sup>

San Jose's plan also contains BMPs for waste storage, which includes "good housekeeping" and protecting the storm drain outlet from accidental discharge.<sup>748</sup>

And San Jose's plan for vehicle washing required water to be discharged into approved sanitary sewer drain, after consultation with the sanitary sewer to see if the wash water can be pre-treated.<sup>749</sup>

Similarly, Santa Clara's 1997 and 2004 urban runoff management plan states "[e]ach Co-permittee that operates a municipal corporation yard has prepared a Storm Water Pollution Prevention Plan (SWPPP) for that facility. The Copermittees will continue to implement the SWPPPs and update them with additional control measures to improve effectiveness."<sup>750</sup> Their 1997 plan also contained the following required performance standard BMPs:

- Evaluate the need for wet cleaning or flushing of streets on a case-by-case basis and where possible, substitute dry methods.<sup>751</sup>
- Where absolutely necessary to use water to clean streets, collect the resulting washwater and dispose of it in the sanitary sewer. Contact the local wastewater treatment agency for permission to discharge to the sanitary sewer and information on any pretreatment requirements for this discharge.<sup>752</sup>

F. Equipment cleaning, maintenance, and storage.

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<sup>747</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2637 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>748</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2636 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>749</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2635 (Attachment 68, City of San Jose Urban Runoff Management Plan, September 2004).

<sup>750</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 72-73; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5748 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004).

<sup>751</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 192-193.

<sup>752</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 193, footnote 1.

1. Inspect equipment daily and repair any leaks.
  2. Perform major equipment repairs at the corporation yard, when practical.
  3. If refueling or repairing vehicles and equipment must be done on-site, use a location away from storm drain inlets and creeks.
  4. Recycle used motor oil, diesel oil, and other vehicle fluids and parts whenever possible.
  5. Clean equipment including sprayers, sprayer paint supply lines, patch and paving equipment, and mudjacking equipment at the end of each day. Conduct cleaning at a corporation or maintenance yard if possible. Use proper collection methods for cleaning solutions and recycle or dispose of waste materials at an approved hazardous waste facility.<sup>753</sup>
- Spill control. Contain the spill and use dry methods to clean (scoops, rags, absorbents, vacuuming). Do not hose down or bury.<sup>754</sup>

Santa Clara's 2004 plan contained similar BMPs, and also included the following BMPs for waste storage: recommend good housekeeping measures, that the facility protects storm drains by relocating substance to a covered area, and that the facility berm or cover substance(s) or install an approved protective device at storm drain inlets.<sup>755</sup>

Thus, there is no showing the activities identified in Section C.2.f. are new. Even though the test claim permit specifically refers to stormwater handbooks for corporation yard BMPs to identify and use "as appropriate" to the scope and type of the permittee's facility, neither the law nor the record show these references increase the level of service to the public.

In addition, the requirements for corporation yards are not unique to government, nor provide a governmental service to the public. As indicated in the General Permit, the same BMPs apply to corporation yards owned by private industries.<sup>756</sup>

Accordingly, the Commission finds Section C.2.f. does not mandate a new program or higher level of service.

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<sup>753</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 196.

<sup>754</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 205.

<sup>755</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-2, 10-TC-03, and 10-TC-05, page 5847 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>756</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 872.

**2. Sections 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., and C.8.h., Addressing the Monitoring and Reporting Requirements, Impose Some New Requirements that Constitute State-Mandated New Programs or Higher Levels of Service.**

The claimants plead the above-captioned sections, which address the monitoring and reporting requirements of the test claim permit.<sup>757</sup> These sections of the permit impose the following requirements:

- 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. (Section C.8.b.).
- Conduct status monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.c., C.8.h., and C.8.d.i.).
- Investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control. (Section C.8.d.ii.).
- Conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report. (Section C.8.d.iii.).
- Conduct pollutants of concern monitoring. (Sections C.8.e.i., C.8.e.iii., C.8.e.iv., and C.8.e.v.).
- Conduct long term monitoring and when the monitoring shows exceedances of water quality standards, determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE). (Sections C.8.e.ii, C.8.e.iii., and C.8.d.i.).
- Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages” by July 1, 2011, and implement the study by July 1, 2012. (Section C.8.e.vi.).
- Encourage citizen monitoring and participation and report on the efforts. (Section C.8.f.).
- Report on the monitoring, using the standard report content requirements and the data accessibility requirements, in the Electronic Status Monitoring Data Report, Urban Creeks Monitoring Report, and Integrated Monitoring Report. (Sections 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.).

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<sup>757</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 29-45; Exhibit B, Test Claim, 10-TC-03, pages 25-37; Exhibit C, Test Claim, 10-TC-05, pages 31-43.

The Commission finds only the following requirements are new and mandate a new program or higher level of service:

1. Conduct one geomorphic study as follows:
  - Permittees shall select a waterbody/reach, preferably one that contains significant fish and wildlife resources, and conduct one of the following projects within each county, except that only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:
    - (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or
    - (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or
    - (3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:
      - Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
      - Contributing drainage area.
      - Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
      - Best available information on average annual rainfall in the study area.
  - Permittees shall complete the selected geomorphic project so that project results are reported in the Integrated Monitoring Report pursuant to Section C.8.g.v.<sup>758</sup>
2. Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012.<sup>759</sup>

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<sup>758</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222, 227 (Test claim permit, Section C.8.d.iii.).

<sup>759</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

3. *For the Vallejo permittees only*, encourage citizen monitoring and participation as follows:
  - Permittees shall encourage Citizen Monitoring.
  - In developing Monitoring Projects and evaluating Status & Trends data, Permittees shall make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
  - Permittees shall demonstrate annually that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions. Permittees shall report on these outreach efforts in the annual Urban Creeks Monitoring Report.<sup>760</sup>
4. Monitoring Reporting and Notice:
  - Electronic Status Monitoring Data Report:
    - Maintain an information management system that will support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>761</sup>
    - Submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>762</sup>
  - Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>763</sup>

All other sections pled do not impose new requirements and, thus, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

a. Federal monitoring requirements

The CWA requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the

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<sup>760</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.f.).

<sup>761</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii., and fn. 46).

<sup>762</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>763</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).



permit.<sup>764</sup> Specifically, applications for an NPDES permit from medium and large MS4 dischargers are required to identify the following information, including monitoring data:

- The location of known municipal storm sewer system outfalls discharging to waters of the United States.<sup>765</sup>
- A list of water bodies that receive discharges from the MS4, including downstream segments, lakes, and estuaries, where pollutants from the system discharges may accumulate and cause water degradation, and a description of water quality impacts.<sup>766</sup>
- Existing quantitative data describing the volume and quality of discharges from the MS4, including a description of the outfalls sampled, sampling procedures and analytical methods used.<sup>767</sup>
- A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls that are currently being implemented.<sup>768</sup>
- The quality and quantity of discharges covered in the permit application, including:
  - Quantitative data from representative outfalls or field screening points that include samples of effluent analyzed for the organic pollutants listed in Table II and the toxic pollutants in Table III of appendix D of 40 C.F.R. part 122.
  - Estimates of the annual pollutant load and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls for BOD<sub>5</sub>, COD, total suspended solids, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. The estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods.
  - A proposed monitoring program for representative data collection that describes the location of outfalls or field screening points to be sampled,

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<sup>764</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1).

<sup>765</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(iii)(B).

<sup>766</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(C).

<sup>767</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(B).

<sup>768</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(v).

why the location is representative, the frequency of sampling, parameters to be sampled, and a description of the sampling equipment.<sup>769</sup>

Federal law then requires the Regional Board to establish conditions, including the monitoring conditions, to provide for and ensure compliance with all applicable requirements of the CWA and its implementing regulations.<sup>770</sup>

- Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate).
- Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.<sup>771</sup>

In addition, when the Regional Board determines an MS4 discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board is required by federal law to develop NPDES permit effluent limits as necessary to meet water quality standards.<sup>772</sup>

Water quality standards and criteria protect the beneficial uses of any given waterbody and are developed by the states, and included in the Regional Board's Basin Plans.<sup>773</sup> States are required to adopt water quality standards and criteria based on sound scientific rationale that identifies sufficient parameters or constituents to protect the designated use, and numerical values related to any constituents should be based on the U.S. EPA's guidance documents or other defensible methods.<sup>774</sup> U.S. EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.<sup>775</sup> In addition, on May 18, 2000, U.S. EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR).<sup>776</sup> As the

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<sup>769</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(A)-(D).

<sup>770</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.43(a).

<sup>771</sup> Code of Federal Regulations, title 40, section 122.48.

<sup>772</sup> Code of Federal Regulations, title 40, section 122.44(d)(1).

<sup>773</sup> United States Code, title 33, section 1313(a), (c)(1); Code of Federal Regulations, title 40, sections 131.6, 131.10-131.12; Water Code sections 13240, 13241.

<sup>774</sup> Code of Federal Regulations, title 40, section 131.11.

<sup>775</sup> United States Code, title 33, section 1314(a).

<sup>776</sup> Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31682, 31711, May 18, 2000).

courts have explained, the CTR is a water quality standard that applies to “all waters’ for ‘all purposes and programs under the CWA.”<sup>777</sup>

Federal regulations require samples and measurements taken for the purpose of monitoring shall be “representative” of the monitored activity.<sup>778</sup> In this respect, federal law does not require monitoring of each stormwater source at the precise point of discharge, but a monitoring scheme must be established “sufficient to yield data which are representative of the monitored activity.”<sup>779</sup> In addition, monitoring must be conducted according to approved test procedures, unless another method is required as specified.<sup>780</sup> Approved testing procedures for sampling, sample preservation, and analyses are located in federal regulations.<sup>781</sup>

Federal law also requires annual monitoring reports to the Regional Board, which shall identify and evaluate the results of the analyses of the monitoring data.<sup>782</sup> The reports are required to include the following information:

- The date, exact place, and time of sampling or measurements;
- The individual(s) who performed the sampling or measurements;
- The date(s) analyses were performed;
- The individual(s) who performed the analyses;
- The analytical techniques or methods used; and
- The results of such analyses.<sup>783</sup>

In addition, the permittee is required by federal regulations to report any noncompliance that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall contain a description of the noncompliance and its cause, the period of noncompliance, and whether the noncompliance has been corrected and the steps taken or planned to reduce or eliminate the noncompliance, including BMPs or “controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as

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<sup>777</sup> *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

<sup>778</sup> Code of Federal Regulations, title 40, sections 122.41(j), 122.48(b).

<sup>779</sup> *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

<sup>780</sup> Code of Federal Regulations, title 40, section 122.41(j).

<sup>781</sup> Code of Federal Regulations, title 40, Part 136.

<sup>782</sup> Code of Federal Regulations, title 40, sections 122.41(j)(3); 122.42(c).

<sup>783</sup> Code of Federal Regulations, title 40, section 122.41(j)(3).

the Administrator or the State determines appropriate for the control of such pollutants.”<sup>784</sup>

The court in *Natural Resources Defense Council, Inc. v. County of Los Angeles* explained an NPDES permit is unlawful if a permittee is not required to monitor its discharges in a manner sufficient to comply with the permit:

[T]he Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) (“[E]ach NPDES permit shall include conditions meeting the following ...monitoring requirements ... to assure compliance with permit limitations.”). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. See 40 C.F.R. § 122.26(d)(2)(i)(F) (“Permit applications for discharges from large and medium municipal storm sewers ... shall include ...monitoring procedures necessary to determine compliance and noncompliance with permit conditions....”).<sup>785</sup>

The court further emphasized:

. . . nothing in the MS4 permitting scheme relieves permittees of the obligation to monitor their compliance with their NPDES permit in some fashion. See 33 U.S.C. § 1342(a)(2) (“The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [the permit], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.”); 40 C.F.R. § 122.44(i)(1) (establishing that every permit “shall include” monitoring “[t]o assure compliance with the permit limitations”).<sup>786</sup>

b. Water quality monitoring required by the test claim permit

The test claim permit explains stormwater discharges from urban and developing areas in the San Francisco Bay Region may be causing exceedances of water quality standards for mercury, PCBs, furans, dieldrin, chlordane, DDT, and selenium in San Francisco Bay segments; pesticide associated toxicity in all urban creeks; and trash and low dissolved oxygen in Lake Merritt in Alameda County, as follows:

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<sup>784</sup> United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.41(l)(6).

<sup>785</sup> *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207.

<sup>786</sup> *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

The Water Board finds stormwater discharges from urban and developing areas in the San Francisco Bay Region to be significant sources of certain pollutants that cause or may be causing or threatening to cause or contribute to water quality impairment in waters of the Region. Furthermore, as delineated in the CWA section 303(d) list, the Water Board has found that there is a reasonable potential that municipal stormwater discharges cause or may cause or contribute to an excursion above water quality standards for the following pollutants: mercury, PCBs, furans, dieldrin, chlordane, DDT, and selenium in San Francisco Bay segments; pesticide associated toxicity in all urban creeks; and trash and low dissolved oxygen in Lake Merritt, in Alameda County. In accordance with CWA section 303(d), the Water Board is required to establish TMDLs for these pollutants to these waters to gradually eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Permittees are warranted and required pursuant to this Order.<sup>787</sup>

The Fact Sheet further explains the prior permits allowed each program to design their own monitoring program with few permit guidelines, which the court in *Baykeeper* found did not comply with federal law with respect to the programs in San Mateo and Contra Costa.<sup>788</sup> Federal law requires all NPDES permits specify “[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity.”<sup>789</sup> The requirements of the prior permits are addressed below under each section pled by the claimants.

In addition, the test claim permit provides the permittees with the following options to comply with the monitoring provisions in Section C.8:

- Contributing to its stormwater countywide program, as determined appropriate by the permittee members, so that the stormwater countywide Program conducts monitoring on behalf of its members.
- Contributing to a regional collaborative effort. The permit defines a regional collaborative effort as follows: “Where all or a majority of the permittees collaborate to conduct water quality monitoring, this shall be considered a regional monitoring collaborative.”<sup>790</sup> The permit further states the following:

The types, quantities, and quality of data required within Provision C.8 establish the minimum level-of-effort that a regional monitoring collaborative must achieve. Provided these data types, quantities, and quality are obtained, a regional monitoring collaborative may

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<sup>787</sup> Exhibit A, Test Claim, 10-TC-02, page 154 (Test claim permit, Finding 11).

<sup>788</sup> Exhibit A, Test Claim, 10-TC-02, pages 332-333 (Fact Sheet).

<sup>789</sup> Code of Federal Regulations, title 40, section 122.48(b).

<sup>790</sup> Exhibit A, Test Claim, 10-TC-02, page 213 (Test claim permit, section C.8.a.).

develop its own sampling design. For Pollutants of Concern and Long-Term monitoring required under C.8.e, an alternative approach may be pursued by Permittees provided that: either similar data types, data quality, data quantity are collected with an equivalent level of effort described under C.8.e; or an equivalent level of monitoring effort is employed to answer the management information needs stated under C.8.e.<sup>791</sup>

- Fulfilling monitoring requirements within its own jurisdictional boundaries.
- A combination of the previous options, so that all requirements are fulfilled.<sup>792</sup>

The permittees may also “choose to fulfill requirements of Provision C.8. using data collected by citizen monitors or other third-party organizations, provided the data are demonstrated to meet the data quality objectives described in Provision C.8.h.”<sup>793</sup>

If the permittees choose to monitor through a regional monitoring collaborative, data is required to be collected beginning in October 2011. All other options are to begin by October 2010. And by July 1, 2010, each permittee was required to provide documentation confirming the option chosen.<sup>794</sup>

The options provided are intended to promote cost savings by encouraging a collaborative. If monitoring is conducted collaboratively, only one monitoring report on behalf of all permittees is required:

In the past, each Stormwater Countywide Program has conducted water quality monitoring on behalf of its member Permittees, and some data were collected by wider collaboratives, such as the Regional Monitoring Program. In this Permit, all the Stormwater Countywide Programs are encouraged to work collaboratively to conduct all or most of the required monitoring and reporting on a region-wide basis. For each monitoring component that is conducted collaboratively, one report would be prepared on behalf of all contributing Permittees; separate reports would not be required from each Program. Cost savings could result also from reduced contract and oversight hours, fewer quality assurance/quality control samples, shared sampling labor costs, and laboratory efficiencies.<sup>795</sup>

Publicly available documents show that all permittees opted to conduct monitoring required by Section C.8. of the test claim permit through a regional monitoring

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<sup>791</sup> Exhibit A, Test Claim, 10-TC-02, page 213 (Test claim permit, section C.8.a.).

<sup>792</sup> Exhibit A, Test Claim, 10-TC-02, pages 213-214 (Test claim permit, section C.8.a.).

<sup>793</sup> Exhibit A, Test Claim, 10-TC-02, page 214 (Test claim permit, section C.8.a.).

<sup>794</sup> Exhibit A, Test Claim, 10-TC-02, page 213 (Test claim permit, section C.8.a.).

<sup>795</sup> Exhibit A, Test Claim, 10-TC-02, pages 332-333 (Fact Sheet).

collaborative, the Bay Area Stormwater Management Agencies (BASMAA) Regional Monitoring Coalition (RMC).<sup>796</sup>

- i. *The requirement in Section C.8.b. to contribute financially to the Regional Monitoring Program does not impose any new requirements and, therefore, does not mandate a new program or higher level of service.*

Section C.8.b. requires that the “Permittees shall 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.”<sup>797</sup> The RMP is intended to answer the following questions:

- Are chemical concentrations in the Estuary potentially at levels of concern and are associated impacts likely?
- What are the concentrations and masses of contaminants in the Estuary and its segments?
- What are the sources, pathways, loadings, and processes leading to contaminant related impacts in the Estuary?
- Have the concentrations, masses, and associated impacts of contaminants in the Estuary increased or decreased?
- What are the projected concentrations, masses, and associated impacts of contaminants in the Estuary?<sup>798</sup>

The RMP is defined in the permit as follows:

A monitoring program aimed at determining San Francisco Bay Region receiving water conditions. The program was established in 1993 through an agreement among the Water Board, wastewater discharger agencies, dredgers, Municipal Stormwater Permittees and the San Francisco Estuary Institute to provide regular sampling of Bay sediments, water, and organisms for pollutants. The program is funded by the dischargers and managed by San Francisco Estuary Institute.<sup>799</sup>

The claimants argue Section C.8.b. imposes state-mandated new requirements on the permittees to “financially support the RMP *and* participate in the development of a

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<sup>796</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 3, 11.

<sup>797</sup> Exhibit A, Test Claim, 10-TC-02, page 214 (Test claim permit, section C.8.b.).

<sup>798</sup> Exhibit A, Test Claim, 10-TC-02, page 214 (Test claim permit, section C.8.b.).

<sup>799</sup> Exhibit A, Test Claim, 10-TC-02, page 273 (Test claim permit, glossary).

monitoring program designed to obtain the answers to specific questions described above.”<sup>800</sup> The claimants assert the following:

Over the past two years, the RMP has begun a Master Planning process which involves stronger Steering Committee direction on special studies as well as revisions to the ongoing Status and Trends program that is subject to MRP Provision C.8.b. [Fn. omitted.] As a result, over 10 subgroups and strategy teams have been added to the original RMP oversight structure of two committees and four workgroups. [Fn. omitted.] This has resulted in additional needs for representation and participation by stormwater program staff, and Test Claimants must expend additional funds in order to comply.<sup>801</sup>

In response to the Draft Proposed Decision, the County of Santa Clara contends there is no evidence that prior law (in the documents cited in the analysis below) required the permittees to provide financial contributions to the RMP or an equivalent program and, thus, this requirement in Section C.8.b. is new.<sup>802</sup> The County states the only requirement in its prior permit (01-024) was to “participate in the RMP or an acceptable alternative monitoring program,” which is different than requiring financial contributions as follows:

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

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<sup>800</sup> Exhibit A, Test Claim, 10-TC-02, page 30, emphasis added; See also Exhibit B, Test Claim, 10-TC-03, pages 25-26; and Exhibit C, Test Claim, 10-TC-05, pages 31-32.

<sup>801</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 29; see also pages 60 and 63 (Declaration of Jon Konnan, former watershed monitoring and assessment coordinator for the San Mateo Countywide Water Pollution Prevention Program), and pages 81 and 84 (Declaration of James Scanlin, Alameda County Public Works Agency, Associate Environmental Compliance Specialist).

<sup>802</sup> Exhibit Z, Claimant’s (County of Santa Clara’s) Comments on the Draft Proposed Decision, pages 3-5.



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.<sup>803</sup>

The Regional Board contends Section C.8.b. only requires the permittees to participate in the RMP or a program equivalent to the RMP by contributing their fair share on an annual basis, and this requirement is not new.<sup>804</sup>

The Commission finds Section C.8.b. of the test claim permit, by its plain language, does not require the permittees to participate in the development of the RMP, as asserted by the claimants, but only to participate in implementing an estuary receiving water monitoring program such as the RMP, or an equivalent program, "*by contributing their fair-share financially on an annual basis.*" This interpretation is consistent with footnote 20 in the test claim permit, which states "the intent of this provision is for Permittees to *continue contributing financially* and as stakeholders in such a program as the RMP, which monitors the quality of San Francisco Bay"; the permit's definition of the

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<sup>803</sup> Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, filed October 28, 2024, page 4.

<sup>804</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 30.

RMP, as “[t]he program . . . funded by the dischargers and managed by San Francisco Estuary Institute,” and with the documents summarized below.<sup>805</sup> Moreover, as indicated below, prior orders from the Regional Board and its executive officer required the permittees to participate in the implementation and expansion of the RMP.<sup>806</sup> That requirement is not imposed by the plain language of Section C.8.b. of the test claim permit. In addition, the requirement to contribute a fair share to the RMP, or an equivalent program, is not new, but was required by prior permits and the permittees’ prior management plans that were made enforceable by the prior permits.

The program stems from a resolution adopted by the Regional Board on April 15, 1992, which required the executive officer of the Regional Board to implement a regional monitoring plan for the San Francisco Bay estuary, with the financial contribution and participation from dischargers, following pilot studies on “cost effective” regional monitoring for the estuary.<sup>807</sup> The resolution states in relevant part the following:

VIII. WHEREAS, SFEP [San Francisco Estuary Project, a cooperative effort between the State and Federal governments] has requested that the Aquatic Habitat Institute Board of Directors recommend alternative institutional arrangements for conducting comprehensive regional monitoring and research within the Estuary; and

IX. WHEREAS, the Regional Board will suspend selected current monitoring requirements for permitted dischargers in order for dischargers to redistribute resources to implement baseline portions of the Regional Monitoring Plan; and

X. WHEREAS, the Regional Board recognizes that dischargers will need to expend additional resources in order to fully implement the Regional Monitoring Plan; and

XI. WHEREAS, the Regional Board will be taking a phased approach to implementing the RMP to insure the effective management of the RMP; and

XII. WHEREAS, this action is categorically exempt from the provision so the California Environmental Quality Act, pursuant to Section 15306, Title 14, California Code of Regulations, in that it involves basic data collection,

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<sup>805</sup> Exhibit A, Test Claim, 10-TC-02, pages 214, 273 (Test claim permit, Section C.8.b., and glossary).

<sup>806</sup> Exhibit BB (35), Resolution No. 92-043, Regional Monitoring Program, pages 2 and 3, requiring the Executive Officer to select and require dischargers to participate in the implementation of the RMP pursuant to Water Code sections 13267 and 13383. The failure to comply with the requirements can lead to misdemeanor charges and civil liability. (Water Code sections 13268, 13385.)

<sup>807</sup> Exhibit BB (35), Resolution No. 92-043, Regional Monitoring Program.

research, management and resource evaluation activities which will not result in a serious or major disturbance to the environment.

THEREFORE BE IT RESOLVED that the Regional Board endorses in concept the development and implementation of a Regional Monitoring Program for San Francisco Bay and directs the Executive Officer to implement the Regional Monitoring Plan (Attachment A) pursuant to California Water Code Sections 13267 and 13383 (authority) and 13268 and 13385 (penalty provisions).

BE IT FURTHER RESOLVED, that the Executive Officer will select dischargers to participate in the program based on the following criteria: discharger classification, representation of a high percentage of the permitted discharge flow to the Estuary and geographical distribution; and

BE IT FURTHER RESOLVED, that the Regional Board's Executive Officer shall work with the selected dischargers to prepare an implementation plan for the RMP including a schedule for executive and submittal of progress reports and an annual report. The Executive Officer shall report to the Regional Board no later than July 15, 1992, on the status of implementation of the RMP including cost sharing and institutional arrangements; and

BE IT FURTHER RESOLVED, that the Regional Board, as part of the SFEP [San Francisco Estuary Project] will continue to assist in the development of the regional monitoring strategy and will offer for consideration inclusion of this Regional Monitoring Plan into the SFEP strategy; and

BE IT FURTHER RESOLVED, that the Regional Board no later than July 1, 1993 will notify additional selected permitted dischargers to require their participation in the implementing the Regional Monitoring Plan and expanding the Regional Monitoring Plan as necessary; and

BE IT FURTHER RESOLVED, that the Regional Board will include the requirement of participation in implementing the Regional Monitoring Plan into the selected dischargers' permits at the time of reissuance and issuance.<sup>808</sup>

As indicated in this resolution, the executive officer of the Regional Board was required to select and require dischargers to participate in the implementation of the RMP pursuant to Water Code sections 13267 and 13383. These code sections authorize the

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<sup>808</sup> Exhibit BB (35), Resolution No. 92-043, Regional Monitoring Program, pages 2 and 3.

Regional Board to require technical or monitoring reports from any discharger. Failure to comply can lead to misdemeanor charges and civil liability.<sup>809</sup>

Effective July 1, 1992, the Regional Board entered into an MOU with the Aquatic Habitat Institute (which later became the San Francisco Estuary Institute, or SFEI) to implement the regional monitoring program for toxic pollutants in the estuary, including the chemical analysis of ambient water, sediment and tissue, and toxicity tests of ambient waters and sediment at 16 fixed stations or subsets of those stations throughout the estuary.<sup>810</sup> The MOU provides the Regional Board and SFEI will form a steering committee to allocate program costs, select criteria, provide technical review of results, and evaluate the effectiveness of the program, and “[p]articipating permittees will be represented on the Steering Committee by at least one per discharger category.”<sup>811</sup> The MOU further provides SFEI was responsible for implementing the regional plan *and the Regional Board remained responsible for ensuring the financial participation of individual permittees.*<sup>812</sup> Since 1996, the total cost of the RMP has been divided up between the participant groups identified in the following chart, with stormwater agencies paying 23.5 percent of the costs:

<b>Participant Group</b>	<b>Percent of Total Program Costs</b>
Publicly-Owned Treatment Works	44%
Stormwater Agencies	23.5%
Dredgers	17.5%
Refineries and Industrial Dischargers	11%
Cooling Water Dischargers	4% <sup>813</sup>

In addition, the 2007 Basin Plan states the stormwater agencies that hold permits for waste discharge into the estuary fund the RMP as a requirement of their permits:

The RMP participants, including dredgers, stormwater agencies, and municipal and industrial dischargers that hold Water Board *permits for waste discharge into the Estuary, fund the RMP as a requirement of their permits.* The San Francisco Estuary Institute (SFEI), an independent

<sup>809</sup> Water Code sections 13268, 13385.

<sup>810</sup> Exhibit BB (24), MOU Between the Regional Board and Aquatic Habitat Institute for the RMP, pages 2-3.

<sup>811</sup> Exhibit BB (24), MOU Between the Regional Board and Aquatic Habitat Institute for the RMP, page 4.

<sup>812</sup> Exhibit BB (24), MOU Between the Regional Board and Aquatic Habitat Institute for the RMP, page 3.

<sup>813</sup> Exhibit BB (37), San Francisco Bay RMP Charter, dated April 21, 2015, page 24.

nonprofit organization, administers and manages the program under a Memorandum of Understanding with the Water Board.<sup>814</sup>

Moreover, each of the prior permits indicate the permittees were previously required to financially contribute to the RMP and, thus, this requirement is not new.

The prior permit for Santa Clara (01-024), in Section C.7.b., required the Santa Clara permittees *to participate* in the RMP or an acceptable alternative monitoring program,<sup>815</sup> and further explained the requirement as follows:

On April 15, 1992, the Board adopted Resolution No. 92-043 directing the Executive Officer to implement the Regional Monitoring Program for San Francisco Bay. Subsequent to a public hearing and various meetings, Board staff requested major permit holders in this region, under authority of Section 13267 of California Water Code, to report on the water quality of the estuary. These permit holders, including the Dischargers, responded to this request by participating in a collaborative effort, through the San Francisco Estuary Institute. This effort has come to be known as the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP). The RMP involves collection and analysis of data on pollutants and toxicity in water, sediment and biota of the estuary. This Order specifies that the Dischargers shall continue to participate in the RMP or shall submit and implement an acceptable alternative monitoring plan. Annual reports from the RMP are referenced elsewhere in this Order.<sup>816</sup>

Santa Clara's 1997 urban runoff management plan, which the permittees were required by the prior permit to comply with,<sup>817</sup> makes it clear that "participation" in the RMP included "financial support" to the RMP. The plan states the Santa Clara permittees work with other entities to pursue urban runoff pollution prevention, including with the RMP, which "is funded by point and urban runoff dischargers, including the SCVURPPP," and the permittees will "[c]ontinue participation in the RMP . . . [which includes] ongoing financial support, participation in technical review and decision-

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<sup>814</sup> Exhibit BB (7), Basin Plan 2007, page 222, emphasis added. An agency's interpretation of its own regulations is entitled to deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-12.)

<sup>815</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2090 (Attachment 60, Order 01-024, Section C.7.b.).

<sup>816</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2080 (Attachment 60, Order 01-024, Finding 18).

<sup>817</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074, 2083-2085 (Attachment 60, Order 01-024, Findings 6 and 7, Sections C.1. and C.2.).

making, and coordination of Program monitoring activities with RMP activities.”<sup>818</sup> As addressed above, the prior permit (01-024) made the County’s 1997 urban runoff management plan an enforceable component of the prior permit as follows:

- The 1997 Urban Runoff Management Plan describes the framework for management of stormwater discharges during the term of the permit. The Plan had to contain several components, including plans for monitoring and Performance Standards.<sup>819</sup>
- The Dischargers *shall comply* with Discharge Prohibition A and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions to reduce pollutants in the discharge *in accordance with the Management Plan* and other requirements of this permit, including any modifications.<sup>820</sup>
- The Dischargers *shall implement the Management Plan*, and shall, through its continuous improvement process, subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C.1 through C.10 of this Order.<sup>821</sup>
- The Program and the Dischargers will on a continuous basis conduct and document peer review and evaluation of each relevant element of each Dischargers program and revise activities, control measures, Best Management Practices (BMPs) and Performance Standards. These changes will be documented in the Annual Report “*and will be considered an enforceable component of this Order.*”<sup>822</sup>

This is further supported by the test claim permit’s Fact Sheet, which states the following:

In the previous permit issuances, the detailed actions to be implemented by the Permittees were contained in Stormwater Management Plans,

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<sup>818</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2084-2085 (Attachment 60, Order 01-024, Section C.2.a.); Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 28, 83.

<sup>819</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074 (Attachment 60, Order 01-124, Findings 6, 7).

<sup>820</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2083-2084 (Attachment 60, Order 01-124, Section C.1.).

<sup>821</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2084-2085 (Attachment 60, Order 01-124, Section C.2.a.).

<sup>822</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2075 (Attachment 60, Order 01-124, Finding 8).

which were separate from the NPDES permits, and incorporated by reference. . . . [T]hose plans were legally an integral part of the permits and were subject to complete public notice, review and comment . . . .<sup>823</sup>

Thus, contrary to the County of Santa Clara's argument, the plan to provide ongoing financial support to the RMP was legally binding on the County of Santa Clara permittees under their prior permit, and the requirement to participate in implementing an estuary receiving water monitoring program such as the RMP, or an equivalent program, "by contributing their fair-share financially on an annual basis" is not a new requirement for these permittees.

The permittees subject to the Alameda prior permit were also required to participate and financially contribute to the RMP. Section C.8.b. of Alameda's prior permit (2003-0021) required the permittees to participate in the RMP or an acceptable alternative monitoring program, and the Alameda County permittees, "along with other NPDES-permitted dischargers, contributes to this effort annually."<sup>824</sup>

Contra Costa's Stormwater Management Plan 1999-2004, which was made enforceable by the prior permit (Order 99-058),<sup>825</sup> states the Contra Costa permittees "will coordinate with the RMP to ensure questions relevant to stormwater runoff and its effects on the San Francisco Bay -San Joaquin Delta are addressed" and "the Regional Monitoring Program will continue to be financed by the [Contra Costa] Program at an appropriate level."<sup>826</sup> Order R2-2004-0059, which was then adopted by the Regional Board following the court's writ in *Baykeeper*, included a monitoring plan to "complement" and work alongside the RMP.<sup>827</sup>

San Mateo's prior permit (R2-2004-0060), which was adopted by the Regional Board after the *Baykeeper* decision, states the permittees "shall" comply with the monitoring requirements in Attachment A, the San Mateo Countywide Stormwater Pollution Prevention Monitoring Program Plan (or STOPPP).<sup>828</sup> That plan states the program provides funding to the RMP as follows:

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<sup>823</sup> Exhibit A, Test Claim, 10-TC-02, page 282 (Fact Sheet).

<sup>824</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order 2003-0021, Section C.8.b.); and page 2378 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>825</sup> Exhibit BB (25), Order 99-058, pages 3, 9 (Findings 6 and 7, and Section C.3.).

<sup>826</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, pages 132-133.

<sup>827</sup> Exhibit BB (28), Order R2-2004-0059, pages 169, 178-179.

<sup>828</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1996, 2001 (Attachment 57, Order R2-2004-0060).

STOPP will also continue to participate in various collaborative efforts to address pollutants of concern (please see next section on regional collaborative efforts).

## REGIONAL COLLABORATIVE EFFORTS

[¶¶]

*Provide funding to the San Francisco Estuary Institute (SFEI) for expenditures on the San Francisco Estuary Regional Monitoring Program (RMP).* The RMP monitors contaminant concentrations in water, sediments, and fish and shellfish tissue in San Francisco Bay and Delta, together known as the San Francisco Estuary. Ultimately, the goal of the RMP is to provide information on how contaminant concentrations in the estuary are responding to pollution prevention and reduction measures and thus if the financial resources devoted to these efforts are improving water quality. STOPPP will also continue to continue to help fund a staff to represent BASMAA in the RMP Sources, Pathways and Loadings Work Group.<sup>829</sup>

Fairfield's prior permit (R2-2003-0034) also required participation and financial contribution to the RMP or an equivalent alternative. The prior permit describes the background of the RMP and Fairfield's participation as follows:<sup>830</sup>

On April 15, 1992, the Regional Board adopted Resolution No. 92-043 directing the Executive Officer to implement the Regional Monitoring Program for San Francisco Bay. Subsequent to a public hearing and various meetings, Board staff requested major permit holders in this region, under authority of Section 13267 of California Water Code, to report on the water quality of the estuary. These permit holders, including the Permittees, responded to this request by participating in a collaborative effort through the San Francisco Estuary Institute. This effort has come to be known as the San Francisco Estuary Regional Monitoring Program for Trace Substances (RMP). The RMP involves collection and analysis of data on pollutants and toxicity in water, sediment and biota of the estuary. The Permittees should continue to report on the water quality of the estuary, as presently required. Compliance with the requirement through participation in the RMP is considered to be adequate compliance. Alternatively, the Permittees may submit and implement an acceptable alternative monitoring plan. Annual reports from the RMP are referenced elsewhere in this Order.

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<sup>829</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2004 (Attachment 57, Order R2-2004-0060).

<sup>830</sup> Exhibit BB (27), Order R2-2003-0034, pages 14-15.



The prior permit required the Fairfield permittees to submit a multi-year monitoring plan and assessment, which “shall include provisions for monitoring Suisun Bay by participating in the San Francisco Estuary RMP for Trace Substances or an acceptable alternative monitoring program.”<sup>831</sup> Fairfield’s 1999-2000 to 2004-2005 urban runoff management plan states “the Program provides financial support to the Regional Monitoring Program being conducted through the San Francisco Estuary Institute ...”<sup>832</sup> Fairfield’s 2007 stormwater management plan further states “[t]he program continues to work with other Bay area dischargers and Water Board staff through ... the RMP to coordinate and plan activities related to PCBs and other pollutants of concern” including “providing funding to these organizations, participating in selected stakeholder meetings, committees and work groups and, as appropriate, reviewing and commenting on relevant documents prepared by the . . . RMP and Water Board staff.”<sup>833</sup>

Finally, the requirement in Section C.8.b. of the test claim permit is not new for the Vallejo permittees. Vallejo’s prior permit states “[t]he permittee shall implement the storm water monitoring program described in the documents listed in Part I.D.12 of this permit,” which refers to the Vallejo Sanitation and Flood Control District Storm Water Management Plan.<sup>834</sup> That plan states “District personnel will continue to participate in the development of the Regional Monitoring Strategy by contributing funds and through active involvement at the strategy development sessions.”<sup>835</sup>

Accordingly, the requirements in Section C.8.b. are not new and do not mandate a new program or higher level of service.

- ii. *The status monitoring requirements imposed by Sections C.8.c., C.8.h., and C.8.d.i. do not mandate a new program or higher level of service.*

Section C.8.c. of the test claim permit requires the permittees to conduct status monitoring to determine whether narrative and numeric water quality objectives, which are identified in the Basin Plan, are being met in local receiving waters, including in creeks, rivers, and tributaries.<sup>836</sup> The permittees are required to conduct status

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<sup>831</sup> Exhibit BB (27), Order R2-2003-0034, page 38.

<sup>832</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 122.

<sup>833</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 161-162.

<sup>834</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8.

<sup>835</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

<sup>836</sup> Exhibit A, Test Claim, 10-TC-02, pages 214-215 (Test claim permit, Section C.8.c.i.). Finding 10 of the test claim permit states: “The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) is the Water Board’s master water quality control planning document. *It designates beneficial uses and water quality objectives for waters*

monitoring using “the parameters, methods, occurrences, durations, and minimum number of sampling sites described in Table 8.1” of the test claim permit.<sup>837</sup> Table 8.1 requires the permittees to monitor the following:

- Biological assessment for the following nutrients (total phosphorus, dissolved orthophosphate, total nitrogen, nitrate, ammonia, silica, chloride, dissolved organic carbon, suspended sediment concentration) during the Spring sampling. The monitoring “consists of collecting samples of benthic communities [including macroinvertebrates<sup>838</sup> and algae] and conducting a taxonomic identification to measure community abundance and diversity, which is then compared to a reference creek to assess benthic community health. This monitoring can also provide information on cumulative pollutant exposure/impacts because pollutant impacts to the benthic community accumulate and occur over time.”<sup>839</sup> The Santa Clara and Alameda permittees are required to have a minimum of 20 sample sites per year; Contra Costa and San Mateo permittees are required to have a minimum of ten sample sites per year; the permittees in Fairfield-Suisun are required to have four sample sites twice during the permit term; and the Vallejo permittees are required to have four sample sites once during the permit term.<sup>840</sup> The purpose of this is “to provide site-specific information about the health and diversity of freshwater benthic communities within a specific reach of a creek, using standard procedures developed and/or used by the State Water Resources Control Board Surface Water Ambient Monitoring Program,” or SWAMP.<sup>841</sup>

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*of the State, including surface waters and groundwater.* It also includes programs of implementation to achieve water quality objectives. The Basin Plan was duly adopted by the Water Board and approved by the State Water Resources Control Board (State Board), Office of Administrative Law and the USEPA, where required.” Exhibit A, Test Claim, 10-TC-02, page 154, emphasis added.

<sup>837</sup> Exhibit A, Test Claim, 10-TC-02, page 215 (Test claim permit, Section C.8.c.ii.).

<sup>838</sup> Exhibit A, Test Claim, 10-TC-02, page 216 (Test claim permit, Table 8.1 and footnote 27). Benthic communities are largely composed of macroinvertebrates, such as annelids, mollusks, and crustaceans. These organisms inhabit the bottom substrates of estuaries and play a vital role in maintaining sediment and water quality. (Exhibit BB (44), U.S. EPA Report on Coastal Benthic Communities, page 1, [https://cfpub.epa.gov/roe/indicator\\_pdf.cfm?i=38#:~:text=Benthic%20communities%20are%20largely%20composed,maintaining%20sediment%20and%20water%20quality](https://cfpub.epa.gov/roe/indicator_pdf.cfm?i=38#:~:text=Benthic%20communities%20are%20largely%20composed,maintaining%20sediment%20and%20water%20quality) (accessed March 20, 2024).

<sup>839</sup> Exhibit A, Test Claim, 10-TC-02, page 336 (Fact Sheet).

<sup>840</sup> Exhibit A, Test Claim, 10-TC-02, pages 215-216 (Test claim permit, Section C.8.c.iii. and Table 8.1) and page 336 (Fact Sheet).

<sup>841</sup> Exhibit A, Test Claim, 10-TC-02, pages 335-336 (Fact Sheet).

- General water quality, including dissolved oxygen, temperature, conductivity, and pH sampled with the biological assessment and during the August-September timeframe. The Santa Clara and Alameda permittees are required to have a minimum of three sample sites per year; Contra Costa and San Mateo permittees are required to have two sample sites measured twice per year; and the permittees in Fairfield-Suisun (twice during permit term) and Vallejo (once during the permit term) are required to have one sample site.
- Chlorine during the Spring and dry seasons. During the Spring sampling, the Santa Clara and Alameda permittees are required to have 20 sample sites per year; Contra Costa and San Mateo permittees are required to have ten sample sites per year; and the permittees in Fairfield-Suisun (twice during permit term) and Vallejo (once during permit term) are required to have two sample sites. For dry weather sampling, the Santa Clara and Alameda permittees are required to have three sample sites per year; Contra Costa and San Mateo permittees are required to have two sample sites per year; and the permittees in Fairfield-Suisun (twice during permit term) and Vallejo (once during permit term) are required to have one sample site. The purpose is “to detect a release of potable water or other chlorinated water sources, which are toxic to aquatic life.”<sup>842</sup>
- Temperature, using 60-minute intervals during sampling conducted in April through September. The Santa Clara and Alameda permittees are required to have eight sample sites per year; Contra Costa and San Mateo permittees are required to have four sample sites per year; and the permittees in Fairfield-Suisun (twice during permit term) and Vallejo (once during permit term) are required to have one sample site.
- Toxicity and pollutants in bedded sediment, during dry and wet season monitoring. The testing is required to consist of “*US EPA three species toxicity tests: Selenastrum growth and Ceriodaphnia and Pimephales with lethal and sublethal endpoints . . . [and] Hyalella azteca with lethal endpoint*”, which measures the water and sediment toxicity to algae growth and in fresh water fish, crustaceans, and amphipods.<sup>843</sup> The Santa Clara and Alameda permittees are required to have three sample sites per year; Contra Costa and San Mateo permittees are required to have two sample sites per year; and the permittees in Fairfield-Suisun (twice during permit term) and Vallejo (once during permit term) are required to have one sample site. This monitoring is to determine the

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<sup>842</sup> Exhibit A, Test Claim, 10-TC-02, page 336 (Fact Sheet).

<sup>843</sup> Exhibit A, Test Claim, 10-TC-02, page 217, footnote 32 (Test claim permit, Table 8.1); Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, page 32.

presence and identity of chemicals that bind to sediment in the creek bed and are toxic to aquatic life.<sup>844</sup>

- Pathogen indicators, including fecal coliform and E. Coli, during the summer sampling and using U.S. EPA criteria, to “detect pathogens in waterbodies that could be sources of impairment to recreational uses at or downstream of the sampling location.” The Santa Clara and Alameda permittees are required to have five sample sites per year during the summer months; Contra Costa and San Mateo permittees are required to have five sample sites per year during the summer months; and the permittees in Fairfield-Suisun and Vallejo are required to have three sites sampled twice in the permit term during the summer months.
- Stream Survey (stream walk and mapping) to assess the overall physical health of the stream and to gain information potentially useful in interpreting monitoring results. The Santa Clara and Alameda permittees are required to survey nine miles per year; Contra Costa and San Mateo permittees are required to survey six miles per year; and Fairfield-Suisun and Vallejo three miles per year.<sup>845</sup>

Section C.8.c.iv. of the test claim permit then identifies the major waterbodies in the region and the permittees are required to select the waterbodies to be sampled during the permit term based on factors such as watershed area, land use, likelihood of urban runoff impacts, and existing monitoring data.<sup>846</sup> Status monitoring is conducted on a rotating-watershed basis, in a similar fashion to the State’s ambient monitoring program, the Statewide Surface Water Ambient Monitoring Program, or SWAMP.<sup>847</sup> The Basin Plan defines “ambient monitoring” as follows:

Ambient monitoring refers to any activity in which information about the status of the physical, chemical and biological characteristics of the environment is collected to answer specific questions about the status and trends in those characteristics. For the purposes of SWAMP, ambient monitoring refers to these activities as they relate to the characteristics of water quality.<sup>848</sup>

The Fact Sheet explains sampling the sediment and water column in urban creeks is a substitute for monitoring the discharge from each outfall, of which there are many, and is used to identify which outfalls or land uses are causing or contributing to the problem and to assess the health of creeks and streams as follows:

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<sup>844</sup> Exhibit A, Test Claim, 10-TC-02, page 336 (Fact Sheet).

<sup>845</sup> Exhibit A, Test Claim, 10-TC-02, pages 215-218, 336-338 (Test claim permit, Section C.8.c., Table 8.1, Fact Sheet).

<sup>846</sup> Exhibit A, Test Claim, 10-TC-02, pages 219, 336-338 (Test claim permit, Section C.8.c.iv., and Fact Sheet).

<sup>847</sup> Exhibit A, Test Claim, 10-TC-02, pages 336-338 (Fact Sheet).

<sup>848</sup> Exhibit BB (7), Basin Plan 2007, page 222.

Status Monitoring and Long-Term Monitoring serve as surrogates to monitoring the discharge from all major outfalls, of which the Permittees have many. By sampling the sediment and water column in urban creeks, the Permittees can determine where water quality problems are occurring in the creeks, then work to identify which outfalls and land uses are causing or contributing to the problem. In short, Status and Long-Term Monitoring are needed to identify water quality problems and assess the health of streams; they are the first step in identifying sources of pollutants and an important component in evaluating the effectiveness of an urban runoff management program.<sup>849</sup>

In addition, Section C.8.h. provides the quality of monitoring data must be SWAMP comparable, and consistent with the SWAMP Quality Assurance Project Plan (QAPP) for the parameters identified. However, a “Regional Monitoring Collaborative may adapt the SWAMP QAPP for use in conducting monitoring in the San Francisco Bay Region, and may use such QAPP if acceptable to the Executive Officer.”<sup>850</sup> As indicated above, all of the permittees participate in a regional monitoring collaborative and, thus, are allowed to adapt the quality assurance procedures to their regional needs.<sup>851</sup>

When status monitoring exceeds water quality objectives, a toxicity threshold, or other trigger identified in the final column of Table 8.1, the permittees are required to comply with Section C.8.d.i. to determine the identity and source of the pollutant using Toxicity Reduction Evaluations (TRE) or Toxicity Identification Evaluations (TIE), identify and evaluate options for controlling the cause, and then implement one or more controls and confirm the work to reduce the pollutant.<sup>852</sup> Section C.8.d.i. clarifies that this procedure is also required by Section C.1. of the test claim permit, which requires a permittee to notify the Regional Board and implement additional controls to reduce and control the discharge of a pollutant upon determining that the discharge is causing or contributing to an exceedance of an applicable water quality standard.<sup>853</sup> Section C.8.d.i. defines when that determination needs to be made; i.e., when monitoring results exceed water quality objectives, a toxicity threshold, or other trigger identified in the final column of Table 8.1, which then triggers the requirement to conduct the TRE and TIE evaluations. Thus, for example, when 20 percent of the results in one waterbody exceed one or more water quality standards or thresholds for nutrients, general water quality, and temperature; when toxicity results exceed certain concentrations; and when pathogen

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<sup>849</sup> Exhibit A, Test Claim, 10-TC-02, page 335 (Fact Sheet).

<sup>850</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.h.).

<sup>851</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 3, 11.

<sup>852</sup> Exhibit A, Test Claim, 10-TC-02, pages 220, 337 (Test claim permit, Sections C.8.c.v. and C.8.d.1.; Fact Sheet.).

<sup>853</sup> Exhibit A, Test Claim, 10-TC-02, pages 157-158, 220 (Test claim permit, Sections A., B., C.1. and C.8.d.1.).

indicators (including fecal coliform and E. coli,) exceed U.S. EPA criteria, a permittee is required to identify the pollutant and the source using TRE and TIE methods, and implement one or more controls to reduce the pollutant.<sup>854</sup> Section C.8.d.i. states the following:

**Stressor/Source Identification** – When Status results trigger a follow-up action as indicated in Table 8.1, Permittees shall take the following actions, as also required by Provision C.1. If the trigger stressor or source is already known, proceed directly to step 2. The first follow-up action shall be initiated as soon as possible, and no later than the second fiscal year after the sampling event that triggered the Monitoring Project.

- (1) Conduct a site specific study (or non-site specific if the problem is wide-spread) in a stepwise process to identify and isolate the cause(s) of the trigger stressor/source. This study should follow guidance for Toxicity Reduction Evaluations (TRE) [fn. omitted] or Toxicity Identification Evaluations (TIE). [Fn. omitted.] A TRE, as adapted for urban stormwater data, allows Permittees to use other sources of information (such as industrial facility stormwater monitoring reports) in attempting to determine the trigger cause, potentially eliminating the need for a TIE. If a TRE does not result in identification of the stressor/source, Permittees shall conduct a TIE.
- (2) Identify and evaluate the effectiveness of options for controlling the cause(s) of the trigger stressor/source.
- (3) Implement one or more controls.
- (4) Confirm the reduction of the cause(s) of trigger stressor/source.
- (5) Stressor/Source Identification Project Cap: Permittees who conduct this monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups, unless monitoring results do not indicate the presence of toxicity. If conducted through a stormwater countywide program, the Santa Clara and Alameda Permittees each shall be required to initiate no more than five (two for toxicity); the Contra Costa and San Mateo Permittees each shall be required to initiate no more than three (one for toxicity); and the Fairfield-Suisun and Vallejo Permittees each shall be required to initiate no more than one Stressor/Source Identification project(s) during the Permit term.
- (6) As long as Permittees have complied with the procedures set forth above, they do not have to repeat the same procedure for continuing or recurring

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<sup>854</sup> Exhibit A, Test Claim, 10-TC-02, pages 216-218 (Test claim permit, Table 8.1).

exceedances of the same receiving water limitations unless directed to do so by the Water Board.<sup>855</sup>

The Fact Sheet explains that the TRE and TIE requirements are intended to identify the “source of the problem” when there is an exceedance of a water quality objective or threshold, to reduce any pollutants discharged from or through the permittee’s MS4, to conform to the discharge prohibitions and receiving water limitations in the permit, and that the cap on the required number of projects is provided to save costs.

When Status or Long-Term Monitoring results indicate an exceedance of a water quality objective, toxicity threshold, or other “trigger”, Permittees must identify the source of the problem and take steps to reduce any pollutants discharged from or through their municipal storm sewer systems. This requirement conforms to the process, outlined in Provision C.1., of complying with the Discharge Prohibition and Receiving Water Limitations. If multiple “triggers” are identified through monitoring, Permittees must focus on the highest priority problems; a cap on the total number of source identification projects conducted within the Permit term is provided to cap Permittees’ potential costs.<sup>856</sup>

The Santa Clara claimants contend Sections C.8.c., C.8.d.i., and C.8.h. mandate a new program or higher level of service by expanding the number of monitoring sites and parameters, and expanding the monitoring protocols as follows:

Specifically, the County must take many more field samples and analysis for more parameters than the monitoring conducted under the prior permits. For example, compared to monitoring conducted under the SCVURPPP FY 2003-04 through FY 2007-08 annual work plans cited by the Regional Board in its response to the Test Claim, ‘ ‘ monitoring required by provision C.8.c of the MRP imposes significant increases in annual: (1) algal bioassessments (20 additional sites), (2) nutrients and similar parameters (7 additional sites), (3) stream surveys (6 additional sites), and other parameters. Additionally, the MRP requires the use of expanded Surface Ambient Monitoring Program (SWAMP) protocols. Using the old SWAMP protocols, a two-person team typically sampled four to six sites per day, while the expanded protocols require at least four to six hours for a three to four person team to complete one site. ‘ ‘  
[Footnotes omitted.]

The cost estimates provided in the Test Claim declaration of Chris Sommers represents the projected *increase in costs* that the County, and co-permittees, will incur due to the increased level of effort required to implement the monitoring specified in detail in Provision C.8.c. These estimates take into account the increased costs for field crews and

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<sup>855</sup> Exhibit A, Test Claim, 10-TC-02, pages 220-221 (Test claim permit, Section C.8.d.i.).

<sup>856</sup> Exhibit A, Test Claim, 10-TC-02, page 337 (Fact Sheet).

associated field equipment and increased analytical laboratory. ' ' It is undisputed that the County must also supply additional staff in order to take the additional samples required by the MRP and manage the additional data. This requires additional funding needs in the County's budget. Accordingly, it is apparent that MRP Provision C.8.c does not merely add more specificity – it also substantively imposes a new program and requirements for higher levels of service. [Fn. omitted.]<sup>857</sup>

The Alameda and San Mateo claimants similarly contend the test claim permit expands protocols, increases the parameters, increases the costs of toxicity testing, and expands the stream survey from 3.5 miles (under the prior permit) to 9 miles as follows:

Specifically, the Alameda County Claimants must increase the annual number of Biological Assessment sampling sites required by almost 50%, from an average of 14 under the prior permit to 20 under the MRP. [Fn. omitted.] Similarly, the San Mateo County Claimants must increase the number of Biological Assessment sampling sites required by approximately 26%, from an average of 4.8 under the prior permit to 6 under the MRP. [Fn. omitted.] While the Test Claimants previously used a protocol for Bioassessment that was limited to collection of one benthic macroinvertebrate sample and completion of a two page visual assessment for 10 physical habitat attributes of the overall sampling area, the MRP requires an expanded Surface Water Ambient Monitoring Program (SWAMP) protocol which additionally requires collection and processing of four different types of algae samples as well as collection of water samples for nutrients and other ancillary parameters. [Fn. omitted.] The SWAMP protocol also requires quantitative measurements or scoring for over 20 different physical habitat parameters at each of 10 or more individual transects within each site. [Fn. omitted.]

These expanded field measurements are to be recorded on a 26 page set of SWAMP field forms. [Fn. omitted.]

Under the prior permit's protocol, Test Claimants' each employed a two-person bioassessment team that typically sampled 4 to 6 sites per day, while the new MRP protocol requires at least 4 to 6 hours for a three to four person team to complete one site. [Fn. omitted.] Laboratory processing and analysis of the four algae samples is a new cost of approximately \$500 per site for the taxonomy and another \$100 for

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<sup>857</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, pages 27-28; see also, Exhibit A, Test Claim, 10-TC-02, pages 30-31; Exhibit B, Test Claim, 10-TC-03, pages 26-27; Exhibit C, Test Claim, 10-TC-05, pages 32-34; and Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, page 6.



chlorophyll and ash-free dry mass, while the macroinvertebrate laboratory processing costs alone are \$325 per site. [Fn. omitted.]

Additionally, Test Claimants are required to sample for parameters not previously required, and some of these require additional field visits separate from the bioassessment sampling conducted in spring. [Fn. omitted.] Specifically, toxicity in the water column requires part of the effort to be done as a separate sampling event during a storm; for this test the MRP adds a fourth species test to the U.S. EPA standard three-species test, which will thereby increase the volume of water that must be collected for sampling, requiring increased costs for handling and transporting to the toxicity laboratory. [Fn. omitted.] Similarly, the MRP also requires the Alameda County Claimants to visit three sites on two separate occasions each year to collect bedded sediment samples, where previously this method had only been used for special studies. [Fn. omitted.] The MRP further requires separate sediment samples for pollutant analysis and toxicity testing, whereas the prior monitoring work plan required only a few of the pollutant analyses required by the MRP, and did not include sediment toxicity testing. [Fn. omitted.] The cost of toxicity testing is approximately \$100 per sample while additional chemical analyses required by the MRP also add costs of \$1,500 per sample. [Fn. omitted.]

In addition to the above noted new and augmented sampling parameters, the methods for other prior parameters have been supplemented. Specifically, the General Water Quality parameter requires a continuous datalogger, which will require two field visits for installation and deployment as opposed to the previous single observation taken during one visit, as is still done along with bioassessment. [Fn. omitted.] The new method generates a continuous record of readings from over 5,000 individual time intervals for the Alameda County Claimants and over 2,500 individual time intervals for the San Mateo County Claimants, requiring additional staff time to download the data and calculate interpretive statistics as well as performance of additional maintenance and calibration for the required Multi-parameter probe before and after each deployment. [Fn. omitted.] Lastly, Alameda County Claimants must now conduct Stream Surveys for nine stream miles, whereas the prior monitoring workplan commitment was a maximum survey of 3.5 stream miles in one year. [Fn. omitted.]

In addition to field equipment and analytical laboratory testing costs which have substantially increased, as shown above, it is undisputed that Test Claimants must also supply additional staff in order to take the additional samples required by the MRP and manage the additional data. [Fn. omitted.] This has resulted in additional funding needs in both the Alameda County Claimants' budget and the San Mateo County

Claimants' budget. Accordingly, it is apparent that MRP Provision C.8.c does not merely add more specificity – it also substantively imposes a new program and requirements for higher levels of service.<sup>858</sup>

The claimants further state the requirement to conduct TRE and TIE stressor/source identification projects pursuant to Section C.8.d.i. have been shifted from the state to the local agencies, thereby creating a new program or higher level of service:

In referring to the stressor/source identification projects of MRP Provision C.8.d.i, the Regional Board incorrectly argues that these monitoring projects are required under the MRP as monitoring results indicate that a permittee's discharge exceeds a "trigger." This is inaccurate. The monitoring triggers at issue do not necessarily pertain to the permittee's discharge, but rather to monitoring of receiving water conditions. More accurately, both the status monitoring under C.8.c and the projects under C.8.d are designed to: 1) determine if water quality objectives in local receiving waters are being met; and 2) if not, to determine if MS4 discharges are having an impact. In short, pressed for resources to do its own job, the Regional Board is effectively shifting these tasks to the County and using its discretion under the Clean Water Act and state law to do so.<sup>859</sup>

Similarly, the County of Santa Clara argues that Section C.8.d.i. 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:

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

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<sup>858</sup> Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 30-32.

<sup>859</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 28; Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, page 32.

waters without regard to whether the permittee's MS4 caused or contributed to an exceedance.<sup>860</sup>

The Regional Board contends Sections C.8.c., C.8.d.i., and C.8.h. do not mandate a new program or higher level of service, and although the prior permits did not use the phrase "status monitoring," the prior permits, management plans, and annual reports did require them to perform chemical, biological, and physical monitoring of their waterbodies to determine if water quality standards were being met.<sup>861</sup>

Provision C.8.c's requirements are a further refinement of status monitoring requirements reflected in Alameda's and Santa Clara County's prior permits. Those prior permits did not use the term "status monitoring" but included requirements to assess beneficial uses using appropriate physical, chemical and biological parameters in representative receiving waters. [Fn. omitted.] All required that Permittees conduct an "[a]ssessment of existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters". [Fn. omitted.] Those permits additionally required that the monitoring programs developed under each permit were to include in relevant part:

Provision for conducting and reporting on the results of special studies ... which are designed to [assess various things which may include] assess the adverse impacts of a pollutant or pollutants on beneficial uses.... Provisions for conducting watershed monitoring activities including: identification of major sources of pollutants of concern; evaluation of the effectiveness of control measures and BMPs; and use of physical, chemical and biological parameters and indicators as appropriate .... Identification and justification of representative sampling locations, frequencies and methods, suite of pollutants to be analyzed, analytical methods, and quality assurance procedures .... [Fn. omitted.]

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Each of the C.8 Claimants was subject to additional requirements through their prior permits concerning monitoring of creeks, streams and

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<sup>860</sup> Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, page 7.

<sup>861</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 31-34.

watersheds. Those requirements were set forth in plans submitted on behalf of C.8 Claimants by their countywide stormwater programs.<sup>862</sup>

The Regional Board further contends Section C.8.d.i.5., which establishes the maximum number of TRE and TIE stressor/source identification studies required to be conducted when water quality objectives are not met, is not new and is less stringent and costly than the studies required by their prior permits, which had to be implemented without any cap.

The San Francisco Bay Water Board disagrees that Provision C.8.d.i imposes a new program or level of service. In fact Provision C.8.d.i sets forth more detail about the requirements which the C.8.d Claimants were already required to follow in Provision C.1 of their prior permits. [Fn. omitted.]

Provision C.8.d.i(1) requires "when status results trigger a follow up action" a Permittee must conduct a site specific study to identify and isolate the cause of a trigger/stressor source. C.8.d.i Claimants' prior permits implicitly (rather than explicitly) required that they conduct an equivalent study. That requirement was outlined in Provision C.1 of their prior permits. Those permits required that Permittees notify the Board when they discovered that their discharge was causing or potentially causing violations of receiving water limitations (water quality standards). The Stressor/Source Identification monitoring is a refinement of that requirement. The requirements set forth in Provision C.8.d.i(2), (3) and (4) are equivalent to the other requirements in Provisions C.1 of Claimants' prior permits which all provide that the Permittees shall:

[S]ubmit a report to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of WQSS .... The report shall include an implementation schedule .... Implement the ... Plan and monitoring program in accordance with the approved schedule. [Fn. omitted.]

Provision C.8.d.i(5) establishes a maximum number of such studies that must be conducted by a Permittee. This provision was not reflected in C.8 Claimants' prior permits which did not establish a maximum number of studies. It thus renders the challenged sub-provision actually less stringent (and less costly) than was required by the previous permits, which

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<sup>862</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 31-32.

provided that Provision C.1 requirements had to be implemented without any cap.<sup>863</sup>

The Commission finds the status monitoring requirements imposed by Sections C.8.c., C.8.h., and C.8.d.i. of the test claim permit do not impose new requirements on the claimants and therefore do not mandate a new program or higher level of service.

As indicated above, status monitoring requires the permittees to perform chemical, biological, and physical monitoring of their receiving waterbodies. If an exceedance of water quality objectives, a toxicity threshold, or other trigger identified in Table 8.1 of the test claim permit is detected in the monitoring data, which indicates that a discharge may be causing or contributing to an exceedance of water quality standards, the permittees are required to determine the pollutant causing or contributing to the exceedance and the source of the pollutants using TIE and TRE studies, and then implement control measures or BMPs, and reassess to see if the control measures are successful to meet water quality standards. The purpose of these requirements is to identify water quality problems and assess the health of creeks and streams by monitoring these receiving waters; it is the first step in identifying sources of pollutants.<sup>864</sup> These requirements are not new and do not impose a new program or higher level of service.

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.<sup>865</sup> Federal law requires the permittees to report any noncompliance that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall contain a description of the noncompliance *and its cause*, the period of noncompliance, and whether the noncompliance has been corrected *and the steps taken or planned to reduce or eliminate the noncompliance, including BMPs or "controls to reduce the discharge of pollutants to the maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."<sup>866</sup>

All prior permits required compliance with water quality standards and objectives and imposed monitoring requirements to ensure water quality standards were met as

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<sup>863</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 34.

<sup>864</sup> Exhibit A, Test Claim, 10-TC-02, page 335 (Fact Sheet).

<sup>865</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(d)(1) and (i)(1); *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207.

<sup>866</sup> United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.41(l)(6), emphasis added.

required by federal law. Specifically, like the test claim permit, 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 that were contained in the Regional Board's Basin Plan.<sup>867</sup> The water quality standards and objectives contained in the 1995 Basin Plan, which were in effect when the prior permits were adopted, include the following numeric and narrative objectives relevant to the issues here:

- Numeric criteria for bacteria, including those established by U.S. EPA, for contact recreation.<sup>868</sup>
- Numeric criteria for toxic pollutants in surface waters, based on U.S. EPA water quality criteria for arsenic, cadmium, chromium, copper, cyanide, lead, mercury, nickel, selenium, silver, tributyltin, zinc, and PAHs (polycyclic aromatic hydrocarbons). "Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use."<sup>869</sup>
- Numeric criteria for municipal supply for color, odor, turbidity, pH, total dissolved solids, inorganic and organic pollutants, and chlorinated hydrocarbons and synthetic pollutants. "Surface waters designed for use as domestic or municipal supply . . . shall not contain concentrations of constituents in excess of the maximum . . . or secondary maximum contaminant levels" specified in Table 3-5.<sup>870</sup>
- Numeric criteria for agricultural supply. "[S]urface waters designated for use in agricultural supply . . . shall not contain concentrations of constituents in excess of levels specified in Table 3-6."<sup>871</sup>
- "Many pollutants can accumulate on particles, in sediment or bioaccumulate in fish or other aquatic organisms. Controllable water quality factors shall not cause

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<sup>867</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A., B., and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., and C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B., and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>868</sup> Exhibit BB (6), Basin Plan 1995, pages 45, 51 (Tables 3-1 and 3-2 for fecal coliform, total coliform, E. coli, and enterococci).

<sup>869</sup> Exhibit BB (6), Basin Plan 1995, pages 48, 53 (Tables 3-3, 3-4).

<sup>870</sup> Exhibit BB (6), Basin Plan 1995, pages 48, 54 (Table 3-5).

<sup>871</sup> Exhibit BB (6), Basin Plan 1995, pages 48, 55 (Table 3-6).

a detrimental increase in concentrations of toxic substances found in bottom sediment or aquatic life.”<sup>872</sup>

- Dissolved oxygen is a general index of the state of the health of receiving waters. Numeric water quality objectives are provided for dissolved oxygen in the Bay and in non-tidal waters with cold and warm water habitats.<sup>873</sup>
- “All waters shall be free of toxic substances in concentrations that are lethal to or that produce significant alterations in population or community ecology or receiving water biota.”<sup>874</sup>
- “The pH shall not be depressed below 6.5 nor raised above 8.5. . . Controllable water quality factors shall not cause changes greater than 0.5 units in normal ambient pH levels.”<sup>875</sup>
- Temperature objectives are identified in the “Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays of California.” The temperature of any cold or warm freshwater habitat shall not be increased by more than five degrees Fahrenheit above natural receiving water temperature.<sup>876</sup>
- “All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms. Detrimental responses include, but are not limited to, decreased growth rate and decreased reproductive success of resident or indicator species.”<sup>877</sup>
- Effluent limits for conventional pollutants, including residual chlorine, as are also identified in Table 4-2.<sup>878</sup>

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.<sup>879</sup> And all permittees were required to

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<sup>872</sup> Exhibit BB (6), Basin Plan 1995, page 45.

<sup>873</sup> Exhibit BB (6), Basin Plan 1995, page 46.

<sup>874</sup> Exhibit BB (6), Basin Plan 1995, page 46.

<sup>875</sup> Exhibit BB (6), Basin Plan 1995, page 46.

<sup>876</sup> Exhibit BB (6), Basin Plan 1995, page 47.

<sup>877</sup> Exhibit BB (6), Basin Plan 1995, page 47.

<sup>878</sup> Exhibit BB (6), Basin Plan 1995, page 125.

<sup>879</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952

conduct monitoring activities using physical, chemical, and biological parameters and indicators.<sup>880</sup> Their monitoring plans, *which were made enforceable by the prior permits*,<sup>881</sup> required these activities as follows:

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(Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et seq.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

<sup>880</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059); page 2002 (Attachment 57, Order R2-2004-0060), and page 2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 38; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), R2-2004-0059, pages 5, 16; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

<sup>881</sup> Santa Clara's prior permit, in Section C.7., required the monitoring plan and the annual monitoring plans to be submitted and acceptable to the Executive Officer of the Regional Board, which, following approval, "shall be implemented." In addition, by March 1 of the year following the submittal of the annual report, the permittees were required to submit workplans, which had to include "alternative monitoring activities as required by Provision C.7." "The workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer." Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2087, 2089-2090 (Attachment 60, Order 01-024).

Alameda's prior permit (Order R2-2003-0021) required that the monitoring plans be approved by the executive officer and that any updates to the plan "shall be deemed to be final and incorporated into the Management Plan . . . unless determined to be unacceptable by the Executive Officer." The Management Plan was "incorporated in the Permit by reference and enforceable as such, and is considered an enforceable component of this Order." Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1853, 1883, 1885 (Attachment 53, Order R2-2003-0021).

Fairfield Suisun's prior permit required that the monitoring plan be acceptable to the Executive Officer of the Regional Board and any updates to the monitoring plan shall be included in the annual report, which were made an enforceable part of the permit; ("In the Annual Reports, the Permittees shall propose pertinent updates, improvements, or revisions to the Management Plan, which shall be complied with under this Order unless disapproved by the Executive Officer . . ."). Exhibit BB (27), Order R2-2003-0034, pages 35, 38.



- Santa Clara’s 2004 Revised Multi-Year Monitoring Plan provides that it was designed to assess the beneficial uses of receiving water bodies, including local creeks and the San Francisco Bay estuary.<sup>882</sup> The objective of the plan was to develop a better understanding of the chemical, biological, and physical characteristics of the water bodies and watersheds; assess baseline water quality conditions in representative watersheds; assess whether pollutants of concern are found in stormwater discharges and impact water quality; and evaluate the effectiveness of their BMPs.<sup>883</sup> Like the requirements imposed by the test claim permit, the screening level (or baseline) indicators used by the Santa Clara permittees included general water quality, rapid bioassessment, fisheries assemblage characterization, qualitative physical habitat assessments, and bacterial indicators.<sup>884</sup> In addition, once a BMP was implemented, they conducted status monitoring to determine if the “net environmental benefit [was] apparent.”<sup>885</sup> They monitored temperature, dissolved oxygen, pH, and specific

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San Mateo’s 2003 permit attaches the monitoring plan as Attachment A and provides that “[t]his amendment will add the Monitoring Requirements to the Permit, as required by the Court [in *Baykeeper*].” Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1994 (Attachment 57, Order R2-2004-0060, Finding 6).

Contra Costa’s prior permit attaches the monitoring plan as Attachment A and provides that “[t]his amendment will add the Monitoring Requirements to the Permit, as required by the Court [in *Baykeeper*].” Exhibit BB (28), R2-2004-0059, page 2 (Finding 6).

Vallejo’s prior permit stated that “The permittee shall implement the storm water monitoring program described in the documents listed in Part I.D.12 of this permit,” and that “The ‘storm water monitoring program’ consists of . . . Storm water monitoring program described in section 8 of the document entitled ‘Vallejo Sanitation and Flood Control District Storm Water Management Plan’ as updated in section 4 of the supplemental Part 2 permit application submitted to Region 9 on August 13, 1998.” Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8.

<sup>882</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5459 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>883</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5460 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>884</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5467-5470, 5482-5484 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>885</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5472 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

conductance; orthophosphate, nitrate, nitrite, chloride, sulfate, ammonia, suspended sediment concentration; pathogen indicators; toxicity testing on *Selenastrum* growth and *Ceriodaphnia* and *Pimephales*. They also conducted a habitat survey and a bioassessment of fish communities. The standard analytical method used to analyze the data was “intended to be congruent with SWAMP/RMAS methodology.”<sup>886</sup>

- Alameda’s Multi-Year Monitoring and Assessment Program, dated May 2003, states that the permittees used a variety of indicators to assess the condition of streams and watersheds, and its watershed assessment included many basic screening activities identified in the SWAMP to identify the presence and extent of potential problems. It also included more detailed assessments and studies involved in hypothesis testing or investigations of local problems in specific watersheds.<sup>887</sup> Alameda’s watershed program evaluated the physical, chemical, and biological functioning of the watersheds.<sup>888</sup> Their objectives included sediment monitoring to characterize and track mercury, PCBs, organochlorine pesticides, and other pollutants in sediment; developing and implementing a screening program for ambient water quality characterization; conducting sampling for toxicity; and special studies focusing on priority pollutants and threat pollutants and their sources.<sup>889</sup> They also collected data on temperature, pH, and dissolved oxygen at 16 monitoring stations; conducted a Toxicity Identification Evaluation (TIE) to determine the cause of toxicity in urban creeks; and monitored for biological indicators of creek health and ability to support aquatic life, basic screening indicators of water quality and absence of human-caused toxicity, and human health risk from contact with natural waters.<sup>890</sup> Alameda’s 2004 Annual Monitoring Program Plans also shows that the Alameda permittees, for fiscal year 2003-2004, used a variety of indicators to assess the

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<sup>886</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5501-5510, including footnotes 2-12 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>887</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2214, 2216, 2222 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

<sup>888</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2254, 2262, 2266 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

<sup>889</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2224 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

<sup>890</sup> Exhibit I, Regional Board’s Comments on Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2230, 2254, 2262, 2266, 2270 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

condition of streams and watershed, including sampling benthic macroinvertebrate communities in certain watersheds, monitoring for coliform and other indicators of human health risk at sites with light contact recreation, characterize and track pollutants of concern found in urban runoff and conduct baseline monitoring of the pollutants of concern, designed a follow-up study on the effectiveness of existing sediment management practices in reducing or avoiding loads of pollutants of concern in urban runoff, continued semi-annual screening for basic water quality chemistry and selected pollutants at 10-15 sites along creeks and channels, and “considered strategies for additional or alternative sampling such as toxicity testing or continuous temperature monitoring at selected sites.”<sup>891</sup> Similar workplans are provided through fiscal years 2004-2005 and 2005-2006.<sup>892</sup>

- Fairfield-Suisun’s 2007 stormwater management plan states that the permittees monitor the chemical, biological, and physical characteristics of the waterbodies and watersheds, assess baseline water quality conditions in representative watersheds to evaluate watersheds and to help solve creek drainage basin-specific water quality problems, assess whether specific pollutants of concern are found in stormwater discharges, and to evaluate the effectiveness of their BMPs and pollution prevention program.<sup>893</sup>
- San Mateo’s monitoring plan required the permittees to perform assessments focusing on environmental indicators, such as benthic macroinvertebrate assemblages, to help characterize the functional attributes of creeks and potential for stormwater impacts. Data on physical, biological, and chemical parameters were collected.<sup>894</sup> In addition, field activities performed in the Cordilleras Creek watershed were conducted, including a chemical analysis and bioassay of grab samples, field instrument measurements (i.e., pH, temperature, conductivity, dissolved oxygen, and velocity), rapid bioassessment, and physical

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<sup>891</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2158-2160 (Attachment 63, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 27, 2004).

<sup>892</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2160 et al. (Attachment 63, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 27, 2004); and pages 2181 et seq. (Attachment 64, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 28, 2005).

<sup>893</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 123.

<sup>894</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2002 (Attachment 57, Order R2-2004-0060).

habitat assessment using protocols outlined in the California Stream Bioassessment Procedure.<sup>895</sup>

- Contra Costa permittees conducted a multi-phased watershed assessment and monitoring program, using GIS technology, water quality database structure, systematic sampling site selection, physical habitat assessments, rapid bioassessments, and general chemical and physical water quality parameters.<sup>896</sup> The protocol used benthic macroinvertebrate community assemblages as the primary indicator of water quality and watershed health.<sup>897</sup>
- The Vallejo permittees worked with the BASMAA Monitoring Committee to determine impacts on beneficial uses in receiving waters. Their plan included watershed monitoring, including land use characteristics and consideration of physical, biological, and chemical indicators to assess drainage areas. They also planned to use special or pilot studies performed by BASMAA member agencies.<sup>898</sup>

Thus, status monitoring for the pollutants and conditions in the receiving waters is not new for the permittees.

In addition, as indicated above, all prior permits required that a discharge shall not cause or contribute to a violation of any applicable water quality standard for receiving waters contained in the Regional Board Basin Plan. Section C.1. of the prior permits further required that upon determination by either the discharger or the Regional Board that discharges are causing or contributing to an exceedance of an applicable water quality standard, the discharger was required to promptly notify and thereafter submit a report to the Regional Board describing the BMPs currently implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. 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.<sup>899</sup> These procedures had to be

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<sup>895</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2002-2003 (Attachment 57, Order R2-2004-0060).

<sup>896</sup> Exhibit BB (28), Order R2-2004-0059, pages 18, 22-24, 29-30 (Contra Costa Clean Water Program Monitoring Program Plan).

<sup>897</sup> Exhibit BB (28), Order R2-2004-0059, page 20 (Contra Costa Clean Water Program Monitoring Program Plan).

<sup>898</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, pages 4, 71.

<sup>899</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024);

repeated if exceedances continued and the Regional Board or EPA required additional control measures and BMPs.<sup>900</sup>

Although the prior permits did not explicitly identify the procedures for determining the source of the pollutant that may be causing or contributing to an exceedance, the prior permits expressly required the permittees “to identify potential sources of pollutants in stormwater discharges” and to assess the existing or potential adverse impacts on beneficial uses caused by pollutants of concern.<sup>901</sup> Identifying the pollutant and the source of the pollutant is required in order 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.”<sup>902</sup>

Moreover, the 1995 Basin Plan states “Permits shall require that if consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted” to identify the pollutant and the source of the pollutant as follows:

Permits shall require that if consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted. Specific language in permits requires the development of workplans for implementing TIEs. TIEs will be initiated within 30 days of detection of persistent toxicity. The purpose of a TIE is to identify the chemical or combination of chemicals causing the observed

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Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>900</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), page 1950 (Attachment 55, Order 99-059), and page 2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5.

<sup>901</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et seq.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

<sup>902</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A, B, and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B. and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

toxicity. Every reasonable effort using currently available TIE methodologies shall be employed by the discharger. The Regional Board recognizes that identification of causes of chronic toxicity may not be successful in all cases.

The purposes of a TRE are to identify the source(s) of the toxic constituents and evaluate alternative strategies for reducing or eliminating their discharge. The TRE shall include all reasonable steps to reduce toxicity to the required level. In addition, the Regional Board will review chronic toxicity test results to assess acute toxicity and consider the need for an acute TIE.

Following completion of the TRE, if consistent toxicity is still exhibited in a discharge, then the discharger shall pursue all feasible waste minimization measures at a level that is acceptable to the Regional Board. The discharger must document that the acceptable level of participation is maintained by submitting reports to the Regional Board according to a specified schedule.

A toxicity reduction evaluation may again be required in situations where chronic toxicity still exists and new techniques for identifying and reducing toxicity become available. Alternatively, the cause of effluent toxicity may change, so that existing techniques will enable identification and reduction of toxicity.

Consideration of any enforcement action by the Regional Board for violation of the effluent limitation will be based in part on the discharger's actions in identifying and reducing sources of persistent toxicity.<sup>903</sup>

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<sup>903</sup> Exhibit BB (6), Basin Plan 1995, page 66; see also, Exhibit BB (7), Basin Plan 2007, pages 90-91, which states the following:

Permits shall require that if consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted. Specific language in permits requires the development of workplans for implementing TIEs. TIEs will be initiated within 30 days of detection of persistent toxicity. The purpose of a TIE is to identify the chemical or combination of chemicals causing the observed toxicity. Every reasonable effort using currently available TIE methodologies shall be employed by the discharger. The Water Board recognizes that identification of causes of chronic toxicity may not be successful in all cases. The purposes of a TRE are to identify the source(s) of the toxic constituents and evaluate alternative strategies for reducing or eliminating their discharge. The TRE shall include all reasonable steps to reduce toxicity to the required level. In addition, the Water Board will review chronic toxicity test results to assess acute toxicity and consider the need for an acute TIE. Following completion of the TRE, if consistent toxicity is still exhibited in a discharge, then the

Santa Clara's 1997 Stormwater Management Plan, which was made enforceable by the prior permit and was binding on the Santa Clara permittees,<sup>904</sup> indicates it has long used TIE and TRE methods as follows:

The Program has, since 1988, collected samples from three watershed stations and from one station that receives runoff from an industrial area. Samples were tested for metal pollutants of concern, and in recent years, for toxicity. Program annual reports evaluate the results as compared to water quality objectives. Toxicity Identification and Evaluation procedures identified the organophosphate Diazinon as the source of acute toxicity in three samples collected at two of the watershed stations.<sup>905</sup>

And Santa Clara's 2004 Multi-Year Receiving Waters Monitoring Plan states that its monitoring plans have "included assessments intended to enhance understanding of the sources and extent of urban runoff pollution, its effects, and methods for its control" and that it uses a two-tiered approach that includes screen-level monitoring and investigative monitoring to determine the cause and source of the pollutant.<sup>906</sup>

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discharger shall pursue all feasible waste minimization measures at a level that is acceptable to the Water Board. The discharger must document that the acceptable level of participation is maintained by submitting reports on a specified schedule to the Water Board.

A Toxicity Reduction Evaluation may again be required in situations where chronic toxicity still exists and new techniques for identifying and reducing toxicity become available. Alternatively, the cause of effluent toxicity may change, so that existing techniques will enable identification and reduction of toxicity. Consideration of any enforcement action by the Water Board for violation of the effluent limitation will be based in part on the discharger's actions in identifying and reducing sources of persistent toxicity.

<sup>904</sup> Santa Clara's prior permit, in Section C.7., required the monitoring plan and the annual monitoring plans to be submitted and acceptable to the Executive Officer of the Regional Board, which, following approval, "shall be implemented." In addition, by March 1 of the year following the submittal of the annual report, the permittees were required to submit workplans, which had to include "alternative monitoring activities as required by Provision C.7." "The workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer." Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2087, 2089-2090 (Attachment 60, Order 01-024).

<sup>905</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 81.

<sup>906</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5464, 5466-5467 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

As previously indicated, Santa Clara's 1997 Stormwater Management Plan and its approved monitoring plans were made enforceable by the prior permit and, thus, the use of TIE and TRE methods to identify the pollutant and the source of the pollutant, as indicated in these plans, were required components of prior law for the Santa Clara permittees.<sup>907</sup>

Alameda's monitoring program, an enforceable under the prior permit, also specifically identifies Toxicity Identification Evaluations (TIEs) to determine the cause of toxicity in urban creeks.<sup>908</sup> Similarly, Fairfield-Suisun's monitoring program under the prior permit, also enforceable, described their evaluations as a tiered approach with focused special studies conducted in tier two:

As described in the Multi-Year Plan, the Program's monitoring and assessment strategy is based on a tiered approach. Tier I monitoring and assessments seek to initially characterize watersheds and water bodies relevant to the Program. After Tier I monitoring and assessments suggest that certain specific issues are local priorities, focused studies (i.e., Tier II monitoring/assessments) may be conducted to test hypotheses. Results of Tier II monitoring and assessments may then provide useful recommendations for management actions in these systems. This approach is similar to regional (i.e., RMAS) and other Bay area urban runoff management program monitoring and assessment approaches.<sup>909</sup>

Thus, TIE and TRE evaluations have long been used by the permittees to determine the source and cause of the toxicity, were required components of their prior permits, and are not new. And, as the Regional Board points out, the prior permits required these special studies without any cap as needed to meet water quality standards.<sup>910</sup> The test claim permit now caps the requirement by providing permittees who conduct this

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<sup>907</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2083-2085, 2087, 2089-2090 (Attachment 60, Order 01-124, Sections C.1., C.2.a., C.2.b., C.6.a., C.7.).

<sup>908</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1853, 1883, 1885 (Attachment 53, Order R2-2003-0021); pages 2230, 2254, 2262, 2266, 2270 (Attachment 66 (ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003); page 2378, (Attachment 67 (ACCWP Stormwater Quality Management Plan July 2001-June 2008, describing the use of Toxicity Identification Evaluations (TIE) to identify diazinon as a probable source of toxicity in urban creeks); and pages 2156, 2160 (Attachment 63, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 27, 2004, describing source ID studies and source investigations to be conducted).

<sup>909</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 123; Exhibit BB (27), Order R2-2003-0034, pages 35, 38.

<sup>910</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 34.



monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups, unless monitoring results do not indicate the presence of toxicity.<sup>911</sup>

The claimants do not deny they performed these activities under prior law. But they argue Sections C.8.c., C.8.d.i., and C.8.h. mandate a new program or higher level of service because the requirements expand the number of monitoring sites and parameters, increase the collection of bedded sediment samples and the length of stream surveys, increase the investigations into the source of pollutants, and they are now required to use an expanded SWAMP protocol to assess the samples; in other words, the requirements result in increased costs.<sup>912</sup> However, the courts have held “simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting ‘service to the public’ under article XIII B, section 6, and Government Code section 17514.”<sup>913</sup> Rather, all of the requirements of article XIII B, section 6 must be met, including that the requirements imposed by the state mandate a new program or higher level of service.<sup>914</sup>

And here, as explained above, the activities required in Sections C.8.c., C.8.d.i., and C.8.h. to perform chemical, biological, and physical monitoring of the receiving waters, identify the cause and source of the pollutants when there is an exceedance of water quality standards detected in the monitoring, implement revised control measures to control the pollutants, and then reassess to see if the control measures are successful to meet water quality standards are not new. Moreover, the permittees were required by federal law and their prior permits to comply with water quality standards and perform “*any additional*” monitoring to “*assure*” water quality standards were met. If water quality standards continued to not be met, the permittees would have been in violation of their prior permits.<sup>915</sup> This is no longer required, since now, Sections C.8.c.

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<sup>911</sup> Exhibit A, Test Claim, 10-TC-02, page 220 (Test claim permit, Section C.8.d.5.).

<sup>912</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, pages 27-28; see also, Exhibit A, Test Claim, 10-TC-02, pages 30-31; Exhibit B, Test Claim, 10-TC-03, pages 26-27; Exhibit C, Test Claim, 10-TC-05, pages 32-34.

<sup>913</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

<sup>914</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, emphasis in original; see also, *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>915</sup> See, for example, *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880, and *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1204-1207. In

and C.8.d.i. cap how often monitoring is required and the number of special studies to determine the identify and source of the pollutant, which could represent a lower level of service if water quality standards are still not met.<sup>916</sup> As stated in Section C.8.d.i., “As long as Permittees have complied with the procedures set forth above, they do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed to do so by the Water Board.”<sup>917</sup> The test claim permit did not shift these requirements to the local agencies, because the permittees have long been required to monitor their discharges to the receiving waters and perform the same activities under both state and federal law. Moreover, although Section C.8.h. provides the quality of monitoring data must be SWAMP comparable, and consistent with the SWAMP Quality Assurance Project Plan (QAPP) for the parameters identified, the section also provides a “Regional Monitoring Collaborative may *adapt* the SWAMP QAPP for use in conducting monitoring in the San Francisco Bay Region, and may use such QAPP if acceptable to the Executive Officer.”<sup>918</sup> As indicated above, all of the permittees participate in a regional monitoring collaborative and, thus, are allowed to adapt the quality assurance procedures to their regional needs.<sup>919</sup> This provision is, therefore, no different than federal law, which requires monitoring must be conducted according to approved test procedures.<sup>920</sup>

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both cases, the permits 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 permits 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. If data collected at monitoring stations showed that water quality standards were exceeded, the permittees were not in compliance with the permit and could be held liable for permit violations. The courts have held that permit provisions requiring compliance with water quality standards are proper under federal law. *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

<sup>916</sup> As indicated above, Section C.8.d.i. provides “Permittees who conduct this monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups. . . .” Exhibit A, Test Claim, 10-TC-02, page 220.

<sup>917</sup> Exhibit A, Test Claim, 10-TC-02, page 221.

<sup>918</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.h.) emphasis added.

<sup>919</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 3, 11.

<sup>920</sup> Code of Federal Regulations, title 40, section 122.41(j); Code of Federal Regulations, title 40, Part 136.

Finally, the analysis here is not at all like the arguments made by the State and rejected by the court in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, as asserted by the County of Santa Clara.<sup>921</sup> There, the State argued that no stormwater permit would ever impose a new program or higher level of service because permit conditions are designed to comply with the same standard under federal law.<sup>922</sup> The court disagreed that reimbursement for *all* stormwater permit conditions would be denied under article XIII B, section 6 and held, as several prior courts have done, that to determine “whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. This is so even though the conditions were designed to satisfy the same standard of performance.”<sup>923</sup> Here, as indicated above, the activities required in Sections C.8.c., C.8.d.i., and C.8.h. to perform chemical, biological, and physical monitoring of the receiving waters, identify the cause and source of the pollutants when there is an exceedance of water quality standards detected in the monitoring, implement revised control measures to control the pollutants, and then reassess to see if the control measures are successful to meet water quality standards are not new, but were previously required by the prior permits and federal law.

Accordingly, the Commission finds the status monitoring requirements imposed by Sections C.8.c., C.8.d.i., C.8.h. do not mandate a new program or higher level of service.

- iii. *The requirement in Section C.8.d.ii. to investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control is not new and does not mandate a new program or higher level of service.*

The claimants request reimbursement to comply with Section C.8.d.ii. of the test claim permit, which requires the permittees to investigate the effectiveness of one stormwater treatment or hydrograph modification BMP or control during the term of the permit as follows:

**BMP Effectiveness Investigation** – Investigate the effectiveness of one BMP for stormwater treatment or hydrograph modification control. Permittees who do this project through a regional collaborative are required to initiate no more than one BMP Effectiveness Investigation during the Permit term. If conducted through a stormwater countywide program, the Santa Clara, Alameda, Contra Costa, and San Mateo

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<sup>921</sup> Exhibit Z, Claimant’s (County of Santa Clara’s) Comments on the Draft Proposed Decision, page 6.

<sup>922</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 559.

<sup>923</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 559.

Permittees shall be required to initiate one BMP Effectiveness Investigation each, and the Fairfield-Suisun and Vallejo Permittees shall be exempt from this requirement. The BMP(s) used to fulfill requirements of C.3.b.iii., C.11.e. and C.12.e. may be used to fulfill this requirement, provided the BMP Effectiveness Investigation includes the range of pollutants generally found in urban runoff. The BMP Effectiveness Investigation will not trigger a Stressor/Source Identification Project. Data from this Monitoring Project need not be SWAMP-comparable.<sup>924</sup>

Section C.8.d.ii. suggests the permittees “may” use the BMPs required by Sections C.3.b.iii., C.11.e. and C.12.e. “to fulfill this requirement.” Section C.3.b.iii. addresses green street projects that incorporate LID techniques (low impact development) for site design and treatment; and Sections C.11.e. and C.12.e. address on-site treatment systems (e.g., detention basins, bioretention units, sand filters, infiltration basins, treatment wetlands) for the removal of mercury and PCBs from the storm drain system.<sup>925</sup> Investigating the effectiveness of these specific controls, however, is not required; the permittees can choose another stormwater treatment or hydrograph modification BMP to investigate.

The Fact Sheet explains the purpose of this provision is to determine how the BMP might be improved as follows:

U.S. EPA’s stated approach to NPDES stormwater permitting uses BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. [Fn. reference to USEPA. 1996. *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits*. Sept. 1, 1996.] The purpose of this monitoring project is to investigate the effectiveness of one currently in-use BMP to determine how it might be improved. Permittees may choose the particular stormwater treatment or hydromodification control BMP to investigate. As with other monitoring requirements, Permittees may work collaboratively to conduct one investigation on a region-wide basis, or each stormwater countywide program may conduct an investigation.<sup>926</sup>

And if the permittees choose to conduct one investigation per stormwater countywide program instead of through a regional collaborative, the “Fairfield-Suisun and Vallejo Permittees shall be exempt from this requirement.”<sup>927</sup>

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<sup>924</sup> Exhibit A, Test Claim, 10-TC-02, page 221 (Test claim permit, Section C.8.d.ii.).

<sup>925</sup> Exhibit A, Test Claim, 10-TC-02, pages 171-172, 239, 247-248 (Test claim permit, Sections C.3.b.iii., C.11.e. and C.12.e.).

<sup>926</sup> Exhibit A, Test Claim, 10-TC-02, page 338 (Fact Sheet).

<sup>927</sup> Exhibit A, Test Claim, 10-TC-02, page 221 (Test claim permit, Section C.8.d.ii.).

The Regional Board contends the requirement in Section C.8.d.ii. is not new, but was required by the prior permits and is less stringent than the prior requirements since the test claim permit limits the assessment of controls to just one BMP.<sup>928</sup>

The claimants respond Section C.8.d.ii. imposes a new program or higher level of service because it limits the type of control measures to be investigated to the more expensive stormwater treatment or hydrograph modification controls as follows:

The Regional Board states that MRP Provision C.8.d.ii. is consistent with the prior permits because the prior permits required the County to conduct monitoring to evaluate the effectiveness of representative storm water pollution prevention or control measures. The prior permits, however, did not limit what prevention or control measures could be evaluated. The MRP, on the other hand, specifies that the evaluated BMP must be for "stormwater treatment or hydrograph modification control." This new provision could prevent or discourage the County from complying by studying a source control BMP, such as street sweeping or restrictions on plastic bags, which would have been sufficient under the old permit. In effect, the MRP requires the County to evaluate more costly structural BMPs instead of less expensive source control measures. This increases costs under the MRP over the prior permits and is a new program or higher level of service.<sup>929</sup>

The Commission finds this requirement to investigate the effectiveness of just one treatment or hydrograph modification control BMP is not new and does not mandate a new program or higher level of service.

Federal law requires each permittee to propose a management program to reduce the discharge of pollutants to the MEP using BMPs, control techniques, and other appropriate systems.<sup>930</sup> The program is required to include structural and source control measures to reduce pollutants from runoff discharged from the MS4, and to detect and remove non-stormwater discharges and improper disposal into the storm sewer.<sup>931</sup> Federal regulations require the permittees to assess the controls comprising the management program to estimate "reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems

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<sup>928</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 35.

<sup>929</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 29; see also, Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 33-34 and Exhibit Z, Claimant's (County of Santa Clara's) Comments on the Draft Proposed Decision, 2024, page 7, for similar comments.

<sup>930</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

<sup>931</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

expected as the result of the municipal storm water quality management program.”<sup>932</sup> In addition, federal regulations require the permittees to submit an annual report to the Regional Board, which must include revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.<sup>933</sup>

All prior permits required the permittees to comply with the discharge prohibitions and receiving water limitations, which prohibit the discharge of any pollutant that causes or contributes to a violation of water quality standards for receiving waters, through the timely implementation of BMPs and control measures designed to meet water quality standards. If there was an exceedance of water quality standards or objectives that persisted notwithstanding the implementation of the permittee’s stormwater management plan, the permittee “shall assure compliance” by notifying the Regional Board of the exceedance and submitting a report identifying the current BMPs and control measures and any additional BMPs that will be implemented to prevent or reduce any pollutants causing or contributing to the exceedance of water quality standards. Within 30 days of approval of the report, the permittee was required to incorporate the approved modified control measures that have been or will be implemented into the stormwater management plan and implement those modified control measures.<sup>934</sup>

To determine whether the BMPs and control measures were effective in meeting water quality standards, the prior permits for the Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo permittees required them to have a monitoring program that demonstrated the effectiveness of the stormwater management plan, which had to include a provision for conducting and reporting the results of special studies designed to determine the effectiveness of BMPs and control measures.<sup>935</sup> The prior permits did not limit the number of special studies required to be conducted; but when read with the

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<sup>932</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

<sup>933</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>934</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059) and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; and Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>935</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021, Section C.8), page 1952 (Attachment 55, Order 99-059, Section C.8.), pages 1995, 1996, 2003-2004, 2009 et al. (Attachment 57, Order R2-2004-0060, Sections C.2. and C.9., and Attachment A (The San Mateo Countywide Stormwater Pollution Prevention Program Monitoring Program Plan), pages 2089-2090 (Attachment 60, Order 01-124, Section C.7.); Exhibit BB (27), Order R2-2003-0034, pages 37-38 (Section C.7.); Exhibit BB (25), Order 99-058, page 11 (Section C.8.); Exhibit BB (28), Order R2-2004-0059, pages 6, 7, 16-17, 26 (Sections C.2. and C.9. and Attachment A, The Contra Costa Monitoring and Assessment Plan).

receiving water limitations, discharge prohibitions, and the requirement to assure compliance with water quality standards, the permittees were required by their prior permits to conduct as many BMP special studies necessary to determine if the BMPs and control measures were effective in reducing the discharge of pollutants to meet water quality standards. The prior management and monitoring plans for these permittees also indicate they conducted special studies to determine the effectiveness of their BMPs.<sup>936</sup>

Similarly, the prior U.S.EPA permit issued for the Vallejo permittees required a monitoring plan and an annual report that identified any revisions or updates to the assessment of controls.<sup>937</sup> Vallejo's prior stormwater management plan indicates it participated in the BASMAA Regional Monitoring Strategy, which helps all member agencies "assess compliance with maximum extent practicable, determine impacts on beneficial uses in receiving waters, decide on appropriate actions to protect and enhance those beneficial uses, and document the effectiveness of their programs."<sup>938</sup> Specific monitoring activities within the strategy included the effective use of special studies performed by BASMAA member agencies.<sup>939</sup>

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<sup>936</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2378 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003); and pages 2216, 2224, 2300 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5490 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004), addressing the monitoring elements and goals for BMPs, including "structural treatment BMPs that are integrated into the stormwater conveyance system to remove pollutants before they enter a water body."

Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2009 (Attachment 57, Order R2-2004-0060, Attachment A, The San Mateo Countywide Stormwater Pollution Prevention Program Monitoring Program Plan); Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3972-3973 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, page 125; and Exhibit BB (28), Order R2-2004-0059, page 26 (Attachment A, The Contra Costa Monitoring and Assessment Plan).

<sup>937</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4-5.

<sup>938</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 71; see also, Exhibit BB, BASMAA Regional Monitoring Strategy, page 3.

<sup>939</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 71.

Thus, the requirement to investigate the effectiveness of BMPs, including stormwater treatment controls, is not new.

Moreover, the requirement in Section C.8.d.ii. of the test claim permit to investigate the effectiveness of just one BMP during the permit term if done through a regional collaborative, or one investigation for each stormwater countywide program (except for the Fairfield-Suisun and Vallejo permittees, who are exempt), does not increase the level of service, but limits the level of service compared to prior law. Even if that one investigation is more costly, as asserted by the claimants, increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution.<sup>940</sup> And, the options provided in the test claim permit to comply with the federal law requirement to assess the controls allows the claimants to limit and reduce their costs.

Accordingly, Section C.8.d.ii. of the test claim permit does not mandate a new program or higher level of service.

- iv. *Section C.8.d.iii., which requires the permittees to conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report required by Section C.8.g.v., imposes a state-mandated new program or higher level of service.*

The claimants request reimbursement to comply with Section C.8.d.iii. of the test claim permit, requiring them to conduct one of the following geomorphic monitoring projects during the term of the permit and to report the results in the Integrated Monitoring Report:

**Geomorphic Project** – This monitoring is intended to answer the questions: How and where can our creeks be restored or protected to cost-effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff?

Permittees shall select a waterbody/reach, preferably one that contains significant fish and wildlife resources, and conduct one of the following projects within each county, except that only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:

- (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or
- (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or

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<sup>940</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.



(3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:

- Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
- Contributing drainage area.
- Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
- Best available information on average annual rainfall in the study area.

Permittees shall complete the selected geomorphic project so that project results are reported in the Integrated Monitoring Report (see Provision C.8.g.v).<sup>941</sup>

Section C.8.d.iii. incorporates by reference the Integrated Monitoring Report required by Section C.8.g.v., which states the following:

No later than March 15, 2014, Permittees shall prepare and submit an Integrated Monitoring Report through the regional collaborative monitoring effort on behalf of all participating Permittees, or on a countywide basis on behalf of participating Permittees, so that all monitoring conducted during the Permit term is reported. [Fn. omitted.] This report shall be in lieu of the Annual Urban Creeks Monitoring Report due on March 15, 2014.<sup>942</sup>

The Fact Sheet explains the purpose of the requirements in Section C.8.d.iii. as follows:

The physical integrity of a stream's bed, bank and riparian area is integral to the stream's capacity to withstand the impacts of discharged pollutants, including chemical pollutants, sediment, excess discharge volumes, increased discharge velocities, and increased temperatures. At present, various efforts are underway to improve geomorphic conditions in creeks, primarily through local watershed partnerships. In addition, local groups are undertaking *green stormwater projects* with the goal of minimizing the physical and chemical impacts of stormwater runoff on the receiving stream. Such efforts ultimately seek to improve the integrity of the waterbodies that receive urban stormwater runoff.

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<sup>941</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222 (Test claim permit, Section C.8.d.iii.).

<sup>942</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

The purpose of the Geomorphic Project is to contribute to these ongoing efforts in each Stormwater Countywide Program area. Permittees may select the geomorphic project from three categories specified in the Permit.<sup>943</sup>

And San Mateo's Integrated Monitoring Report dated March 15, 2014, indicates that the permittees conducted a geomorphic study to help in the development of regional curves to help estimate equilibrium channel conditions for different sized drainages. The report contains maps, tables, and an analysis of the study in accordance with the reporting requirements of Section C.8.g.v.<sup>944</sup>

The Regional Board admits the prior permits did not contain a requirement to conduct a geomorphic project, but contends the requirement does not impose a new program or higher level of service because the permittees were required by their prior permits to develop and implement hydromodification plans and to monitor the effectiveness of those plans:

Provision C.8.d.iii requires that Permittees monitor a waterbody within each county to determine "[h]ow and where creeks can be restored or protected to cost- effectively reduce the impacts of pollutants, increased flow rates, and increased flow durations of urban runoff ... " C.8 Claimants' prior permits did not include a monitoring requirement expressly described as a "Geomorphic Project" monitoring requirement. Instead their prior permits were amended to included related requirements to develop and implement hydromodification management plans and to monitor the effectiveness of hydromodification control measures.<sup>184</sup> Provision C.8.d.iii provides added specificity to those requirements but does not result in a new program or higher level of service.<sup>945</sup>

The claimants respond the requirement to conduct a geomorphic study is new and different from the prior requirements to develop a hydromodification plan for new development and redevelopment projects and, therefore section C.8.d.iii. mandates a new program or higher level of service.<sup>946</sup>

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<sup>943</sup> Exhibit A, Test Claim, 10-TC-02, page 338 (Fact Sheet).

<sup>944</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 27, 186-196.

<sup>945</sup> Exhibit I, Regional Board's Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 35; see also footnote 184, which references Sections C.3.f. in Orders R2-2005-0035 (Santa Clara), R2-2007-0025 (Alameda), and R2-2007-0027 (San Mateo).

<sup>946</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, pages 29-30; Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, page 34.

The Commission finds the requirements to conduct one geomorphic study and to report the results in the Integrated Monitoring Report are new and mandate a new program or higher level of service.

The Regional Board references the prior permit amendments issued for the Alameda, Santa Clara, and San Mateo permittees, which required these permittees to implement Hydromodification Management Plans and controls for certain commercial, industrial, and residential new development or redevelopment projects so any increased stormwater discharge rates or durations do not result in an increased potential for erosion or other significant adverse impacts to beneficial uses over the pre-project condition.<sup>947</sup>

These requirements, however, are not the same as the requirements in Section C.8.d.iii. to conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report. While the implementation of the Hydromodification Management Plans and the geomorphic study are both intended to improve geomorphic conditions, they are different approaches and impose different requirements. This is evidenced by the fact the test claim permit includes separate requirements to implement hydromodification plans and controls for new development and redevelopment projects in Section C.3.g.<sup>948</sup>

Prior law did not require the permittees to conduct one of the following geomorphic studies required by Section C.8.d.iii. and report the results in the Integrated Monitoring Report identified in Section C.8.g.v. and, thus, the following requirements are new:

- (1) Gather geomorphic data to support the efforts of a local watershed partnership to improve creek conditions; or
- (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or
- (3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:
  - Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
  - Contributing drainage area.

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<sup>947</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1932-1935 (Attachment 54, Order R2-2007-0025); pages 2063-2067 (Attachment 59, Order R2-2007-0027); and pages 2143 (Attachment 62, Order R2-2005-0035).

<sup>948</sup> Exhibit A, Test Claim, 10-TC-02, pages 184-187 (Test claim permit, Section C.3.g.).

- Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
- Best available information on average annual rainfall in the study area.

Permittees shall complete the selected geomorphic project so that project results are reported in the Integrated Monitoring Report (see Provision C.8.g.v).<sup>949</sup>

Moreover, the requirements to conduct one of the geomorphic studies and report the results impose a state-mandated program. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a “true choice,” the requirement is not federally mandated.<sup>950</sup>

The courts have also explained “except where a regional board finds the conditions are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard.”<sup>951</sup>

Here, federal law requires the Regional Board to establish conditions, including the monitoring conditions, to provide for and ensure compliance with all applicable requirements of the CWA and its implementing regulations.<sup>952</sup> But federal law does not require permittees to conduct a geomorphic monitoring study and report the results. Nor is there evidence conducting a geomorphic study is the only means by which the federal MEP standard can be met. The requirements to conduct a geomorphic study during the permit term and report the results are mandated at the discretion of the Regional Board and are not mandated by federal law and, thus, impose a state-mandated program.

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<sup>949</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222(Test claim permit, Section C.8.d.iii.).

<sup>950</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

<sup>951</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>952</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.43(a), 122.48.

In addition, the requirements constitute a new program or higher level of service, which 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.”<sup>953</sup> Only one of these alternatives is required to establish a new program or higher level of service.<sup>954</sup>

Here, the new mandated activities cited above are expressly directed toward local agency permittees as governments, and thus are unique to local government. The Regional Board imposed the requirements “to improve the integrity of the waterbodies that receive urban stormwater runoff.”<sup>955</sup> The challenged requirements are not bans or limits on pollution levels; they are mandates to perform specific actions designed to reduce pollution entering stormwater drainage systems and receiving waters.<sup>956</sup> Thus, the new mandated activities also provide a governmental service to the public.

Thus, the following requirements imposed by Section C.8.d.iii. mandate a new program or higher level of service:

- Permittees shall select a waterbody/reach, preferably one that contains significant fish and wildlife resources, and conduct one of the following projects within each county, except that only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees’ jurisdictions:
  - (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or
  - (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or
  - (3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:
    - Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain

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<sup>953</sup> *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.

<sup>954</sup> *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.

<sup>955</sup> Exhibit A, Test Claim, 10-TC-02, page 338 (Fact Sheet).

<sup>956</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

terrace and be marked by a permanent, protruding (not flush with ground) monument.

- Contributing drainage area.
  - Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
  - Best available information on average annual rainfall in the study area.
- Report the selected geomorphic project results in the Integrated Monitoring Report.<sup>957</sup>
    - v. *Sections C.8.e.i., C.8.e.iii., C.8.e.iv., and C.8.e.v., which address Pollutants of Concern Monitoring, are not new and do not mandate a new program or higher level of service.*

The claimants request reimbursement to comply with Section C.8.e.i., which requires them to conduct pollutants of concern monitoring as defined by Sections C.8.e.iii., iv., and v.<sup>958</sup> Pollutants of concern are “[p]ollutants that impair waterbodies listed under CWA section 303(d), [and] pollutants associated with the land use type of a development, including pollutants commonly associated with urban runoff.”<sup>959</sup>

Section C.8.e.i. states pollutants of concern monitoring is intended to assess inputs of pollutants of concern to the Bay from local tributaries and urban runoff, assess programs towards achieving wasteload allocations for TMDLs, and to help resolve uncertainties associated with loading estimates for pollutants of concern. In particular, the Regional Board wants the pollutants of concern monitoring to:

- 1) Identify which Bay tributaries (including stormwater conveyances) contribute most to Bay impairment from pollutants of concern.
- 2) Quantify annual loads or concentrations of pollutants of concern from tributaries to the Bay.
- 3) Quantify the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay.
- 4) Quantify the projected impacts of management actions (including control measures) on tributaries and identifying where these management actions should be implemented to have the greatest beneficial impact.<sup>960</sup>

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<sup>957</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222 (Test claim permit, Section C.8.d.iii.).

<sup>958</sup> Exhibit A, Test Claim, 10-TC-02, pages 32-33; Exhibit B, Test Claim, 10-TC-03, pages 28-29; Exhibit C, Test Claim, 10-TC-05, pages 34-35.

<sup>959</sup> Exhibit A, Test Claim, 10-TC-02, page 272 (Test claim permit, glossary).

<sup>960</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit, Section C.8.e.).

The introductory paragraphs to Section C.8.e. state “Permittees shall implement the following POC monitoring components or pursue an alternative approach that addresses each of the aforementioned management information needs. An alternative approach may be pursued by Permittees provided that: either similar data types, data quality, data quantity are collected with an equivalent level of effort described; or an equivalent level of monitoring effort is employed to answer the management information needs.”<sup>961</sup>

Section C.8.e.i. requires the permittees to conduct Pollutants of Concern monitoring at stations listed in the receiving waters below, which may be installed in two phases, or “alternative POC monitoring locations” approved by the Regional Board’s executive officer:

Permittees shall conduct Pollutants of Concern monitoring at stations listed below. Permittees may install these stations in two phases providing at least half of the stations are monitored in the water year beginning October 2010, and all the stations are monitored in the water year beginning October 2012. Upon approval by the Executive Officer, Permittees may use alternate POC monitoring locations.

- (1) Castro Valley Creek S3 at USGS gauging station in Castro Valley
- (2) Guadalupe River
- (3) Zone 4 Line A at Chabot Road in Hayward
- (4) Rheem Creek at Giant Road in Richmond
- (5) Walnut Creek at a downstream location
- (6) Calabazas Creek at Lakeside Drive in Sunnyvale, at border with Santa Clara
- (7) San Mateo Creek at downstream location
- (8) Laurel Creek at Laurie Meadows park, off Casanova Drive in City of San Mateo.

The permittees are required to conduct pollutants of concern sampling pursuant to Table 8.4, which identifies the parameters and methods of monitoring for category 1 and 2 pollutants. Category 1 pollutants are “those for which the Water Board has active water quality attainment strategies (WQAS), such as TMDL or site specific objective projects.”<sup>962</sup> These pollutants are total and dissolved copper; total mercury; methyl mercury; total PCBs; suspended sediments (SSC); total organic carbon; toxicity – water

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<sup>961</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit, Section C.8.e.).

<sup>962</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit, Section C.8.e.iii.).

column; nitrate as nitrogen (N); and hardness.<sup>963, 964</sup> Methyl mercury samples shall be grab samples collected during storm events that produce rainfall of at least 0.10 inch, shall be frozen immediately upon collection, and shall be kept frozen during transport to the laboratory. All other Category 1 samples shall be wet weather flow weighted.<sup>965</sup> Sampled storms must have 72 hours of antecedent dry weather and must include the first rise in the hydrograph. An average of four weather events shall be conducted annually.<sup>966</sup> Section C.8.e.iv. states “At a minimum, sampling and analysis protocols shall be consistent with 40 CFR 122.21(g)(7)(ii).”<sup>967</sup>

Category 2 pollutants are “those for which WQAS are in development. The lower monitoring frequency for Category 2 pollutants is sufficient to develop preliminary loading estimates for these pollutants.”<sup>968</sup> These pollutants are total and dissolved selenium; total PBDEs (Polybrominated Diphenyl Ethers); total PAHs (Poly-Aromatic Hydrocarbons); chlordane; DDTs (Dichloro-Diphenyl-Trichloroethane); dieldrin; nitrate as nitrogen (N); pyrethroids (bifenthrin, cyfluthrin, betacyfluthrin, cypermethrin, deltamethrin, esfenvalerate, lambda-cyhalothrin, permethrin, and tralomethrin); carbaryl and fipronil; and total and dissolved phosphorus.<sup>969</sup> Category 2 samples shall be wet

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<sup>963</sup> Exhibit A, Test Claim, 10-TC-02, pages 223-224 (Test claim permit, Section C.8.e.iii. and Table 8-4).

<sup>964</sup> For example, see California Code of Regulations, title 23, section 3915 (Register 2007, No. 45), which codifies the mercury TMDL adopted by R2-2006-0052 for all segments of the San Francisco Bay.

California Code of Regulations, title 23, section 3917 (Register 2007, No. 3), which codifies the Dioxin and Pesticide-Related Toxicity in Urban Creeks TMDL adopted by R2-2005-0063.

California Code of Regulations, title 23, section 3919.3 (Register 2008, No. 20), which codifies site specific objectives adopted by R2-2007-0042 for dissolved copper.

California Code of Regulations, title 23, section 3919.6 (Register 2010, No. 9), which codifies the PCB TMDL adopted by R2-2008-0012 for the San Francisco Bay Region.

California Code of Regulations, title 23, section 3919.7 (Register 2010, No. 9), which codifies the mercury TMDL adopted by R2-2008-0089 for the Guadalupe River watershed (which includes the Guadalupe River).

<sup>965</sup> Exhibit A, Test Claim, 10-TC-02, page 224 (Test claim permit, Section C.8.e.v.).

<sup>966</sup> Exhibit A, Test Claim, 10-TC-02, page 224 (Test claim permit, Section C.8.e.v.).

<sup>967</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit, Section C.8.e.iv.).

<sup>968</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit, Section C.8.e.iii.).

<sup>969</sup> Exhibit A, Test Claim, 10-TC-02, pages 223-224 (Test claim permit, Section C.8.e.iii. and Table 8-4). Like chlordane, DDTs, and dieldrin, pyrethroids (bifenthrin, cyfluthrin, betacyfluthrin, cypermethrin, deltamethrin, esfenvalerate, lambda-cyhalothrin, permethrin, and tralomethrin), carbaryl and fipronil are “pesticides of concern.” Exhibit



weather flow weighted.<sup>970</sup> Sampled storms must have 72 hours of antecedent dry weather and must include the first rise in the hydrograph. Two sampling events shall be conducted annually.<sup>971</sup> Section C.8.e.iv. states “At a minimum, sampling and analysis protocols shall be consistent with 40 CFR 122.21(g)(7)(ii).”<sup>972</sup>

The test claim permit’s Finding 11 explains chlordane, DDT, dieldrin, selenium, and pesticide associated toxicity in urban creeks have been detected in stormwater discharges from urban and developing areas in the region and the discharge causes or may be causing or contributing to water quality exceedances and, thus, TMDLs for these pollutants will need to be developed.<sup>973</sup> Finding 15 states pollutants of concern in stormwater discharges also include certain heavy metals, excessive sediment production from erosion due to anthropogenic activities, petroleum hydrocarbons from sources such as used motor oil, certain pesticides associated with acute aquatic toxicity, excessive nutrient loads which can cause or contribute to the depletion of dissolved oxygen or toxic concentrations of dissolved ammonia, and other pollutants detected in the receiving waters.<sup>974</sup> Finding 17 further states the following:

Certain pollutants present in stormwater and/or urban runoff can be derived from extraneous sources over which the Permittees have limited or no direct jurisdiction. Examples of such pollutants and their respective sources are polycyclic aromatic hydrocarbons (PAHs), which are products of internal combustion engine operation and other sources; heavy metals, such as copper from vehicle brake pad wear and zinc from vehicle tire wear; dioxins as products of combustion; polybrominated diphenyl ethers that are incorporated in many household products as flame retardants; mercury resulting from atmospheric deposition; and naturally occurring minerals from local geology. All these pollutants, and others, can be deposited on paved surfaces, rooftops, and other impervious surfaces as fine airborne particles—thus yielding stormwater runoff pollution that is unrelated to the activity associated with a given project site.<sup>975</sup>

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A, Test Claim, 10-TC-02, page 229 (Test claim permit, Section C.9.), which requires the permittees to develop a toxicity control program for these pollutants. PBDEs (Polybrominated Diphenyl Ethers) are flame retardant chemicals. Exhibit BB (12), CDC PBDE Fact Sheet.

<sup>970</sup> Exhibit A, Test Claim, 10-TC-02, page 224 (Test claim permit, Section C.8.e.v.).

<sup>971</sup> Exhibit A, Test Claim, 10-TC-02, page 224 (Test claim permit, Section C.8.e.v.).

<sup>972</sup> Exhibit A, Test Claim, 10-TC-02, page 224 (Test claim permit, Section C.8.e.iv.).

<sup>973</sup> Exhibit A, Test Claim, 10-TC-02, page 154 (Test claim permit, Finding 11).

<sup>974</sup> Exhibit A, Test Claim, 10-TC-02, page 156 (Test claim permit, Finding 15).

<sup>975</sup> Exhibit A, Test Claim, 10-TC-02, page 156 (Test claim permit, Finding 17).

The claimant in Test Claim 10-TC-02 contends the pollutants of concern monitoring required by Section C.8.e.i. mandates a new program or higher level of service and represents a significant increase in what was required by their prior permit, including setting up a new monitoring station and monitoring new pollutants as follows:

- Claimant and other Permittees in the Alameda Countywide Program are required to monitor two stations instead of one, involving new costs for development and maintenance of the second stations.
- Due to numerous pollutants to be sampled, both the new and existing station will require additional setup (purchasing equipment, installation, and calibration of equipment) of monitoring equipment prior to beginning to monitor annually at one station in October 2011 and another beginning in October 2012.
- A minimum of four storms have to be sampled per year at each station. While previous monitoring sampled an average of seven storms per year, there will be increased costs for each event, for mobilizing larger field crews, setup and preparation of sampling equipment, and post-storm sample collection, and transport to laboratory. This increased effort would more than double the annual average cost at just one station compared to the previous 5-year period.
- Numerous new pollutants or analytes are required to be monitored.
- Specialized protocols or extra field visits will also be required for some pollutants.<sup>976</sup>

The claimant further explains the additional requirements and costs for the additional monitoring stations and analysis of certain pollutants as follows:

For example, Alameda County Claimants will be required to add one additional monitoring station (Zone 4 Line A at Chabot Road in Hayward, MRP provision C.8.e.i.(3)) in order to comply with the MRP. [Fn. omitted.] This will require substantial funds both to construct and to maintain. [Fn. omitted.] Similarly, San Mateo County Claimants will be required. to add two new monitoring stations (MRP Provision C.8.e.i.(7 and 8)) in order to comply with the MRP. [Fn. omitted.] This will also require substantial funds to construct, operate and maintain. [Fn omitted.] The two new field sampling stations will need multiple autosamplers, accessory tubing, cables, batteries and sample bottles, security enclosures and solar panels, all of which require ongoing maintenance. [Fn. omitted.] Analysis for many of the parameters is costly and provided by very few commercial

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<sup>976</sup> Exhibit A, Test Claim, 10-TC-02, pages 35-36, 61-62 (Declaration of Shannan Young, City of Dublin Environmental Coordinator); see also, Exhibit B, Test Claim, 10-TC-03, page 29.

laboratories. [Fn. omitted.] For example, accurate methods for measures the pesticide fipronil have only been published in the last 5 to 10 years, and there is no commercial market incentive for laboratories to offer this service at low cost. [Fn. omitted.] It is likely that several different labs would be needed to provide SWAMP-comparable results as required by the MRP. [Fn. omitted.] The deployment of the above equipment and the above lab work was neither required nor implemented under the previous permit. [Fn. omitted.]<sup>977</sup>

The claimants in Test Claim 10-TC-03 contend the test claim permit requires them to supplement previous monitoring efforts, which increases costs, as follows:

The prior permit only required the County to implement a monitoring plan, which the County developed and the Regional Board approved. Now, these prior approved monitoring plans will no longer suffice, requiring the County to greatly supplement the previous monitoring efforts. Additionally, the County has presented financial data addressing the additional expenditures that will be required to comply with MRP Provision C.8.e.i. [Fn. omitted.] The Regional Board does not attempt to discredit the County's figures and has not presented any competing evidence.

Although the Regional Board is correct that the County has alternatives that can be used instead of implementing C.8.e.i, use of these alternatives would not lower the higher level of service required by the MRP. In fact, MRP provision C,8.e., page 73, states that alternative approaches may only be pursued if the alternative requires "an equivalent level of monitoring effort." As such, the alternatives would be just as burdensome and costly and the approach specified in the MRP.<sup>978</sup>

The Regional Board contends that the pollutants of concern monitoring required by Section C.8.e.i. does not impose a new program or higher level of service because the permittees were required by their prior permits to conduct pollutants of concern monitoring:

C.8.e.i is not a new program or higher level of service. C.8 Claimants' prior permits required monitoring for pollutants of concern. Those permits required that Alameda, Brisbane and Santa Clara County implement monitoring programs that would characterize "representative drainage areas and stormwater discharges, including land use characteristics pollutant concentrations and mass loadings", assess "existing or potential adverse [sic] impacts on beneficial uses caused by pollutants of concern in stormwater dischargers, including an evaluation of representative

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<sup>977</sup> Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 36-37, 67-68 (Footnotes citing to Attachment E to Declaration of Jon Konnan (September 15, 2011)).

<sup>978</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, pages 30-31.

receiving waters", and evaluate "effectiveness of representative stormwater pollution prevention or control measures. [Fn. omitted.]

Provision C.8.e.i adds more specificity to the prior permit monitoring requirements, but it does not increase those requirements. Also, Provision C.8.e.i provides two levels of flexibility to the Claimants. First, Claimants may use alternative monitoring locations than those specified, and second, Claimants may pursue an alternative approach than that specified as long as the alternative approach addresses the aforementioned management information needs, which are consistent with prior permit requirements.<sup>979</sup>

The Commission finds that the requirement to monitor pollutants of concern is not new and therefore does not mandate a new program or higher level of service.

The test claim permit gave the claimants a choice and the flexibility to determine how to comply with the requirement to monitor pollutants of concern. The permittees are required to conduct pollutants of concern monitoring for the Category 1 pollutants four times per year and the Category 2 pollutants two times per year at the sampling monitoring locations identified in the permit, which could be installed in two phases, and conduct analysis using the protocols identified in federal law; *or* pursue an alternative approach that addresses management information needs, collects similar data types, data quality, data quantity with an equivalent level of effort described in the permit, and allowed alternative monitoring locations to be proposed. The claimants may also comply with Section C.8.e. by participating in a regional monitoring collaborative and sharing costs.<sup>980</sup>

Documents publicly available show that the claimants complied with the requirements in Section C.8.e. by participating in a regional monitoring cooperative (BASMAA's RMC), which developed an alternative plan known as the Small Tributaries Loading Strategy to monitor pollutants of concern, which includes monitoring at six "bottom of the watershed" stations over several years to accumulate data to assist in developing loading estimates from small tributaries.<sup>981</sup> The monitoring stations were "set up and mobilized" in October 2011 and 2012 and are located in the following locations: Lower Marsh Creek (Contra Costa), North Richmond Pump Station (Contra Costa), San Leandro Creek (Alameda), Guadalupe River (Santa Clara), Sunnyvale East Channel (Santa Clara), and Pulgas Creek Pump Station (San Mateo).<sup>982</sup> BASMAA (on behalf of

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<sup>979</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-15, page 36.

<sup>980</sup> Exhibit A, Test Claim, 10-TC-02, page 213 (Test claim permit, Section C.8.a.).

<sup>981</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 28, 201-230.

<sup>982</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 28-29.

all RMC participants) contracted with the San Francisco Estuary Institute (SFEI) to coordinate laboratory analyses, data management and data quality assurance.<sup>983</sup> Thus, the test claim permit does not direct how the monitoring is to be conducted.

The claimants nevertheless contend that the requirements in Section C.8.e.i. result in increased costs due to an increased number of monitoring stations and equipment for those stations, additional pollutants, and specialized protocols to analyze some of the pollutants.<sup>984</sup>

The courts have held, however, that “simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting ‘service to the public’ under article XIII B, section 6, and Government Code section 17514.”<sup>985</sup> Rather, all of the requirements of article XIII B, section 6 must be met, including that the requirements imposed by the state are new and mandate a new program or higher level of service.<sup>986</sup> And here, the requirements are not new.

Federal law has long required that NPDES permits include conditions to achieve water quality standards and objectives, including monitoring requirements sufficient to ensure that water quality standards are met.<sup>987</sup> An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.<sup>988</sup>

The pollutants of concern at issue here have been previously addressed by the Regional Board’s Basin Plan and the California Toxics Rule with narrative and numeric water quality standards and objectives, and the prior permits required compliance with these water quality standards and objectives and imposed monitoring requirements for pollutants of concern to ensure that water quality standards were met. Specifically, the

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<sup>983</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, page 29.

<sup>984</sup> Exhibit A, Test Claim, 10-TC-02, pages 32-33; Exhibit B, Test Claim, 10-TC-03, pages 28-29; Exhibit C, Test Claim, 10-TC-05, pages 34-35; Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, pages 36-37; and Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, pages 30-31.

<sup>985</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

<sup>986</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, emphasis in original; see also, *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>987</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(d)(1) and (i)(1); *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207.

<sup>988</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

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 that discharges shall not cause *or contribute* to a violation of any applicable water quality standard or objective for the receiving waters in the region.<sup>989</sup> The 1995 Basin Plan identified the water quality standards and objectives for the pollutants at issue here, including for suspended sediment, toxic substances and pesticides, and chemical constituents for all surface waters as follows:

- The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.

Controllable water quality factors shall not cause a detrimental increase in the concentrations of toxic pollutants in sediments or aquatic life.<sup>990</sup>

- All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms. Detrimental responses include, but are not limited to, decreased growth rate and decreased reproductive success of resident or indicator species. There shall be no acute toxicity in ambient waters. Acute toxicity is defined as a median of less than 90 percent survival, or less than 70 percent survival, 10 percent of the time, of test organisms in a 96-hour static or continuous flow test.<sup>991</sup>
- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use.

In this respect, the Basin Plan indicates that the Regional Board intends to work towards the derivation of site-specific objectives for the Bay-Delta estuarine system, with objectives for copper, mercury, PCBs, and selenium to be the highest priorities in this effort. Pending the adoption of site-specific objectives, the objectives in Tables 3-3 and 3-4 apply throughout the region. Water quality objectives for aromatic hydrocarbons are also noted as being needed.<sup>992</sup> Tables 3-3 and 3-4 identify numeric objectives for copper, mercury, selenium, and PAHs.<sup>993</sup>

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<sup>989</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021); page 1948-1950 (Attachment 55, Order 99-059); and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>990</sup> Exhibit BB (6), Basin Plan 1995, page 46.

<sup>991</sup> Exhibit BB (6), Basin Plan 1995, page 47.

<sup>992</sup> Exhibit BB (6), Basin Plan 1995, page 48.

<sup>993</sup> Exhibit BB (6), Basin Plan 1995, pages 52-53; see also page 126, which identifies numeric objectives for these pollutants in discharges to surface waters.

The California Toxics Rule (CTR) adopted in 2000, which “appl[ies] to waters identified in the Basin Plan chapters designating beneficial uses for waters within the region,” also contains numeric criteria for priority toxic pollutants, including copper, mercury, selenium, chlordane, DDT, dieldrin, and PCB for all inland surface waters and enclosed bays and estuaries.<sup>994</sup>

Moreover, the prior permits for Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo, specifically found that stormwater discharges may cause or contribute to water quality exceedances for mercury, PCBs, dieldrin, chlordane, DDT, copper, nutrients, and sediment.<sup>995</sup> These prior permits also found that stormwater runoff discharges contained the following pollutants of concern that impaired beneficial uses: heavy metals, petroleum hydrocarbons, certain pesticides, excessive sediment production, excessive nutrient loads (like nitrate and phosphorus) that may result in the depletion of dissolved oxygen.<sup>996</sup> The prior permits for Alameda, Santa Clara, and Fairfield-Suisun also required the permittees to implement programs to control copper, mercury, pesticides, PCBs, and sediment in stormwater discharges.<sup>997</sup> The prior permits for Contra Costa and San Mateo required the permittees to submit a report to the Regional Board on exceedances of water quality standards for copper, mercury, chlordane, DDT, dieldrin, and PCBs.<sup>998</sup> And the prior permit for Vallejo required those

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<sup>994</sup> Code of Federal Regulations, title 40, section 131.38(d)(1) (65 FR 31711, May 18, 2000).

<sup>995</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1856 (Attachment 53, Order R2-2003-0021, Finding 22), pages 1945-1946 (Attachment 55, Order 99-059, Finding 12), and page 2079 (Attachment 60, Order 01-124); Exhibit BB (27), Order R2-2003-0034, page 8; and Exhibit BB (25), Order 99-058.

<sup>996</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1857 (Attachment 53, Order R2-2003-0021), pages 1943-1944 (Attachment 55, Order 99-059), pages 1943-1944 (Attachment 55, Order 99-059), and pages 2072-2073 (Attachment 60, Order 01-124); Exhibit BB (27), Order R2-2003-0034, pages 9-10; Exhibit BB (25), Order 99-058, pages 1-2.

<sup>997</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1862-1864, 1887-1890 (Attachment 53, Order R2-2003-0021); pages 2077, 2092-2096 (Attachment 60, Order 01-124); Exhibit BB (27), Order R2-2003-0034, pages 15-17, 40-44.

<sup>998</sup> Exhibit BB (25), Order 99-058, pages 8-9; Exhibit BB (28), Order R2-2004-0059, page 6; Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1950 (Attachment 55, Order 99-059), and page 1995 (Attachment 57, Order R2-2004-0060).

permittees to submit a proposal for controlling pesticides, herbicides, and fertilizers in stormwater discharges.<sup>999</sup>

Thus, these constituents were known and identified as pollutants of concern that were causing or contributing to water quality exceedances before the adoption of the test claim permit.

In addition, the TMDL adopted by the Regional Board in 2005 for diazinon and other pesticide-related toxicity in Bay Area urban creeks noted that that U.S. EPA phased out residential end use diazinon products at the end of 2004, which increased the use of alternative pesticides and encouraged new pesticides to enter the marketplace, that some diazinon alternatives pose water quality concerns, and that pyrethroids in particular may now cause sediment toxicity in some Bay Area urban creeks.<sup>1000</sup> Thus, the pyrethroids identified in Section C.8.e. of test claim permit under category 2 (bifenthrin, cyfluthrin, betacyfluthrin, cypermethrin, deltamethrin, esfenvalerate, lambda-cyhalothrin, permethrin, and tralomethrin), carbaryl, and fipronil are identified as “pesticides of concern” and were known in 2005.<sup>1001</sup>

The prior permits for Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo expressly required the permittees to monitor their discharges for pollutants of concern. They were required to develop a monitoring program to assess “existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters;” to characterize pollutant concentrations and mass loadings; and to identify “potential sources of pollutants of concern found in stormwater discharges.”<sup>1002</sup> And, their monitoring plans identified pollutant of concern monitoring.<sup>1003</sup>

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<sup>999</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 22.

<sup>1000</sup> Exhibit BB (31), Order R2-2005-0063 TMDL for Diazinon and Pesticide Related Toxicity in Urban Creeks, pages 1-2.

<sup>1001</sup> Exhibit A, Test Claim, 10-TC-02, page 229 (Test claim permit, Section C.9.).

<sup>1002</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021, Section C.8.), page 1952 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 37-38; Exhibit BB (25), Order 99-058, page 11.

<sup>1003</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-01, 10-TC-02, and 10-TC-05, pages 2001, 2003-2004 (Attachment 57, Order R2-2004-0060, Attachment A [San Mateo Countywide Stormwater Pollution Prevention Program Monitoring Program Plan for Fiscal Year 2004/05, March 1, 2004]), pages 2280-2282 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003), and page 5486 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004); Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 123; and Exhibit BB (28), Order R2-2004-0059, page 17.



Vallejo's prior permit required the permittees to implement the stormwater monitoring program identified in their stormwater management plan, and that plan indicates that the permittees participated in the BASMAA Regional Monitoring Strategy, whose monitoring activities included "characterization of drainage areas including land use characteristics and consideration of physical and biological, as well as chemical indicators to assess the drainage areas."<sup>1004</sup> BASMAA's Regional Monitoring Strategy included objectives to investigate the contribution and loading of pollutants of concern, in particular metals, and the extent and causes of stormwater toxicity in the region, including the presence of "other sources of toxicity."<sup>1005</sup>

In addition, all prior permits required that the permittees' management plans achieve compliance with the receiving water limitations and prohibitions, including the prohibition that discharges shall not cause or contribute to a violation of water quality standards in receiving waters. If an exceedance of water quality standards or water quality objectives persisted notwithstanding the implementation of their plans, then the discharger "*shall assure compliance*" with the discharge prohibitions and receiving water limitations by revising their management plan and monitoring program to incorporate the modified control measures and "*any additional monitoring required*" and implement those plans and programs to meet water quality standards.<sup>1006</sup>

Therefore, the requirement to monitor for pollutants of concern is not new and does not mandate a new program or higher level of service.

- vi. *Sections C.8.e.ii. and C.8.e.iii., which address Long Term Monitoring, do not impose new requirements and, thus, do not mandate a new program or higher level of service.*

Sections C.8.e.ii. and C.8.e.iii. require the permittees in Alameda, Santa Clara, Contra Costa, and San Mateo to conduct long-term monitoring once every other year during the April-June months to collect grab samples of bedded sediment to test for toxicity and pollutants.<sup>1007</sup> "To . . . reduce costs, the Fairfield-Suisun and Vallejo Permittees have no Long-Term Monitoring requirements."<sup>1008</sup> Long-term monitoring is intended to assess long-term trends in pollutant concentrations and toxicity in receiving waters and

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<sup>1004</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 71.

<sup>1005</sup> Exhibit BB (9), BASMAA Regional Monitoring Strategy, pages 3-4, 7-8.

<sup>1006</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1007</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit, Sections C.8.e.ii. and C.8.e.iii.).

<sup>1008</sup> Exhibit A, Test Claim, 10-TC-02, page 336 (Fact Sheet).

sediment, in order to evaluate if stormwater discharges are causing or contributing to toxic impacts on aquatic life.<sup>1009</sup> Long-term monitoring, like status monitoring, serve as surrogates to monitoring the discharge from all major outfalls and are the first step needed to identify which outfalls and land uses are causing or contributing to exceedances of water quality standards and objectives.<sup>1010</sup>

Long-term monitoring is conducted at fixed stations, which are identified in Table 8.3.<sup>1011</sup> Section C.8.e.iii. states that SWAMP (the Surface Water Ambient Monitoring Program, the statewide monitoring effort administered by the State Water Board) has scheduled collection of sediment toxicity and sediment chemistry samples at the long-term monitoring locations identified in the test claim permit. The permittees may use the SWAMP data to fulfill the sampling requirements for long-term monitoring pursuant to Sections C.8.a.iv. and C.8.e.iii.<sup>1012</sup>, and the Fact Sheet suggests the permittees use the SWAMP locations to comply with the requirements as follows:

Provision C.8.e.ii. establishes the waterbodies on which to locate fixed stations, and suggests that fixed stations be co-located with SWAMP fixed stations so that Permittees can use SWAMP data to fulfill some of their monitoring requirements. However, Permittees may select alternate locations based on their knowledge of such factors as site access and stream characteristics and provided that similar data types, data quality, and data quantity are collected.<sup>1013</sup>

The permittees may also use alternate monitoring locations after conferring with the Regional SWAMP program and upon approval of the Regional Board's executive officer.<sup>1014</sup>

If sediment toxicity tests show certain results, then the permittees are required to comply with Section C.8.d.i. and conduct TIE/TRE stressor and source identification studies to identify and control the source.<sup>1015</sup>

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<sup>1009</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit, Sections C.8.e.).

<sup>1010</sup> Exhibit A, Test Claim, 10-TC-02, page 335 (Fact Sheet).

<sup>1011</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit, Table 8-3.).

<sup>1012</sup> Exhibit A, Test Claim, 10-TC-02, page 223 (Test claim permit), "SWAMP has scheduled collection of Category 3 data at the Long-Term monitoring locations stated in C.8.e.ii. As stated in Provision C.8.a.iv., Permittees may use SWAMP data to fulfill Category 3 sampling requirements."

<sup>1013</sup> Exhibit A, Test Claim, 10-TC-02, page 337 (Fact Sheet).

<sup>1014</sup> Exhibit A, Test Claim, 10-TC-02, pages 223, 335, 337 (Test claim permit, Section C.8.e.ii., Fact Sheet).

<sup>1015</sup> Exhibit A, Test Claim, 10-TC-02, page 225, footnote 45 ("If *Ceriodaphnia*, *Hyalella azteca*, or *Pimephales* survival or *Selenastrum* growth is < 50% of control results,

When . . . Long-Term Monitoring results indicate an exceedance of a water quality objective, toxicity threshold, or other “trigger”, Permittees must identify the source of the problem and take steps to reduce any pollutants discharged from or through their municipal storm sewer systems. This requirement conforms to the process, outlined in Provision C.1., of complying with the Discharge Prohibition and Receiving Water Limitations. If multiple “triggers” are identified through monitoring, Permittees must focus on the highest priority problems; a cap on the total number of source identification projects conducted within the Permit term is provided to cap Permittees’ potential costs.<sup>1016</sup>

As indicated in Section C.8.d.i.5., a cap on the total number of stressor/source identification projects conducted during the permit term is provided as follows: “Permittees who conduct this monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups, unless monitoring results do not indicate the presence of toxicity.”<sup>1017</sup> The Fact Sheet explains the following:

When Status or Long-Term Monitoring results indicate an exceedance of a water quality objective, toxicity threshold, or other “trigger”, Permittees must identify the source of the problem and take steps to reduce any pollutants discharged from or through their municipal storm sewer systems. This requirement conforms to the process, outlined in Provision C.1., of complying with the Discharge Prohibition and Receiving Water Limitations. If multiple “triggers” are identified through monitoring, Permittees must focus on the highest priority problems; a cap on the total number of source identification projects conducted within the Permit term is provided to cap Permittees’ potential costs.<sup>1018</sup>

The Regional Board argues that the long-term monitoring requirements are not new because the permittees were required to conduct “multi-year” monitoring under their prior permits and, thus, Sections C.8.e.ii and C.8.e.iii. do not mandate a new program or higher level of service as follows:

Alameda and Santa Clara were required under their permits to submit a multiyear monitoring plan designed to comply with the monitoring program requirements in the permit which required in relevant part that they characterize "representative drainage areas and stormwater discharges

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repeat wet weather sample. If 2nd sample yields < 50% of control results, proceed to C.8.d.i.”).

<sup>1016</sup> Exhibit A, Test Claim, 10-TC-02, page 337 (Fact Sheet).

<sup>1017</sup> Exhibit A, Test Claim, 10-TC-02, page 220 (Test claim permit, Section C.8.d.i.5.).

<sup>1018</sup> Exhibit A, Test Claim, 10-TC-02, page 337 (Fact Sheet).

including land-use characteristics, pollutant concentrations, and mass loadings" and assess "existing or potential adverse impacts on beneficial uses caused by pollutants of concern in stormwater discharges, including an evaluation of representative receiving waters". [Fn. omitted.]

San Mateo's prior permit required that it prepare a multi-year monitoring plan that revised and extended the activities included in the monitoring program plan that was adopted as part of its permit. [Fn. omitted.]

The fact that C.8 Claimants were required to conduct multiyear monitoring means that C.8 Claimants were already subject to long term monitoring requirements that were equivalent to those required in Provision C.8.e.ii. Thus the Provision does not impose a new program or higher level of service.<sup>1019</sup>

The County of Santa Clara agrees that some multi-year monitoring was required by the prior permit, but that monitoring was not the same as that required by the test claim permit, in particular because they now have to establish two new monitoring stations to assess long-term trends in pollutant concentrations and toxicity in receiving waters and sediment and, thus, the long-term monitoring program is new and requires reimbursement under article XIII B, section 6:

The County acknowledges that it was previously required to perform some multiyear monitoring, but that monitoring was not equivalent to the monitoring required by MRP Provision C.8.e.ii. Furthermore, the County will have to implement a new program in order to comply with this provision of the MRP.

Specifically, the County, along with the co-permittees, is required to establish and maintain two new Pollutant of Concern (POC) monitoring stations. POC monitoring stations will require substantial funds to construct, operate, and maintain. The two new field sampling stations will need multiple autosamplers, accessory tubing, cables, batteries, and sample bottles, security enclosures, and solar panels, all of which requires ongoing maintenance and associated costs. Analysis for many of the parameters is costly and provided by very few laboratories. For example, accurate methods for measuring the pesticide fipronil have only been published in the last 5-10 years and there is commercial market incentive for laboratories to offer this service at low cost. It is likely that several that several different labs will be needed to provide SWAMP-comparable results as required by the MRP.<sup>1020</sup>

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<sup>1019</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 37.

<sup>1020</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 31; see also, Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 37-38.

The Alameda and San Mateo claimants similarly assert they have to add new monitoring stations as follows:

Specifically, Alameda County Claimants will be required to add 2 new monitoring stations in order to comply with the increased parameters required by C.8.e.ii, and San Mateo County Claimants will also be required to add 2 new monitoring stations. [Fn. omitted.] The prior Alameda County monitoring program used one “ISCO”\_type autosampler at a station initially installed in 1988. [Fn. omitted.] Sampling the required Category 1 and Category 2 parameters in MRP Table 8.4 would require a minimum of four autosamplers per station with a purchase cost of \$3,200. [Fn. omitted.] Accessory tubing, cables, batteries and sample bottles increase the effective unit cost to over \$5,000 per sampler. [Fn. omitted.] Stations with multiple samplers also require larger security enclosures and solar panels, with higher ongoing maintenance costs. [Fn. omitted.] Furthermore, estimated laboratory cost for the MRP Category 1 parameter list are \$13,000 per site for the required minimum four sampling events per year. [Fn. omitted.] In alternate years Category 2 parameters would be an additional \$4,000. [Fn. omitted.] Analysis for many Category 2 parameters is costly and provided by very few commercial laboratories. [Fn. omitted.] In contrast to previous Alameda County Claimant samples which could be shipped to a single laboratory, it is likely that several different labs would be needed to provide SWAMP comparable results as required by the MRP. [Fn omitted.]<sup>1021</sup>

However, the Integrated Monitoring Report for Water Years 2012 and 2013 shows that the permittees did not, in fact, add new monitoring stations, but complied with the long-term monitoring requirements in Sections C.8.e.ii. and C.8.e.iii. of the test claim permit by participating in a regional coordinated effort through BASMAA’s RMC, used SWAMP’s monitoring locations to fulfill the sampling requirements, and then evaluated the SWAMP data.<sup>1022</sup>

[T]he State of California’s Surface Water Ambient Monitoring Program (SWAMP) through its Statewide Stream Pollutant Trend Monitoring (SPoT) Program currently monitors the seven long-term monitoring sites required by Provision C.8.e.ii. Sampling via the SPoT program is currently conducted at the sampling interval described in Provision C.8.e.iii in the MRP. . . .

Based on discussions with Regional Water Board staff, RMC participants are complying with long-term trends monitoring requirements described in MRP provision C.8.e via monitoring conducted by the SPoT program. This

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<sup>1021</sup> Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, page 38.

<sup>1022</sup> Exhibit BB (23), Integrated Monitoring Report for Waters Years 2012 and 2013, page 34; see also, Exhibit BB (39), Santa Clara Annual Report 2009-2010, page 107.

manner of compliance is consistent with the MRP language in provisions C.8.e.ii and C.8.a.iv. RMC representatives coordinate with the SPoT program on long-term monitoring to ensure MRP monitoring and reporting requirements are addressed. . . .

The statewide network of SPoT sites includes one station in San Mateo County at the base of San Mateo Creek (Figure 1.1). Stream sediments were collected 2008, 2009, and 2010 during summer base flow conditions. Sediments were analyzed for a suite of water quality indicators including toxicity with *Hyalella azteca*, organic contaminants (organophosphate, organochlorine, pyrethroid pesticides, and PCBs), trace metals, total organic carbon (TOC), and polycyclic aromatic hydrocarbons (PAHs) and polybrominated diphenyl ethers (PBDEs).

[¶]

SMCWPPP [San Mateo Countywide Water Pollution Prevention Program] queried the SWAMP database for the San Mateo Creek site (204SMA020) and evaluated the data using the same methods used to evaluate MRP Provision C.8.c sediment data. . . .<sup>1023</sup>

In any event, the test claim permit gives the permittees a choice to use the SWAMP monitoring locations and their data or use alternative monitoring locations to gather data. Adding new monitoring locations is not mandated by the test claim permit.

Moreover, the requirement to conduct long-term monitoring to evaluate if stormwater discharges are causing or contributing to toxic impacts on aquatic life is not new. The prior permits for Alameda and Santa Clara required the permittees to submit a multi-year receiving water monitoring plan designed to comply with the monitoring requirements in the permits, which included monitoring representative drainage areas and stormwater discharges including land use characteristics, pollutant concentrations, and mass loadings, and to assess existing and potential adverse impacts on beneficial uses caused by pollutants of concern, including an evaluation of representative receiving waters.<sup>1024</sup>

Alameda's Multi-Year Monitoring and Assessment Program included a requirement to conduct sediment monitoring to characterize and track mercury, PCBs, organochlorine pesticides, and other sediment pollutants at watershed sites and to study long-term

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<sup>1023</sup> Exhibit BB (23), Integrated Monitoring Report for Waters Years 2012 and 2013, pages 34-35.

<sup>1024</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021, Section C.8.); and pages 2089-2090 (Attachment 60, Order 01-024, Section C.7.).

trends of pollutants of concern in watersheds.<sup>1025</sup> The primary goals identified in Santa Clara's multi-year monitoring plan were to develop a better understanding of the chemical and biological characteristics of the water bodies and to assess whether pollutants of concern impact water quality in local water bodies and the Bay.<sup>1026</sup> Sediment samples were analyzed to determine the impacts of pollutants on aquatic life uses, and special studies conducted to characterize the distribution of pollutants of concern found in creek imbedded sediment.<sup>1027</sup>

The prior permits for Contra Costa and San Mateo also required permittees to monitor representative drainage areas and stormwater discharges including land use characteristics, pollutant concentrations, and mass loadings, and to assess existing and potential adverse impacts on beneficial uses caused by pollutants of concern, including an evaluation of representative receiving waters.<sup>1028</sup> The monitoring programs made enforceable by their prior permits also show that these permittees had multi-year and long-term monitoring programs to assess the adverse impacts on what water quality in local creeks and the San Francisco Bay.<sup>1029</sup>

Furthermore, the prior permits required that 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."<sup>1030</sup> In this respect, the 1995 Basin Plan states "Permits shall require that if

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<sup>1025</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2224, 2294 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003).

<sup>1026</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5460 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>1027</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5467, 5477 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>1028</sup> Exhibit BB (25), 99-058, page 11; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1952 (Attachment 55, Order 99-059, Section C.8.).

<sup>1029</sup> Exhibit BB (28), Order R2-2004-0059, pages 7, 16, 19; Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 129; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1996, 2005 (Attachment 57, Order R2-2004-0060).

<sup>1030</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A., B., and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B., and C.1.); Exhibit BB

consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted” to identify the pollutant and the source of the pollutant as follows:

Permits shall require that if consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted. Specific language in permits requires the development of workplans for implementing TIEs. TIEs will be initiated within 30 days of detection of persistent toxicity. The purpose of a TIE is to identify the chemical or combination of chemicals causing the observed toxicity. Every reasonable effort using currently available TIE methodologies shall be employed by the discharger. The Regional Board recognizes that identification of causes of chronic toxicity may not be successful in all cases.

The purposes of a TRE are to identify the source(s) of the toxic constituents and evaluate alternative strategies for reducing or eliminating their discharge. The TRE shall include all reasonable steps to reduce toxicity to the required level. In addition, the Regional Board will review chronic toxicity test results to assess acute toxicity and consider the need for an acute TIE.

Following completion of the TRE, if consistent toxicity is still exhibited in a discharge, then the discharger shall pursue all feasible waste minimization measures at a level that is acceptable to the Regional Board. The discharger must document that the acceptable level of participation is maintained by submitting reports to the Regional Board according to a specified schedule.

A toxicity reduction evaluation may again be required in situations where chronic toxicity still exists and new techniques for identifying and reducing toxicity become available. Alternatively, the cause of effluent toxicity may change, so that existing techniques will enable identification and reduction of toxicity.

Consideration of any enforcement action by the Regional Board for violation of the effluent limitation will be based in part on the discharger's actions in identifying and reducing sources of persistent toxicity.<sup>1031</sup>

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(27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1031</sup> Exhibit BB (6), Basin Plan 1995, page 66; see also, Exhibit BB (7), Basin Plan 2007, pages 90-91, which states the following:

Permits shall require that if consistent toxicity is exhibited, then a chronic toxicity identification evaluation (TIE) and toxicity reduction evaluation (TRE) shall be conducted. Specific language in permits requires the development of



Santa Clara's 1997 Stormwater Management Plan indicates it has long used TIE and TRE methods as follows:

The Program has, since 1988, collected samples from three watershed stations and from one station that receives runoff from an industrial area. Samples were tested for metal pollutants of concern, and in recent years, for toxicity. Program annual reports evaluate the results as compared to water quality objectives. Toxicity Identification and Evaluation procedures identified the organophosphate Diazinon as the source of acute toxicity in three samples collected at two of the watershed stations.<sup>1032</sup>

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workplans for implementing TIEs. TIEs will be initiated within 30 days of detection of persistent toxicity. The purpose of a TIE is to identify the chemical or combination of chemicals causing the observed toxicity. Every reasonable effort using currently available TIE methodologies shall be employed by the discharger. The Water Board recognizes that identification of causes of chronic toxicity may not be successful in all cases. The purposes of a TRE are to identify the source(s) of the toxic constituents and evaluate alternative strategies for reducing or eliminating their discharge. The TRE shall include all reasonable steps to reduce toxicity to the required level. In addition, the Water Board will review chronic toxicity test results to assess acute toxicity and consider the need for an acute TIE. Following completion of the TRE, if consistent toxicity is still exhibited in a discharge, then the discharger shall pursue all feasible waste minimization measures at a level that is acceptable to the Water Board. The discharger must document that the acceptable level of participation is maintained by submitting reports on a specified schedule to the Water Board.

A Toxicity Reduction Evaluation may again be required in situations where chronic toxicity still exists and new techniques for identifying and reducing toxicity become available. Alternatively, the cause of effluent toxicity may change, so that existing techniques will enable identification and reduction of toxicity. Consideration of any enforcement action by the Water Board for violation of the effluent limitation will be based in part on the discharger's actions in identifying and reducing sources of persistent toxicity.

<sup>1032</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 81; see also, Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5466 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004), which describes their two-tiered approach; screen-level monitoring and investigative monitoring to determine the cause and source of the pollutant identified.

Alameda's monitoring program also specifically identifies Toxicity Identification Evaluations (TIEs) to determine the cause of toxicity in urban creeks.<sup>1033</sup>

As indicated above, these management and monitoring plans were made enforceable by the prior permits and, thus, the use of TIE and TRE methods to identify the pollutant and the source of the pollutant is not new.<sup>1034</sup>

As the Regional Board points out, the prior permits required these special studies without any cap in order to meet water quality standards.<sup>1035</sup> The test claim permit now caps the requirement by providing that permittees who conduct this monitoring through a regional collaborative shall be required to initiate no more than ten Stressor/Source Identification projects during the Permit term in total, and at least two must be toxicity follow-ups, unless monitoring results do not indicate the presence of toxicity.<sup>1036</sup>

Accordingly, the long-term monitoring requirements imposed by Sections C.8.e.ii. and C.8.e.iii. of the test claim permit do not mandate a new program or higher level of service.

- vii. Section C.8.e.vi., which requires the permittees to develop and implement a Sediment Delivery, Estimate/Budget in local tributaries, imposes a state-mandated new program or higher level of service.*

The claimants request reimbursement to comply with Section C.8.e.vi. of the test claim permit, which requires the permittees to “develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages” by July 1, 2011, and to implement the study by July 1, 2012.<sup>1037</sup> “The objective of this

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<sup>1033</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2230, 2254, 2262, 2266, 2270 (Attachment 66 (ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003); page 2378, Attachment 67 (ACCWP Stormwater Quality Management Plan July 2001-June 2008, describing the use of Toxicity Identification Evaluations (TIE) to identify diazinon as a probable source of toxicity in urban creeks); and pages 2156, 2160 (Attachment 63, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 27, 2004, describing source ID studies and source investigations to be conducted).

<sup>1034</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021) and page 2090 (Attachment 60, Order 01-024).

<sup>1035</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 34.

<sup>1036</sup> Exhibit A, Test Claim, 10-TC-02, page 220 (Test claim permit, Section C.8.d.i.5.).

<sup>1037</sup> Exhibit A, Test Claim, 10-TC-02, page 36; Exhibit B, Test Claim, 10-TC-03, page 30; Exhibit C, Test Claim, 10-TC-05, page 36; and Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

monitoring is to develop a strong estimate of the amount of sediment entering the Bay from local tributaries and urban drainages.”<sup>1038</sup> The Fact Sheet explains that chemicals and compounds bind to sediment in creek beds and the sediment delivery estimate/budget is required to improve the Permittees’ ability to estimate their urban runoff contributions to the loads of pollutants of concern entering the Bay.<sup>1039</sup>

The permittees complied with this provision by coordinating with the Bay Area Stormwater Management Agencies (BASMAA) Regional Monitoring Coalition (RMC) as follows:

To determine a strategy for a robust sediment estimate/budget, BASMAA representatives reviewed recent sediment delivery estimates developed by the RMP, and determined that these objectives would be met effectively through sediment-specific submodeling with the Regional Watershed Spreadsheet Model (RWSM), under the ongoing oversight of the RMP Sources Pathways Loadings Work Group and the Small Tributaries Loading Strategy (STLS) Work Group.

The implementation of the sediment delivery/budget study was designed to occur in coordination with the STLS Multi-Year Plan, with funding from both the RMP and BASMAA regional projects. Sediment-specific model developments included:

- Literature-based refinement of land-use based Event Mean Concentrations;
- Development of a sub-model incorporating bedrock type, hillslope and convergence processes, and level /age of urbanization;
- Incorporation and calibration of specific watershed sediment loads calculated from available USGS gauge data or previous monitoring stations;
- Coordination of sediment submodeling with RWSM model development for PCBs and mercury; and
- Mapping of areas upstream of reservoirs and application of estimated delivery ratios to adjust modeled loads for storage of sediment within watersheds.

BASMAA-funded activities included:

- Sensitivity analyses and evaluation of weaknesses in the initial set of sediment runoff coefficients for the RWSM;

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<sup>1038</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

<sup>1039</sup> Exhibit A, Test Claim, 10-TC-02, pages 336, 338 (Fact Sheet).

- Implementation of high-priority improvements and convening a panel of local experts to provide input on the geological bases for model coefficients;
- Analysis of results of calibration on modeled sediment estimates and model loads; and
- Development of a RWSM geoprocessing tool to incorporate the sediment model structure and its parameterization from locally derived land use/geological sediment erosion coefficients and equations.<sup>1040</sup>

The Regional Board “agrees that the C.8 Claimants' prior permits did not require them to design or implement sediment delivery” but “[t]he Provision added further specificity to the monitoring requirements included in C.8 Claimants' prior permits.”<sup>1041</sup>

The Commission finds that Section C.8.e.vi. mandates a new program or higher level of service to develop and implement the sediment delivery estimate/sediment budget in local tributaries and urban drainages. This monitoring is required in addition to the status monitoring, long-term monitoring, and pollutants of concern monitoring, and was not required by the prior permits.

Moreover, the requirements to develop and implement the sediment delivery estimate/sediment budget impose a state-mandated program. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a “true choice,” the requirement is not federally mandated.<sup>1042</sup>

The courts have also explained that “except where a regional board finds the conditions are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be

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<sup>1040</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, page 39.

<sup>1041</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 37-38.

<sup>1042</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

met, the State exercises a true choice by determining what controls are necessary to meet the standard.”<sup>1043</sup>

Here, federal law requires the Regional Board to establish conditions, including the monitoring conditions, to provide for and ensure compliance with all applicable requirements of the CWA and its implementing regulations.<sup>1044</sup> But federal law does not require permittees to develop and implement the sediment delivery estimate/sediment budget. Nor is there evidence that developing and implementing the sediment delivery estimate/sediment budget is the only means by which the federal MEP standard can be met. The requirements to develop and implement the sediment delivery estimate/sediment budget are mandated at the discretion of the Regional Board and are not mandated by federal law and, thus, impose a state-mandated program.

In addition, the requirements constitute a new program or higher level of service, which 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.”<sup>1045</sup> Only one of these alternatives is required to establish a new program or higher level of service.<sup>1046</sup>

Here, the new mandated activities to develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages and implement the study are expressly directed toward the local agency permittees, and thus are unique to local government. The Regional Board imposed the requirements to improve the permittees’ ability to estimate their urban runoff contributions to the loads of pollutants of concern entering the Bay.<sup>1047</sup> The challenged requirements to are not bans or limits on pollution levels, they are mandates to perform specific actions designed to reduce

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<sup>1043</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>1044</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.43(a), 122.48.

<sup>1045</sup> *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.

<sup>1046</sup> *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.

<sup>1047</sup> Exhibit A, Test Claim, 10-TC-02, page 238 (Fact Sheet).

pollution entering stormwater drainage systems and receiving waters.<sup>1048</sup> Thus, the new mandated activities also provide a governmental service to the public.

Thus, the following requirements imposed by Section C.8.e.vi. mandate a new program or higher level of service:

- Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012.<sup>1049</sup>
  - viii. *Section C.8.f., which address Citizen Monitoring and Participation requirements, mandates a new program or higher level of service for the Vallejo permittees; but the requirements are not new and, thus, do not impose a new program or higher level of service for the remaining permittees.*

As indicated above, the test claim permit provides that the permittees may “choose to fulfill requirements of Provision C.8 using data collected by citizen monitors or other third-party organizations, provided the data are demonstrated to meet the data quality objectives described in Provision C.8.h.”<sup>1050</sup> Thus, the use of citizen monitors is not required by the permit, but is an option to comply with the monitoring requirements. However, Section C.8.f. of the test claim permit requires the permittees to *encourage* citizen monitoring and participation by imposing the following activities:

- i. Permittees shall encourage Citizen Monitoring.
- ii. In developing Monitoring Projects and evaluating Status & Trends data, Permittees shall make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
- iii. Permittees shall demonstrate annually that they have encouraged citizen and stakeholder observations and reporting of waterbody conditions. Permittees shall report on these outreach efforts in the annual Urban Creeks Monitoring Report.<sup>1051</sup>

The Fact Sheet states that Section C.8.f. focuses citizen participation and monitoring on creek conditions:

CWA section 101(e) and 40 CFR Part 25 broadly require public participation in all programs established pursuant to the CWA, to foster

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<sup>1048</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

<sup>1049</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

<sup>1050</sup> Exhibit A, Test Claim, 10-TC-02, page 214 (Test claim permit, Section C.8.a.iv.).

<sup>1051</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.f.).

public awareness of environmental issues and decision-making processes. Provision C.8.f. is intended to do the following:

- Support current and future creek stewardship efforts by providing a framework for citizens and Permittees to share their collective knowledge of creek conditions; and
- Encourage Permittees to use and report data collected by creek groups and other third-parties when the data are of acceptable quality.<sup>1052</sup>

The claimants seek reimbursement to comply with Section C.8.f.<sup>1053</sup> The claimants contend that the activities required by Section C.8.f. mandate a new program or higher level of service as follows:

The prior permits did not require the same type and scope of activities to encourage citizen monitoring. [Fn. omitted.] Specifically, the prior permits and plans did not require Test Claimants to seek out citizen and stakeholder information and to solicit comments regarding water body function and quality. [Fn. omitted.] The MRP provisions require Test Claimants to increase their level of coordination as well as expend more staff hours in order to accomplish the required citizen encouragement and coordination.<sup>1054</sup>

The Regional Board contends that Alameda and San Mateo permittees were required through their prior stormwater management plans to encourage citizen monitoring and public participation and, therefore, these requirements are not new for those permittees.<sup>1055</sup> The Regional Board states, however, that the Santa Clara permittees were not subject to citizen monitoring requirements under their prior permit. Nevertheless, the Regional Board asserts “Provision C.8.f does not impose a new program or higher level of service for any of C.8 Claimants”, but “[i]nstead the Provision provides additional refinement on C.8 Claimants’ requirements for compliance with CWA requirements.”<sup>1056</sup>

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<sup>1052</sup> Exhibit A, Test Claim, 10-TC-02, pages 338-339 (Fact Sheet).

<sup>1053</sup> Exhibit A, Test Claim, 10-TC-02, page 37; Exhibit B, Test Claim, 10-TC-03, pages 30-31; Exhibit C, Test Claim, 10-TC-05, pages 36-37.

<sup>1054</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 40.

<sup>1055</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 38-39.

<sup>1056</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-15, pages 38-39.

In response to a request for additional briefing, the Regional Board asserts that the requirements in Section C.8.f. are mandated by federal law and were determined necessary to meet the federal MEP standard:

The public participation and citizen monitoring required by C.8.f is required by federal law. Title 40 of the Code of Federal Regulations, section 122.26, subdivision (d)(2)(iv) requires public participation in developing a stormwater management program. Stormwater permittees must also develop “a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers” as well as “educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.” (40 C.F.R. § 122.26, subd. (d)(iv)(B)(5)- (6).) EPA guidance emphasizes the importance of giving the public opportunities to play an active role in both the development and implementation of the Phase II program, and suggests three types of citizen monitoring Best Management Practices (BMPs) to comply with the public participation requirements of the stormwater regulations: “(1) Volunteer water quality monitoring, which “gives citizens first-hand knowledge of the quality of local water bodies and provides a cost-effective means of collecting water quality data;” (2) Citizen watch groups, which “can aid local enforcement authorities in the identification of polluters;” and “Adopt A Storm Drain” programs, which “encourage individuals or groups to keep storm drains free of debris and to monitor what is entering local waterways through storm drains.” (Att. 2, U.S. EPA, Stormwater Phase II Compliance Assistance Guide, at p. 4-24.) Similarly, the guidance recommends “coordinating volunteers for locating and visually inspecting outfalls and stenciling storm drains” in order to detect illicit discharges. (*Id.*, at p. 4-28.) Here, Provision C.8.f of the MRP does not specify which type of citizen monitoring permittees must institute, but EPA’s guidance makes clear that such monitoring is a necessary element of the federal requirement to “facilitate public reporting” of illicit discharges and water quality impacts. (See 40 C.F.R. 122.26, subd. (d)(iv)(B)(5).) 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.<sup>1057</sup>

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<sup>1057</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 11.



The Regional Board also contends that “U.S. EPA has issued permits containing substantially similar provisions, demonstrating that the San Francisco Bay Water Board effectively administered federal requirements concerning permit requirements.”<sup>1058</sup>

The Commission finds that the requirements in Section C.8.f. mandate a new program or higher level of service for the Vallejo permittees. However, the required activities are not new for the Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo permittees. Although the prior permits for these five groups of permittees do not contain a section called “citizen monitoring and participation,” their prior permits made the stormwater management plans and monitoring plans enforceable, and these plans required these permittees to perform activities to encourage citizen monitoring, seek out citizen and stakeholder comment regarding waterbody function and quality, and annually report on these outreach activities as described below. Thus, the activities required by Section C.8.f. are not new for the Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo permittees and do not increase the level of service provided to the public.

Alameda’s prior permit (R2-2003-0021) recognized that public information and participation are critical components to the stormwater management program, and that the permittees’ management plan required annual citizen participation activities.<sup>1059</sup>

Alameda’s Stormwater Management Plan, which was made enforceable by the prior permit, states that to properly characterize functional attributes of creeks and potential stormwater impacts, the permittees “promote[d] consistent, effective indicator application among the Program, its members and other partners *including volunteer monitors*.”<sup>1060</sup> They were also required by a performance standard to develop watershed awareness by doing “one or more of the following types of activities:” identify and support a friends of a watershed group and encourage creek cleanups or adopt-a-creek or other volunteer monitoring; conduct a creek cleanup on an annual basis; or participate in a local event as part of the Coastal Commission’s annual coastal cleanup day or as part of Earth Day.<sup>1061</sup> The Alameda permittees also provided resources and

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<sup>1058</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 13, 16.

<sup>1059</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1854, 1861 (Attachment 53, Order R2-2003-0021, Findings 12, 42).

<sup>1060</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2375-2376 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>1061</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2416 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

training to citizen monitoring groups that work with local watershed partners.<sup>1062</sup> Alameda's prior permit also required the permittees to document the status of the program's activities and the performance of tasks contained in the Management Plan in each annual report to the Regional Board.<sup>1063</sup> In addition, Alameda's workplan for fiscal year 2006-2007, which was made enforceable by its prior permit,<sup>1064</sup> required the permittees to "Continue supporting community members and groups partnering with ACCWP members and other agencies on volunteer monitoring . . . ." <sup>1065</sup>

The requirement to encourage citizen monitoring is not new for the Santa Clara permittees. Santa Clara's prior permit (01-124) states that the permittees' stormwater management program participates in and contributes to citizens' groups.<sup>1066</sup> The prior permit required the public information and participation program to include "citizen participation activities designed to further the objectives and meet the requirements of this permit" and that the effectiveness and level of implementation shall be reported annually.<sup>1067</sup> Santa Clara's 1997 management plan, which was made enforceable by the prior permit,<sup>1068</sup> required citizen participation "to encourage the active involvement of the public in preventing urban runoff pollution, and increase appreciation of streams and the Bay, "which may include" volunteer creek and shoreline cleanup events such as Coastal Cleanup Day; adopt-a-creek programs; funding citizen participation projects; targeting creek-side residents; or partnering with other organizations.<sup>1069</sup> The management plan further states that in 1996, the Regional Board encouraged the

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<sup>1062</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2457 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>1063</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021, Section C.7.).

<sup>1064</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1868, 1883 (Attachment 53, Order R2-2003-0021, Sections C.2.b. and C.7.b.).

<sup>1065</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2165 (Attachment 63, ACCWP Annual Monitoring Program Plan and update to the Multi-Year Monitoring and Assessment Plan, February 27, 2004).

<sup>1066</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2074 (Attachment 60, Order 01-024, Finding 7).

<sup>1067</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2086-2087 (Attachment 60, Order 01-024, Section C.4.).

<sup>1068</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2073-2074, 2083-2085 (Attachment 60, Order 01-024, Findings 6 and 7, Sections C.1 and C.2.).

<sup>1069</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 67-68.

program to support volunteer monitoring.<sup>1070</sup> Thus, Santa Clara’s monitoring strategy identified in the 1997 management plan states that it will encourage volunteer monitoring as follows.

5. Assist citizen monitoring. This may include continuation of Program-level support for citizen monitoring on creeks. Where opportunities exist, the Co-permittees will provide in-kind assistance to encourage volunteer monitoring efforts at the local level.<sup>1071</sup>

Santa Clara’s 2004 plan also required the permittees to “encourage the active involvement of the public in preventing urban runoff pollution, and increase appreciation of streams and the Bay” by conducting volunteer creek and shoreline clean-ups or funding community groups for citizen participation projects.<sup>1072</sup> In addition, the 2004 plan contained a performance standard for illicit connections and discharges to “determine and implement appropriate outreach efforts to reduce non-permissible non-stormwater discharges” and to respond to citizen complaints of illegal dumping.<sup>1073</sup>

Santa Clara’s 2004 Revised Multi-Year Monitoring Plan discusses stakeholder involvement and input, and states that the program actively encourages stakeholder input through comments on its annual reports “as the most effective means to influence future efforts.”<sup>1074</sup> The input has primarily come from the Santa Clara Basin Watershed Management Initiative, which “is a collaborative, stakeholder driven effort among representatives from regional and local public agencies; civic, environmental, resource conservation and agricultural groups; professional and trade organizations; business and industrial sectors; and the general public.”<sup>1075</sup> Thus, the requirement to make reasonable efforts to seek out stakeholder information and comment regarding waterbody function and quality when developing and analyzing monitoring data is not

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<sup>1070</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 81; see also, Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5464 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>1071</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 84.

<sup>1072</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5743 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004).

<sup>1073</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5808 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>1074</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5474 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

<sup>1075</sup> Exhibit BB (40), Santa Clara Basin Watershed Management Initiative, <https://www.scbwmi.org/index.htm> (accessed May 2, 2024).

new for the Santa Clara permittees. And the prior permit required an annual report documenting the program's activities and, thus, reporting on these outreach activities is not new.<sup>1076</sup>

The prior permit for the Fairfield-Suisun permittees (R2-2003-0034) also required the permittees to have a public information and participation program as part of their stormwater management plan, and required them to develop a work plan to evaluate the effectiveness of that program.<sup>1077</sup> Fairfield-Suisun's 1999-2000 to 2004-2005 Stormwater Management Plan, made enforceable by the prior permit,<sup>1078</sup> required the permittees to work with citizen groups interested in visually monitoring the condition of watercourses and implement a program for community groups to monitor conditions in neighborhood creeks.<sup>1079</sup> Fairfield-Suisun's 2007 stormwater management plan also states that the permittees contract with the Solano Resource Conservation District to manage the urban runoff education program and to work with high school biology classes in Fairfield-Suisun Unified School District to conduct bioassessments in three watersheds (Laurel, Ledge wood, and American Canyon Creeks), and that an evaluation goal for the program would be to use community-based or volunteer monitoring to help conduct the watershed resources inventory and analysis.<sup>1080</sup> The plan also required the permittees to have procedures for handling stormwater related phone calls from the public.<sup>1081</sup> The Fairfield-Suisun permittees are also required to submit an annual report documenting the status of the activities during the previous fiscal year, including an assessment of those activities and the performance of the tasks contained in the management plan.<sup>1082</sup> Thus, the requirements to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and reporting on these outreach activities are not new for the Fairfield-Suisun permittees.

The requirements to encourage citizen monitoring, seek out citizen and stakeholder comment regarding waterbody function and quality, and annually report on these outreach activities are also not new for the Contra Costa permittees. The prior permit for Contra Costa (99-058) required the permittees to have a stormwater management plan, which had to include a public information and industrial outreach program, and

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<sup>1076</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2087 (Attachment 60, Order 01-024, Section C.6.).

<sup>1077</sup> Exhibit BB (27), Order R2-2003-0034, pages 19, 34.

<sup>1078</sup> Exhibit BB (27), Order R2-2003-0034, page 19.

<sup>1079</sup> Exhibit BB (19), Fairfield Suisun 1999-2000 to 2004-2005 Stormwater Management Plan, pages 84, 139-140.

<sup>1080</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 124-126, 137.

<sup>1081</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 139.

<sup>1082</sup> Exhibit BB (27), Order R2-2003-0034, page 35.

that plan was made enforceable by the prior permit.<sup>1083</sup> Contra Costa's stormwater management plan for 1999-2004 had a goal to "[e]ducate the general public and businesses about our local watershed and solicit their participation for ongoing creek protection and restoration efforts."<sup>1084</sup> The plan identified a performance standard requiring the permittees to develop watershed awareness by doing "one or more of the following types of activities:" identify and support a friends of a watershed group and encourage creek cleanups or adopt-a-creek or other volunteer monitoring; conduct a creek cleanup on an annual basis; or participate in a local event as part of the Coastal Commission's annual coastal cleanup day or as part of Earth Day.<sup>1085</sup> The program also planned a special study to inventory and determine the health of the creeks "possibly using volunteer monitors."<sup>1086</sup> Contra Costa's monitoring plan approved and made enforceable in Order R2-2004-0059 stated the program's goal to facilitate a volunteer monitoring effort to sustain a long-term assessment program within the watershed and fund volunteer-led bioassessments.<sup>1087</sup> And the prior permit required the Contra Costa permittees to submit an annual report documenting the status of the activities during the previous fiscal year, including an assessment of those activities and the performance of the tasks contained in the management plan.<sup>1088</sup> Contra Costa's annual report for fiscal year 2005-2006 discusses its monitoring and assessment plan, with the goal to "integrate volunteer resources into CCMAP's water assessments."<sup>1089</sup> The annual report also indicates that the Contra Costa permittees received grant funding in fiscal year 2002-2003 for the development and implementation of a citizen monitoring program and several tasks for the citizen monitoring program were completed by fiscal year 2004-2005.<sup>1090</sup> The Contra Costa County Community Development Department also produced a publication in 2006 documenting GPS data for numerous creek features collected by volunteers since 2001.<sup>1091</sup>

The prior permit for San Mateo (99-059) required the permittees to have a stormwater management plan, which had to include a public information and participation

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<sup>1083</sup> Exhibit BB (25), Order 99-058, pages 2-3.

<sup>1084</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 36.

<sup>1085</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 62.

<sup>1086</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 138.

<sup>1087</sup> Exhibit BB (28), Order R2-2004-0059, pages 7, 21-22, 24-25.

<sup>1088</sup> Exhibit BB (25), Order 99-058, page 10.

<sup>1089</sup> Exhibit BB, Contra Costa 2005-2006 Annual Report (Excerpts), page 14.

<sup>1090</sup> Exhibit BB, Contra Costa 2005-2006 Annual Report (Excerpts), pages 15-16.

<sup>1091</sup> Exhibit BB, Contra Costa 2005-2006 Annual Report (Excerpts), page 16.

component, and that plan was made enforceable by the prior permit.<sup>1092</sup> The San Mateo stormwater management plan for 2004-2010 states that one of its purposes is to increase residents' hands-on involvement in the program's activities and that it had outreach programs to encourage the public to take an active role in keeping stormwater and creeks clean.<sup>1093</sup> The plan required each municipality to promote the use of one of its telephone numbers to facilitate public reporting of the presence of illicit discharges.<sup>1094</sup> The plan also required the permittees to "[i]dentify and support a 'Friends of (a watershed)' group and encourage creek (lagoon or shoreline) cleanups, or adopt-a-creek or other volunteer monitoring and resource inventorying activities."<sup>1095</sup> The plan indicates that one of its achievements was the rapid bioassessment work in the San Pedro Creek Watershed, and the "San Pedro Creek Watershed Coalition and local volunteers assisted with the fieldwork."<sup>1096</sup> The plan also states that the permittees "will develop and evaluate cost-effective methods to address water quality problems in specific watersheds . . . [which] will necessitate collaborating with other agencies and organizations (e.g., *local watershed stakeholder groups*) in a watershed's jurisdiction to leverage limited resources."<sup>1097</sup> And the prior permit required the Contra Costa permittees to submit an annual report documenting the status of the activities during the previous fiscal year, including an assessment of those activities and the performance of the tasks contained in the management plan.<sup>1098</sup> San Mateo's annual report for fiscal year 2007-2008 indicates that it coordinated with the California Coastal Commission to conduct a beach and creek cleanup, with ten sites located at inland

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<sup>1092</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1944-1945, 1949 (Attachment 55, Order 99-059, Findings 6 and 7, Section C.1.).

<sup>1093</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3933, 3958, 3962 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1094</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4035 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1095</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4037 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1096</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3974 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1097</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3977 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1098</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1951 (Attachment 55, Order 99-059, Section C.5.).

creeks.<sup>1099</sup> Thus, the requirements to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and reporting on these outreach activities are not new for the San Mateo permittees.

However, the requirements to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and reporting on these outreach activities are new for the Vallejo permittees. The prior permit for the Vallejo permittees made the Vallejo Sanitation and Flood Control District Storm Water Management Plan enforceable.<sup>1100</sup> The stormwater management plan contains a section on public information and participation, noting the general objective is to provide opportunities for community involvement and feedback, and to promote community ownership of the storm drain system.<sup>1101</sup> The plan further states that the “District shall review the progress of the Monitoring Committee and WARC [the Watershed Assessment Resource Center Council] to determine the feasibility of establishing a citizen based monitoring program for the City of Vallejo.”<sup>1102</sup> However, there was no prior requirement for the Vallejo permittees to encourage citizen monitoring, seek out citizen comment regarding waterbody function and quality, and reporting on these outreach activities. Thus, these activities are new for the Vallejo permittees.

Moreover, these activities are mandated by the state on the Vallejo permittees. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a “true choice,” the requirement is not federally mandated.<sup>1103</sup>

The courts have also explained that “except where a regional board finds the conditions are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be

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<sup>1099</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3450-3452 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1100</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 3, 8.

<sup>1101</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 66.

<sup>1102</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 69.

<sup>1103</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

met, the State exercises a true choice by determining what controls are necessary to meet the standard.”<sup>1104</sup> “That the . . . Regional Board found the permit requirements were ‘necessary’ to meet the standard establishes only that the . . . Regional Board exercised its discretion.”<sup>1105</sup>

As indicated in the Regional Board’s comments, federal regulations require the permittee’s application for an NPDES permit to have a proposed management program, which “shall include a comprehensive planning process which involves public participation . . . to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.”<sup>1106</sup> Stormwater permittees must also develop “a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers” and “educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.”<sup>1107</sup> While EPA guidance may encourage the use of volunteer or citizen monitoring as indicated by the Regional Board, federal law does not require citizen monitoring as part of the public participation or illicit discharge components of the stormwater management program.<sup>1108</sup>

Moreover, there is no evidence in the record to show that the citizen monitoring and participation requirements in Section C.8.f. “are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be met.”<sup>1109</sup> “That the . . . Regional Board found the permit requirements were ‘necessary’ to meet the standard establishes only

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<sup>1104</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

<sup>1105</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

<sup>1106</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv). See also, United States Code, title 33, section 1251(e), which states that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.”

<sup>1107</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(5) and (6).

<sup>1108</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 73-74 (Attachment 2, EPA Stormwater Phase II Compliance Assistance Guide, noting the possible BMP practice for public participation “could” include volunteer water quality monitoring).

<sup>1109</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.



that the . . . Regional Board exercised its discretion.”<sup>1110</sup> Thus, the requirements to encourage citizen monitoring, seek out citizen and stakeholder comment regarding waterbody function and quality when developing monitoring projects and analyzing data, and annually report on these outreach activities are not mandated by federal law.

In addition, the requirements are new for the Vallejo permittees as indicated above and are uniquely imposed on government.<sup>1111</sup> Section C.8.f. also provides a governmental service to the public since it is intended to support creek stewardship and encourage citizens to use and report data.<sup>1112</sup>

Thus, Section C.8.f. mandates a new program or higher level of service for the Vallejo permittees only.

*ix. Sections C.8.g.i. (first sentence only), ii., iii., v., vi., and vii., Reporting*

The claimants seek reimbursement to comply with portions of Section C.8.g. of the test claim permit, which addresses various monitoring reports. The narratives in the Test Claims focus on just three provisions in Section C.8.g., addressing the Electronic Status Monitoring Data Report, the Urban Creeks Monitoring Report, and a requirement to make electronic reports available through a regional data center and to provide notice to the public about the availability of electronic and paper monitoring reports as follows:

Provision C.8.g.ii requires submission of “an Electronic Status Monitoring Data Report no later than January 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period. Electronic Status Monitoring Data Reports shall be in a format compatible with the SWAMP database. Water Quality Objective exceedences [sic] shall be highlighted in the Report.” (Ex. 1 at 77.)

Provision C.8.g.iii requires submission of

a comprehensive Urban Creeks Monitoring Report no later than March 15 of each year, reporting on all data collected during the foregoing October 1–September 30 period, with the initial report due March 15, 2012, unless the Permittees choose to monitor through a regional collaborative, in which case the due date is March 15, 2013.

(*Id.* at 77.) Each Urban Creeks Monitoring Report shall contain summaries of Status, Long-Term, Monitoring Projects, and Pollutants of Concern Monitoring. (*Id.*) The materials required for this submission are extensive,

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<sup>1110</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

<sup>1111</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 630 (the “permit applies by its terms only to the local governmental entities identified in the permit; no one else is bound by it.”).

<sup>1112</sup> Exhibit A, Test Claim, 10-TC-02, pages 338-339 (Fact Sheet).

and include maps, data tables, descriptions of data quality, analyses of the data, identification of any “long-term trends in stormwater or receiving water quality,” and a discussion of the data relative to beneficial uses identified in the basin plan. (*Id.* at 77-78.)

Finally, Provision C.8.g.vi requires that electronic reports be made available through a regional data center, and optionally through their web sites. Claimant and other Permittees are required to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list. (*Id.* at 79.)<sup>1113, 1114</sup>

The rebuttal comments filed by the claimants in 10-TC-02, for the first time, discuss the *first sentence* in Section C.8.g.i., requiring the inclusion of a discussion of possible pollutant sources in the Urban Creeks Monitoring Report when monitoring data indicates that stormwater runoff or dry weather discharges are or may be causing or contributing to an exceedance of water quality standards, and Section C.8.g.v. addressing the Integrated Monitoring Report as follows:

Provision C.8.g imposes various requirements for reporting of monitoring results. Specifically, Test Claimants must take actions *in the event monitoring data indicates stormwater runoff or dry weather discharges may be causing or contributing to an exceedance of applicable water quality standards*. [Fn. omitted.] Furthermore, Test Claimants are required to submit the following annual reports: Electronic Status Monitoring Data Report; Urban Creek Monitoring Report; and *Integrated Monitoring Report*. [Fn. omitted.]<sup>1115</sup>

There is no discussion in the Test Claims regarding the other provisions in Section C.8.g.; namely, Section C.8.g.iv. (Monitoring Project Reports) and Section C.8.g.vi. (Standard Report Contents, which identifies the information required in the monitoring reports).

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<sup>1113</sup> Exhibit A, Test Claim, 10-TC-02, pages 37-38. See also, Exhibit B, Test Claim, 10-TC-03, pages 31-32 and Exhibit C, Test Claim, 10-TC-05, pages 37-38, which contain the same quoted language.

<sup>1114</sup> The claimants incorrectly cite Section C.8.g.vi. for the data accessibility requirements. The correct cite is to Section C.8.g.vii. Exhibit A, Test Claim, 10-TC-02, pages 227-228 (Test claim permit, Sections C.8.g.vi. and C.8.g.vii.).

<sup>1115</sup> Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, page 40, emphasis added. See also, Declaration from James Scanlin, an Associate Environmental Compliance Specialist with the Alameda County Public Works Agency, contending that these provisions are new and constitute a new program or higher level of service. (Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, pages 80, 96-97.)

Nor is there any discussion or reference in the Test Claims, declarations, or comments filed by the claimants regarding the *second sentence* in Section C.8.g.i., which states “When data collected pursuant to C.8.a.-C.8.f. indicate that discharges are causing or contributing to an exceedance of an applicable water quality standard, Permittees shall notify the Water Board within no more than 30 days of such a determination and submit a follow-up report in accordance with Provision C.1 requirements.”<sup>1116</sup>

Thus, it is not clear which provisions in Section C.8.g. the claimants are pleading in their Test Claims. Government Code section 17553(b)(1) requires Test Claims to identify the *specific* sections of the executive order alleged to contain a mandate *and* a detailed description of the new activities mandated by the state.

This Decision will address the monitoring reports and notice requirements the claimants addressed in their Test Claims and rebuttal comments; namely the Electronic Status Monitoring Data Report (Section C.8.g.ii.), the Urban Creeks Monitoring Report (Section C.8.g.iii.), the Integrated Monitoring Report (Section C.8.g.v.), the sections that address the scope of these reports (the first sentence in Section C.8.g.i. and Section C.8.g.vi., Standard Report Content), and the requirements to make electronic reports and data available through a regional data center and to provide notice to the public about the availability of electronic and paper monitoring reports (Section C.8.g.vii.).

However, the claimants have *not* pled, and this Decision does not address, the requirements in the second sentence of Section C.8.g.i. requiring notice within 30 days and a report to the Regional Board when discharges exceed water quality standards, and Section C.8.g.iv. addressing Monitoring Project Reports.

As described in the analysis below, the Commission finds as follows:

- The substantive reporting requirements imposed by Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi. for status monitoring, long-term monitoring, pollutants of concern monitoring, and the two monitoring projects (stressor/source identification and BMP effectiveness investigations) in the annual Urban Creeks Monitoring Report and the Integrated Monitoring Report are not new and do not increase the level of service provided to the public and, thus, do not impose a new program or higher level of service.
- The remaining requirements in Section C.8.g.v. to include in the Integrated Monitoring Report a budget summary for each monitoring requirement and recommendations for future monitoring, which also becomes part of the ROWD for the reissuance of the next permit, are required by existing federal law and are not new.
- The requirements imposed by Section C.8.g.ii. to maintain an information management system that will electronically transfer data and report all data collected during the previous year in electronic SWAMP comparable format to the Regional Data Center of the California Environmental Data Exchange

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<sup>1116</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.g.i.).

Network by January 15 are new requirements that constitute a state-mandated new program or higher level of service.

- The requirement in Section C.8.g.vii. to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list, constitutes a state-mandated new program or higher level of service.

1) The requirements imposed by Sections C.8.g.i. (first sentence only), ii., iii., v., vi., and vii.

The following requirements are imposed in the sections pled by the claimants:

- Status Monitoring Electronic Reporting (Section C.8.g.ii.). This section requires the permittees to submit an Electronic Status Monitoring Data Report no later than January 15 of each year, reporting on all data collected during the previous October 1–September 30 period. Electronic Status Monitoring Data Reports shall be in a format compatible with the SWAMP database. “Permittees shall maintain an information management system that will support electronic transfer of data to the Regional Data Center of the *California Environmental Data Exchange Network (CEDEN)*, located within the San Francisco Estuary Institute.”<sup>1117</sup> Water quality objective exceedances are required to be highlighted in the report.<sup>1118</sup>
- Urban Creeks Monitoring Report (Sections C.8.g.i. (first sentence only), C.8.g.iii.). These sections require the permittees to submit a comprehensive Urban Creeks Monitoring Report no later than March 15 of each year, reporting on the information described below during the previous October 1-September 30 period, with the initial report due March 15, 2013, since the permittees chose to monitor through a regional collaborative. The Urban Creeks Monitoring Report is required to contain summaries of status monitoring, long-term monitoring, monitoring projects,<sup>1119</sup> and pollutants of concern monitoring.

Pursuant to Section C.8.g.i., when monitoring data indicates that stormwater runoff or dry weather discharges are or may be causing or contributing to an exceedance of water quality standards, including narrative standards, “a discussion of possible pollutant sources shall be included in the Urban Creeks

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<sup>1117</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>1118</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>1119</sup> “Monitoring projects” is defined in Section C.8.d. of the test claim permit to include Stressor/Source Identification (which is discussed with the status monitoring and long-term monitoring requirements), BMP Effectiveness Investigation, and Geomorphic Project. (Exhibit A, Test Claim, 10-TC-02, pages 221-222.) Section C.8.d.iii., however, requires the Geomorphic Project to be reported in the Integrated Monitoring Report, and not the Urban Creeks Monitoring Report, and that reporting requirement was analyzed under Section C.8.d.iii. and will not be further addressed here.

Monitoring Report.” This reporting requirement does not apply to “continuing or recurring exceedances of water quality standards previously reported to the Water Board or to exceedances of pollutants that are to be addressed pursuant to Provisions C.8 through C.14 of this Order in accordance with Provision C.1.”

The report shall contain the following information “as appropriate:”

1. Maps and descriptions of all monitoring locations.
2. Data tables and graphical data summaries; and constituents that exceed applicable water quality standards shall be highlighted.
3. For all data, a statement of the data quality.
4. An analysis of the data, which shall include the following:
  - Calculations of biological metrics and physical habitat endpoints.
  - Comparison of biological metrics to:
    - Each other
    - Any applicable, available reference site(s)
    - Any applicable, available index of biotic integrity
    - Physical habitat endpoints.
  - Identification and analysis of any long-term trends in stormwater or receiving water quality.
5. A discussion of the data for each monitoring program component, which shall:
  - Discuss monitoring data relative to prior conditions, beneficial uses and applicable water quality standards as described in the Basin Plan, the Ocean Plan, or the California Toxics Rule or other applicable water quality control plans.
  - Where appropriate, develop hypotheses to investigate regarding pollutant sources, trends, and BMP effectiveness.
  - Identify and prioritize water quality problems.
  - Identify potential sources of water quality problems.
  - Describe follow-up actions.
  - Evaluate the effectiveness of existing control measures.
  - Identify management actions needed to address water quality problems.<sup>1120</sup>

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<sup>1120</sup> Exhibit A, Test Claim, 10-TC-02, pages 225-227 (Test claim permit, Sections C.8.g.i. (first sentence only), C.8.g.iii.).

- Integrated Monitoring Report (Section C.8.g.v.) – This section requires the permittees to prepare and submit an Integrated Monitoring Report through the regional collaborative monitoring effort on behalf of all participating permittees. The report is a one-time report to be included with the ROWD for the reissuance of the next permit, and is due on March 15, 2014, “in lieu of the annual Urban Creeks Monitoring Report due on March 15, 2014.” This report is required to include the following information:
  - A comprehensive analysis of all monitoring data collected.
  - Methods, data, calculations, load estimates, and source estimates for each pollutant of concern monitoring parameter.
  - A budget summary for each monitoring requirement.
  - Recommendations for future monitoring.<sup>1121</sup>
- Standard Report Content for All Monitoring Reports (Section C.8.g.vi.). All monitoring reports shall contain the following information:
  - The purpose of the monitoring and briefly describe the study design rationale.
  - Quality Assurance/Quality Control summaries for sample collection and analytical methods, including a discussion of any limitations of the data.
  - Brief descriptions of sampling protocols and analytical methods.
  - Sample location description, including waterbody name and segment and latitude and longitude coordinates.
  - Sample ID, collection date (and time if relevant), media (e.g., water, filtered water, bed sediment, tissue).
  - Concentrations detected, measurement units, and detection limits.
  - Assessment, analysis, and interpretation of the data for each monitoring program component.
  - Pollutant load and concentration at each mass emissions station.
  - A listing of volunteer and other non-Permittee entities whose data are included in the report.
  - Assessment of compliance with applicable water quality standards.
  - A signed certification statement.<sup>1122</sup>

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<sup>1121</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

<sup>1122</sup> Exhibit A, Test Claim, 10-TC-02, pages 227-228 (Test claim permit, Section C.8.g.vi.).

- Data Accessibility (Section C.8.g.vii.). This section requires the permittees to make electronic reports available through a regional data center. In addition, “Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.”<sup>1123</sup>

The Fact Sheet explains that “[f]or each monitoring component that is conducted collaboratively, one report would be prepared on behalf of all contributing Permittees; separate reports would not be required from each Program. Cost savings could result also from reduced contract and oversight hours, fewer quality assurance/quality control samples, shared sampling labor costs, and laboratory efficiencies.”<sup>1124</sup> As previously indicated, evidence in the record shows that the permittees from all six regions collaborated their monitoring efforts by participating in the Bay Area Stormwater Management Agencies (BASMAA) Regional Monitoring Coalition (RMC).<sup>1125</sup> Thus, only one annual Urban Creeks Monitoring Report, and one Integrated Monitoring Report (which is to be submitted as a one-time report as part of the ROWD by March 15, 2014, in lieu of the annual Urban Creeks Monitoring Report for that year) is required to be submitted for all permittees. And then the data presented in these reports is also required to be submitted in electronic SWAMP comparable format to the Regional Board by January 15 pursuant to Section C.8.g.ii.<sup>1126</sup> Permittees are also required to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list pursuant to pursuant to Section C.8.g.vii.

The claimants contend that these provisions impose new requirements that constitute a state-mandated new program or higher level of service as follows:

The Prior Permit required the County and other Permittees to prepare a single annual report, which included a description of data collected over the previous fiscal year, and general interpretation of the results. (Citation omitted.) The format of the report was unspecified. (Citation omitted.)

The MRP required electronic reporting and required that the data be maintained in a database accessible by the public. (Citation omitted.) In addition, the requirement for submission of a separate annual Urban Creeks Monitoring Report was new. This submission prescribed roughly similar report contents, but due to the increased number of data

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<sup>1123</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>1124</sup> Exhibit A, Test Claim, 10-TC-02, page 335 (Fact Sheet).

<sup>1125</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, pages 3, 11.

<sup>1126</sup> See, for example, Exhibit BB (38), San Mateo Water Pollution Prevention Urban Creeks Monitoring Report for Water Year 2014, page 5.

parameters and programs, the total level of reporting effort was required to increase.<sup>1127</sup>

The claimants also contend that the number of data parameters has increased, which made reporting more costly than under prior law as follows:

Prior reporting obligations were less costly. By significantly increasing the number of data parameters and programs required under C.8.c, C.8.d, and C.8.e, the total level of reporting effort must be increased to comply with the MRP. The County set forth evidence that the Regional Board has not refuted proving the MRP C.8 provisions are more costly that [sic] under prior permits. Accordingly, MRP Provision C.8.g is a new program or reflects requirements calling for a higher level of service.<sup>1128</sup>

The Regional Board asserts that the requirements are not new. The Regional Board agrees that the prior permits did not require the submission of the reports electronically, but contends that these costs are not reimbursable since the permittees already submitted monitoring reports with data in tables electronically and “it is arguably less costly to submit a report electronically than by using mail delivery.”<sup>1129</sup> The Regional Board also argues that the Public Records Act previously required the permittees to maintain data in a database accessible to the public and, thus, this requirement is not new.<sup>1130</sup> In addition, the Regional Board asserts that the information required to be reported in the Urban Creeks Monitoring Report was previously required to be reported in the Annual Report rather than in a separate monitoring report and, thus, “[t]here would be at most *de minimis* costs associated with submission of urban creeks monitoring data in a separate annual report.”<sup>1131</sup> The Regional Board also contends that federal law requires the submission of electronic reports, that the requirement is not unique to government since private parties are expressly required to report stormwater data electronically and, thus, the reporting requirements do not mandate a new program or higher level of service.<sup>1132</sup>

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<sup>1127</sup> Exhibit B, Test Claim 10-TC-03, pages 31-32.

<sup>1128</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 33; see also, Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, pages 40-41.

<sup>1129</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1130</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1131</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1132</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 47; Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 11-12.



- 2) The substantive reporting requirements imposed by Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi. for status monitoring, long-term monitoring, pollutants of concern monitoring, and the two monitoring projects (stressor/source identification and BMP effectiveness investigations) in the annual Urban Creeks Monitoring Report and the Integrated Monitoring Report are not new and do not increase the level of service provided to the public and, thus, do not impose a new program or higher level of service.

The first sentence of Section C.8.g.i. and Section C.8.g.iii. of the test claim permit governs the annual Urban Creeks Monitoring Report, which is required to contain summaries of status monitoring, long-term monitoring, pollutants of concern monitoring, and monitoring projects (Stressor/Source Identification and BMP Effectiveness Investigation) conducted during the previous year. The annual report is required to include the following analysis and information:

- Maps and descriptions of monitoring locations.
- Data tables and graphical data summaries, with constituents that exceed water quality standards highlighted.
- A statement of data quality.
- An analysis of the data, including calculations; comparison of biological metrics; identification and analysis of any long-term trends; analysis of monitoring data relative to prior conditions, beneficial uses, and water quality standards; identify sources of pollutants and hypotheses to investigate sources of pollutants and BMP effectiveness.
- Identify potential sources of water quality problems and describe follow-up actions.
- Evaluate the effectiveness of existing control measures.<sup>1133</sup>

And when data collected indicates that stormwater runoff or dry weather discharges are or may be causing or contributing to an exceedance of applicable water quality standards, including narrative standards, a discussion of possible pollutant sources shall be included in the Urban Creeks Monitoring Report pursuant to Section C.8.g.i.<sup>1134</sup>

Section C.8.g.vi. (Standard Report Content) also requires some of the same information bulleted above and further adds that the Urban Creeks Monitoring Report shall include the following:

- Sample ID, collection date (and time if relevant), media (e.g., water, filtered water, bed sediment, tissue).

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<sup>1133</sup> Exhibit A, Test Claim, 10-TC-02, pages 225-227 (Test claim permit, Sections C.8.g.i. (first sentence only), C.8.g.iii.).

<sup>1134</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.g.i.).

- Concentrations detected, measurement units, and detection limits.
- A listing of volunteer and other non-permittee entities whose data are included in the report.
- A signed certification statement.<sup>1135</sup>

Similarly, the one-time Integrated Monitoring Report required by Section C.8.g.v. is required to include “a comprehensive analysis of all data collected” and for “Pollutants of Concern, the report shall include methods, data, calculations, load estimates, and source estimates for each Pollutant of Concern Monitoring parameter.”<sup>1136</sup>

As discussed in the sections above, status monitoring, long-term monitoring, pollutants of concern monitoring, and two of the monitoring projects (stressor/source identification, and BMP effectiveness investigations) are not new; nor is the requirement to submit monitoring reports for these monitoring activities new. Existing federal law and the prior permits required the permittees to submit annual monitoring reports that analyzed the same data to determine if the permittees were in compliance with water quality standards and, thus, preparing these reports as required by Sections C.8.g. is *not* new for status monitoring, long-term monitoring, pollutants of concern monitoring, and two of the monitoring projects (stressor/source identification, and BMP effectiveness investigations).

The CWA requires an NPDES permittee to monitor discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit and whether it is meeting water quality standards.<sup>1137</sup> An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.<sup>1138</sup>

When a permittee applies for an NPDES permit, the permittee is required to provide information characterizing the quality and quantity of discharges covered in the application, including quantitative data from representative outfalls. When no analytical method is approved to characterize the discharge, the permittee may use any suitable method, but must provide a description of the method to be used.<sup>1139</sup> The application must also include a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling

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<sup>1135</sup> Exhibit A, Test Claim, 10-TC-02, pages 227-228 (Test claim permit, Section C.8.g.vi.).

<sup>1136</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

<sup>1137</sup> United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.44(i)(1).

<sup>1138</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F).

<sup>1139</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(A).

equipment.<sup>1140</sup> Monitoring is required to be conducted according to test procedures identified in federal law.<sup>1141</sup>

As the courts have held, when the permit provides that the purpose of the monitoring and reporting program is to characterize stormwater discharges and assess compliance with water quality standards (as the test claim permit in this case does)<sup>1142</sup>, and the monitoring data shows that the level of pollutants in federally protected waterbodies exceed those allowed under the permit, then the monitoring data conclusively demonstrates that the permittees are not in compliance with the permit conditions and may be liable for permit violations.<sup>1143</sup>

Thus, to ensure compliance with the permit and water quality standards, the CWA requires permittees to submit annual reports to the Regional Board.<sup>1144</sup> Federal regulations require the annual report to include a summary of monitoring data, identification of water quality improvements or degradation, and any necessary revisions to the program as follows:

- The status of implementing the components of the storm water management program that are established as permit conditions.
- Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with 40 Code of Federal Regulations 122.26(d)(2)(iii) [which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application].
- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.
- A summary of data, including monitoring data that is accumulated throughout the reporting year.
- Annual expenditures and budget for the year following each annual report.

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<sup>1140</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(D).

<sup>1141</sup> Code of Federal Regulations, title 40, section 122.41(j)(4); Code of Federal Regulations, title 40, Part 136.

<sup>1142</sup> Exhibit A, Test Claim, 10-TC-02, page 331 (Fact Sheet).

<sup>1143</sup> *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1205-1207, 1210.

<sup>1144</sup> United States Code, title 33, section 1342(a)(2) (“The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, *including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.*,” emphasis added).

- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.<sup>1145</sup>

Federal law also requires permittees to report monitoring results, “with the frequency dependent on the nature and effect of the discharge, but in no case less than once a year.”<sup>1146</sup> Federal law states that records of monitoring information shall include:

- The date, exact place, and time of sampling or measurements;
- The individual(s) who performed the sampling or measurements;
- The date(s) analyses were performed;
- The individual(s) who performed the analyses;
- The analytical techniques or methods used; and
- The results of such analyses.<sup>1147</sup>

In addition, federal law requires permittees to report all instances of noncompliance with the permit at the time monitoring reports are submitted.<sup>1148</sup> This includes non-compliance with the discharge prohibitions and receiving water limitations and exceedances of water quality standards and objectives identified in the permit, the Basin Plan, the CTR, the Ocean Plan, and any other water quality standard.

Federal law also requires permittees to assess the effectiveness of their management programs and to identify any proposed revisions in the annual report to ensure that water quality standards and objectives are achieved. Specifically, federal regulations require the permittees to assess their programs 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.”<sup>1149</sup> Any revisions necessary to comply with water quality standards are then required to be included in the annual report.<sup>1150</sup>

And federal law requires that all reports filed with the Regional Board “shall be signed and certified.”<sup>1151</sup>

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<sup>1145</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1146</sup> Code of Federal Regulations, title 40, section 122.44(i).

<sup>1147</sup> Code of Federal Regulations, title 40, section 122.41(j)(3).

<sup>1148</sup> Code of Federal Regulations, title 40, section 122.41(l)(7).

<sup>1149</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

<sup>1150</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1151</sup> Code of Federal Regulations, title 40, section 122.41(k).

Thus, the detailed information and analysis of the data identified in Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi. to be reported for the status monitoring, long-term monitoring, pollutants of concern monitoring, and the two monitoring projects (stressor/source identification and BMP effectiveness investigations) in the Urban Creeks Monitoring Report, and the requirements that the Integrated Monitoring Report contain “a comprehensive analysis of all data collected” and for “Pollutants of Concern, the report shall include methods, data, calculations, load estimates, and source estimates for each Pollutant of Concern Monitoring parameter,” are already required by federal law.

Moreover, all prior permits required the permittees to 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; identify potential sources of pollutants in stormwater discharge; and evaluate the effectiveness of representative stormwater pollution prevention or control measures.<sup>1152</sup> The permittees were also required to report on this monitoring and the results. The prior permits for Alameda, Santa Clara, Fairfield-Suisun, Contra Costa, and San Mateo specifically required their monitoring program to include the following reporting provisions:

The Monitoring Program shall include the following:

- i. Provision for conducting *and reporting* the results of special studies conducted by Permittees which are designed to determine effectiveness and BMPs or control measures, define a Performance Standard or assess the adverse impacts of a pollutant or pollutants on beneficial uses.
- ii. Provisions for conducting watershed monitoring activities including: identification of major sources of pollutants of concern; evaluation of the effectiveness of control measures and BMPs, and use of physical, chemical, and biological parameters and indicators as appropriate.
- iii. Identification and justification of representative sampling locations, frequencies and methods, suite of pollutants to be analyzed, analytical methods, and quality assurance procedures.<sup>1153</sup>

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<sup>1152</sup> Exhibit I, Regional Board’s Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et al.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

<sup>1153</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment

Vallejo's prior permit required a summary of the monitoring data accumulated during the monitoring year.<sup>1154</sup> Vallejo's prior stormwater management plan indicates that it participated in the BASMAA Regional Monitoring Strategy, which helps all member agencies "assess compliance with maximum extent practicable, determine impacts on beneficial uses in receiving waters, decide on appropriate actions to protect and enhance those beneficial uses, and document the effectiveness of their programs."<sup>1155</sup>

Therefore, the substantive reporting requirements imposed by Sections C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi. for status monitoring, long-term monitoring, pollutants of concern monitoring, and the two monitoring projects (stressor/source identification and BMP effectiveness investigations) in the annual Urban Creeks Monitoring Report due March 15 and the Integrated Monitoring Report due March 15, 2014, are not new and do not increase the level of service provided to the public.

- 3) The remaining requirements in Section C.8.g.v. to include in the Integrated Monitoring Report a budget summary for each monitoring requirement and recommendations for future monitoring, which also becomes part of the ROWD for the reissuance of the next permit, are required by existing federal law and are not new.

Section C.8.g.v. also requires the Integrated Monitoring Report due March 15, 2014, to include "a budget summary for each monitoring requirement and recommendations for future monitoring. This report will be part of the next Report of Waste Discharge for the reissuance of this Permit."<sup>1156</sup> Water Code section 13260 requires the Report of Waste Discharge (ROWD) when proposing to discharge waste within any region that could affect the quality of the waters of the state and the ROWD starts the application process for a new NPDES permit.

These requirements are not new. Existing federal law requires that applications for a MS4 NPDES stormwater permit identify "the budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs" and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the requirements of the program, including the monitoring program, for each fiscal year to be covered by the permit.<sup>1157</sup> Applications must also contain a proposed management program including recommendations for

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55, Order 99-059), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 38; Exhibit BB (25), Order 99-058, page 11.

<sup>1154</sup> Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5.

<sup>1155</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 71; see also, Exhibit BB (9), BASMAA Regional Monitoring Strategy, page 3.

<sup>1156</sup> Exhibit A, Test Claim, 10-TC-02, page 227 (Test claim permit, Section C.8.g.v.).

<sup>1157</sup> Code of Federal Regulations, title 40, sections 122.26(d)(1)(vi) and 122.26(d)(2)(vi).

monitoring.<sup>1158</sup> Federal law also requires annual reports identifying annual expenditures and budget for the year, proposed changes to the programs established in the permit, and any necessary revisions.<sup>1159</sup>

Accordingly, the requirements in Section C.8.g.v. to include a budget summary for each monitoring requirement and recommendations for future monitoring in the Integrated Monitoring Report are not new and do not increase the level of service to the public.

- 4) The requirements imposed by Section C.8.g.ii. to maintain an information management system that will electronically transfer data and report all data collected during the previous year in electronic SWAMP comparable format to the Regional Data Center of the California Environmental Data Exchange Network by January 15 are new requirements that constitute a state-mandated new program or higher level of service.

In addition to the annual Urban Creeks Monitoring Report and Integrated Monitoring Report due March 15 of each year, which summarize and analyze the data,<sup>1160</sup> Section C.8.g.ii. requires the permittees to submit an Electronic Status Monitoring Data Report no later than January 15 of each year, on the data collected during the previous October 1–September 30 period in a format compatible with the SWAMP database. “Permittees shall maintain an information management system that will support electronic transfer of data to the Regional Data Center of the *California Environmental Data Exchange Network (CEDEN)*, located within the San Francisco Estuary Institute.”<sup>1161</sup> Water quality objective exceedances are required to be highlighted in the report.<sup>1162</sup>

Thus, pursuant to the plain language of the test claim permit, the permittees are required to maintain an information management system that electronically transfers data to the Regional Data Center of the San Francisco Estuary Institute, and then electronically report, by January 15, the data collected during the previous year in a format that is compatible with the SWAMP database and highlight any water quality exceedances in the report. The analysis and conclusions of the data are then included in the Urban Creeks Monitoring Report and Integrated Monitoring Report, due March 15. This interpretation is consistent with San Mateo’s Integrated Monitoring Report for Water Years 2012 and 2013, which states the following: “Monitoring data presented in

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<sup>1158</sup> Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(A)(5) and 122.26(d)(2)(iv)(C).

<sup>1159</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1160</sup> Exhibit A, Test Claim, 10-TC-02, pages 226-227 (Test claim permit, Sections C.8.g.iii. and C.8.g.v.).

<sup>1161</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>1162</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

this report were submitted electronically to the SFRWQCB and may be obtained via the San Francisco Bay Area Regional Data Center (<http://water100.waterboards.ca.gov/ceden/sfei.shtml>)."<sup>1163</sup>

The Regional Board agrees the permittees were not required to submit reports electronically under prior law, but asserts the permittees were already compiling data in electronic form:

The San Francisco Bay Water Board agrees that C.8 Claimants' prior permits did not require that they submit reports electronically. The San Francisco Bay Water Board included the requirement to report data electronically because Permittees have submitted all previous monitoring reports with data in tables created with computer software. In light of the fact that Permittees already compile their data in electronic form, the Provision merely requires that they submit that data via email rather than print it out and submit it in hard copy. It is arguably less costly to submit a report electronically than by using mail delivery.<sup>1164</sup>

The Commission finds the requirements in Section C.8.g.ii. are new. Federal law requires the permittees to *retain* records of all monitoring data for a period of three years as follows:

Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application."<sup>1165</sup>

Federal law requires the records of monitoring information shall include the following:

- The date, exact place, and time of sampling or measurements;
- The individual(s) who performed the sampling or measurements;
- The date(s) analyses were performed;
- The individual(s) who performed the analyses;

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<sup>1163</sup> Exhibit BB (23), Integrated Monitoring Report for Water Years 2012 and 2013, page 9.

<sup>1164</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1165</sup> Code of Federal Regulations, title 40, section 122.41(j)(2).



- The analytical techniques or methods used; and
- The results of such analyses.<sup>1166</sup>

Federal law then requires the permittee to provide a *summary* of monitoring data each year to the Regional Board.<sup>1167</sup> However, federal law does not require the electronic submission of all data collected and does not require multiple annual reports.

Moreover, the prior permits did not contain these requirements. Even if the permittees decided to maintain and submit data electronically under prior law, there was no requirement by the state to do so. Government Code section 17565 states “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.”

Accordingly, the Commission finds the following requirements imposed by Section C.8.g.ii. of the test claim permit are new:

- Maintain an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>1168</sup>
- Submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>1169</sup>

These requirements are also mandated by the state. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose

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<sup>1166</sup> Code of Federal Regulations, title 40, section 122.41(j)(3).

<sup>1167</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1168</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>1169</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

the requirement by virtue of a “true choice,” the requirement is not federally mandated.<sup>1170</sup>

As indicated above, federal law does not require the electronic submission of the data collected and, thus, the Regional Board exercised discretion with respect to this requirement.

The Water Boards contend, however, that 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, pursuant to Section C.8.g.ii., are not mandated by the state. Rather, they contend these provisions, which address how data that is federally required to be maintained and submitted, impose costs that are de minimis to the federal requirement and, thus, the costs are not mandated by the state pursuant to the court’s holding in *San Diego Unified School Dist. v. Commission on State Mandates*.<sup>1171</sup>

*San Diego Unified School Dist.* is distinguishable, however. In that case, the Supreme Court addressed whether certain due process procedural requirements, which were triggered by discretionary decisions of school districts to seek an expulsion of a student, were mandated by the state. The court recognized the initial discretionary decision to seek expulsion triggered a federal constitutional mandate to provide due process procedural rights for the student. The court noted, however, that case law in the area of due process procedures concerning expulsion matters was undeveloped at the time. Thus, when the state enacted the expulsion legislation it adopted specific statutory procedures designed to comply with the students’ underlying federal due process rights, including various notice, inspection rights, and recording rules, and that even in the absence of the test claim statute, school districts would be mandated by federal law to provide these rights.<sup>1172</sup> The court determined that the procedures “did not significantly increase the cost of compliance with the federal mandate” to provide due process for the student and that “for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable. . . .”<sup>1173</sup> The court also stated that “[w]e do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than “incidental” or “de minimis” expenses in excess of those demanded by federal law, and

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<sup>1170</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

<sup>1171</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, pages 8-9.

<sup>1172</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889.

<sup>1173</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890.

thus gives rise to a reimbursable state mandate to that extent.”<sup>1174</sup>

As indicated above, federal law does *not* require the electronic submission of the data collected. Federal law simply requires the permittee to provide a summary and analysis of monitoring data each year to the Regional Board, which under this permit is accomplished with the annual Urban Creeks Monitoring Report and the Integrated Monitoring Report, due March 15.<sup>1175</sup> Similar annual reports summarizing and analyzing the monitoring data were required under the prior permits to satisfy the federal requirement.<sup>1176</sup> Unlike the situation in *San Diego Unified School Dist.*, these federal reporting requirements are clear. The *additional* requirements imposed by Section C.8.g.ii. of the test claim permit to maintain an information management system that electronically transfers data to the Regional Data Center of the San Francisco Estuary Institute, and then electronically report, by January 15 each year, the data collected during the previous year are imposed by the Regional Board under its discretionary authority and are not part and parcel of the federal mandate. In the absence of these state requirements, local government would *not* be required to maintain and annually submit electronically all monitoring data; but would simply have to submit a summary and analysis of the data as indicated above. Thus, the Commission finds that the new and additional requirements imposed by Section C.8.g.ii. are mandated by the state.

The Regional Board also argues the requirements are not a new program or higher level of service because they are not unique to government since electronic reporting of monitoring data is also required of private dischargers subject to the State’s General Construction Permit as follows:

As discussed above private entities are subject to NPDES permit requirements in order to discharge to waters of the United States. Private parties are expressly required to report stormwater data electronically. The NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities requires that all dischargers covered under the permit must submit electronic reports that include monitoring data.<sup>1177</sup>

The Regional Board submitted the General Construction Permit identified in their comments, and it does require the electronic submission of the annual report, including

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<sup>1174</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890, footnote 24.

<sup>1175</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1176</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1177</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 47.

a summary and evaluation of all sampling and analysis results and laboratory reports as follows:

All dischargers must prepare and electronically submit an annual report no later than September 1 of each year using the Storm water Multi-Application Reporting and Tracking System (SMARTS). The Annual Report must include a summary and evaluation of all sampling and analysis results, original laboratory reports, chain of custody forms, a summary of all corrective actions taken during the compliance year, and identification of any compliance activities or corrective actions that were not implemented.”<sup>1178</sup>

The General Construction Permit does not require the electronic submission *of the data in SWAMP format*, however, and does not require multiple annual reports. The test claim permit requires the permittees “to submit electronic *and* comprehensive reports on their water quality monitoring.”<sup>1179</sup> So the test claim permit requirements are not the same as those in the General Construction Permit. Therefore, the Commission finds that the requirements in Section C.8.g.ii. are unique to local government.

Moreover, the requirements carry out the governmental function of providing a service to the public.<sup>1180</sup> The monitoring data and results are used to “focus actions to reduce pollutant loadings to comply with applicable WLAs, and protect and enhance the beneficial uses of the receiving waters in the Permittees’ jurisdictions and the San Francisco Bay.”<sup>1181</sup> The requirements also enhance public awareness and help facilitate analysis of the data.<sup>1182</sup> This is no different than the finding by the Second District Court of Appeal, which found in the 2021 *Department of Finance* case, the operation of stormwater drainage and flood control systems is a governmental function that provides a service to the public and the new requirements imposed uniquely on local government to prevent or reduce the discharge of pollutants from their stormwater

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<sup>1178</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1348, 1374 [Attachment 50, Order No. 2009-0009-DWQ, General NPDES Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities].

<sup>1179</sup> Exhibit A, Test Claim, 10-TC-02, page 339 (Fact Sheet), emphasis added.

<sup>1180</sup> *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.

<sup>1181</sup> Exhibit A, Test Claim, 10-TC-02, page 332 (Fact Sheet).

<sup>1182</sup> Exhibit A, Test Claim, 10-TC-02, page 339 (Fact Sheet).

systems by placing and maintaining trash receptacles at transit stops provided a higher level of service.<sup>1183</sup>

Turning to the instant case, there are three pertinent governmental functions implicated by the challenged requirements for purposes of section 6: The operation of stormwater drainage and flood control systems; the installation and maintenance of trash receptacles at transit stops; and the inspection of commercial, industrial, and construction facilities and sites to ensure compliance with environmental laws and regulations. The first existed prior to the Regional Board's permit; the other two are new. Each is a governmental function that provides services to the public, and the carrying out of such functions are thus programs under the first part of the Supreme Court's definition of that term.

In the case of the provision of stormwater drainage and flood control services, the trash receptacle requirement provides a higher level of service because it, together with other requirements, will reduce pollution entering stormwater drainage systems and receiving waters. In addition, litter will presumably be reduced at transit stops and adjacent streets and sidewalks; as the local governments put it, the "community is cleaner as a result."

Thus, the mandated activities to maintain an information management system that will electronically transfer monitoring data to the Regional Data Center of the San Francisco Estuary Institute, and then electronically report, by January 15, the data collected during the previous year in a format that is compatible with the SWAMP database are specific actions imposed uniquely on local government and are designed to assess whether pollution entering stormwater drainage systems and receiving waters are reduced to the MEP and whether the storm drainage systems are meeting water quality standards.<sup>1184</sup> Thus, the new mandated activities provide a governmental service to the public.

Accordingly, the Commission finds that the following requirements imposed by Section C.8.g.ii. of the test claim permit mandate a new program or higher level of service:

- Maintain an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>1185</sup>
- Submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data

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<sup>1183</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 558.

<sup>1184</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 558-560.

<sup>1185</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>1186</sup>

- 5) The requirement in Section C.8.g.vii. to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list, constitutes a state-mandated new program or higher level of service.

Section C.8.g.vii. states the following:

Permittees shall make electronic reports available through a regional data center, and optionally through their web sites. Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>1187</sup>

The only report required by the test claim permit to be maintained electronically is the Electronic Status Monitoring Data Report identified in the section above, which is submitted to the Regional Data Center of the California Environmental Data Exchange Network, and that requirement is new. And although Section C.8.g.ii. of the test claim permit requires that the monitoring data be submitted electronically, it does not require the other monitoring reports analyzing the data be maintained or submitted electronically. And federal law does not require electronic submission of MS4 reports until December 21, 2025.<sup>1188</sup> If a permittee decides to submit a monitoring report other than the Electronic Status Monitoring Data Report to the Regional Board electronically, then it will have to comply with the requirement to make that report available through a regional data center. However, downstream requirements triggered by an underlying discretionary decision are not mandated by the state.<sup>1189</sup>

The requirement to notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, however, is a new requirement. The Regional Board admits the prior permits did not require reporting data to be accessible to the public, but argues the permittees were already subject to the Public Records Act as follows:

Although C.8 Claimants' prior permits did not require that they make reporting data accessible to the public, they were already required to do

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<sup>1186</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>1187</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>1188</sup> Code of Federal Regulations, title 40, section 122.42(c); see also Code of Federal Regulations, title 40, section 127.16 (which requires NPDES reports be filed electronically "after" December 21, 2025).

<sup>1189</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731, 743.

so under the Public Records Act. Government Code section 6253.9 requires that public agencies make data available upon request to the public in electronic format when that data is in electronic format. The requirement to post the data in a database accessible to the public adds further specificity to the C.8 Claimants' prior permits.<sup>1190</sup>

The monitoring reports are public records. However, the Public Records Act does not require a local agency to affirmatively notify stakeholders and members of the public about the availability of electronic and paper monitoring reports. Rather, the Public Records Act simply requires public records be available for inspection by the public during the office hours of a local agency, authorizes a local agency to upload the public record to its website, requires the local agency to provide a copy of the public record upon request, and to provide the record electronically upon request if the record is kept in an electronic format.<sup>1191</sup>

Thus, the Commission finds the following requirement imposed by Section C.8.g.vii. is new:

- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>1192</sup>

The Commission further finds the new requirement imposes a state-mandated program. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.<sup>1193</sup>

Federal law states "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and

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<sup>1190</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 40.

<sup>1191</sup> Government Code sections 7922.525, 7922.530, 7922.545, and 7922.570.

<sup>1192</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>1193</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

assisted by the Administrator and the States.”<sup>1194</sup> Accordingly, federal law requires the proposed runoff management programs developed by permittees must also involve public participation. Federal regulations require proposed management programs, which “shall include a comprehensive planning process *which involves public participation* and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable . . . .”<sup>1195</sup> “Public participation” is not defined in the federal statutes or regulations. However, EPA’s MS4 Program Evaluation Guidance describes the public participation activities as requiring, at a minimum, notice of and an opportunity to comment on the stormwater management plan:

#### Public Participation Activities

Ideally, permittees give the public the opportunity to participate in the development, implementation, evaluation, and improvement of the stormwater program. At the very least, permittees need to notify the public about the availability of the SWMP [stormwater management plan] and notice of intent and solicit comments. Some permittees have stakeholder workgroups that are involved in developing policy and programs. Many permittees encourage and facilitate involvement by coordinating or promoting community events and promoting volunteerism in the community through activities such as storm drain stenciling, stream cleanups, riparian tree plantings, and other programs.<sup>1196</sup>

However, federal law does not require notice be provided to stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list and, thus, this requirement is mandated by the state.

Moreover, the requirement is unique to government and provides a governmental service to the public to inform the public about the condition of the waters and whether they meet water quality standards and, thus, the requirement constitutes a new program or higher level of service.

Thus, the following requirement in Section C.8.g.vii. mandates a new program or higher level of service:

- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>1197</sup>

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<sup>1194</sup> United States Code, title 33, section 1251(e).

<sup>1195</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

<sup>1196</sup> Exhibit BB (42), U.S. EPA MS4 Program Evaluation Guidance, January 2007, page 38.

<sup>1197</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).



**3. Sections 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., and C.10.d.ii., Addressing Requirements to Reduce Trash Loads, Impose Some New Requirements that Constitute State-Mandated New Programs or Higher Levels of Service.**

The claimants seek reimbursement to comply with Section C.10. of the test claim permit, which imposes the following requirements to reduce trash loads from MS4s by 40 percent by 2014, 70 percent by 2017, and 100 percent by 2022:<sup>1198</sup>

- Short-Term Trash Load Reduction Plan (Section 10.a.i.). Each permittee is required to submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.<sup>1199</sup>
- Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). Each permittee, working collaboratively or individually, is required to determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Regional Board by February 1, 2012, along with documentation of the methodology used to determine the load level. The submittal shall also include a description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels. The submittal shall account for the drainage areas of a permittee's jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.

Each permittee is also required to submit a progress report by February 1, 2011, that indicates whether it is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used. The report shall also include the types and examples of documentation that will be used to propose exclusion areas,

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<sup>1198</sup> Exhibit A, Test Claim, 10-TC-02, pages 45-52; Exhibit B, Test Claim, 10-TC-03, pages 38-44; Exhibit C, Test Claim, 10-TC-05, pages 44-51.

<sup>1199</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

and the land use characteristics and estimated area of potentially excluded areas.<sup>1200</sup>

- Minimum Full Trash Capture (Section C.10.a.iii.). Except as specified, permittees are required to install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions. “A population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000, is exempt from this trash capture requirement. The minimum number of trash capture devices required to be installed and maintained by non-population-based Permittees is included in Attachment J of the test claim permit.<sup>1201</sup>

All installed devices that meet the following full trash capture definition may be counted toward this requirement regardless of date of installation. A full capture system or device is any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area.<sup>1202</sup>

- Trash Hot Spots (Section 10.b.i., ii., iii.). The Permittees are required to clean up selected Trash Hot Spots to a level of “no visual impact” at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length. The minimum number of trash hot spots per permittee is identified in Attachment J of the test claim permit. The permittees shall submit the selected trash hot spots to the Regional Board by July 1, 2010. “The list should include photo documentation (one photo per 50 feet) and initial assessment results for the proposed hot spots.”

The Permittees are required to quantify the volume of material removed from each trash hot spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after clean up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>1203</sup>

- Long Term Trash Load Reduction Plan (Section 10.c.). Each Permittee is required to submit a Long-Term Trash Load Reduction Plan, including an

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<sup>1200</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>1201</sup> Exhibit A, Test Claim, 10-TC-02, pages 410 et seq. (Test claim permit, Attachment J).

<sup>1202</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1203</sup> Exhibit A, Test Claim, 10-TC-02, pages 234-235 (Test claim permit, Section C.10.b.).

implementation schedule, to the Regional Board by February 1, 2014. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and “an increased level of implementation” designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1204</sup>

- Reporting (Section 10.d.i., ii.). In each Annual Report, each permittee is required to provide a summary of its trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action. The latter shall include each Trash Hot Spot selected pursuant to C.10.b. Beginning with the 2012 Annual Report, each Permittee shall also report its percent annual trash load reduction relative to its Baseline Trash Load.

The Permittees shall retain records for review providing supporting documentation of trash load reduction actions and the volume and dominant type of trash removed from full trash capture devices, from each Trash Hot Spot cleanup, and from additional control measures or best management practices implemented. Data may be combined for specific types of full trash capture devices deployed in the same drainage area. These records shall have the specificity required for the trash load reduction tracking method established pursuant to subsection C.10.a.iii.<sup>1205</sup>

The test claim permit further provides “Flood management agencies, which are non-population-based Permittees that do not have jurisdiction over urban watershed land, are not subject to these trash reduction requirements except for minimum full trash capture and Trash Hot Spot requirements.”<sup>1206</sup>

The test claim permit indicates trash is a pollutant of concern and a pervasive problem near and in creeks and in the San Francisco Bay.<sup>1207</sup> Trash is defined to consist of litter and particles of litter as follows: “*Litter* means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture,

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<sup>1204</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

<sup>1205</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i., ii.).

<sup>1206</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.).

<sup>1207</sup> Exhibit A, Test Claim, 10-TC-02, pages 156, 346 (Test claim permit, Finding 15, Fact Sheet).

mining, logging, sawmilling, or manufacturing.”<sup>1208</sup> The Fact Sheet explains the significant impact of trash on the environment as follows:

Controlling trash is one of the priorities for this Permit reissuance not only because of the trash discharge prohibition, but also because trash and litter cause particularly major impacts on our enjoyment of creeks and the Bay. There are also significant impacts on aquatic life and habitat in those waters and eventually to the global ocean ecosystem, where plastic often floats, persists in the environment for hundreds of years, if not forever, concentrates organic toxins, and is ingested by aquatic life. There are also physical impacts, as aquatic species can become entangled and ensnared and can ingest plastic that looks like prey, losing the ability to feed properly.<sup>1209</sup>

The Regional Board states the requirement to control and prohibit trash is not new; “Claimants were required through plans developed to implement their prior permits to remove trash from the urban landscape and from the stormdrain system.”<sup>1210</sup> Although the Regional Board generally agrees “Provision C.10 requires a higher level of service from Claimants,”<sup>1211</sup> the Regional Board contends the requirements are not eligible for reimbursement.

As explained below, the Commission finds the required activities associated with the Short Term Trash Load Reduction Plan (Section C.10.a.i.), the Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.ii.), Minimum Full Trash Capture (Section C.10.a.iii.), submitting selected Trash Hot Spots to the Regional Board by July 1, 2010 (C.10.b.ii.), and submitting the Long Term Trash Reduction Plan (Section C.10.c.) are new. The Commission also finds the Hot Spot Assessments (Section C.10.b.iii.) and Reporting requirements (C.10.d.i., ii.) are new for *some* of the permittees, but not all. The Commission finds the new required activities are mandated by the state and impose a new program or higher level of service. The remaining requirements in Sections C.10.b.i. and C.10.b.ii. to select and clean trash hot spots are not new and do not mandate a new program or higher level of service.

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<sup>1208</sup> Exhibit A, Test Claim, 10-TC-02, page 346 (Fact Sheet, quoting Government Code section 68055.1(g)), emphasis in original.

<sup>1209</sup> Exhibit A, Test Claim, 10-TC-02, pages 345-346 (Fact Sheet).

<sup>1210</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 48.

<sup>1211</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 48.

a. Existing Federal Law and Prior Prohibitions on Trash

- i. *Federal law prohibits non-stormwater discharges and requires controls to reduce the discharge of pollutants to the maximum extent practicable.*

Trash is addressed in the CWA as both a stormwater discharge and an illicit non-stormwater discharge. Federal law defines stormwater as “storm water runoff, snow melt runoff, and surface runoff and drainage; events related to precipitation,” which can carry with it pollutants such as trash.<sup>1212</sup> A discharge to an MS4 that “is *not* composed entirely of stormwater” is considered a non-stormwater, or dry weather discharge.<sup>1213</sup> A non-stormwater discharge that is prohibited by law is an illicit discharge.<sup>1214</sup>

Federal law requires permits for discharges from municipal stormwater systems “shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers,” unless those discharges are conditionally exempted from this prohibition.<sup>1215</sup> Trash is not an exempted discharge and, thus, must be effectively prohibited under federal law. The test claim permit defines trash as follows:

Trash consists of litter and particles of litter. California Government Code Section 68055.1 (g) defines litter as all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing.<sup>1216</sup>

To “effectively prohibit” non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges. This shall include:

- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.

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<sup>1212</sup> Code of Federal Regulations, title 40, section 122.26(b)(13).

<sup>1213</sup> Code of Federal Regulations, title 40, section 122.26(b)(2) defines “Illicit discharge” as “any discharge to a municipal separate storm sewer that is *not* composed entirely of storm water except discharges pursuant to a NPDES permit (*other than the NPDES permit for discharges from the municipal separate storm sewer*) and discharges resulting from firefighting activities.” Emphasis added.

<sup>1214</sup> Exhibit A, Test Claim, 10-TC-02, page 270 (Test claim permit, glossary).

<sup>1215</sup> United States Code, title 33, section 1342(p)(3)(B)(ii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

<sup>1216</sup> Exhibit A, Test Claim, 10-TC-02, page 274 (Test claim permit, glossary).

- A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water.
- A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer.<sup>1217</sup>

Federal law also requires permits for discharges from municipal stormwater systems “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.”<sup>1218</sup>

Applications for a large or medium municipal separate storm sewer discharge permit are required to include, “A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs.”<sup>1219</sup>

The application shall also include a proposed management program, which involves public participation and intergovernmental coordination, “to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.”<sup>1220</sup> The proposed management program is specifically required to include “A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls.”<sup>1221</sup> Among other things, the control measures shall include “a description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers,”<sup>1222</sup> and “a description of practices for operating

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<sup>1217</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2)-(4).

<sup>1218</sup> United States Code, title 33, section 1342(p)(3)(B)(iii).

<sup>1219</sup> Code of Federal Regulations, title 40, section 122.26(d)(1)(v)(A).

<sup>1220</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

<sup>1221</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A).

<sup>1222</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(1).

and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities.”<sup>1223</sup>

Finally, federal law requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit, which must ensure compliance with the CWA and its implementing regulations.<sup>1224</sup>

- ii. *The Basin Plan and Prior Permit Discharge Prohibitions and Receiving Water Limitations prohibited the discharge of trash into the waters of the State.*

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, like the test claim permit, 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 that were contained in the Regional Board’s Basin Plan.<sup>1225</sup> The 1995 Basin Plan contained the following narrative effluent limit for trash: “waters shall not contain floating material, including solids, liquids, foam and scum, in concentrations that cause nuisance or adversely affect beneficial uses.”<sup>1226</sup>

In addition to the discharge prohibitions and receiving water limitations, 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

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<sup>1223</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(3).

<sup>1224</sup> United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.44(i)(1), 122.43(a).

<sup>1225</sup> Exhibit I, Regional Board’s Comments on the Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A., B., and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B. and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1226</sup> Exhibit BB (6), Basin Plan 1995, page 46.

which will cause deleterious effects on aquatic biota, wildlife, or wildfowl, or which render any of these unfit for human consumption.”<sup>1227</sup>

Additionally, each permittee’s prior permit required that when discharges are causing an exceedance of an applicable water quality standard, the permittee shall notify the Regional Board and submit a report on the BMPs currently being implemented and additional BMPs that will be implemented to prevent or reduce the pollutants causing or contributing to the exceedance in water quality standards.<sup>1228</sup>

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.<sup>1229</sup>

b. Some of the requirements in Section C.10. are new.

i. *The requirement in Section C.10.a.i. to submit a Short-Term Trash Load Reduction Plan is new.*

Section C.10.a.i. of the test claim permit requires the permittees to submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan “shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an

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<sup>1227</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1866 (Attachment 53, Order R2-2003-0021), pages 1948-1949 (Attachment 55, Order 99-059), and page 2083 (Attachment 60, Order 01-024); Exhibit BB (25), Order 99-058, page 7; Exhibit BB (27), Order R2-2003-0034, page 18; Exhibit BB (43), U.S. EPA Permit No. CA612006, page 4.

<sup>1228</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1867 (Attachment 53, Order R2-2003-0021), page 1949 (Attachment 55, Order 99-059); and page 2084 (Attachment 60, Order 01-024); Exhibit BB (25), Order 99-058, page 8; Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4-5.

<sup>1229</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et al.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.



increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.”<sup>1230</sup> The Plan shall also “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>1231</sup> The requirements in Section C.10.a.i. do not apply to flood management agencies, which are non-population based permittees without jurisdiction over urban watershed land.<sup>1232</sup>

The Regional Board contends this section does not constitute a new program or higher level of service since “[c]laimants were required to implement plans under their prior permits that provided for removal of trash from the urban landscape and from the storm drain system. Those actions included street sweeping, storm drain inlet cleaning and storm drain system maintenance and cleaning.”<sup>1233</sup> The Water Boards further assert the short-term trash load reduction plan required by the test claim permit simply mandates that permittees do what they were required to do under their previous permits when water quality standards are not being met and beneficial uses are affected: i.e., 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.<sup>1234</sup>

The claimants disagree and contend the requirements in Section 10.a.i. mandate a new program or higher level of service as follows:

However, the Regional Board is now requiring the County to implement a Short-Term Trash Reduction Plan to reduce 40% of trash from the storm drainage system. This program requirement poses a significantly higher level of service than previously required, since the previous program is no longer sufficient, and, under the MRP on its face, only new and increased levels of control measure implementation can be used to demonstrate the 40% reduction.

As the Regional Board notes, the previous permits required the County to implement street sweeping and storm drain maintenance, litter control, and general plans related to trash control. [Fn. omitted.] The tasks cited by the Regional Board related to investigation and were not focused on trash reductions required by Provision C.10.a.i. Most importantly, the previous requirements cannot be used as a baseline because only new and increased levels of control measure implementation can be used to demonstrate the 40% reduction. To comply with this baseline reduction,

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<sup>1230</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>1231</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>1232</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.).

<sup>1233</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 49.

<sup>1234</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 3.

the County will be required to develop new programs and expend substantially more funds than previously required. For example, anticipated new programs that the County will need to develop, implement and include in its Short Term Plans to achieve a 40% reduction in trash by July 1, 2014, include targeted enforcement of illegal dumping activities that require law enforcement resources; staffing resources needed to prevent the use of single use plastic grocery bags; new or enhanced street sweeping programs that require additional staffing, equipment and/or contract resources to increase sweeping frequencies in trash-prone areas; and, enhanced public education and outreach programs designed to reduce littering. Therefore, it is self-evident that the new 40% required reduction constitutes a new program and higher levels of service.<sup>1235</sup>

The Commission finds the requirements in Section C.10.a.i. are new and constitute a state-mandated new program or higher level of service.

The plain language of Section C.10.a.i. requires the submittal of a short-term reduction plan by February 1, 2012, to achieve the 40 percent trash load reduction by July 1, 2014. The Plan is required to describe the following:

- “Control measures and best management practices, including any trash reduction ordinances, that are *currently* being implemented and the current level of implementation.”
- “*Additional* control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.”
- And “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>1236</sup>

The control measures and best management practices “currently being implemented” are described in the permittees’ prior management plans discussed below, which as the Regional Board indicates, included the inspection and cleaning of storm drain facilities and watercourses, street sweeping, removal of litter, placing and maintaining trash receptacles, posting “no littering signs,” and community clean-up days, all for the purpose of complying with the Basin Plan, and discharge prohibitions and receiving

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<sup>1235</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 38, emphasis in original. See also, Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, pages 46-47.

<sup>1236</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.), emphasis added.

water limitations of the prior permits, which prohibited trash or litter “in concentrations that cause nuisance or adversely affect beneficial uses.”<sup>1237</sup>

Alameda’s 2001-2008 Stormwater Management Plan required agencies shall participate in at least four to eight community outreach program activities each year depending on the size of the agency’s population from a list of possible activities, at least one of which every other year must be related to developing watershed awareness through activities such as supporting a friends of a watershed group and encouraging creek cleanups; conducting creek, lagoon, or shoreline cleanups within its jurisdiction on an annual basis; and participating in a local event in its jurisdiction or a neighboring jurisdiction as part of the Coastal Commission’s annual Coastal Cleanup Day or Earth Day.<sup>1238</sup> The performance standards for municipal maintenance of storm drain facilities and watercourses required each agency to inspect and clean as necessary, storm drainage facilities, defined as inlets, culverts, v-ditches, pump stations, open channels and watercourses, once a year on average unless an alternative schedule is approved in a written action plan.<sup>1239</sup> Agencies shall remove the maximum amount of material possible, and keep records of the amount of material removed and the areas where man-made materials were removed and the types of material removed and estimated quantity or weight removed.<sup>1240</sup> Materials removed from a storm drainage facility shall be stored on a concrete or asphalt pad in a contained area to allow liquids to evaporate or drain to the sanitary sewer.<sup>1241</sup> The litter control performance standard required agencies provide an adequate number of litter receptacles in commercial areas and other litter source areas, ensure litter receptacles are adequately maintained to

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<sup>1237</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 48-49.

<sup>1238</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2416 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008).

<sup>1239</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2421 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008).

<sup>1240</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2421-2422 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008).

<sup>1241</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2423 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008).

minimize or prevent spillage, and document the areas targeted for litter removal and the total amount of material removed.<sup>1242</sup>

Santa Clara's 2004 Urban Runoff Management Plan contained performance standards for Public Streets, Roads and Highways, which included a section on litter control BMPs as follows: 1) Post "No Littering" signs where needed and enforce anti-littering laws; 2) Provide an adequate number of litter receptacles in commercial areas and other litter source areas; 3) Empty litter receptacles on a frequent enough basis to prevent spillage; and 4) Encourage public education efforts to include an anti-littering message.<sup>1243</sup> The BMPs for Storm Drain System Operation and Maintenance provided routine inspection and cleaning of inlets/catch basins, storm drain lines, pump stations, detention basins, drainage ditches and debris basins, during which as much debris, silt, trash, and sediment shall be removed as possible and the removed waste dewatered before proper disposal to the landfill.<sup>1244</sup> The Monitoring program element has a specific section on Trash Management Activities.<sup>1245</sup> It reports that in 2003, the State Water Resources Control Board followed a recommendation from the Regional Board to add all urban creeks, lakes, and shorelines to the 303(d) monitoring list due to the threat of trash impairing water quality. In a proactive response to the recommendation, the Santa Clara permittees formed a trash ad-hoc task group, which conducted the following activities: a survey of existing trash management practices and policies; created a trash work plan to identify the strategies to be used to address trash problem areas in streams and waterways; and created a statement of the Santa Clara permittees' trash goals for the next five years (2004-2009).<sup>1246</sup>

Fairfield-Suisun's prior stormwater management plan also required the permittees to encourage local law enforcement officials to enforce laws prohibiting dumping of any material into storm drain systems and watercourses; inspect inlets, culverts, ditches, channels, and watercourses at least once per year and clean as needed; and when

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<sup>1242</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2425 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008).

<sup>1243</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5947 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>1244</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5945-5976 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>1245</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5777-5779 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004).

<sup>1246</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5777-5779 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004).

cleaning storm drain inlets and lines, remove the maximum amount of material at the nearest access point to minimize discharges to watercourses.<sup>1247</sup> The plan identified performance standards for litter control, requiring the Fairfield-Suisun permittees to provide an adequate number of litter receptacles in commercial areas and other litter source areas, pick up litter receptacles on a frequent enough basis to prevent spillage, document and maintain records for litter control monthly; encourage local law enforcement personnel and the District to post signs and enforce anti-littering laws; and encourage public education efforts to include an anti-littering message.<sup>1248</sup>

San Mateo 's stormwater management plan contained performance standards for the municipal maintenance component, which required agencies to inspect and clean as necessary all storm drain facilities (defined in the performance standard as "inlets, culverts, v-ditches, pump stations, open channels and watercourses"<sup>1249</sup>) at least once per year on average "unless an alternative schedule is approved."<sup>1250</sup> The inclusion of open channels and watercourses for annual inspection and cleaning is meant to include creeks, as the instructions in the performance standard note "if cleaning a 'natural' creek or waterway, minimize the removal of natural vegetation and focus on litter and trash removal."<sup>1251</sup> The performance standards for lagoon management include a section on litter and debris control, the activities for which include: provide and service a sufficient number of litter control receptacles in public areas; promote compliance with local litter control ordinances and policies; and inspect, service, and maintain structural litter and debris controls such as debris curtains, trash racks, and storm drain outfalls.<sup>1252</sup> The public information and participation section requires one or more of the following activities: identify and support a "Friends of (a watershed)" and encourage creek, lagoon, or shoreline cleanups, or adopt-a-creek or other volunteer monitoring and resource inventorying activities; conduct a creek, lagoon, or shoreline cleanup within the

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<sup>1247</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 88.

<sup>1248</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 89-90.

<sup>1249</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3931 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1250</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4007 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1251</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4008, 4049 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010, defining storm drain inlet conveyances to include "v-ditches, storm drain lines, channels, creeks, and culverts").

<sup>1252</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4022 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

municipality jurisdiction on an annual basis; or participate in a local event such as the Coastal Commission's annual Coastal Clean-up Day or Earth Day activities.<sup>1253</sup>

Contra Costa's stormwater management plan required "each agency will inspect, and clean as necessary, public storm drainage facilities (i.e. inlets, v-ditches, pump stations, open channels and watercourses), once a year on average unless an alternative schedule is approved as described in MUNI-21. The inspections and needed sweeping will preferably occur prior to the rainy season. In calculating this average, some facilities may be inspected more than once per year and others less than once per year."<sup>1254</sup>

Municipal standard MUNI-42 required "Each agency will identify illegal dumping hot spots. Agencies will conduct regular inspections, posting, and sweep-up to discourage additional dumping incidents. Each agency will consider appropriate actions to prevent illegal dumping."<sup>1255</sup> Each agency was required to have an adequate number of litter receptacles in litter source areas, pick up litter receptacles frequently enough to minimize spillage, promote public education efforts to include an anti-littering message, and encourage appropriate personnel and agencies to post signs and enforce anti-littering laws, and keep records of areas targeted for litter removal and the total amount of material removed.<sup>1256</sup>

Vallejo Sanitation and Flood Control District's Stormwater Management Plan for FY 1999/2000 through 2004/2005 requires best management practices for residential, industrial, and commercial developments within permittees' jurisdiction.<sup>1257</sup> For residential developments, developments with an association are required to implement trash management and litter control through litter patrol, emptying trash receptacles in common areas, and noting trash disposal violations by homeowners and businesses and reporting the violations for investigation. Industrial developments are required to have all trash enclosures and dumpster areas covered and protected from roof and surface drainage.<sup>1258</sup> The City of Vallejo Maintenance Division is also required by the Public Agency Activities section to implement street sweeping for the city of Vallejo, with commercial corridors swept on a weekly basis and residential streets swept at least once a month with selected areas swept more frequently in the fall for leaf removal.<sup>1259</sup> Streets in the unincorporated parts of Solano County are swept as needed. Half of the

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<sup>1253</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4037 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1254</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 74.

<sup>1255</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 80.

<sup>1256</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, pages 81-82.

<sup>1257</sup> Exhibit BB (49), Vallejo Sanitation District Storm Water Management Plan, page 24.

<sup>1258</sup> Exhibit BB (49), Vallejo Sanitation District Storm Water Management Plan, page 34.

<sup>1259</sup> Exhibit BB (49), Vallejo Sanitation District Storm Water Management Plan, page 58.

District's catch basins are inspected and cleaned each year, while open ditches and basins are cleaned on an as needed basis.<sup>1260</sup>

In addition, all of the prior permits required the permittees to report on the performance of these activities in their annual reports due September 15 each year.<sup>1261</sup> If an exceedance of water quality standards or water quality objectives persisted notwithstanding the implementation of their management plans, then all prior permits required that the discharger "shall assure compliance" with the discharge prohibitions and receiving water limitations by notifying and submitting a report to the Regional Board, which could be included in the annual report, describing the BMPs 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.<sup>1262</sup>

The short-term reduction plan required by the test claim permit, however, is a one-time report due February 1, 2012, which is designed to attain a new standard established by the test claim permit of a 40 percent trash load reduction by July 1, 2014, and requires the permittees to report on their plans for achieving that reduction in accordance with the test claim permit. This plan must take into account the requirement to install a minimum number of full trash capture devices required by Section C.10.a.iii. of the test claim permit, which as described below is new to the extent a permittee has not already installed such devices. The plan is required *in addition* to the annual reporting requirements imposed by Section C.16. of the test claim permit (still due September 15), which still requires permittees to identify and schedule the tasks necessary to achieve compliance with the test claim permit.<sup>1263</sup>

Thus, the Commission finds the following requirement imposed by Section C.10.a.i. of the test claim permit is new for all permittees, except for flood management agencies:

1. Submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe the following:

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<sup>1260</sup> Exhibit BB (49), Vallejo Sanitation District Storm Water Management Plan, page 61.

<sup>1261</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021), page 1951 (Attachment 55, Order 99-059), and page 2087 (Attachment 60, Order 01-124); Exhibit BB (27), Order R2-2003-0034, page 35; Exhibit BB (25), Order 99-058, page 10; and Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 5-6.

<sup>1262</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1263</sup> Exhibit A, Test Claim, 10-TC-02, page 265 (Test claim permit, Section C.16.).

- Control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation.
- Additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.
- The Plan shall also “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>1264</sup>

*ii. The requirements in Section C.10.a.ii., addressing the Baseline Trash Load and Trash Load Reduction Tracking Method, are new.*

Section C.10.a.ii. requires the permittees, working collaboratively or individually, to

- Determine the baseline trash load from its MS4.
- Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:
  - Documentation of the methodology used to determine the load level.
  - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
  - The submittal shall account for the drainage areas of a Permittee’s jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.
- Submit a progress report by February 1, 2011, that indicates whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>1265</sup>

The requirements in Section C.10.a.ii. do not apply to flood management agencies.<sup>1266</sup>

Section C.10.a.ii. also allows the permittees to propose areas to be excluded from the baseline trash load determination that already satisfy discharge prohibition A.2 (prohibiting the discharge of “rubbish, refuse, bark, sawdust, or other solid wastes” into surface waters or any place where they would eventually end up in surface waters, such

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<sup>1264</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>1265</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.)

<sup>1266</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.).



as floodplains) and trash related Receiving Water Limitations, with documentation demonstrating no material trash presence based on existing capture devices, trash flux measurement data from the MS4 and water column of streams during wet weather, trash hot spot assessments, and litter audits of street curbs and gutters in areas with high pedestrian traffic and high commercial activity.<sup>1267</sup> If a proposed excluded area is in a commercial, industrial, or high-density residential area or adjacent to a school or event venue, the permittee shall gather and submit an additional year of documentation by February 1, 2013 to support the basis for exclusion.<sup>1268</sup> If a permittee decides to exclude areas from the baseline trash load determination, the February 1, 2011 progress report shall also include the types and examples of documentation that will be used to propose exclusion areas, and the land use characteristics and estimated area of potentially excluded areas.<sup>1269</sup> These provisions, however, are not required by the test claim permit, but can be proposed at the discretion of a permittee.

The Fact Sheet explains the requirements in Section C.10.a.ii. are intended “to achieve the incremental trash load reductions in an accountable manner, [and therefore] the Permittees will propose Baseline Trash Loads and a Trash Load Reduction Tracking Method. The Tracking will account for additional trash load reducing actions and BMPs the Permittees implement.”<sup>1270</sup>

The Regional Board states “Although C.10 Claimants were required to report on trash reduction efforts in compliance with their prior permits, Provision C.a.ii [sic] provides more specificity than was required in C.10 Claimants' prior permits in that Permittees must report in an accountable manner on their focused efforts to reduce their overall trash loading to the storm sewer system by 40% by year 2013.” In comments on the Draft Proposed Decision, the Water Boards contend that the requirements to submit a baseline trash load and trash load reduction tracking method are not new monitoring requirements as follows:

Trash is a pollutant of concern and permittees were not complying with the receiving water limitations in previous permits. [Fn. omitted.] 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

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<sup>1267</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>1268</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.ii.).

<sup>1269</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.ii.).

<sup>1270</sup> Exhibit A, Test Claim, 10-TC-02, page 348 (Fact Sheet).

sources of trash (as required for the hot spot assessments) was a specific requirement for monitoring under previous permits. [Fn. omitted.]<sup>1271</sup>

The claimants state the requirements impose a new program:

No requirements in prior permits issued to the County, nor plans developed by the County or SCVURPPP, on behalf of the County, included provisions or tasks to develop baseline trash loading estimates or load reduction methodologies. The prior permit only required the County to document the amount of trash actually removed, whereas the new permit now requires the County to document the amount of litter being discharged, a very different requirement. These two measures are not comparable. Reporting the amount of litter being discharged will require the County, in conjunction with SCVURPPP, to develop and design an entirely new program to address these unknown figures, whereas the previous reporting requirement concerned figures known to the County, specifically, the amount of trash actually removed from the stormwater system.<sup>1272</sup>

The Commission finds the requirements in Section C.10.a.ii. are new. Under the permittees' prior stormwater management plans, the permittees were required to report the quantity or volume of trash removed, but not to establish a baseline trash load from the MS4, provide documentation of the methodology used to determine the load level, or identify a trash load reduction tracking method to demonstrate progress.<sup>1273</sup> As indicated in the Fact Sheet, these requirements are accountability measures now required to be reported to the Regional Board to determine the progress made towards achieving the 40, 70, and 100 percent reductions of trash under the permit.<sup>1274</sup>

Thus, the Commission finds that Section C.10.a.ii. imposes the following new requirements on all permittees, except for flood management agencies:

- Determine the baseline trash load from its MS4.
- Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:

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<sup>1271</sup> Exhibit AA, Water Boards' Comments on the Draft Proposed Decision, pages 4-5.

<sup>1272</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 39. See also, Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 47-48.

<sup>1273</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2421-2422 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008), pages 3951, 4009 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010); Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 88; and Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, pages 76-66.

<sup>1274</sup> Exhibit A, Test Claim, 10-TC-02, page 348 (Fact Sheet).

- Documentation of the methodology used to determine the load level.
  - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
  - The submittal shall account for the drainage areas of a Permittee's jurisdiction associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.
- Submit a progress report by February 1, 2011, indicating whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>1275</sup>
    - iii. *The requirements in Section C.10.a.iii., to install and maintain Minimum Full Trash Capture Devices, are new to the extent a permittee has not already installed full trash capture devices to meet the mandatory minimum number of devices required by the test claim permit.*

Except for permittees with smaller jurisdictions as specified below, Section C.10.a.iii. requires permittees to install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land draining to MS4s within their jurisdictions (as identified in Attachment J, Table 10.1 for each permittee).<sup>1276</sup> If the sum of the areas generating trash loads determined pursuant to Section C.10.a.ii. is a smaller acreage than the required trash capture acreage, a population-based permittee may reduce its minimum full trash capture requirement to the smaller acreage. "A population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000, is exempt from this trash capture requirement."<sup>1277</sup> The minimum number of trash capture devices required to be installed and maintained by non-population-based permittees (i.e., "Flood management agencies")<sup>1278</sup> is included in Attachment J, Table 10-2 of the test claim permit.<sup>1279</sup>

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<sup>1275</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>1276</sup> Exhibit A, Test Claim, 10-TC-02, pages 234, 411 et al. (Test claim permit, Section C.10.a.iii., Attachment J, Table 10.1).

<sup>1277</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1278</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1279</sup> Exhibit A, Test Claim, 10-TC-02, pages 415 (Test claim permit, Attachment J, Table 10-2).

Section C.10.a.iii. further states “All *installed* devices that meet the following full trash capture definition may be counted toward this requirement *regardless of date of installation.*”<sup>1280</sup> The permit then defines “a full capture system or device” as “any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area.”<sup>1281</sup> Thus, any pre-existing full trash capture devices installed by the permittees may be counted towards this requirement regardless of when the device was installed, provided the device meets the permit’s definition of a full trash capture device. In addition, any full trash capture device previously installed is required by existing law to be maintained by the permittee.<sup>1282</sup>

The Regional Board states Santa Clara County cooperated with implementing a study for “a pilot installation and assessment of full trash capture inlet based devices,” and contends Section C.10.a.iii. “includes more specificity than was required in C.10 Claimants' prior permits but does not impose a new program or higher level of service.”<sup>1283</sup>

The claimants contend Section C.10.a.iii. imposes new requirements as follows:

MRP Provision C.10.a.iii requires the County to install and maintain a mandatory minimum number of trash fall capture devices. The C.10 provisions in general are the most costly in the Test Claim, and the Minimum Full Trash Capture provisions are the most expensive of all the C. 10 provisions. Again, the estimates for the state mandated investment required here are significant: \$423,045 in 2010 and \$423,045 in 2011. In total, the estimated two year costs for all SCVURPPP permittees attributable to MRP Provision C. 10.a.iii is \$19,761,664.

While these cost estimates make it clear that the MRP requires a huge investment in Minimum Full Trash Capture devices, the prior permits did not require any of these devices to be installed. The Regional Board notes that Santa Clara County had cooperated in a pilot program regarding trash full capture devices. [Fn. omitted.] However, during the implementation of the pilot program, no fill trash capture devices were installed within the

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<sup>1280</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.), emphasis added.

<sup>1281</sup> Exhibit A, Test Claim, 10-TC-02, pages 234, 270 (Test claim permit, Section C.10.a.iii., glossary).

<sup>1282</sup> Code of Federal Regulations, title 40, section 122.41(e) requires “The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.”

<sup>1283</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 51.

unincorporated County and, thus, the County did not install the trash capture devices to comply with the requirements of Provision C.10.a.iii. The devices that were installed as part of the pilot program were done so voluntarily within the jurisdictional limits of the cities of San Jose and Sunnyvale, and were not required under the prior permits.<sup>1284</sup>

The Commission finds the requirements in Section C.10.a.iii. are new to the extent a permittee has not already installed full trash capture devices to meet the mandatory minimum number of devices required by the test claim permit.

Under prior law, some permittees had previous requirements to evaluate the feasibility of installing screens or grates to inhibit trash,<sup>1285</sup> and to regularly clean and maintain any structural litter control devices they installed.<sup>1286</sup> However, there were no previous requirements to install full trash capture devices as defined in the permit.

Two of the co-permittees within the Santa Clara Valley region, the cities of San Jose and Sunnyvale, participated in a pilot study of trash structural treatment controls to answer questions about the costs and effectiveness of full trash capture devices. Specifically, the pilot study looked at the trash load rates from specific land use types, the types of materials that can be caught and removed using full trash capture devices, the frequency at which these devices need to be cleaned for proper operation, and the overall cost of treatment per the amount of trash removed.<sup>1287</sup> As indicated above, these already-installed devices are counted to satisfy the minimum requirements of Section C.10.a.iii. and the installation and maintenance of the already-installed devices would not be new. However, there is no evidence in the record these permittees prior permits were amended or that they modified their stormwater management plan to require the use of full trash capture devices to meet the minimum standards identified in

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<sup>1284</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 39. See also, Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, pages 48-49.

<sup>1285</sup> See, Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2421 (Attachment 67, ACCWP Stormwater Quality Management Plan July 1-June 2008, February 10, 2003).

<sup>1286</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2422 (Attachment 67, ACCWP Stormwater Quality Management Plan July 1-June 2008, February 10, 2003, [requiring each agency to inspect trash racks after significant storms and remove debris as needed]), page 4022 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010, [requiring permittees inspect, service, and maintain any structural litter and debris controls installed on the lagoon]); Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 80 (requiring each agency to inspect trash racks after significant storms and remove debris as needed).

<sup>1287</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5363 (Attachment 90, SCVURPPP FY 2008-2009 Draft Workplan, Sections 1-9, March 1, 2008).

Section C.10.a.iii. Rather, this pilot study was performed voluntarily as a one-time study, and not as a requirement of the previous permit.

Thus, the Commission finds Section C.10.a.iii. imposes the following new requirements:

- Install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land draining to MS4s within their jurisdictions. The scope of this requirement is as follows:
  - A full capture system or device is “any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area”.
  - The mandatory minimum number of full trash capture devices for each permittee is identified in Attachment J to the test claim permit, Tables 10-1 and 10-2. However, if the sum of the areas generating trash loads determined pursuant to Section C.10.a.ii is a smaller acreage than the required trash capture acreage, the minimum full trash capture requirement is reduced to the smaller acreage for the population-based permittee.

The requirements to install and maintain full trash capture devices **does not apply:**

- To a population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000.<sup>1288</sup>
- To full trash capture devices installed by a permittee *before* the effective date of the test claim permit, which may be counted towards the minimum number of full trash capture devices identified in Attachment J, provided the device meets the permit’s definition of a full trash capture device.<sup>1289</sup>
- iv. *Sections 10.b.i. and C.10.b.ii. which require selection and cleanup of trash hot spots are not new, but the remaining requirements in Sections C.10.b.ii. and C.10.b.iii. which address hot spot reporting and assessment impose some new requirements on the permittees.*

Section C.10.b. states “Trash Hot Spots in receiving waters shall be cleaned annually to achieve the multiple benefits of beginning abatement of these impacts as mitigation and

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<sup>1288</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1289</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.); Code of Federal Regulations, title 40, section 122.41(e).

to learn more about the sources and patterns of trash loading.”<sup>1290</sup> Thus, Sections C.10.b.i., ii., iii. require the permittees to perform the following activities:

- Hot spot cleanup. Clean up selected Trash Hot Spots to a level of “no visual impact” at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length.<sup>1291</sup>
- Hot spot selection and reporting. Population -based permittees shall select high trash impacted locations on State waters totaling at least one Trash Hot Spot per 30,000 population, or one per 100 acres of Retail/Wholesale Commercial Land Area, within their jurisdictions based on Association of Bay Area Governments (ABAG) 2005 data<sup>1</sup>, whichever is greater.<sup>1292</sup> The minimum number of Trash Hot Spots per Permittee is included in Attachment J for population and non-population-based Permittees (i.e., “Flood management agencies”).<sup>1293</sup>

The Permittees shall each submit selected Trash Hot Spots to the Water Board by July 1, 2010. The list “should include” photo documentation (one photo per 50 feet) and initial assessment results for the proposed hot spots.<sup>1294</sup>

- Hot spot assessment. The Permittees shall quantify the volume of material removed from each trash hot spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after clean up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length. “Trash Hot Spots may also be assessed using either the Rapid Trash Assessment (RTA v.8) or the SCVURPPP Urban RTA variation of that method.”<sup>1295</sup>

Flood management agencies, which are non-population-based Permittees without jurisdiction over urban watershed land, are subject to the Trash Hot Spot requirements.<sup>1296</sup>

The Regional Board, citing to Alameda’s 2003 Multi-Year Plan for Monitoring and Assessment and a 2003 Santa Clara Trash Control Work Plan, contends the required activities are not new and do not impose a new program or higher level of service since the claimants completed required cleanup and assessment of stream locations that

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<sup>1290</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.).

<sup>1291</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.i.).

<sup>1292</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.ii.).

<sup>1293</sup> Exhibit A, Test Claim, 10-TC-02, pages 411 et seq., 415 et seq. (Test claim permit, Attachment J, Tables 10-1, 10-2).

<sup>1294</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.ii.).

<sup>1295</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.iii.).

<sup>1296</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.).

would qualify as trash hot spots under their prior permits.<sup>1297</sup> The Regional Board further asserts that “[u]nder their prior permits, C.10 Claimants were required to use the Regional Trash Assessment protocol or the Urban Rapid Trash Assessment Protocol” to count and categorize individual trash items during the stream segment assessments and cleanups, and requiring documentation of the total volume and dominant type of trash removed under the test claim permit, instead of categorizing individual trash items, is less labor intensive.<sup>1298</sup>

The County of Santa Clara responds, “Although the County *was required* to conduct trash hot spot cleanups, the prior permits did not require the identification and submittal of information to the Water Board regarding trash hot spots. In order to comply, the County must develop a new program and expend substantial funds to so do. For example, the County, in conjunction with SCVURPPP, must select hot spots, conduct a two-day workshop to obtain input on potential hot spot locations from stakeholders, and develop a County-wide report with information required by the MRP.”<sup>1299</sup> In the next section of the County’s comments, the County states it was not required to conduct trash hot spot clean-ups under the prior permit, and its prior creek clean-ups were done on a pilot scale and were voluntary:

Specifically, the County *has never been required to conduct trash hot spot clean-ups under prior permits*. Nevertheless, the Regional Board argues that the clean-up and assessment of stream locations was equivalent to the creek cleanups under the prior permits. However, the Regional Board fails to note that under the prior permits, the County participated in the creek cleanups in conjunction with SCVURPPP and these were done on a pilot scale and on a voluntary basis, and not under any requirement.<sup>1300</sup>

The Alameda and San Mateo County claimants similarly state the following:

Specifically, the Alameda County claimants were previously required to only perform 3 site assessments annually, where now they must perform assessments and cleanups at 55 sites within the same period. [Fn. omitted.] Furthermore, the costs associated with prior assessments are small as compared with the costs associated with clean-ups. [Fn. omitted.] Accordingly, the MRP Provision C.10.b.iii. has exponentially increased the level of service required from the Alameda County claimants.

Similarly, the San Mateo County claimants have never been required to conduct trash hot spot clean-ups under prior permits. [Fn. omitted.]

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<sup>1297</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 51.

<sup>1298</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 52.

<sup>1299</sup> Exhibit J, Claimant’s Rebuttal Comments, 10-TC-03, page 40, emphasis added.

<sup>1300</sup> Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, page 40.



Nevertheless, the Regional Board argues that the clean-up and assessment of stream locations is equivalent to the creek cleanups under the prior permits. However, the Regional Board fails to note that under the prior permits, the San Mateo County Claimants participated in the creek cleanups voluntarily through a pilot study in order to evaluate trash assessment methodologies, and was never under any specific requirement to do so. [Fn. omitted.] In fact, the pilot study was primarily designed to identify types of trash found in creeks and sources, not to actually clean the trash in creeks. [Fn. omitted.]<sup>1301</sup>

- 1) The requirements to select and clean trash hotspots (creeks and shoreline), as required by Sections C.10.b.i. and C.10.b.ii, are not new.

As indicated in the Background for this section, federal law prohibits non-stormwater illicit discharges, such as trash, and requires the implementation of BMPs to control trash in stormwater to meet water quality standards.<sup>1302</sup> To “effectively prohibit” non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges from areas posing a reasonable potential of containing illicit discharges or other sources of non-storm water, and the program “shall” include the following:

- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.
- A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water.<sup>1303</sup>

In addition, the 1995 Basin Plan contained the following narrative effluent limit for trash: “waters shall not contain floating material, including solids, liquids, foam and scum, in concentrations that cause nuisance or adversely affect beneficial uses.”<sup>1304</sup>

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.”<sup>1305</sup> The prior

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<sup>1301</sup> Exhibit K, Claimant’s Rebuttal Comments, 10-TC-02, pages 50-51.

<sup>1302</sup> United States Code, title 33, section 1342(p)(3)(B)(ii), (iii).

<sup>1303</sup> Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2)-(4).

<sup>1304</sup> Exhibit BB (6), Basin Plan 1995, page 48.

<sup>1305</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1866 (Attachment 53, Order R2-2003-0021); pages 1948-1949 (Attachment 55, Order 99-059), and page 2083 (Attachment 60, Order 01-024); Exhibit

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.”<sup>1306</sup>

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.<sup>1307</sup>

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.<sup>1308</sup>

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BB (27), Order R2-2003-0034, page 18; Exhibit BB (25), Order 99-058, page 7; Exhibit BB (43), U.S. EPA Permit No. CA612006, page 2.

<sup>1306</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1866 (Attachment 53, Order R2-2003-0021); pages 1948-1949 (Attachment 55, Order 99-059), and page 2083 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 18; Exhibit BB (25), Order 99-058, page 7; Exhibit BB (43), U.S. EPA Permit No. CA612006, page 4.

<sup>1307</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1308</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et seq.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

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. This is confirmed in the permittees' stormwater management plans, which were made enforceable by the prior permits, all of which required the inspection and clean-up of storm drain facilities and watercourses, including creeks, considered "hot spots" or high trash areas along creeks and shorelines at least once per year as described below.

Santa Clara's 1997 and 2004 urban runoff management plans required the Santa Clara permittees to develop and implement a process for "tracking hot spots and ensuring that appropriate BMPs . . . will be implemented for storm drain operation and maintenance activities."<sup>1309</sup> They also had to develop a record-keeping system to track cleaning activities and "hot spots."<sup>1310</sup> The permittees were also required to inspect and clean all inlets and catch basins in known problem areas at least once a year. "As much debris, silt, trash and sediment as possible shall be removed from the storm drain system when cleaning. Debris capture systems shall be used to prevent material from washing into streams or channels."<sup>1311</sup> And they were required to encourage citizen participation for clean-up, which may include volunteer creek and shoreline cleanup events such as Coastal Cleanup Day and adopt-a-creek programs.<sup>1312</sup> These plans also contained provisions requiring street sweeping and cleaning, and litter control.<sup>1313</sup>

Alameda's Stormwater Management Plan required each agency to "inspect, and clean as necessary, storm drainage facilities (inlets, culverts, V-ditches, pump stations, open channels, and watercourses), once a year on average unless an alternative schedule is approved," and when cleaning agencies would remove the maximum amount of

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<sup>1309</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 242; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5964 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>1310</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 245.

<sup>1311</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, page 251; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5975 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

<sup>1312</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2084-2085 (Attachment 60, Order 01-024); Exhibit BB (2) 1997 Santa Clara Valley Urban Runoff Management Plan, pages 67-68.

<sup>1313</sup> Exhibit BB (2), 1997 Santa Clara Valley Urban Runoff Management Plan, pages 172, 191-192, 204; Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5934-5935, 5947 (Attachment 98, SCVURPPP Urban Runoff Management Plan, Appendix A, September 1, 2004).

material possible from the nearest access point.<sup>1314</sup> Watercourses includes creeks and, therefore, it was previously required for agencies under the Alameda permit to inspect and clean as necessary creeks within each jurisdiction. The public participation requirement further demonstrates this could be accomplished through volunteer labor. The plan required each agency to participate in at least four to eight community outreach activities depending on the agency's population, some of the possible activities being "Identify and support a friends of a watershed group and encourage creek cleanups (or if this is infeasible, lagoon or shoreline cleanups) or adopt-a-creek or other volunteer monitoring and resource inventorying activities[;] Conduct a creek cleanup (or if this is not feasible, lagoon or shoreline cleanups) within its jurisdiction on an annual basis; and Participate in a local event in its jurisdiction or neighboring jurisdiction as part of the Coastal Commission's annual Coastal Clean-Up Day and/or as part of Earth Day."<sup>1315</sup> The requirement to clean trash is not new for Alameda, as it was previously required to clean creeks and shorelines.

San Mateo's Stormwater Management Plan required permittees to keep standardized records of routine municipal maintenance activities and noted "The storm drain system maintenance data include the number of inlets and other storm drainage facilities (e.g., creeks, channels, culverts and v-ditches) inspected and cleaned and the total volume of material removed."<sup>1316</sup> Permittees were required by the performance standards to inspect and clean as necessary storm drainage facilities at least once per year on average unless an alternative schedule was approved, and noted when cleaning a natural creek or waterway, cleaning should focus on litter and trash removal and minimize removal of natural vegetation.<sup>1317</sup> The public information and participation performance standards in the plan also required permittees to either identify and support a "Friends of [a watershed] group and encourage creek cleanups, conduct its own creek cleanup within the municipality jurisdiction on an annual basis, or participate

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<sup>1314</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2421 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001- June 2008, February 10, 2003).

<sup>1315</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2416 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001- June 2008, February 10, 2003).

<sup>1316</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3945 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1317</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4007-4008 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

in an annual event such as the Coastal Commission's annual Coastal Cleanup Day.<sup>1318</sup> These requirements show San Mateo permittees were already previously required to remove trash from their creeks, and the requirement to clean trash along creeks and shorelines is not new.

The Contra Costa Stormwater Management Plan required as part of its municipal maintenance performance standards "Each agency will inspect, and clean as necessary, public storm drainage facilities (i.e., inlets, V-ditches, pump stations, open channels, and watercourses), once a year on average unless an alternative schedule is approved as described in MUNI-21."<sup>1319</sup> As indicated above, "watercourses" include creeks, and so the requirement to annually clean its creeks already existed for Contra Costa and is not new.

Fairfield-Suisun's Stormwater Management Plan required the cities to "inspect inlets, culverts, ditches, channels and watercourses at least once per year and clean as needed."<sup>1320</sup> Additionally, the Public Information and Participation section required the District to participate in at least six of nine proposed activities. Two of these options were to develop watershed awareness by "Conduct[ing] a creek, lagoon, marsh or shoreline cleanup;... or Participate in a local event such as the Coastal Commission's annual Coastal Cleanup Day," and to coordinate with local volunteer groups to conduct community outreach by having the volunteer group "assist with school outreach, stenciling, or creek clean-up activities."<sup>1321</sup> The District was also required to implement citizen involvement activities by implementing a program for community groups to cleanup neighborhood creeks and supporting efforts to organize creek and marsh clean-up days.<sup>1322</sup> The requirement to annually clean trash is not new for Fairfield-Suisun.

The Vallejo Stormwater Management Plan's public agency activities are intended "to maximize the removal of pollutants during routine maintenance activities and minimize discharges of pollutants to storm drains and watercourses."<sup>1323</sup> The plan requires the Vallejo Flood Control District to "promote the reduction of pollutants in the storm drain system wherever possible by removing litter and debris" and, thus, the permittees were

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<sup>1318</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4037 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1319</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 74.

<sup>1320</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 89.

<sup>1321</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, pages 143-144.

<sup>1322</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 147.

<sup>1323</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, pages 58-59.

responsible for removing trash from the storm drainage system.<sup>1324</sup> The requirement to remove trash is not new for the Vallejo permittees.

Thus, all permittees were required to clean trash hotspots under prior law and this requirement is not new. Although they may be required to select and clean additional high trash hotspots and incur increased costs to meet the “one trash hot spot per 30,000 population” requirement and to reduce trash loads as required by the permit, increased costs alone are not determinative of whether Sections C.10.b.i. and C.10.b.ii. impose a reimbursable state-mandated program under article XII B, section 6.<sup>1325</sup> The requirement to clean selected trash hotspots is not new. Moreover, under the permittees’ prior permits, if trash problems persisted and exceeded the water quality standards in the Basin Plan and the discharge prohibitions and receiving water limitations of their prior permits, which they did, then the permittees were required by prior law to perform *additional* BMPs and monitoring to prevent or reduce the pollutants causing or contributing to the exceedance in water quality standards.<sup>1326</sup>

Therefore, the requirements to select and clean trash hotspots pursuant to Sections C.10.b.i. and C.10.b.ii. are not new and do not impose a new program or higher level of service.

2) The requirement in Section C.10.b.ii., to submit selected trash hot spots to the Regional Board by July 1, 2010, is new.

The requirement in Section C.10.b.ii., to submit selected trash hot spots to the Regional Board by July 1, 2010, was not previously required and is new for all permittees. Section C.10.b.ii. also provides “[t]he list *should* include photo documentation (one photo per 50 feet) and initial assessment results for the proposed hot spots.”<sup>1327</sup> 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.” ’

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<sup>1324</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 59.

<sup>1325</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; see also, *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

<sup>1326</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1867 (Attachment 53, Order R2-2003-0021), page 1949 (Attachment 55, Order 99-059); and page 2084 (Attachment 60, Order 01-024); Exhibit BB (25), Order 99-058, page 8; Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4-5.

<sup>1327</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.b.ii.).

[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.<sup>1328</sup>

Webster’s II New College Dictionary states the word “should” is used to express a probability or an expectation, or to express conditionality or a contingency.<sup>1329</sup> Thus, while the Regional Board expects the permittees to submit photo documentation and initial assessment results for the proposed hot spots, there is nothing in the law or any evidence in the record to support a finding the photo and initial assessment of the proposed hot spots is required or mandated by the test claim permit. Instead, it is up to the permittees to decide how best to submit the selected trash hot spots to the Regional Board.

3) Some of the requirements in Section C.10.b.iii. regarding the assessment of trash hot spots are new for some of the permittees.

Section C.10.b.iii. requires the permittees to conduct hot spot assessments by quantifying the volume of material removed from each trash hot spot cleanup, and identifying the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after cleanup of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length. “Trash Hot Spots *may* also be assessed using either the Rapid Trash Assessment (RTA v.8) or the SCVURPPP Urban RTA variation of that method.”<sup>1330</sup>

The Rapid Trash Assessment (RTA) protocol identified above is a method proposed by the Regional Board to measure trash levels in creeks and is intended to be used to provide multiple types of information, such as evaluating management actions, determining trash accumulation rates, or comparing sites with and without public access.<sup>1331</sup> The procedure involves selecting a 100-foot creek section, doing an initial visual assessment, removing all visible trash in the area and noting the types and actual number of trash items removed and whether they were found above or below the high water line, taking before and after photos of the assessment site, and filling out a worksheet to grade the site on the visual level of trash, actual number of trash items

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<sup>1328</sup> *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082-1083.

<sup>1329</sup> Exhibit BB (51), Webster’s II New College Dictionary, Definition of Should.

<sup>1330</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.iii.).

<sup>1331</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 908-914 (Attachment 34, San Francisco Bay Regional Water Quality Control Board Rapid Trash Assessment Protocol).

found, threats to aquatic life and human health, signs of illegal dumping or littering, and trash accumulation.<sup>1332</sup>

The SCVURPPP [Santa Clara Valley Urban Runoff Pollution Prevention Plan] Urban RTA variation of that method “was developed by the Santa Clara permittees to more effectively assess trash problem areas and to detect changes in trash conditions over time as a result of management actions.”<sup>1333</sup> The assessment parameters under this variation include the visual level of trash; the actual number of trash items found; transportable, persistent, buoyant trash;<sup>1334</sup> biohazards, toxic items, sharp objects and site accessibility/use;<sup>1335</sup> signs of illegal dumping or littering; and trash accumulation.<sup>1336</sup> Otherwise, the procedure is the same.

The permittees are not required to use the Rapid Trash Assessment (RTA v.8) or the SCVURPPP Urban RTA variation of that method, based on the word “may” in Section 10.b.iii., but using those methodologies complies with the requirements of the test claim permit to identify the dominant types of trash removed and their sources, and photo documenting the trash condition before and after clean-up.<sup>1337</sup> The only difference is the RTA has the permittee quantify the actual number of trash items removed and whether the items were found above or below the high water line, and the test claim

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<sup>1332</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 908-914 (Attachment 34, San Francisco Bay Regional Water Quality Control Board Rapid Trash Assessment Protocol).

<sup>1333</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3676 (in Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1334</sup> This parameter is intended to measure the following: “. . . certain characteristics of trash make it more harmful to aquatic life. If trash items are persistent in the environment, buoyant (floatable), and relatively small, they can be transported long distances and be mistaken by wildlife as food items. Larger items can cause entanglement. All of these factors are considered in the narrative descriptions in this assessment parameter.” (Exhibit I, Regional Board Comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 3678.)

<sup>1335</sup> “This category is concerned with items that are dangerous to people who wade or swim in the water, and with pollutants that could accumulate in fish in the downstream environment. Medical waste, diapers, and human or pet waste could potentially adversely affect water quality. Site accessibility and site use is considered in the scoring of this condition category. Sites with very difficult or restricted human access and no evidence of recreational use will receive higher scores due to reduced risk of human exposure at the site.” Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3678.

<sup>1336</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3677-3678.

<sup>1337</sup> Water Code section 15, which states “‘Shall’ is mandatory and ‘may’ is permissive.”



permit requires the quantification of the volume of trash removed (i.e., the amount of space a substance occupies).<sup>1338</sup> In this regard, the Fact Sheet states the following:

Trash Hot Spot assessments have been simplified and streamlined. Rather than counting individual trash items, which can vary in size from small plastic or glass particles to shopping carts, volume of material removed is measured, along with dominant types of trash removed. Photographs are recorded both before and after cleanup, to add to the record and verify cleanup.<sup>1339</sup>

Thus, Section C.10.b.iii. requires the permittees to assess the hot spot cleanups by:

- Quantifying the volume of material removed from each trash hot spot cleanup.
- Identifying the dominant types of trash removed (e.g., glass, plastics, paper).
- Identifying the sources of trash removed to the extent possible.
- Documenting the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.

As indicated above, all prior permits required the permittees 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.<sup>1340</sup> Thus, Section 10.b.iii. is defining how that assessment will be done and shown with respect to trash. Since the prior permits required the permittees to identify potential sources of pollution in stormwater discharges, the requirement in Section C.10.b.iii. to “Identify the sources of trash removed to the extent possible” is not new.

However, as explained below, some of the remaining requirements are new for some of the permittees.

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<sup>1338</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 909 (Attachment 34, San Francisco Bay Regional Water Quality Control Board Rapid Trash Assessment Protocol); Exhibit A, Test Claim, 10-TC-02, pages 234 (Test claim permit, Section C.10.b.iii.).

<sup>1339</sup> Exhibit A, Test Claim, 10-TC-02, page 349 (Fact Sheet).

<sup>1340</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1884-1885 (Attachment 53, Order R2-2003-0021), page 1952 (Attachment 55, Order 99-059), pages 2002-2003 (Attachment 57, Order R2-2004-0060), and pages 2089-2090 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 37; Exhibit BB (25), Order 99-058, page 11; Exhibit BB (28), Order R2-2004-0059, pages 16 et seq.; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 4, 8; and Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 4.

As indicated in the comments, before the adoption of the test claim permit, Alameda, San Mateo, and Santa Clara permittees participated in pilot studies using the RTA methodology developed by the Regional Board. Alameda's 2003 Multi-Year Plan for Monitoring and Assessment indicates it was going to conduct a pilot test of the RTA in August and September 2002 at several sites in the area, and it would repeat that screening in May 2003.<sup>1341</sup> There is no support in the law or evidence in the record that the Alameda permittees continued to use, or were required to use, the Regional Board's RTA protocol beyond this one-time pilot study.

Nevertheless, Alameda's stormwater management plan, made enforceable by the prior permit, contains performance standards for municipal maintenance of storm drain facilities and watercourses and requires each agency to inspect and clean as necessary the watercourses once a year on average unless an alternative schedule is approved in a written action plan.<sup>1342</sup> Agencies shall remove the maximum amount of material possible, and keep records of the amount of material removed and the areas where man-made materials were removed, and the types of material removed and estimated quantity or weight removed.<sup>1343</sup> Thus, quantifying the material removed and identifying the types of trash removed are not new requirements for the Alameda permittees. In addition, the "detailed workplan" for fiscal year 2002-2003 states they would:

Conduct pilot visual and photo assessments of trash in waterbodies, supported by more detailed inventory at selected sites. Coordinate procedures with prototype by Regional Board.<sup>1344</sup>

Alameda's prior permit (Order R2-2003-0021) stated "Workplans and Updates shall be deemed to be final and incorporated into the Management Plan and this Order as of June 1 unless previously determined to be unacceptable by the Executive Officer," and there is no indication the plan to conduct photo assessments of trash in waterbodies

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<sup>1341</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2266, 2268 (Attachment 66, ACCWP Multi-Year Plan for Monitoring and Assessment, May 28, 2003), which identifies the number of sites assessed.

<sup>1342</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2421 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>1343</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2421-2422 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>1344</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2332 (Attachment 67, ACCWP Multi-Year Plan for Monitoring and Assessment).

was determined unacceptable.<sup>1345</sup> Thus, the trash assessment activities required by Section C.10.b.iii. are not new for the Alameda permittees.

San Mateo's pilot study is described in the San Mateo Countywide Stormwater Pollution Prevention Program's Trash Control Work Plan for fiscal year 2003-2004, submitted in June 2003, which indicates the San Mateo permittees would begin developing and implementing a strategy to address trash problems areas as a proactive measure in response to the Regional Board adding Bay Area creeks, lakes, and shorelines to its preliminary monitoring list for the threat of trash to impair water quality.<sup>1346</sup> The plan indicates the San Mateo permittees evaluated the RTA at five locations in the San Pedro Creek watershed during September 2002. Creek sections were selected at two known trash hot spot locations (based on discussions with City of Pacifica staff) and within residential, commercial, and open space land uses.<sup>1347</sup> The pilot assessment was conducted to capture levels of trash in the creeks prior to winter rains, and before the national trash cleanup event that occurred on September 21, 2002.<sup>1348</sup>

San Mateo conducted another trash pilot study in 2005.<sup>1349</sup> The objective of this study was "to attempt to identify trash sources and management measures at a selected in-stream trash accumulation area" and apply the Regional Board's RTA protocol. The assessment was conducted during three hydrologic periods: the dry season, in mid-winter between rainstorms, and in the spring. Assessment dates were October 7, 2004,

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<sup>1345</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1881-1882 (Attachment 53, Order R2-2003-0021, Section 7.a.).

<sup>1346</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3312-3333 (Attachment 75, SMCWPPP FY 2003-2004 Trash Control Workplan, June 2003).

<sup>1347</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3322 (Attachment 75, SMCWPPP FY 2003-2004 Trash Control Workplan, June 2003).

<sup>1348</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3326 (Attachment 80, Pilot Study to Identify Trash Sources and Management Measures at an In-stream Trash Accumulation Area, San Mateo County Pollution Prevention Program, August 2005); see also, pages 5644-5652 (Attachment 96, SCVURPPP and SMSTOPPP Pilot Implementation and Testing of RWQCB Rapid Trash Assessment, March 1, 2003).

<sup>1349</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3732-3756 (Attachment 80, SMCWPPP Pilot Study to Identify Trash Sources and Management Measures at an In-Stream Trash Accumulation Area, August 2005).

January 20, 2005, and May 16, 2005.<sup>1350</sup> A reach of San Mateo Creek in Gateway Park in the City of San Mateo was selected for the pilot study.<sup>1351</sup> One of the principal findings of the study was “applying the Rapid Trash Assessment protocol, in conjunction with research on adjacent and upstream land uses, sources and transport pathways, is potentially a useful methodology for addressing trash in San Mateo County creeks.”<sup>1352</sup> The report further states “this methodology may help identify trash sources and inform the selection of trash management measures at in-stream trash accumulation sites. However, further confirmation of the utility of the methodology would require additional pilot testing at a variety of trash sites.”<sup>1353</sup>

San Mateo’s 2007-2008 annual report indicates the San Mateo permittees also used RTA protocol in the fall of 2007 and in the spring of 2008 at seven of the 27 trash accumulation sites identified during creek walks, for a total of 14 assessments.<sup>1354</sup> Appendix E is a report titled “FY 2007/2008 Trash Assessments in Urban Creeks in San Mateo County, California, San Mateo Countywide Water Pollution Prevention Program in August 2008.”<sup>1355</sup> “General characteristics of each identified trash site were documented including major types of trash, readily apparent sources (i.e., littering, [fn. omitted] illegal dumping, [fn. omitted] and accumulation from upstream sources) and adjacent land uses. GPS coordinates of each site were recorded and digital photographs were taken.”<sup>1356</sup> In addition, “Each trash item at the site was categorized by type (e.g., plastics, metals, biohazards, construction materials) and the total number

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<sup>1350</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3733 (Attachment 80, SMCWPPP Pilot Study to Identify Trash Sources and Management Measures at an In-Stream Trash Accumulation Area, August 2005).

<sup>1351</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3733 (Attachment 80, SMCWPPP Pilot Study to Identify Trash Sources and Management Measures at an In-Stream Trash Accumulation Area, August 2005).

<sup>1352</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3733 (Attachment 80, SMCWPPP Pilot Study to Identify Trash Sources and Management Measures at an In-Stream Trash Accumulation Area, August 2005).

<sup>1353</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3733 (Attachment 80, SMCWPPP Pilot Study to Identify Trash Sources and Management Measures at an In-Stream Trash Accumulation Area, August 2005).

<sup>1354</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3418, 3506, 3664 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1355</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3663-3682 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1356</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3664 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

of items found in each category was recorded.”<sup>1357</sup> The report further states, “It is important to note that the sites selected for the more detailed URTA assessments were not intended to represent trash conditions throughout a watershed. Instead, relatively impacted and accessible sites were selected to begin identifying and prioritizing major trash sources and potential BMPs to reduce levels of trash.”<sup>1358</sup>

Finally, San Mateo’s 2007-2008 annual report indicates it had initiated a program to begin identifying and addressing trash accumulation areas in urban waterways in San Mateo County.<sup>1359</sup> The report does not indicate the specifics of that program, but highlighted what they had done during the past several years, including “[p]ilot-testing Regional Water Board staff’s Rapid Trash Assessment (RTA) protocol as a tool to monitor the amount and types of trash in creeks and inform efforts to identify sources and controls” and “using the URTA to further evaluate a subset of the trash accumulation sites identified during the USA creek walks. The information collected is establishing a baseline against which to track future trends and will assist with efforts to identify trash sources and transport pathways.”<sup>1360</sup>

However, San Mateo’s prior work plans and annual reports are not binding, but describe actions voluntarily taken by the San Mateo permittees. San Mateo’s prior permit (Order 99-059) was challenged in *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527.<sup>1361</sup> The court found the provisions in the permit that allowed the Executive Officer to approve changes and substantive revisions to the stormwater management plans by way of work plans and annual reports, without notice or an opportunity for public comment, were unlawful.<sup>1362</sup> A writ of mandate was issued requiring the Regional Board to modify the

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<sup>1357</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3664-3665 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1358</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3664 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1359</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3512 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1360</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3512 (Attachment 79, SMCWPPP FY 2007-2008 Annual Report).

<sup>1361</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1337-1344 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control Board, San Francisco Region*, San Francisco Superior Court, Case No. 500527).

<sup>1362</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1341-1342 (Attachment 49, Order Granting Petition for Writ of Mandate and Statement of Decision, *Baykeeper v. Regional Water Quality Control*

permits in accordance with its decision, which the Regional Board did in R2-2004-0060. R2-2004-0060 required the Regional Board to act on annual reports that propose to modify the stormwater plans to adopt “pertinent updates, improvements, or revisions to the Plan.”<sup>1363</sup> “Any proposed changes to the plan, which is an integral and enforceable part of this Order . . . , will be made in accordance with applicable State and federal regulations for permit modifications.”<sup>1364</sup>

Nevertheless, San Mateo’s stormwater management plan, which was adopted and approved by the Regional Board,<sup>1365</sup> required the permittees to inspect and clean as necessary all storm drain facilities (defined in the performance standard as “inlets, culverts, v-ditches, pump stations, open channels and watercourses”<sup>1366</sup>) at least once per year on average “unless an alternative schedule is approved.”<sup>1367</sup> The inclusion of open channels and watercourses for annual inspection and cleaning includes creeks, as the instructions in the performance standard note “if cleaning a ‘natural’ creek or waterway, minimize the removal of natural vegetation and focus on litter and trash removal.”<sup>1368</sup> Permittees were required to report the amount of material removed when cleaning storm drain facilities in monthly record keeping forms that ask for the volume of material removed.<sup>1369</sup> Thus, quantifying the volume of material removed from each trash hot spot cleanup is not new for the San Mateo permittees. There is no support in the law or evidence in the record that the following remaining requirements imposed by

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*Board, San Francisco Region, San Francisco Superior Court, Case No. 500527); Exhibit BB, Order 2004-0060, page 2; Exhibit BB, Order 2004-0059, page 2.*

<sup>1363</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1996 (Attachment 57, Order R2-2004-0060).

<sup>1364</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1999 (Attachment 57, Order R2-2004-0060).

<sup>1365</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1996 (Attachment 57, Order R2-2004-0060).

<sup>1366</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3931 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1367</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4007 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1368</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4008-4009 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010 [Defining storm drain inlet conveyances to include “v-ditches, storm drain lines, channels, creeks, and culverts”]).

<sup>1369</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3951, 4009 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

Section C.10.b.iii. of the test claim permit were required by San Mateo's prior permit and, thus, these activities are new for the San Mateo permittees:

- Identifying the dominant types of trash (e.g., glass, plastics, paper) removed.
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>1370</sup>

Santa Clara also participated in the pilot study of the Regional Board's RTA with the San Mateo permittees in the fall of 2002, before the national trash cleanup event that occurred on September 21, 2002, at nine stream locations in the counties.<sup>1371</sup> The assessment protocol included identification and enumeration of all trash items that occur below high-water line and along stream banks within a 100-foot section of stream. The second part of the protocol determined the condition for six assessment parameters using the narrative parameter descriptions provided in the assessment worksheet. The permittees also took digital photographs at each site to determine if photo documentation could accurately depict the level of trash and potential impairment.<sup>1372</sup> The Santa Clara permittees recommended some modifications to the Regional Board's assessment parameters following the study, as indicated earlier.<sup>1373</sup>

Santa Clara's 2004 Urban Runoff Management Plan and 2004 Multi-Year Monitoring Plan contain a specific section on trash management activities.<sup>1374</sup> They report in 2001, the Regional Board added all urban creeks, lakes, and shorelines to the 303(d) monitoring list due to the threat of trash impairing water quality. In a proactive response to the recommendation, the Santa Clara permittees formed a trash ad-hoc task group, which conducted the following activities: a survey of existing trash management practices and policies; created a trash work plan to identify the strategies to be used to address trash problem areas in streams and waterways; kept the Santa Clara Valley Water Resources Protection Collaborative informed about trash issues within the

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<sup>1370</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.iii.).

<sup>1371</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5644-5652 (Attachment 96, SCVURPPP and SMSTOPPPP Pilot Implementation and Testing of RWQCB Rapid Trash Assessment, March 1, 2003).

<sup>1372</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5645 (Attachment 96, SCVURPPP and SMSTOPPPP Pilot Implementation and Testing of RWQCB Rapid Trash Assessment, March 1, 2003).

<sup>1373</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5652 (Attachment 96, SCVURPPP and SMSTOPPPP Pilot Implementation and Testing of RWQCB Rapid Trash Assessment, March 1, 2003).

<sup>1374</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5777-5779 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004); and page 5494 (Attachment 92, SCVURPPP Multi-Year Receiving Waters Monitoring Plan (Revised) July 1, 2004).

jurisdiction; and created a statement of trash goals for the next five years (2004-2009).<sup>1375</sup>

Santa Clara's Trash Work Plan states it was "submitted to fulfill a Program FY 01-02 Continuous Improvement item and actions identified within the Program's Multi-Year Receiving Waters Monitoring Plan."<sup>1376</sup> The program focused on implementing trash control measures and documenting the effectiveness of their management activities in "higher priority on specific urban areas of special concern (identified trash problem areas and creek segments that are visible and/or accessible to the general public)" and called them "hot spots".<sup>1377</sup> The Santa Clara permittees used a modified version of the Regional Board's RTA to conduct these trash assessments. The tasks identified in the work plan indicate the permittees would document and map co-permittees' known trash problem areas, develop standardized reporting and documentation format and procedures that detail and evaluate trash management practices, and compile and document trash evaluation results.<sup>1378</sup>

In a 2006 memo to the Trash Ad Hoc Task Group regarding Santa Clara's "Development of Urban Rapid Trash Assessment Protocol," the Santa Clara permittees stated they conducted trash evaluations at thirty-five wadeable creek sites that were previously identified as trash problem areas. "The evaluations were conducted using the San Francisco Bay Regional Water Quality Control Board's (Water Board) Rapid Trash Assessment (RTA) Protocol (Version 7.0)" and they planned to conduct a second year of trash evaluations at selected sites "during FY 05-06."<sup>1379</sup>

Santa Clara's fiscal year 2004-2005, 2005-2006, and 2006-2007 work plans all noted they would continue to implement the prior trash work plan's trash evaluation and management practices.<sup>1380</sup> The fiscal year 2007-2008 work plan noted of the original

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<sup>1375</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5777-5779 (Attachment 97, SCVURPPP Urban Runoff Management Plan, Chapters 1-4, September 1, 2004).

<sup>1376</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5624 (Attachment 96, Trash Work Plan, March 1, 2003).

<sup>1377</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 5626, 5627 (Attachment 96, Trash Work Plan, March 1, 2003).

<sup>1378</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5628 (Attachment 96, Trash Work Plan, March 1, 2003).

<sup>1379</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4077 (Attachment 84, Development of Urban Rapid Trash Assessment Protocol).

<sup>1380</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 4448, 4817, 5070-5071 (Attachments 86, 87, and 88, SCVURPPP FY 2004-2005 Draft Workplan, Sections 1-9, March 1, 2004; SCVURPPP FY 2005-2006



11 tasks from the fiscal year 2003-2004 trash work plan, tasks 1 through 6 had been completed. The tasks scheduled for completion that year were to implement a trash pilot documentation project, develop long term management strategies for high-priority watersheds, and to continue evaluating creek conditions and the effectiveness of management practices.<sup>1381</sup> The fiscal year 2008-2009 work plan noted in the past year, the Program had created a summary of its conceptual understanding of potential trash sources and pathways to urban creeks, and was in the process of developing a memorandum for co-permittees on how to identify and prioritize trash problem areas based on risk to creeks.<sup>1382</sup> For the 2008-2009 fiscal year, the Santa Clara permittees intended to continue assisting co-permittees in identifying high-priority trash loading areas and opportunities for implementing BMPs.<sup>1383</sup>

Thus, with the stormwater plans and annual work plans submitted by Santa Clara after the pilot study was conducted, Santa Clara committed to continuing to use the RTA and its later developed Urban RTA to assess and document identified trash problem areas. Pursuant to Santa Clara's prior permit (Order 01-124), these work plans are deemed final unless determined unacceptable by the Executive Officer, are incorporated into the stormwater management plan, and become enforceable components of the prior permit. Section C.6.b. of Santa Clara's prior permit (Order 01-124) stated the following:

By March 1 of the year following the submission of each Annual Report, the Dischargers shall submit draft Workplans that describe the proposed implementation of the Management Plan and the Watersheds 2000 Vision Statement for the next fiscal year. The Workplans shall be deemed to be final and incorporated into the Management Plan and this Order as of July 1 unless previously determined to be unacceptable by the Executive Officer.<sup>1384</sup>

There is no evidence the work plans were deemed unacceptable, or voluntary as suggested by the claimants, and thus, the modifications to the stormwater management

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Draft Workplan, Sections 1-9, March 1, 2005; SCVURPPP FY 2006-2007 Draft Workplan, Sections 1-9, March 1, 2006).

<sup>1381</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5220 (Attachment 89, SCVURPPP FY 2007-2008 Draft Workplan, Sections 1-9, March 1, 2007).

<sup>1382</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5363 (Attachment 90, SCVURPPP FY 2008-2009 Draft Workplan, Sections 1-9, March 1, 2008).

<sup>1383</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5364 (Attachment 90, SCVURPPP FY 2008-2009 Draft Workplan, Sections 1-9, March 1, 2008).

<sup>1384</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2089 (Attachment 60, Order 01-024, Section C.6.b.).

plan made through the work plans are binding and enforceable as prior law in accordance with the above provision.<sup>1385</sup> Moreover, the change from identifying actual number of trash items removed under the RTA to the volume of trash removed, as required by the test claim permit, does not increase the level of service to the public. Thus, the requirements to quantify the volume of material removed from each trash hot spot, identify the dominant types of trash removed and their sources if possible, and photo documenting the trash condition before and after clean-up in accordance with Section C.10.b.iii. are not new for the Santa Clara permittees.

Fairfield-Suisun's stormwater management plan required the permittees to inspect inlets, culverts, ditches, channels, and watercourses at least once per year and clean as needed, and when cleaning storm drain inlets and lines, remove the maximum amount of material at the nearest access point to minimize discharges to watercourses.<sup>1386</sup> They were then required to document and maintain the following records monthly: volume of material removed from storm drainage facilities (inlets, lines, channels, watercourses, etc.), management practices, observations of illegal discharges, and areas that could be improved.<sup>1387</sup> Thus, the requirement to quantify the volume of material removed is not new for the Fairfield-Suisun permittees. However, there is no support in the law or evidence in the record the remaining requirements imposed by Section C.10.b.iii. of the test claim permit were previously required and, thus, these activities are new for the Fairfield-Suisun permittees:

- Identify the dominant types of trash (e.g., glass, plastics, paper) removed.
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>1388</sup>

The municipal maintenance performance standards in Contra Costa's stormwater management plan, which was approved by the Regional Board when the prior permit was adopted, required "each agency will inspect, and clean as necessary, public storm drainage facilities (i.e. inlets, v-ditches, pump stations, open channels and watercourses), once a year on average unless an alternative schedule is approved as described in MUNI-21.<sup>1389</sup> Each agency was required report on the amount of material

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<sup>1385</sup> Exhibit U, Regional Board's Response to the Request for Additional Evidence and Briefing, page 9 ("Modifications to the management plans, implemented through Regional Board Orders, Annual Reports, Annual Work Plans, and Updated Stormwater Management Plans in accordance with the "continuous improvement process" described in Section I.B, supra, were also enforceable permit terms."); Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 40.

<sup>1386</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 89.

<sup>1387</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 88.

<sup>1388</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.iii.).

<sup>1389</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 74.

removed when cleaning storm drainage facilities, and specifically report on man-made materials removed and the type and estimated volume of material removed.<sup>1390</sup> Thus, quantifying the volume of material removed and identifying the dominant types of trash removed are not new for the Contra Costa permittees. The following requirement, however, was not imposed by Contra Costa's prior permit or management plan and, thus, is new:

- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.<sup>1391</sup>

Finally, Vallejo's prior stormwater management plan simply required any solid materials such as trash are taken to the District's wastewater treatment plant to be allowed to dry out before being taken to the sanitary landfill.<sup>1392</sup> Thus, the following requirements are new for the Vallejo permittees:

- Quantify the volume of material removed from each trash hot spot cleanup.
- Identify the dominant types of trash removed (e.g., glass, plastics, paper).
- Document the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.<sup>1393</sup>

v. *The requirement in Section C.10.c. to submit a Long-Term Trash Load Reduction Plan is new.*

Section C.10.c. requires each permittee "shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014." The Plan shall describe control measures and best management practices, including any trash reduction ordinances, being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1394</sup> These requirements are not imposed on Flood Control agencies, "which are non-population-based Permittees that do not have jurisdiction over urban watershed land."<sup>1395</sup>

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<sup>1390</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, page 74.

<sup>1391</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.iii.).

<sup>1392</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 61.

<sup>1393</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.b.iii.).

<sup>1394</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

<sup>1395</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.).

In comments on the Test Claim, the Regional Board admits this requirement is new, however denies the requirement imposes a new program or higher level of service as follows:

Although C.10 Claimants conducted planning efforts for short term trash reduction, they were not previously required to produce long term trash reduction plans. Thus, Provision C.10.c sets forth more specific requirements than were included in C.10 Claimants' prior permits but it does not impose a new program or higher level of service.<sup>1396</sup>

In comments on the Draft Proposed Decision, the Water Boards now assert the long term trash load reduction plans are not new, but simply mandate that permittees do what they were required to do under their previous permits when water quality standards are not being met and beneficial uses are affected: 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.<sup>1397</sup>

The Commission finds that the requirement imposed by Section C.10.c. to submit a long-term trash load reduction plan is new. None of the prior permits or management plans for Alameda, Contra Costa, Fairfield-Suisun, San Mateo, and Vallejo permittees contain any requirements to create a long-term trash load reduction plan, or any similar concept to address trash concerns.

Starting with the fiscal year 2005-2006 work plan, Santa Clara made one of its planned tasks to address trash problems to “assist [its] Co-permittees in developing a long-term strategy for trash conditions in urban streams and waterways.”<sup>1398</sup> Although this was called a long-term strategy, no specifics were given about the strategy’s intended goals. The long-term strategy could have just as feasibly been focused on reducing trash loads as it could have been about ensuring their existing trash problems don’t get any worse than they already were. Without additional information about Santa Clara’s long-term strategy, it cannot be said preparing a long-term trash load reduction is substantially the same activity.

The prior permits also required the permittees to report on the performance of their control measures in their annual reports due September 15 each year.<sup>1399</sup> As part of

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<sup>1396</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 53.

<sup>1397</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 3.

<sup>1398</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 4859 (Attachment 87, SCVURPPP FY 2005-2006 Draft Work Plan, March 1, 2005).

<sup>1399</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021), page 1951 (Attachment 55, Order 99-059), and page 2087 (Attachment 60, Order 01-124); Exhibit BB (27),

those reports, the permittees had to describe the BMPs currently used and the additional BMPs that will be implemented to prevent or reduce any pollutants, including trash, causing or contributing to persistent exceedances of water quality standards in violation of the permit.<sup>1400</sup>

The long-term reduction plan required by the test claim permit, however, is a one-time report due February 1, 2014, and is required *in addition* to the annual reporting requirements imposed by Section C.16. of the test claim permit (due September 15).<sup>1401</sup> The long-term reduction plan is designed to attain a new standard established by the test claim permit of a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022. Like the prior permits, the annual reporting provisions in Section C.16. of the test claim permit require permittees to identify and schedule the tasks necessary to achieve compliance with the test claim permit when a permittee is unable to certify compliance with any provision, including non-compliance with the trash load reduction requirements, which by July 1, 2014 (five months after the long term trash load reduction plan is due) requires permittees to attain a 40 percent trash load reduction from its MS4. However, the one-time long term trash load reduction report due February 1, 2014, is required regardless of whether the permittee is meeting the requirements under the permit at that point and is required in addition to the annual report.

Thus, Section C.10.c. of the test claim permit imposes the following new requirements on all the permittees, except flood control agencies:

- Submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe the control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1402</sup>

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Order R2-2003-0034, page 35; Exhibit BB (25), Order 99-058, page 10; and Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 5-6.

<sup>1400</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021), pages 1949-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, page 8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1401</sup> Exhibit A, Test Claim, 10-TC-02, page 265 (Test claim permit, Section C.16.).

<sup>1402</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

vi. *Reporting and Document Retention Requirements for Trash (Section C.10.d.)*

Section C.10.d.i. requires each permittee to provide a summary of the following information in each annual report:

- Trash load reduction actions (control measures and best management practices) including the types of actions and levels of implementation.
- Total trash loads and dominant types of trash removed by its actions.
- Total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected* pursuant to Section C.10.b.
- Beginning with the 2012 annual report, report the percent annual trash load reduction relative to the permittee's baseline trash load.<sup>1403</sup>

Section C.10.d.ii. requires the permittees to “retain records for review providing supporting documentation of trash load reduction actions and the volume and dominant type of trash removed from full trash capture devices, from each trash hot spot cleanup, and from additional control measures or best management practices implemented.” The retained documentation is required to be as specific as the trash load reduction tracking method established by the permittee.

The Regional Board states all of the C.10. claimants reported on their municipal maintenance activities and stream assessment and cleanup activities in their annual reports and other reports and although the requirements for reporting in C.10.d. are different than previous reporting requirements and thus provide more specificity, “they do not impose a new program or higher level of service.”<sup>1404</sup>

The County of Santa Clara responds the “new reporting requirements go beyond those established in prior permits, of which none were associated with trash. To comply with this provision of the MRP, the County must expend an additional \$16,850.”<sup>1405</sup> The City of Brisbane and the County of San Mateo make the same arguments and further contend “To comply with this provision of the MRP, the Alameda County Claimants will have to expend an additional \$57,084 annually while the San Mateo County Claimants will have to expend an additional \$35,782 annually.”<sup>1406</sup>

The Commission finds some of these requirements are new for some of the permittees.

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<sup>1403</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i.).

<sup>1404</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 53.

<sup>1405</sup> Exhibit J, Claimant's Rebuttal Comments, 10-TC-03, page 41.

<sup>1406</sup> Exhibit K, Claimant's Rebuttal Comments, 10-TC-02, page 52.

Federal law requires an annual report be filed by the permittees by the anniversary date of the issuance of the permit and include the following relevant information:

- The status of implementing the components of the stormwater management program that are established as permit conditions.
- Proposed changes to the stormwater management programs that are established as permit conditions. Such proposed changes shall be consistent with Code of Federal Regulations, title 40, 122.26(d)(2)(iii) (which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application).
- A summary of data, including monitoring data, that is accumulated throughout the reporting year.<sup>1407</sup>

Federal law also requires the retention of monitoring records and copies of required reports for a period of at least three years from the date of the sample or measurement.<sup>1408</sup>

In accordance with federal law, all of the prior permits required the permittees to submit annual reports documenting the status of their programs and the performance of tasks, including control measures and best management practices, contained in their stormwater management plans in the previous fiscal year.<sup>1409</sup> As indicated in the sections above, all permittees were required to select and clean trash hot spots under prior law using control measures and best management practices.<sup>1410</sup> Thus, reporting control measures and best management practices, including the types of actions and levels of implementation, to reduce trash and retaining those records are not new.

In addition, reporting total trash loads and the dominant types of trash removed each year, and retaining those records, are not new for some of the permittees. As indicated above, Santa Clara used the RTA to evaluate and assess trash before the adoption of the test claim permit, which contained detailed worksheets regarding the loads and

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<sup>1407</sup> Code of Federal Regulations, title 40, section 122.42(c).

<sup>1408</sup> Code of Federal Regulations, title 40, section 122.41(j)(2).

<sup>1409</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1881 (Attachment 53, Order R2-2003-0021), page 1951 (Attachment 55, Order 99-059), and page 2087 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, page 35; Exhibit BB (25), Order 99-058, page 10; Exhibit BB (43), U.S. EPA Permit No. CAS612006, page 5.

<sup>1410</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021); pages 1948-1950 (Attachment 55, Order 99-059), and pages 2083-2084 (Attachment 60, Order 01-024); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CA612006, pages 2, 4, and 5.

types of trash removed.<sup>1411</sup> Moreover, Santa Clara's 2003 trash work plan identified the task of documenting and mapping co-permittees' known trash problem areas, developing standardized reporting and documentation format and procedures that detail and evaluate trash management practices, and compiling and documenting trash evaluation results.<sup>1412</sup> Under their prior permit, the tasks identified in the work plans became part of their stormwater management plans and the performance of those tasks had to be reported in the annual report.<sup>1413</sup> Thus, reporting total trash loads and the dominant types of trash removed each year and retaining those records are not new for the Santa Clara permittees.

The activity of reporting total trash loads and the dominant types of trash removed and retaining those records is also not new for the Alameda and Contra Costa permittees. The Alameda permittees were required to keep records of the weight or volume of materials removed through street sweeping; the amount of material removed and the areas where man-made materials were removed and the types of material removed and estimated quantity or weight removed when cleaning storm drainage facilities; and the areas targeted for litter removal and the total amount of litter removed.<sup>1414</sup> The Contra Costa permittees were required to report on the amount of material removed when cleaning storm drainage facilities, specifically report on man-made materials removed and the type and estimated volume of material removed, and to keep records of the areas targeted for litter removal and the amount of materials removed.<sup>1415</sup>

The Fairfield-Suisun permittees were required to document and maintain the following records monthly: volume of material removed from storm drainage facilities (inlets, lines, channels, watercourses, etc.), management practices, observations of illegal discharges, and areas that could be improved.<sup>1416</sup> San Mateo was also required to report on the amount of material removed when cleaning storm drain facilities by

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<sup>1411</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 3682 (Attachment 79, Santa Clara Valley Urban Runoff Pollution Prevention Program, Trash Item Tally Worksheet).

<sup>1412</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 5628 (Attachment 96, Trash Work Plan, March 1, 2003).

<sup>1413</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 2087 (Attachment 60, Order 01-024).

<sup>1414</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 2420, 2422, 2425 (Attachment 67, ACCWP Stormwater Quality Management Plan July 2001-June 2008, February 10, 2003).

<sup>1415</sup> Exhibit BB (15), Contra Costa Stormwater Management Plan 1999-2004, pages 76-77, 81-82.

<sup>1416</sup> Exhibit BB (20), Fairfield Suisun 2007 Stormwater Management Plan, page 88.



volume.<sup>1417</sup> Thus, the reporting of total trash loads and retaining those records are not new for these permittees. However, the Fairfield-Suisun and San Mateo permittees were not previously required to report on the dominant types of trash removed and, thus, this requirement and the requirement to retain the records on the dominant types of trash removed are new for the Fairfield-Suisun and San Mateo permittees.

Vallejo's Stormwater Management Plan only says the Annual Report shall include progress on stormwater management activities related to street sweeping, catch basin inspection and maintenance, open ditch and basin maintenance, and handling of wastes, and did not require the Vallejo permittees to report total trash loads and the dominant types of trash removed each year, and retain those records and, thus, these activities are new for the Vallejo permittees.<sup>1418</sup>

Finally, none of the permittees were required to report and retain records on the total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected pursuant to Section C.10.b.*, or report the percent reduction of the annual trash load relative to the permittee's baseline trash load beginning with the 2012 annual report. These requirements are new for all permittees.

c. The new requirements imposed by Section C.10. are mandated by the state and constitute a new program or higher level of service.

As indicated above, the following requirements imposed by Section C.10. are new:

- 1) Short-Term Trash Load Reduction Plan (Section C.10.a.i.). All permittees, except for flood management agencies, shall submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe the following:
  - Control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation.
  - Additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.
  - The Plan shall also "account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii. and Trash Hot Spot Cleanup called for in Provision C.10.b."<sup>1419</sup>

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<sup>1417</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 3951, 4009 (Attachment 83, STOPPP Stormwater Management Plan, April 2004-June 2010).

<sup>1418</sup> Exhibit BB (49), Vallejo Sanitation and Flood Control District Storm Water Management Plan, page 61.

<sup>1419</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

- 2) Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). All permittees, except for flood management agencies, shall comply with the following new requirements:
- Determine the baseline trash load from its MS4.
  - Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:
    - Documentation of the methodology used to determine the load level.
    - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
    - The submittal shall account for the drainage areas of a Permittee's jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.
  - Submit a progress report by February 1, 2011, that indicates whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>1420</sup>
- 3) Minimum Full Trash Capture (Section C.10.a.iii.). Except as specified below, all permittees shall comply with the following requirements:
- Install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land draining to MS4s within their jurisdictions. The scope of this requirement is as follows:
    - A full capture system or device is "any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area".
    - The mandatory minimum number of full trash capture devices for each permittee is identified in Attachment J to the test claim permit, Tables 10-1 and 10-2. However, if the sum of the areas generating trash loads determined pursuant to Section C.10.a.ii. is a smaller acreage than the required trash capture acreage, the minimum full trash capture

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<sup>1420</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

requirement is reduced to the smaller acreage for the population-based permittee.<sup>1421</sup>

The requirements to install and maintain full trash capture devices **does not apply:**

- To a population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000.<sup>1422</sup>
- To full trash capture devices installed by a permittee *before* the effective date of the test claim permit, which may be counted towards the minimum number of full trash capture devices identified in Attachment J, provided the device meets the permit's definition of a full trash capture device.<sup>1423</sup>

#### 4) Trash Hot Spots (C.10.b.ii. and iii.)

- The permittees shall each submit selected Trash Hot Spots to the Regional Board by July 1, 2010. (Section C.10.b.ii.)<sup>1424</sup>
- Hot Spot Assessments. (Section C.10.b.iii.)

The San Mateo and Fairfield-Suisun permittees shall comply with the following new requirements:

- Identify the dominant types of trash (e.g., glass, plastics, paper).
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Contra Costa permittees shall comply with the following new requirement:

- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Vallejo permittees shall comply with the following new requirements:

- Quantify the volume of material removed from each trash hot spot cleanup.

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<sup>1421</sup> Exhibit A, Test Claim, 10-TC-02, pages 234, 411 et seq., and 415 et seq. (Test claim permit, Section C.10.a.iii., Attachment J, Tables 10-1, 10-2).

<sup>1422</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1423</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.); Code of Federal Regulations, title 40, section 122.41(e).

<sup>1424</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.ii.).

- Identify the dominant types of trash removed (e.g., glass, plastics, paper).
  - Document the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.<sup>1425</sup>
- 5) Long-Term Trash Load Reduction Plan (Section C.10.c.). All permittees, except for flood management agencies, shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe the control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1426</sup>
- 6) Reporting and Document Retention (Section C.10.d.i. and C.10.d.ii.)

The Fairfield-Suisun, San Mateo, and Vallejo permittees shall comply with the following new requirement:

- In each annual report, report on the dominant types of trash removed and retain these records.<sup>1427</sup>

All permittees shall comply with the following new requirements:

- In each Annual Report, provide total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected* pursuant to Section C.10.b. and retain these records.<sup>1428</sup>
- Beginning with the 2012 annual report, report the percent annual trash load reduction relative to the permittee's baseline trash load.<sup>1429</sup>

The Commission finds these activities are mandated by the state. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES

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<sup>1425</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.iii.).

<sup>1426</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

<sup>1427</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1428</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1429</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i.).

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.<sup>1430</sup>

The courts have also explained “except where a regional board finds the conditions are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard.”<sup>1431</sup>

Here, federal law requires the implementation of a program to effectively prohibit non-stormwater discharges, controls to reduce the discharge of pollutants to the MEP, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”<sup>1432</sup> But federal law does not require permittees to perform the new trash load reduction requirements. Nor is there evidence complying with these new activities is the only means by which the federal MEP standard can be met. The new trash load reduction requirements are mandated at the discretion of the Regional Board and are not mandated by federal law and, thus, impose a state-mandated program.

Moreover, the requirements are unique to government and provide a governmental service to the public. As indicated in the Fact Sheet, trash has a significant impact on the environment:

Controlling trash is one of the priorities for this Permit reissuance not only because of the trash discharge prohibition, but also because trash and litter cause particularly major impacts on our enjoyment of creeks and the Bay. There are also significant impacts on aquatic life and habitat in those waters and eventually to the global ocean ecosystem, where plastic often floats, persists in the environment for hundreds of years, if not forever, concentrates organic toxins, and is ingested by aquatic life. There are also physical impacts, as aquatic species can become entangled and

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<sup>1430</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

<sup>1431</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>1432</sup> United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

ensnared and can ingest plastic that looks like prey, losing the ability to feed properly.<sup>1433</sup>

The Regional Board's Rapid Trash Assessment Protocol (RTA) also explains trash is a pollutant of concern:

Trash is a water pollutant that has a large range of characteristics of concern. Not all litter and debris delivered to streams are of equal concern to water quality. Besides the obvious negative aesthetic effects, most of the harm of trash in surface waters is imparted to aquatic life in the form of ingestion or entanglement. Some elements of trash exhibit significant threats to human health, such as discarded medical waste, human or pet waste, and broken glass. Also, some household and industrial wastes may contain toxic substances of concern to human health and wildlife, such as batteries, pesticide containers, and fluorescent light bulbs that contain mercury. Larger trash such as discarded appliances can present physical barriers to natural stream flow, causing physical impacts such as bank erosion. From a management perspective, the persistence and accumulation of trash in a water body are of particular concern, and signify a priority area for prevention of trash discharges. Also of concern are trash "hotspots" where illegal dumping, littering, and/or accumulation of trash occur.<sup>1434</sup>

Thus, the Regional Board's mandate to reduce trash in the new ways required by the test claim permit provide a service to the public and mandate a new program or higher level of service.

#### **4. Mercury and PCB Diversion Studies – Sections C.11.f. and C.12.f.**

Sections C.11.f. and C.12.f. of the test claim permit require the permittees to implement pilot programs to evaluate the reduction in mercury and PCB levels by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works ("POTWs").<sup>1435</sup> The permittees are also required to quantify and report the amount of mercury and PCB levels reduced as a result of the pilot studies.<sup>1436</sup> These sections were included in the test claim permit to implement previously approved TMDLs requiring a reduction of mercury and PCB loads in the receiving waters and intended to "provide a basis for

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<sup>1433</sup> Exhibit A, Test Claim, 10-TC-02, pages 345-346 (Fact Sheet).

<sup>1434</sup> Exhibit I, Regional Board's Comments on Test Claims 10-TC-02, 10-TC-03, and 10-TC-05, page 910.

<sup>1435</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f. and C.12.f.).

<sup>1436</sup> Exhibit A, Test Claim, 10-TC-02, pages 241, 249 (Test claim permit, Sections C.11.f.iii. and C.12.f.iii.).

determining the implementation scope of urban runoff diversion projects in subsequent permit terms."<sup>1437</sup>

The claimants contend the prior permits contained no provisions requiring the diversion studies and pilot programs for mercury and PCBs required under the test claim permit. The studies and pilot projects required under sections C.11.f and C.12.f are therefore new programs mandated by the state.<sup>1438</sup>

The Regional Board acknowledges Sections C.11.f. and C.12.f. contain more detailed requirements when compared to the permittees' prior programs but contends these provisions do not mandate a new program or higher level of service because they are necessary to implement the minimum federal MEP standard.

When the San Francisco Bay Water Board issued the Permit it determined that more detailed requirements were necessary to refine Claimants' existing programs to address mercury and PCBs contamination. That approach was consistent with the iterative approach required to meet the MEP standard under federal law. Thus, the Board did not require that Claimants implement a new program but instead provided further detail in implementing the minimum federal MEP standard and added specificity to already existing BMPs.<sup>1439</sup>

The Regional Board also argues the requirements imposed by Sections C.11.f. and C.12.f. are mandated by federal law since federal law prohibits the discharge of non-stormwater discharges, requires controls to reduce pollutants to the MEP, and gives the Regional Board discretion to include such other provisions as the permitting agency determines to be appropriate for the control of pollutants:

Provisions C.11. f and C.12. f are required by the Clean Water Act and its implementing regulations. As discussed above Clean Water Act section 402(p)(3)(B)(ii-iii) governs issuance of MS4 permits. It provides broad legal authority for the requirements in Provision C.11 and C.12. That law provides three separate but related requirements for discharge permits issued to the local governments that operate MS4s.

First, the CWA requires that stormwater permits must require that permittees effectively prohibit non-stormwater discharges into storm sewers. [Fn. omitted.] The challenged Provisions relate to dry weather flows. EPA has defined "storm water" to mean "storm water runoff, snow melt runoff and surface runoff and drainage." [Fn. omitted.] Dry weather

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<sup>1437</sup> Exhibit A, Test Claim, 10-TC-02, pages 240, 248 (Test claim permit, Sections C.11.f.i., C.12.f.i.).

<sup>1438</sup> Exhibit A, Test Claim, 10-TC-02, pages 52-54; Exhibit B, Test Claim, pages 45-46; Exhibit C, Test Claim, 10-TC-05, pages 51-52.

<sup>1439</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 56.

flows are not included in the definition of "stormwater", thus such flows are prohibited.

Second, MS4 permits must require controls that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the MEP. [Fn. omitted.] The challenged Provisions also relate to stormwater flows, specifically MS4 discharges of first-flush stormwater flows which are flows during the initial or early parts of storms. There is a general analysis of the MEP standard above. The San Francisco Bay Water Board implemented the MEP standard in requiring Provisions C.11.f and C.12.f. Federal law mandates that the Board exercise its discretion in establishing requirements to meet the MEP standard. The Board determined that the challenged provisions were necessary to meet the MEP standard. The MEP standard required that the Board make such a determination thus the Board complied with the standard in adopting Provisions C.11. f and C.12. f, despite the fact that the provisions are more specific than the federal laws and regulations that are cited in the permit. For those reasons the challenged requirements meet but do not exceed the MEP standard.

Last, stormwater permits must include such other provisions as the permitting agency determines to be appropriate for the control of pollutants. [Fn. omitted.] This federal requirement is the basis for water quality based provisions such as Provisions C.11.f and C.12.f.<sup>1440</sup>

In comments on the Draft Proposed Decision, the Water Boards contend the requirements imposed by Sections C.11.f. and C.12.f. are mandated by federal law and that the Commission should not focus on the MEP standard, but on separate requirements in federal regulations requiring the Regional Board to adopt effluent limits in NPDES permits consistent with the assumptions and requirements of the U.S. EPA-approved WLAs adopted in a TMDL for the discharge of the pollutant:

[T]he "true choice" analysis [fn. omitted] 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 [in 40 C.F.R. section 122.44(d)(1)(vii)(B)] 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."<sup>1441</sup>

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<sup>1440</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 56-57.

<sup>1441</sup> Exhibit AA, Water Boards' Comments on the Draft Proposed Decision, pages 6-8.



The federal regulation cited by the Water Boards, 40 C.F.R. section 122.44(d)(1)(vii)(B), requires that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, have to be “consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA.” The Water Boards state that these regulations are independent from and more restrictive than the MEP standard that the California Supreme Court considered in the 2016 *Department of Finance* case. The Water Boards explain the following:

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. [Fn omitted.]<sup>1442</sup>

The Water Boards conclude, “[i]ncorporating those controls into the permit as narrative, BMP-based water-quality based effluent limitations does not constitute a “true choice.””<sup>1443</sup>

The Regional Board also argues the requirements in Sections C.11.f. and C.12.f. are not unique to government and, therefore do not impose a new program or higher level of service as follows:

Provisions C.11.f and C.12.f, which require Permittees to conduct pilot feasibility studies to divert mercury and PCBs, respectively, to public treatment works, implement the mercury and PCBs TMDLs in the San Francisco Bay. In addition to being mandated by federal law, these two provisions are also generally applicable to entities aside from local agencies. (See generally Atts. 23 and 24 [TMDL Staff Reports].) The Mercury TMDL has wasteload allocations for stormwater runoff, wastewater from refineries and other industrial dischargers, and publicly-owned treatment works, while the PCBs TMDL has wasteload allocations for industrial wastewater discharges, municipal discharges, stormwater, and the Central Valley watershed. (See Att. 23, Mercury TMDL Staff Report, at pp. III-5 - III-7; Att. 24, PCBs TMDL Staff Report, at p. 63-64.) Under both TMDLs, municipalities managing stormwater and industrial facilities managing wastewater have comparable obligations to identify and reduce their discharges of mercury and PCBs. (See Att. 23, Mercury TMDL Staff Report, at pp. III-9- III-10, III-14; Att. 24, PCBs TMDL Staff

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<sup>1442</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 7.

<sup>1443</sup> Exhibit AA, Water Boards’ Comments on the Draft Proposed Decision, page 8.

Report, at p. 71 [wasteload allocations for municipal and industrial dischargers would be implemented through BMPs]; p. 73 [diversion of dry and/or wet weather flows to POTWs “should be investigated, pilot-tested, and implemented where feasible”].) NPDES permits in the Bay Area impose requirements of feasibility studies akin to the requirements in C.11.f and C.12.f. (See Att. 25, Order No. R2-2007-0032 [*C&H Sugar*], Appx. F- 6, at pp. 4-7 [describing results of mercury source investigation]; Att. 23, R2-2007-0077 [*Mercury Watershed Permit*], at p. E-8 [requiring both industrial and municipal dischargers to provide description of source control projects, including estimates of avoided mercury loading achieved by recycling water].)<sup>1444</sup>

For the reasons below, the Commission finds Sections C.11.f. and C.12.f. impose a state-mandated new program or higher level of service on the permittees.

- a. Federal law requires that the Regional Board include effluent limits in the permit that are consistent with the assumptions and requirements of any available wasteload allocation for the discharge once a TMDL is adopted.

As discussed in the Background, the CWA requires states to develop a list of “impaired” waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards 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 water quality standards.<sup>1445</sup> 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.<sup>1446</sup> The

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<sup>1444</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>1445</sup> United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

<sup>1446</sup> 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

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.

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.*<sup>1447</sup>

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.”<sup>1448</sup> A regional board is then required by federal law to

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loading. Wherever possible, natural and nonpoint source loads should be distinguished.”

<sup>1447</sup> *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

<sup>1448</sup> United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, section 130.7(d)(2).

incorporate the TMDL into the Basin Plan.<sup>1449</sup> Basin Plan amendments do not become effective until approved by the State Water Board and the Office of Administrative Law (OAL).<sup>1450</sup>

Federal law then requires regional boards to include effluent limits in compliance with “all applicable water quality standards” and “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.<sup>1451</sup>

b. TMDLS for Mercury and PCB were adopted and approved before the adoption of the test claim permit.

In 1998, the Regional Board adopted a 303(d) impaired water body list classifying all of San Francisco Bay as impaired due to mercury.<sup>1452</sup> Mercury concentrations in the Bay were high enough to threaten the health of humans who consume fish and some bird eggs harvested from the shores of the Bay were high enough to account for abnormally high rates of eggs failing to hatch.<sup>1453</sup> On August 9, 2006, the Regional Board adopted a TMDL for mercury in the San Francisco Bay.<sup>1454</sup> The TMDL was ultimately adopted by the State Board on July 17, 2007, approved by the Office of Administrative Law on November 7, 2007, and approved by the U.S. EPA on February 12, 2008.<sup>1455</sup> The mercury TMDL established wasteload allocations (WLAs) for urban stormwater runoff and identified individual allocations and the reductions required for each of the six

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<sup>1449</sup> United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, sections 130.6, 130.7(d)(2).

<sup>1450</sup> California Government Code section 11353.

<sup>1451</sup> Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

<sup>1452</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1863 (Attachment 53, Order 2003-0021, Finding 49).

<sup>1453</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, page 10.

<sup>1454</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, page 4.

<sup>1455</sup> California Code of Regulations, title 23, section 3915.

groups of permittees governed by the Santa Clara Valley Urban Runoff Pollution Prevention Program, Alameda Countywide Clean Water Program, Contra Costa Clean Water Program, San Mateo County Stormwater Pollution Prevention Program, Vallejo Sanitation and Flood Control District, and Fairfield-Suisun Urban Runoff Management Program.<sup>1456</sup> WLAs were also established for other entities, including industrial companies discharging wastewater and petroleum wastewater.<sup>1457</sup> The TMDL required the WLAs for urban stormwater runoff be implemented through NPDES stormwater permits and to be finally achieved within 20 years, with an interim loading milestone achieved within ten years.<sup>1458</sup> The TMDL also required that the NPDES permits issued or reissued by the Water Board for urban runoff management agencies include the development and implementation of a monitoring program to quantify mercury loads and reductions through treatment and control and to conduct or cause to be conducted studies aimed at better understanding “mercury fate, transport, and biological uptake in San Francisco Bay and tidal areas.”<sup>1459</sup>

PCBs are a potential carcinogen and are suspected of having negative impacts on the human immune system, reproductive system, nervous system, endocrine system, and digestive system. Although their manufacture is banned in the United States, PCBs continue to pose a serious risk due to their presence in the environment, tend to accumulate in fatty tissue in fish, and waters in the Bay were placed on the impaired 303(d) list in 1998 for PCBs.<sup>1460</sup> On February 13, 2008, the Regional Board adopted a TMDL for PCBs in the San Francisco Bay.<sup>1461</sup> The TMDL was approved by the State Board on October 20, 2009, by the Office of Administrative Law on March 1, 2010, and by the U.S. Environmental Protection Agency on March 29, 2010.<sup>1462</sup> Consequently, the PCB TMDL was moving through the approval process during the same time as the test claim permit, and the PCB TMDL had been approved by the Regional Board before the test claim permit was finalized and adopted. The TMDL explains that the California Toxics Rule (CTR) previously prescribed numeric water quality criteria for PCBs applicable to the San Francisco Bay, but those standards were not being met.<sup>1463</sup> The TMDL sets a numeric concentration-based target for total PCBs in fish tissue in San

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<sup>1456</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, pages 13-14.

<sup>1457</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, pages 15-17.

<sup>1458</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, page 19.

<sup>1459</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, page 19.

<sup>1460</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, page 1863 (Attachment 53, Order R2-2003-0021, Findings 52-54).

<sup>1461</sup> Exhibit BB (33), Order R2-2008-0012, PCB TMDL, page 3.

<sup>1462</sup> Exhibit BB (36), San Francisco Bay PCBs TMDLs Project, page 2, [http://www.swrcb.ca.gov/sanfranciscobay/water\\_issues/programs/TMDLs/sfbaypcbstmdl.shtml](http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/TMDLs/sfbaypcbstmdl.shtml) (accessed June 14, 2024).

<sup>1463</sup> Exhibit BB (33), Order R2-2008-0012, PCB TMDL, pages 1, 5.

Francisco Bay, based on protecting human health risk associated with consumption of recreationally-caught fish and protection of wildlife.<sup>1464</sup> Sources of PCBs include municipal and industrial wastewater discharges and urban and non-urban stormwater runoff.<sup>1465</sup> The TMDL established WLAs for municipal and industrial wastewater dischargers and individual WLAs for stormwater runoff to county-based watersheds.<sup>1466</sup> The TMDL required final compliance within 20 years.<sup>1467</sup> The Final Staff Report for the TMDL indicates that “[r]outing of urban stormwater runoff through municipal wastewater treatment facilities is a means of reducing PCBs.”<sup>1468</sup>

Thus, the staff report for the TMDL concludes by stating stormwater WLAs “will be implemented through NPDES stormwater permits issued to urban runoff management agencies;” . . . “[a] potential means to reduce urban stormwater runoff PCBs loads will be to strategically intercept and route runoff to municipal wastewater treatment systems;” and the control measures “to be considered” include opportunities to route dry and wet weather flows from storm drain systems to wastewater systems, “which should be investigated, pilot tested, and implemented where feasible” as follows:

NPDES permit requirements will call for progressive implementation of PCBs control measures. Specific best management practices (BMPs) and control measures to be considered include: . . . Opportunities to route dry weather and/or wet weather flows from storm drain systems to wastewater systems should be investigated, pilot tested, and implemented where feasible. This includes consideration of dry weather flows, including possible street washing flows, and wet weather flows, particularly first flush flows.<sup>1469</sup>

c. Sections C.11.f. and C.12.f. of the test claim permit impose new requirements on the permittees.

Sections C.11.f. and C.12.f. of the test claim permit require the permittees to implement two pilot programs to evaluate the reduction in mercury and PCB levels by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants by Publicly Owned Treatment Works (POTWs). The permittees are also required to quantify and report the amount of mercury and PCB levels reduced as a result of the pilot study. These sections were included in the test claim permit to

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<sup>1464</sup> California Code of Regulations, title 23, 3919.6.

<sup>1465</sup> Exhibit BB (33), Order R2-2008-0012, PCB TMDL, page 6.

<sup>1466</sup> Exhibit BB (33), Order R2-2008-0012, PCB TMDL, pages 7, 8, 10.

<sup>1467</sup> Exhibit BB (33), Order R2-2008-0012, PCB TMDL, page 11.

<sup>1468</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 1826 (Final Staff Report for the PCB TMDL).

<sup>1469</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 1817, 1824-1825 (Final Staff Report for the PCB TMDL).

implement the previously approved TMDLs that require a reduction of mercury and PCB loads in the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.”<sup>1470</sup>

Specifically, sections C.11.f. and C.12.f. impose identical requirements on the permittees to “implement pilot projects to divert dry weather and first flush flows to POTWs to address these flows as a source of PCBs and mercury to receiving waters.” To do this, the permittees are required to perform the following activities for *both* the PCB and mercury pilot projects:

- Conduct feasibility evaluations for mercury and PCBs by selecting five stormwater pump stations and five alternates for each pollutant and evaluate drainage characteristics and the feasibility of diverting flows of each to the sanitary sewer. The feasibility evaluations shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.
- From these feasibility evaluations, select five pump stations and five alternates for the pilot diversion studies for each pollutant. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.
- Implement flow diversion of mercury and PCBs to the sanitary sewer at five pilot pump stations.
- As part of the pilot studies, the permittees shall monitor, measure, and report mercury and PCBs load reduction.
- Report the following information to the Regional Board:
  - Summarize the results of the feasibility evaluations in the 2010 Annual Report. The reports shall include the selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies; time schedules for conducting the pilot studies; and a proposed method for distributing mercury load reductions to participating wastewater and stormwater agencies.
  - Report annually on the status of the pilot studies in each subsequent annual report.
  - Include in the March 15, 2014 Integrated Monitoring Report, the following information for each study: evaluation of pilot programs effectiveness,

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<sup>1470</sup> Exhibit A, Test Claim, 10-TC-02, pages 237, 240, 244, 248 (Test claim permit, Sections C.11., C.11.f.i., C.12., C.12.f.i.).

mercury and PCBs loads reduced, and updated feasibility evaluation procedures to guide future diversion project selection.<sup>1471</sup>

These activities are new for all the permittees. The prior permits required the permittees to monitor for pollutants, implement BMPs of their choosing to control the discharge of pollutants to the MEP, and prohibited the discharge of stormwater that causes or contributes to a violation of water quality standards.<sup>1472</sup> In addition, most of the prior permits required the permittees to have a control program, reduction plan, or to submit a technical report specifically for mercury and PCBs to address the impairment of the waterbodies caused by these pollutants.<sup>1473</sup> However, the prior permits did not require the permittees to implement pilot projects to divert dry weather and first flush stormwater flows to POTWs to reduce the flow of PCBs and mercury to receiving waters. Moreover, statutes enacted by the Legislature provide authority, but do not require, local agencies to divert stormwater and dry weather runoff from the stormwater system to a wastewater collection or treatment system.<sup>1474</sup> Thus, the requirements in Sections C.11.f. and C.12.f. are new.

- d. The new requirements imposed by Sections C.11.f. and C.12.f. are mandated by the state and impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular

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<sup>1471</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f. and C.12.f.).

<sup>1472</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1866-1867 (Attachment 53, Order R2-2003-0021, Sections A., B., and C.1.), pages 1948-1950 (Attachment 55, Order 99-059, Sections A., B., and C.1.), and pages 2083-2084 (Attachment 60, Order 01-024, Sections A., B., and C.1.); Exhibit BB (27), Order R2-2003-0034, pages 18-19; Exhibit BB (25), Order 99-058, pages 7-8; Exhibit BB (43), U.S. EPA Permit No. CAS612006, pages 2, 4-5.

<sup>1473</sup> Exhibit I, Regional Board's Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 1887-1888, 1889-1890 (Attachment 53, Order R2-2003-0021), page 1950 (Attachment 55, Order 99-059), and pages 2092-2093, 2095-2096 (Attachment 60, Order 01-024); Exhibit BB (28), Order R2-2004-0059, page 6; Exhibit BB (27), Order R2-2003-0034, pages 40-41, 43-44.

<sup>1474</sup> Water Code sections 13910 et seq. (Stats. 2021, ch. 241).



implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a “true choice,” the requirement is not federally mandated.<sup>1475</sup>

As indicated in the court’s decision, this is the long-standing test identified in prior case law to determine if requirements imposed by state statute or executive order are mandated by the state or the federal government when the state is implementing federal law.<sup>1476</sup>

The courts have also explained “except where a regional board finds the conditions are the *only means* by which the [federal] ‘maximum extent practicable’ standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard.”<sup>1477</sup> “That the . . . Regional Board found the permit requirements were ‘necessary’ to meet the standard establishes only that the . . . Regional Board exercised its discretion.”<sup>1478</sup>

Here, the mercury and PCB TMDLs were required by federal law since the waterbodies were 303(d) listed as impaired because of these pollutants. Regional boards are then required by federal law to include effluent limits compliant with “all applicable water quality standards” and “consistent with the assumptions and requirements of any available wasteload allocation for the discharge” in NPDES permits.<sup>1479</sup> And, as the

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<sup>1475</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

<sup>1476</sup> See *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 764-765, where the court explains the following prior decisions: *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, which addressed local governments’ reimbursement claims for the costs of extending unemployment insurance protection to their employees pursuant to a federal statute that induced the state’s compliance with a carrot and stick; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, addressing a state statute that required local governments to provide indigent criminal defendants with experts for the preparation of their defense in accordance with federal law; and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, which addressed state special education statutes implementing the federal Education of the Handicapped Act.

<sup>1477</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

<sup>1478</sup> *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

<sup>1479</sup> Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

Regional Board points out, the permits can also include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.<sup>1480</sup>

However, federal law does not require NPDES stormwater permittees to implement pilot projects to divert dry weather and first flush flows to POTWs in an effort to control or reduce PCBs and mercury to the receiving waters. The Regional Board could have complied with federal law by simply directing the local government permittees to comply with the WLAs by implementing control measures, BMPs, and the monitoring of their choosing, rather than imposing a specific requirement directing local government to implement pilot projects to divert flows to POTWs. Although pilot studies were identified in the staff reports to the TMDLs “to be considered” in the NPDES permits or to be included in the NPDES permits,<sup>1481</sup> and the TMDLs were approved by U.S. EPA, the Regional Board exercised a true choice in imposing this requirement, in addition to the pollutants of concern monitoring requirements imposed by Section C.8.e., which made clear that the monitoring for mercury and PCBs “is not sufficient to determine progress toward achieving TMDL load allocations. Progress toward achieving load allocations will be accomplished [in part] by assessing loads avoided resulting from treatment . . . .”<sup>1482</sup> Thus, the Regional Board exercised discretion when imposing the additional requirements in Sections C.11.f. and C.12.f. and determined the pilot studies would be appropriate to control these pollutants and to determine the scope of urban runoff diversion projects in subsequent permit terms.<sup>1483</sup>

Moreover, the requirements of Sections C.11.f. and C.12.f. constitute a new program or higher level of service. New requirements constitute a new program or higher level of service within the meaning of article XIII B, section 6, when the requirements carry out the governmental function of providing services to the public, or to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.<sup>1484</sup> Only one of these alternatives is required to establish a new program or higher level of service.<sup>1485</sup>

The Regional Board argues Sections C.11.f. and C.12.f. do not impose a new program or higher level of service because the requirements are not unique to government since

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<sup>1480</sup> United States Code, title 33, section 1342(p)(3)(B)(iii).

<sup>1481</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, page 19; Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 1817, 1824-1825 (Final Staff Report for the PCB TMDL).

<sup>1482</sup> Exhibit A, Test Claim, 10-TC-02, page 222 (Test claim permit).

<sup>1483</sup> Exhibit A, Test Claim, 10-TC-02, pages 237, 240, 244, 248 (Test claim permit, Sections C.11., C.11.f.i., C.12., C.12.f.i.).

<sup>1484</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>1485</sup> *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.

both public and private entities are required to comply with the TMDLs and are issued NPDES permits. And NPDES permits for industrial dischargers are more stringent than municipal permits because federal law requires they meet technology-based standards by including numeric effluent limitations to ensure compliance with water quality standards in receiving waters.<sup>1486</sup> The Regional Board bases its argument on the fact that the mercury and PCB TMDLs have WLAs for both stormwater runoff and industrial wastewater discharges, and all permittees subject to the TMDLs have comparable obligations to identify and reduce their discharges of mercury and PCBs as indicated in the following pages cited by the Regional Board:<sup>1487</sup>

- The Regional Board Staff Report for the Mercury TMDL (and the Regional Board refers to pages III-9 through III-10, and III-14 of that report).<sup>1488</sup>

These pages show part of the implementation plan for urban stormwater runoff and industrial wastewater dischargers to reduce the discharge of mercury was to monitor levels of methylmercury in the discharges.<sup>1489</sup>

- Regional Board Order R2-2007-0077, a wastewater discharge permit implementing the mercury TMDL for municipal and industrial dischargers that own and operate wastewater treatment facilities.<sup>1490</sup> The Fact Sheet to Order R2-2007-0077 explains:

Municipal wastewater treatment plants provide secondary treatment, which includes settling, filtration, and biological treatment. Some plants also provide advanced treatment, which removes additional solids. Removing additional solids removes additional pollutants, like mercury, that adhere to particles. Municipal wastewater treatment plants generally remove over 90% of the mercury in their influent. While the removed mercury is not directly discharged to water, some is returned to the environment through landfills, incinerators, or soil amendments. The primary

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<sup>1486</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 24.

<sup>1487</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 24.

<sup>1488</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 24.

<sup>1489</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, pages 1663-1664, 1668. Methylmercury is "a highly toxic form of mercury, is a persistent bioaccumulative pollutant." Exhibit P, Regional Board's Response to the Request for Additional Briefing, page 2165.

<sup>1490</sup> Exhibit P, Regional Board's Response to the Request for Additional Briefing, pages 24, 2092 et seq.

sources of mercury in municipal wastewater are expected to be human waste and medical and dental facilities.

Industrial Dischargers include petroleum refineries, chemical plants, and other large industrial facilities. The mercury loads depend on the types of activities in which these Dischargers engage.<sup>1491</sup>

Order R2-2007-0077 requires these dischargers to comply with the individual numeric effluent limits identified for each discharger in the permit.<sup>1492</sup>

The Regional Board cites to page E-8 of this permit, which requires both industrial and municipal wastewater dischargers to submit a report describing their mercury reduction efforts, including “estimates of mercury mass loads that can be avoided through program activities unrelated to normal treatment, including recycled water delivered, summarized by activity if appropriate.”<sup>1493</sup>

- The Regional Board Staff Report for the PCBs TMDL (and the Regional Board refers to page 71).<sup>1494</sup> This page addresses the implementation plan for municipal and industrial wastewater discharges and states the following:

Wasteload allocations for municipal and industrial wastewater discharges reflect current PCBs loads. Loads are expected to diminish as sources of PCBs to wastewater treatment systems diminish over time. Wasteload allocations will be implemented through NPDES permits that require implementation of best management practices (BMPs) to maintain optimum treatment performance for solids removal and to identify and manage controllable sources.<sup>1495</sup>

This page also explains “[t]he primary PCBs treatment mechanism is solids removal, and as such, ongoing attainment of suspended solids effluent limits provides a surrogate indicator of PCBs control. In addition to maintaining optimum solids removal performance,

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<sup>1491</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 2161.

<sup>1492</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, pages 2111-2117 (“The mass and concentration of mercury in the effluent at the Discharge Points . . . shall not exceed the limitations.”)

<sup>1493</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 2148.

<sup>1494</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>1495</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 1823.

wastewater dischargers should evaluate whether there are any controllable sources of PCBs to their systems (e.g., industrial uses of equipment that contain PCBs).<sup>1496</sup>

- The Regional Board Staff Report for the PCBs TMDL (and the Regional Board refers to page 73).<sup>1497</sup> This page addresses the “[s]pecific best management practices (BMPs) and control measures *to be considered*” for stormwater runoff,<sup>1498</sup> including “Opportunities to route dry weather and/or wet weather flows from storm drain systems to wastewater systems *should be investigated*, pilot tested, and implemented where feasible.”<sup>1499</sup>
- The industrial permit for C & H Sugar, which requires that discharger to report the results of mercury source investigation.<sup>1500</sup>

The Regional Board is correct that the mercury and PCB TMDLs impose WLAs on MS4 stormwater dischargers and municipal and industrial wastewater dischargers, requiring reductions in their discharges of these pollutants.<sup>1501</sup> However, the requirements imposed by Sections C.11.f. and C.12.f. to conduct pilot diversion studies for mercury and PCBs in stormwater are uniquely imposed on the local agency permittees. The Regional Board is mandating the permittees to perform the pilot diversion studies as specific BMPs to reduce and control these pollutants, rather than leaving the decision to the permittees to decide the treatment and control measures to comply with the WLAs adopted in the TMDLs.

Even if a court agrees with the Regional Board that the requirements are not unique to government, the new requirement to conduct pilot diversion studies for mercury and PCBs in stormwater carries out the governmental function of providing services to the public.<sup>1502</sup> The waters in the San Francisco Bay were impaired for mercury and PCBs, both of which threaten the health of humans, as described above. The purpose of the

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<sup>1496</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 1823.

<sup>1497</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>1498</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 1824.

<sup>1499</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 1825, emphasis added.

<sup>1500</sup> Exhibit P, Regional Board’s Response to the Request for Additional Briefing, page 24.

<sup>1501</sup> Exhibit BB (32), Order R2-2006-0052, Mercury TMDL, pages 13-17; Exhibit BB (33), Order R2-2008-0012, PCB TMDL, pages 7, 8, 10.

<sup>1502</sup> *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.

diversion studies is to reduce the discharge of these pollutants to the receiving waters and are intended to “provide a basis for determining the implementation scope of urban runoff diversion projects in subsequent permit terms.”<sup>1503</sup> As the courts have explained, the new requirements impose a new program or higher level of service when they are mandates to perform specific actions designed to reduce the discharge of pollutants in stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.<sup>1504</sup>

Accordingly, the Commission finds that Sections C.11.f. and C.12.f. mandate a new program or higher level of service requiring the permittees to implement pilot projects to divert dry weather and first flush flows to POTWs to address these flows as a source of PCBs and mercury to receiving waters by conducting the following activities:

- Conduct feasibility evaluations for mercury and PCBs by selecting five stormwater pump stations and five alternates for each pollutant and evaluate drainage characteristics and the feasibility of diverting flows of each to the sanitary sewer. The feasibility evaluations shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.
- From these feasibility evaluations, select five pump stations and five alternates for the pilot diversion studies for each pollutant. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.
- Implement flow diversion of mercury and PCBs to the sanitary sewer at five pilot pump stations.
- As part of the pilot studies, the permittees shall monitor, measure, and report mercury and PCBs load reduction.
- Report the following information to the Regional Board:
  - Summarize the results of the feasibility evaluations in the 2010 Annual Report. The reports shall include the selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies; time schedules for conducting the pilot studies; and a proposed method for distributing mercury load reductions to participating wastewater and stormwater agencies.

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<sup>1503</sup> Exhibit A, Test Claim, 10-TC-02, pages 237, 240, 244, 248 (Test claim permit, Sections C.11., C.11.f.i., C.12., C.12.f.i.).

<sup>1504</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

- Report annually on the status of the pilot studies in each subsequent annual report.
- Include in the March 15, 2014 Integrated Monitoring Report, the following information for each study: evaluation of pilot programs effectiveness, mercury and PCBs loads reduced, and updated feasibility evaluation procedures to guide future diversion project selection.<sup>1505</sup>

**C. There Are Costs Mandated by the State for the New State-Mandated Activities from December 16, 2009, Through December 31, 2017. Beginning January 1, 2018, there Are No Costs Mandated by the State Pursuant to Government Code Section 17556(d).**

As indicated above, the following activities constitute state-mandated new programs or higher levels of service:

Geomorphic Study

- Permittees shall select a waterbody/reach, preferably one containing significant fish and wildlife resources, and conduct one of the following projects within each county, except only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:
  - (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or
  - (2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or
  - (3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach not undergoing changing land use. Collect and report the following data:
    - Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
    - Contributing drainage area.
    - Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
    - Best available information on average annual rainfall in the study area.

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<sup>1505</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f., C.12.f.).

- Report selected geomorphic project results in the Integrated Monitoring Report.<sup>1506</sup>

#### Sediment Delivery Estimate/Budget

- Permittees shall develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012.<sup>1507</sup>

#### Citizen Monitoring and Participation – for the City of Vallejo and Vallejo Sanitary District only:

- Encourage Citizen Monitoring.
- In developing Monitoring Projects and evaluating Status & Trends data, make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
- Demonstrate annually the permittee has encouraged citizen and stakeholder observations and reporting of waterbody conditions. Report on these outreach efforts in the annual Urban Creeks Monitoring Report.<sup>1508</sup>

#### Monitoring Reporting and Notice

- Permittees shall maintain an information management system that supports electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>1509</sup>
- Permittees shall submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>1510</sup>
- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>1511</sup>

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<sup>1506</sup> Exhibit A, Test Claim, 10-TC-02, pages 221-222 (Test claim permit, Sections C.8.d.iii.).

<sup>1507</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.e.vi.).

<sup>1508</sup> Exhibit A, Test Claim, 10-TC-02, page 225 (Test claim permit, Section C.8.f.).

<sup>1509</sup> Exhibit A, Test Claim, 10-TC-02, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>1510</sup> Exhibit A, Test Claim, 10-TC-02, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>1511</sup> Exhibit A, Test Claim, 10-TC-02, page 228 (Test claim permit, Section C.8.g.vii.).



## Trash

- 1) Short-Term Trash Load Reduction Plan (Section C.10.a.i.). All permittees, except for flood management agencies, shall submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe the following:
  - Control measures and best management practices, including any trash reduction ordinances, currently being implemented and the current level of implementation.
  - Additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.
  - The Plan shall also “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>1512</sup>
- 2) Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). All permittees, except for flood management agencies, shall comply with the following new requirements:
  - Determine the baseline trash load from its MS4.
  - Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:
    - Documentation of the methodology used to determine the load level.
    - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
    - The submittal shall account for the drainage areas of a Permittee’s jurisdiction associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.
  - Submit a progress report by February 1, 2011, indicating whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>1513</sup>

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<sup>1512</sup> Exhibit A, Test Claim, 10-TC-02, page 233 (Test claim permit, Section C.10.a.i.).

<sup>1513</sup> Exhibit A, Test Claim, 10-TC-02, pages 233-234 (Test claim permit, Section C.10.a.ii.).

3) Minimum Full Trash Capture (Section C.10.a.iii.). Except as provided below, all permittees shall comply with the following requirements:

- Install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions. The scope of this requirement is as follows:
  - A full capture system or device is “any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area”.
  - The mandatory minimum number of full trash capture devices for each permittee is identified in Attachment J to the test claim permit, Tables 10-1 and 10-2. However, if the sum of the areas generating trash loads determined pursuant to Section C.10.a.ii is a smaller acreage than the required trash capture acreage, the minimum full trash capture requirement is reduced to the smaller acreage for the population-based permittee.<sup>1514</sup>

The requirements to install and maintain full trash capture devices **does not apply:**

- To a population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000.<sup>1515</sup>
- To full trash capture devices installed by a permittee *before* the effective date of the test claim permit, which may be counted towards the minimum number of full trash capture devices identified in Attachment J, provided the device meets the permit’s definition of a full trash capture device.<sup>1516</sup>

4) Trash Hot Spots (C.10.b.ii and iii.)

- The permittees shall each submit selected Trash Hot Spots to the Regional Board by July 1, 2010. (Section C.10.b.ii.)<sup>1517</sup>
- Hot Spot Assessments. (Section C.10.b.iii.)

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<sup>1514</sup> Exhibit A, Test Claim, 10-TC-02, pages 234, 411 et seq., and 415 et seq. (Test claim permit, Section C.10.a.iii., Attachment J, Tables 10-1, 10-2).

<sup>1515</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1516</sup> Exhibit A, Test Claim, 10-TC-02, page 234 (Test claim permit, Section C.10.a.iii.); Code of Federal Regulations, title 40, section 122.41(e).

<sup>1517</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.ii.).

The San Mateo and Fairfield-Suisun permittees shall comply with the following new requirements:

- Identify the dominant types of trash (e.g., glass, plastics, paper) removed.
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Contra Costa permittees shall comply with the following new requirement:

- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Vallejo permittees shall comply with the following new requirements:

- Quantify the volume of material removed from each trash hot spot cleanup.
- Identify the dominant types of trash removed (e.g., glass, plastics, paper).
- Document the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.<sup>1518</sup>

5) Long-Term Trash Load Reduction Plan (Section C.10.c.). All permittees, except for flood management agencies, shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe the control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1519</sup>

6) Reporting and Document Retention (Sections C.10.d.i. and C.10.d.ii.)

The Fairfield-Suisun, San Mateo, and Vallejo permittees shall comply with the following new requirement:

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<sup>1518</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.b.iii.).

<sup>1519</sup> Exhibit A, Test Claim, 10-TC-02, page 235 (Test claim permit, Section C.10.c.).

- In each annual report, report on the dominant types of trash removed and retain these records.<sup>1520</sup>

All permittees shall comply with the following new requirements:

- In each Annual Report, provide total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected* pursuant to Section C.10.b. and retain these records.<sup>1521</sup>
- Beginning with the 2012 annual report, report the percent annual trash load reduction relative to the permittee's baseline trash load.<sup>1522</sup>

### Mercury and PCB Diversion Studies

- Permittees shall conduct feasibility evaluations for mercury and PCBs by selecting five stormwater pump stations and five alternates for each pollutant and evaluate drainage characteristics and the feasibility of diverting flows of each to the sanitary sewer. The feasibility evaluations shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.
- From these feasibility evaluations, select five pump stations and five alternates for the pilot diversion studies for each pollutant. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.
- Implement flow diversion of mercury and PCBs to the sanitary sewer at five pilot pump stations.
- As part of the pilot studies, the permittees shall monitor, measure, and report mercury and PCBs load reduction.
- Report the following information to the Regional Board:
  - Summarize the results of the feasibility evaluations in the 2010 Annual Report. The reports shall include the selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies; time schedules for conducting the pilot studies; and a proposed

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<sup>1520</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1521</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1522</sup> Exhibit A, Test Claim, 10-TC-02, pages 235-236 (Test claim permit, Section C.10.d.i.).

method for distributing mercury load reductions to participating wastewater and stormwater agencies.

- Report annually on the status of the pilot studies in each subsequent annual report.
- Include in the March 15, 2014 Integrated Monitoring Report, the following information for each study: evaluation of pilot programs effectiveness, mercury and PCBs loads reduced, and updated feasibility evaluation procedures to guide future diversion project selection.<sup>1523</sup>

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 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 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.”<sup>1524</sup>

In addition, a finding of costs mandated by the state means 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 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 none of the exceptions to reimbursement apply to deny this claim.<sup>1525</sup>

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<sup>1523</sup> Exhibit A, Test Claim, 10-TC-02, pages 240-241, 248-249 (Test claim permit, Sections C.11.f., C.12.f.).

<sup>1524</sup> *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.

<sup>1525</sup> Exhibit A, Test Claim, 10-TC-02, pages 26-29; Exhibit B, Test Claim, 10-TC-03, pages 22-24; Exhibit C, Test Claim, 10-TC-05, pages 23-26.

Finance and the Regional Board contend the claimants possess fee authority within the meaning of section 17556(d), and therefore reimbursement is not required.<sup>1526</sup>

As explained below, there are costs mandated by the state for the new state-mandated activities from December 1, 2009, through December 31, 2017 only:

- There is substantial evidence in the record, as required by Government Code section 17559, the claimants incurred increased costs exceeding \$1,000 and used their local “proceeds of taxes” to comply with the new state-mandated activities.<sup>1527</sup>
- The claimants have constitutional and statutory authority to charge property-related fees for the new requirements. However, from December 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, Government Code section 17556(d) does not apply. 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).<sup>1528</sup> Thus, there are costs mandated by the state from December 1, 2009, through December 31, 2017, for the new state-mandated requirements.

However, reimbursement is not required to the extent the claimants received fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants’ proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local “proceeds of taxes,” reimbursement under section 6 is not required.<sup>1529</sup>

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<sup>1526</sup> Exhibit I, Regional Board’s Comments on the Test Claims, 10-TC-02, 10-TC-03, and 10-TC-05, pages 24-25; Exhibit Q, Finance’s Response to the Request for Additional Briefing, page 1.

<sup>1527</sup> Exhibit A, Test Claim, 10-TC-02, pages 55-56, 66 (Declaration of Shannon Young); Exhibit C, Test Claim, 10-TC-05, pages 52-53, 60 et seq. (Amended Declaration of Chris Sommers).

<sup>1528</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

<sup>1529</sup> *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.”). See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on*

- Beginning January 1, 2018, and based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (SB 231, 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 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).<sup>1530</sup>

**1. There Is Substantial Evidence in the Record, As Required by Government Code Section 17559, 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 “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 the one percent (1%) tax was to be collected by counties and “apportioned according to law to the districts within the counties...”<sup>1531</sup> 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 the voters.<sup>1532</sup>

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.”<sup>1533</sup> 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

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*State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

<sup>1530</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

<sup>1531</sup> California Constitution, article XIII A, section 1 (effective June 7, 1978).

<sup>1532</sup> California Constitution, article XIII A, section 4 (effective June 7, 1978).

<sup>1533</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

the ‘proceeds of taxes.’”<sup>1534</sup> “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.<sup>1535</sup> 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.<sup>1536</sup> Article XIII B does *not* restrict the growth in appropriations financed from nontax sources, such as “user fees based on reasonable costs.”<sup>1537</sup> And appropriations subject to limitation do not include “[a]ppropriations for debt service.”<sup>1538</sup>

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.”<sup>1539</sup> The California Supreme Court, in *County of Fresno v. State of California*,<sup>1540</sup> 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

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<sup>1534</sup> *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.

<sup>1535</sup> California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990), emphasis added.

<sup>1536</sup> California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

<sup>1537</sup> *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).

<sup>1538</sup> California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

<sup>1539</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>1540</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482.



and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.<sup>1541</sup>

The California Supreme Court concluded 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*.”<sup>1542</sup> Accordingly, reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur “increased actual expenditures of limited tax proceeds that are counted against the local government’s spending limit.”<sup>1543</sup>

- 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,<sup>1544</sup> 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 local “proceeds of taxes,” reimbursement under section 6 is not required.<sup>1545</sup> Government Code section 17514 defines “costs mandated by the state” as any increased costs 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.

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<sup>1541</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

<sup>1542</sup> *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

<sup>1543</sup> *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.

<sup>1544</sup> Government Code section 17559.

<sup>1545</sup> *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.”). See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

All of the claimants have identified increased costs exceeding \$1,000. The claimant in Test Claim 10-TC-02, City of Dublin, has filed a declaration showing aggregate actual costs for years one and two of the permit to implement monitoring, trash, and mercury and PCB diversion activities totaling \$39,398, with the City's share of cost totaling \$13,631.<sup>1546</sup> The claimants in Test Claim 10-TC-03, County of Santa Clara declare the aggregate actual costs for the Santa Clara Valley Program's implementation of monitoring, trash, and mercury and PCB diversion activities totaled \$7,490,605, which is supported by a declaration from Chris Sommers who served as the watershed monitoring and assessment coordinator for the Santa Clara Valley Urban Runoff Pollution Prevention Program.<sup>1547</sup> Mr. Sommer's declaration further states "I am not aware of any dedicated state or federal funds, or of any other non-local agency funds, that were available to pay for these increased costs."<sup>1548</sup> And the claimants in Test Claim 10-TC-05, City of San Jose, identified costs for fiscal years 2009-2010 and 2010-2011 of \$990,436 and attach a declaration from Chris Sommers supporting the assertion, and also declaring "I am not aware of any dedicated state or federal funds, or of any other non-local agency funds, that were available to pay for these increased costs."<sup>1549</sup>

However, reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.<sup>1550</sup>

Some of the claimants have adopted stormwater fees to cover the costs to comply with NPDES permits. For example, in 1994, Alameda County adopted Ordinance O-94-36 which provided for an annual fee levied against property owners in the unincorporated area of Alameda County, to fund activities associated with NPDES permit

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<sup>1546</sup> Exhibit A, Test Claim, 10-TC-02, pages 55-56, 66 (Declaration of Shannon Young).

<sup>1547</sup> Exhibit B, Test Claim 10-TC-03, pages 48, 58 (Declaration of Chris Sommers).

<sup>1548</sup> Exhibit B, Test Claim 10-TC-03, page 61 (Declaration of Chris Sommers).

<sup>1549</sup> Exhibit C, Test Claim 10-TC-05, pages 52-53, 60 et seq. (Amended Declaration of Chris Sommers).

<sup>1550</sup> *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."). See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

requirements.<sup>1551</sup> The City of San Jose, in 2011, adopted Resolution No. 75857, imposing a property-related stormwater fee.<sup>1552</sup> And the Vallejo Sanitation and Flood Control District has levied a property-related stormwater fee.<sup>1553</sup> 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.<sup>1554</sup>

The record also shows the City of Dublin and the County of Santa Clara received grant funding from state and federal sources to purchase and install trash capture devices in response to Section C.10. of the test claim permit.<sup>1555</sup>

There is no evidence in the record, however, showing the claimants used fee or grant revenue to pay for all the mandated activities here. And the State has not filed any evidence rebutting the claimants' assertion that proceeds of taxes were used to pay for the new state-mandated activities.

Accordingly, there is substantial evidence in the record the claimants incurred increased costs exceeding \$1,000 and used their proceeds of taxes to comply with the test claim permit. 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. The Claimants Have Authority to Impose Property-Related Stormwater Fees for the New Activities Mandated by the State. However, from December 1, 2009, through December 31, 2017, Voter Approval of These Fees Is Required and the Courts Have Found That When Voter Approval Is Required, Government Code section 17556(d) Does Not Apply and There Are Costs Mandated by the State. Beginning January 1, 2018, When Property-Related Fees Are Subject Only to the Voter Protest Provisions of Article XIII D, Section 6 of the California Constitution, Government Code Section 17556(d) Applies, There Are No Costs Mandated by the State, and Reimbursement Is Denied.**

Government Code section 17556(d) provides the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds "the local

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<sup>1551</sup> Exhibit BB (3), Alameda Clean Water Protection Fee, page 4.

<sup>1552</sup> Exhibit BB (13), City of San Jose Stormwater Fees, pages 1-2.

<sup>1553</sup> Exhibit BB (50), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10; see also Exhibit BB (11) CASQA Fee Study and Ordinance, page 3.

<sup>1554</sup> Exhibit BB, (11), CASQA, Fee Study and Ordinance, <https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance> (accessed on November 23, 2022).

<sup>1555</sup> Exhibit A, Test Claim, 10-TC-02, pages 57-58; Exhibit B, Test Claim, 10-TC-03, page 50.

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 California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno*.<sup>1556</sup> The court, in holding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.<sup>1557</sup>

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, 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.<sup>1558</sup>

For example, in *Connell* the court held 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.<sup>1559</sup> The district acknowledged the existence of fee authority, but argued it was not “sufficient,” within the meaning of section 17556(d).<sup>1560</sup> The court held “[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

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<sup>1556</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

<sup>1557</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

<sup>1558</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

<sup>1559</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

<sup>1560</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

reasonable adjudication.”<sup>1561</sup> The court concluded: “Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry.”<sup>1562</sup>

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.”<sup>1563</sup> 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.”<sup>1564</sup>

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 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.”<sup>1565</sup>

In this case, the claimants have authority pursuant to their constitutional police powers<sup>1566</sup> and other statutory authority<sup>1567</sup> to impose property-related fees for the new state mandated activities.<sup>1568</sup> “[P]revention of water pollution is a legitimate governmental objective, in furtherance of which the police power may be exercised.”<sup>1569</sup>

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<sup>1561</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>1562</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>1563</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

<sup>1564</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

<sup>1565</sup> *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.

<sup>1566</sup> California Constitution, article XI, section 7.

<sup>1567</sup> 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).

<sup>1568</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

<sup>1569</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561, citing to *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

And, as indicated above, some of the claimants have adopted and imposed such fees to cover the costs to comply with stormwater permits.<sup>1570</sup>

As described below, however, stormwater property-related fees are subject to certain substantive and procedural requirements of Proposition 218, or article XIII D of the California Constitution. The City of Dublin and the Alameda Countywide Clean Water Program contend they have no legal authority to impose fees for the new monitoring activities (Section C.8.), trash requirements (Section C.10.), and mercury and PCB diversion study requirements (Sections C.11.f. and C.12.f.) because the Water Boards and the Department of Finance have not met their burden of proof to show that a property-related fee could satisfy the substantive requirements of article XIII D, section 6(b)(1), (4), and (5); namely that the fee would not exceed the proportional cost of the service attributable to the parcel, that the service is actually used by or immediately available to the property owner, and that the fee would not be imposed to the public at large.<sup>1571</sup>

In addition, property-related fees are subject to the procedural requirements of article XIII D, which until January 1, 2018, required voter approval before new or increased fees could be charged. The courts have held when voter approval of a fee is required by article XIII D, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements.<sup>1572</sup>

Effective January 1, 2018, SB 231 defined “sewer” to include stormwater as an exception to the voter approval requirement in article XIII D, which makes only the voter protest provisions of article XIII D apply to property-related stormwater fees. The courts have held Government Code section 17556(d) applies to deny a claim for state mandate reimbursement when the fee authority is subject to voter protests under article XIII D, section 6(a).<sup>1573</sup>

These issues are analyzed below.

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<sup>1570</sup> Exhibit BB (3), Alameda Clean Water Protection Fee, page 4; Exhibit BB (13), City of San Jose Stormwater Fees, pages 1-2; Exhibit BB (50), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10.

<sup>1571</sup> Exhibit X, Claimant’s (City of Dublin) and Alameda Countywide Clean Water Program’s Comments on the Draft Proposed Decision, pages 1-18, relying on *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546.

<sup>1572</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

<sup>1573</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

a. The substantive and procedural requirements of articles and XIII C and XIII D for property-related fees and SB 231.

Proposition 218, approved by voters in 1996, added articles XIII C and XIII D to the California Constitution and “is one of a series of voter initiatives restricting the ability of state and local governments to impose taxes and fees.”<sup>1574</sup> Article XIII C concerns voter approval for many types of local taxes other than property taxes. Article XIII D addresses property-based taxes and fees.<sup>1575</sup> Specifically, article XIII D of the California Constitution “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.’”<sup>1576</sup> For example, 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.<sup>1577</sup>

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency “shall consider all

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<sup>1574</sup> *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.

<sup>1575</sup> *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 381.

<sup>1576</sup> *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 citing California Constitution, article XIII D, section 3.

<sup>1577</sup> California Constitution, article XIII D, section 4(a).

protests...and tabulate the ballots.” If the majority of the returned ballots oppose the assessment, the agency “shall not impose” the assessment.<sup>1578</sup>

Similarly, section 6 provides for a proportionality requirement with respect to property-related fees and charges and imposes the following substantive requirements:

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.<sup>1579</sup>

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.<sup>1580</sup>

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<sup>1578</sup> California Constitution, article XIII D, section 4(c); (d); (e).

<sup>1579</sup> California Constitution, article XIII D, section 6(b).

<sup>1580</sup> Compare California Constitution, article XIII D, section 6(a)(1)-(2) with article XIII D, section 4(a).



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.<sup>1581</sup> This section is discussed further below, but for charges for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, and are subject only to the voter protest provisions of article XIII D.

In 2010, the voters approved Proposition 26 to amend article XIII C, section 1 of the California Constitution to define a “tax” subject to the voters’ approval as “any levy, charge, or exaction of any kind imposed by a local government, *except*” as stated.<sup>1582</sup> An exception to the definition of a tax includes “Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.”<sup>1583</sup> Thus, as long as local government complies with the substantive and procedural requirements of article XIII D (added by Proposition 218), then the revenues received are not considered proceeds of taxes, but revenue from “nontax” property-related fees and assessments. Article XIII C also makes clear that the burden is on 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.<sup>1584</sup>

Many of the limitations stated in Proposition 218 and article XIII D 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.<sup>1585</sup> Despite the existence of such limitations before Proposition 218, the court in *County of Placer v. Corin* held assessments were sufficiently distinct from taxes as to be outside the scope of articles XIII A and XIII B.<sup>1586</sup>

After Proposition 218 came the cases of *Apartment Ass’n of Los Angeles County, Richmond*, and *Bighorn-Desert View*.<sup>1587</sup> 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 the fees were not “imposed by an agency upon a parcel or upon a person as *an incident of property*

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<sup>1581</sup> California Constitution, article XIII D, section 6(c).

<sup>1582</sup> California Constitution, article XIII C, section 1 (amended by the voters on Nov. 2, 2010, by Prop. 26).

<sup>1583</sup> California Constitution, article XIII C, section 1(e)(7).

<sup>1584</sup> California Constitution, article XIII C, section 1(e).

<sup>1585</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

<sup>1586</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

<sup>1587</sup> *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.

*ownership...*<sup>1588</sup> The Court held Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only “when they burden landowners as *landowners*.”<sup>1589</sup> 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.<sup>1590</sup>

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 the impossibility of compliance with section 4 was one reason to find that the capacity charge was not an assessment, within the meaning of article XIII D.<sup>1591</sup> The Court also found the charge was to be imposed on applicants for new service, rather than users receiving service through existing connections, and that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.<sup>1592</sup> 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.”<sup>1593</sup>

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,<sup>1594</sup> finding 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.”<sup>1595</sup> 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

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<sup>1588</sup> 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.

<sup>1589</sup> *Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 (emphasis in original).

<sup>1590</sup> *Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

<sup>1591</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

<sup>1592</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

<sup>1593</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

<sup>1594</sup> *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

<sup>1595</sup> *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa*, *supra*, 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [“We should not presume ... that the electorate will fail to do the legally proper thing.”].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected (see Stats.1969, ch. 1175, § 5, p. 2274, 72B West's Ann. Wat.-Appen., *supra*, ch. 112, p. 190), will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.<sup>1596</sup>

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 “sewer,” for purposes of the voter approval exemption in article XIII D, does *not* include storm sewers or storm drains.<sup>1597</sup> *City of Salinas* involved a challenge to a “storm drainage fee” imposed by the City of Salinas 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 CWA.<sup>1598</sup> 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.”<sup>1599</sup> Taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the

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<sup>1596</sup> *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

<sup>1597</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

<sup>1598</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

<sup>1599</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

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 "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.<sup>1600</sup> 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."<sup>1601</sup>

Thus, under the *City of Salinas* case, a local agency's charges on developed parcels to fund stormwater management were property-related fees not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, 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.<sup>1602</sup> Government Code section 53750(k) defines the term "sewer" for purposes of article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters." Government Code section 53751 explains why the Legislature thinks the *City of Salinas* case is wrong:

The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The

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<sup>1600</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

<sup>1601</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

<sup>1602</sup> Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

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.<sup>1603</sup>

- b. Local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6(b).

The City of Dublin and the Alameda Countywide Clean Water Program contend they have no legal authority to impose fees for the new monitoring activities (Section C.8.), trash requirements (Section C.10.), and mercury and PCB diversion study requirements (Sections C.11.f. and C.12.f.) because the Water Boards and the Department of Finance have not met their burden of proof, in accordance with the 2021 *Department of Finance* case, to show that a property-related fee could satisfy the substantive requirements of article XIII D, section 6(b)(1), (4), and (5); namely that the fee would not exceed the proportional cost of the service attributable to the parcel, that the service is actually used by or immediately available to the property owner, and that the fee would not be imposed to the public at large.<sup>1604</sup> Rather, they contend that the new mandated activities all benefit the general public and not the property owners and, thus, the fees would not satisfy article XIII D, section 6(b).<sup>1605</sup>

The Commission disagrees with these contentions. First, the City of Dublin's and the Alameda Countywide Clean Water Program's reliance on the 2021 *Department of Finance* case is misplaced. There, the Second District Court of Appeal determined that an NPDES permit condition requiring the local governments to install and maintain trash receptacles at public transit stops owned by *other* public entities required subvention under article XIII B, section 6 because the local agencies did not have sufficient authority to levy fees for the requirement.<sup>1606</sup> The court held the local governments did not have authority to install equipment on another public entity's property and then charge that entity for installation and ongoing maintenance.<sup>1607</sup> The State then contended the local governments could impose a fee on private property owners.

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<sup>1603</sup> Government Code section 53751(f).

<sup>1604</sup> Exhibit X, Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, pages 1-18 relying on *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546.

<sup>1605</sup> Exhibit X, Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision, pages 13-18.

<sup>1606</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 561.

<sup>1607</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 565-567.

However, the court determined not only that the State had not shown the fee would meet article XIII D's substantive requirements for property-related fees, but common sense dictated 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, as follows.<sup>1608</sup>

The state agencies have not satisfied their burden. Not only have the state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy the substantive constitutional requirements, but 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.<sup>1609</sup>

In 2022, the Third District Court of Appeal revisited the 2021 case and the substantive requirements in article XIII D, section 6(b) regarding property-related fees to cover the costs of street sweeping required by the NPDES permit as part of the receiving water limitations and discharge prohibitions to keep pollutants out of local waters.<sup>1610</sup> The State acknowledged the general rule that the party claiming the applicability of an exception bears the burden of demonstrating that it applies. However, the State argued that this typical approach should not apply to the burden of showing fee authority under Government Code section 17556(d). The State argued "the inherent flexibility in permittees' police power means permittees may develop fees in any number of ways. Also, local governments like permittees have significantly more expertise and experience than the State agencies before us in designing, implementing, and defending local government fees. The State asserts that permittees' expertise means

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<sup>1608</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 567-568.

<sup>1609</sup> *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

<sup>1610</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

they should bear the burden on this point.”<sup>1611</sup> The court agreed, and held as follows:

We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D’s substantive requirements. The sole issue before us is whether permittees have “the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.” (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)<sup>1612</sup>

The court further held that requiring the State to show affirmatively how permittees can create a fee that meets the substantive requirements *where no fee yet exists* requires the State to effectively engage in the rulemaking process itself and asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue under Government Code section 17556(d).<sup>1613</sup> The court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact (as was the case in the 2021 *Department of Finance* case), then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee. The court stated the following:

Although the court of appeal in *Los Angeles Mandates II* [i.e., the 2021 *Department of Finance* case] stated the state bore the burden to show that a fee for public trash receptacles could satisfy the substantive requirements, and that the state did not satisfy its burden, the court actually ruled that the local governments could not establish a fee that could meet the substantive requirements as a matter of law or undisputed

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<sup>1611</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584.

<sup>1612</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

<sup>1613</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585. This finding is consistent with provisions in articles XIII C and XIII D, which state the burden is on the local agency to demonstrate compliance with the substantive rules *when a fee exists* and is legally challenged. Article XIII D, section 6(b), states that “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;” and article XIII C, section 1(e), states “The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”

fact. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568-569, 273 Cal.Rptr.3d 619 ["common sense dictates" that fee would not meet requirements].) To require the State to show affirmatively how permittees can create a fee that meets the substantive requirements where no fee yet exists requires the State effectively to engage in the rulemaking process itself. That asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue. To the extent *Los Angeles Mandates II* requires the State to prove more, we respectfully disagree with its interpretation.<sup>1614</sup>

Similarly, here, there is no showing as a matter of law or fact that a fee cannot meet the substantive requirements of article XIII D, section 6(b). The new state-mandated requirements in this case are *not* like the requirement to place trash receptacles on transit property owned by other entities and not within the regulatory control of the permittees. The new mandated requirements at issue here (monitoring, trash, and mercury and PCB diversion studies) address waters and areas within the regulatory control of the permittees. Like street sweeping in the 2022 *Department of Finance* case, all of the new requirements implement the receiving water limitations and discharge prohibitions required by the permit to protect the beneficial uses of the local waters enjoyed by property owners in the San Francisco region and to prevent pollutants from causing or contributing to a violation of water quality standards.<sup>1615</sup>

As indicated above, the courts have found that local government has the authority (i.e., the right and the power) to levy property-related fees for stormwater services under their police powers.<sup>1616</sup> And the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they can properly develop property-related stormwater fees under section XIII D of the California Constitution, including elements incorporated into a stormwater fee for various types of parcels to cover the cost of reducing stormwater pollutant loading and public education.<sup>1617</sup> CASQA describes the typical apportionment of costs for stormwater services as follows:

Proposition 218 requires that property-related fees "shall not exceed the proportional cost of the service attributable to the parcel."

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<sup>1614</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

<sup>1615</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 158 (Test claim permit, Section C.1.).

<sup>1616</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

<sup>1617</sup> Exhibit BB, (11), CASQA, Fee Study and Ordinance, <https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance> (accessed on November 23, 2022).



Therefore, it is essential to develop an apportionment of costs that best reflects the stormwater services provided by the municipality.

Across the U.S., most stormwater fee structures are based on the amount of impervious surface on a parcel, which is proportional to the amount of rainwater that runs off a parcel. This is a straight forward method, although impervious surface data may be difficult or expensive to obtain. Rate-setting consultants have experience working around this issue with sampling and statistical approaches, which can satisfy the Proposition 218 "proportionality" test.

The majority of stormwater rate structures utilize an equivalent residential unit (ERU) as a basis for fees. ERUs estimate the average or median characteristics for a residential property. For stormwater, land use, impervious surface cover, or total size are possible metrics. Once established based on a sample of properties, each parcel in a municipality can be assigned an individual number of ERUs, which is multiplied by the base residential rate to establish the individual fee. With the ERUs assigned and totaled, the revenue requirement is divided by the total number of ERUs to establish the base residential rate.

Most municipalities are bound to an NPDES permit requiring them to reduce stormwater pollutant loading as well as other objectives such as green infrastructure development and public education. These elements could be incorporated into the stormwater fees for various types of parcels.

It is worth noting that Proposition 218's strict requirements on a fair apportionment method means that a municipality should create a thorough administrative record of how the rate and studies upon which it relies would need to be clearly referenced.<sup>1618</sup>

Moreover, as indicated in the section above, the following permittees have adopted property-related fees to pay for similar requirements imposed in an NPDES permit, which included fees for stormwater pollution and control and trash capture systems:

- In 1994, Alameda County adopted Ordinance O-94-36 which provided for an annual fee levied against property owners in the unincorporated area of Alameda County, to fund activities associated with NPDES permit requirements.<sup>1619</sup>

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<sup>1618</sup> Exhibit BB, (11), CASQA, Fee Study and Ordinance, pages 2-3, <https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance> (accessed on November 23, 2022).

<sup>1619</sup> Exhibit BB (3), Alameda Clean Water Protection Fee, page 4.

- The City of San Jose, in 2011, adopted Resolution No. 75857, imposing a property-related stormwater fee to pay for “stormwater pollution control and permit compliance.”<sup>1620</sup>
- The City of Palo Alto adopted a voter-approved stormwater management fee to residential property owners “to maintain and improve Palo Alto’s stormwater system.” “The stormwater system is comprised of infrastructure that conveys stormwater from the urban landscape to the streams and San Francisco Bay. It includes gutters, storm drains, pipes, pumps, as well as green stormwater infrastructure . . . and trash capture devices that help keep our waterways clean.”<sup>1621</sup>
- Vallejo Sanitation and Flood Control District levied a property-related stormwater fee.<sup>1622</sup>

Accordingly, the Commission finds that local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6(b).

- c. The courts have held Government Code section 17556(d) does not apply to deny a claim when voter approval of the property-related stormwater fee is required under article XIII D (Proposition 218). However, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

The court in *Paradise Irrigation District* (a challenge to the Commission’s Decision in *Water Conservation*, 10-TC-12/12-TC-01) held, in the context of water services, 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.<sup>1623</sup> 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

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<sup>1620</sup> Exhibit BB (13), City of San Jose Stormwater Fees, pages 1-2.

<sup>1621</sup> Exhibit BB (52), City of Palo Alto Stormwater Management Fee, page 1, <https://www.cityofpaloalto.org/Departments/Public-Works/Engineering-Services/Stormwater-Management-Fee> (accessed November 5, 2024).

<sup>1622</sup> Exhibit BB (50), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10; see also Exhibit BB (11) CASQA Fee Study and Ordinance, page 3.

<sup>1623</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

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*.<sup>1624</sup>

Ultimately the court preserved and followed the rule of *Connell*, finding, based in large part on a discussion of *Bighorn-Desert View*, “Proposition 218 implemented a power-sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts’ fee authority.”<sup>1625</sup> 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.”<sup>1626</sup> 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.”<sup>1627</sup> 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.”<sup>1628</sup> The court found 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.<sup>1629</sup> 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 “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 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’

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<sup>1624</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

<sup>1625</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

<sup>1626</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

<sup>1627</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

<sup>1628</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

<sup>1629</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

concerns that the agency’s water delivery charges are excessive.”<sup>1630</sup> Accordingly, the court found 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.”<sup>1631</sup> The court noted 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.”<sup>1632</sup> Thus, the court found 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).

Finally, the Third District Court of Appeal addressed the *voter approval* issue in *Department of Finance v. Commission on State Mandates (Discharge of Stormwater Runoff)* and found that Government Code section 17556(d) does not apply when voter approval is required and, thus, there are costs mandated by the state for new requirements mandated by a stormwater permit issued by the San Diego Regional Water Quality Control Board.<sup>1633</sup> The court’s reasoning is as follows:

The State contends the reasoning in *Paradise Irrigation Dist.* applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees’ governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The “fact that San Diego property owners could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not ‘eviscerate’ San Diego’s police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee.”

The State’s argument does not recognize a key distinction we made in *Paradise Irrigation Dist.*: water service fees were not subject to voter approval. We contrasted article XIII D’s protest procedure with the voter-approval requirement imposed by Proposition 218 on new taxes. Under article XIII C, no local government may impose or increase any general or special tax “unless and until that tax is submitted to the electorate and approved” by a majority of the voters for a general tax and by a two-thirds

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<sup>1630</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

<sup>1631</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

<sup>1632</sup> *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

<sup>1633</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Cal. Const., art. XIII D, § 6, subd. (c).) (*Paradise Irrigation Dist.*, *supra*, 33 Cal.App.5th at p. 192, 244 Cal.Rptr.3d 769.) The implication is the voter approval requirement would deprive the districts of fee authority.

Since the fees in *Paradise Irrigation Dist.* were not subject to voter approval, the protest procedure created a power sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist.* correctly described as a “speculative and uncertain threat.” (*Paradise Irrigation Dist.*, *supra*, 33 Cal.App.5th at p. 184, 244 Cal.Rptr.3d 769.)

Here, a fee for stormwater drainage services is *not* valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees’ police power to proposing the fee. Like article XIII C’s limitation on local governments’ taxing authority, article XIII D provides that “[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.” (Cal. Const., art. XIII D, § 6, subd. (c).) The State’s argument ignores the actual limitation article XIII D imposes on permittees’ police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason Section 6 exists and requires subvention. As stated earlier, the purpose of Section 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.” (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B “work in tandem, together restricting California

governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the "next logical step" to article XIII A, limits the growth of appropriations made from the proceeds of taxes. (Cal. Const., art. XIII B, §§ 1, 2, 8; *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334, 194 Cal.Rptr. 110.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under Section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Section 6 provides them with those resources.

Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in *Paradise Irrigation Dist.*, the voter approval requirement does not create a power sharing arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Section 6 thus requires subvention because of Article XIII D's voter approval requirement. Contrary to the State's argument, *Paradise Irrigation Dist.* does not compel a different result.<sup>1634</sup>

The Water Boards disagree with the holding in the 2022 *Department of Finance* decision and contend that the holding in *Paradise Irrigation Dist.* should be extended when voter approval is required by the Constitution. They state "[o]ther [appellate] districts are not bound by the Third District Court of Appeal's decision [in the 2022 *Department of Finance* decision] and could decide differently."<sup>1635</sup>

However, the Commission is required by law to follow the 2022 *Department of Finance* case and find that Government Code section 17556(d) does not apply to deny a claim

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<sup>1634</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

<sup>1635</sup> Exhibit AA, Water Boards' Comments on the Draft Proposed Decision, page 11.

when voter approval of the fee is required under article XIII D (Proposition 218).<sup>1636</sup> However, pursuant to the decision in *Paradise Irrigation District*, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

- d. From December 1, 2009, through December 31, 2017, voter approval of stormwater fees is required pursuant to the decision in the City of Salinas and, thus, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements. Beginning January 1, 2018, when property-related fees are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution, then Government Code section 17667(d) applies, and there are no costs mandated by the state.

As indicated above, the court in *City of Salinas* held 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, 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.<sup>1637</sup> When voter approval of fees are required, then Government Code section 17556(d) does not apply and there are costs mandated by the state.<sup>1638</sup>

However, Government Code sections 53750 and 53751 superseded the holding in *City of Salinas* and defined "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D.<sup>1639</sup> These provisions became effective January 1, 2018.

The Commission is required to presume statutes 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:

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<sup>1636</sup> *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 ("Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.").

<sup>1637</sup> *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

<sup>1638</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

<sup>1639</sup> Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

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;

¶

The Commission also finds, pursuant to the decision of the Third District Court of Appeal, Government Code sections 53750 and 53751, absent a clear and unequivocal statement to the contrary, operate *prospectively* beginning January 1, 2018.<sup>1640</sup>

Accordingly, the claimants do not have fee authority sufficient as a matter of law to cover the costs of the new state-mandated activities from December 1, 2009, through December 31, 2017, when voter approval of stormwater fees is required, and there are costs mandated by the state during that time. However, reimbursement is not required to the extent the claimants received fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes.<sup>1641</sup>

Pursuant to Government Code sections 53750 and 53751 and the decision in *Paradise Irrigation District*, there are no costs mandated by the state beginning January 1, 2018.

**3. The Water Boards' Assertion that the Reimbursement Period for the Test Claim Should End on December 31, 2015, When the Test Claim Permit Ended and Was Superseded by the Next NPDES Permit, Is Not Consistent with Article XIII B, Section 6.**

The Water Boards assert that reimbursement for any activity should end on December 31, 2015, when the test claim permit ended and was superseded by Order R2-2015-0049, effective January 1, 2016.<sup>1642</sup> In other words, the Water Boards want

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<sup>1640</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

<sup>1641</sup> *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."). See also, *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, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

<sup>1642</sup> Exhibit AA, Water Boards' Comments on the Draft Proposed Decision, pages 11-12. Order No. R2-2015-0049 is the subject of a separate Test Claim, *California Regional*



the Commission to interpret stormwater permits as contracts that expire. This interpretation is not consistent with article XIII B, section 6, or the courts' interpretation of these permits as executive orders.

The courts have found that NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.<sup>1643</sup> 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.<sup>1644</sup> Thus, reimbursement under article XIII B, section 6 continues to be required for each fiscal year actual increased costs are incurred by local government to comply with the reimbursable state-mandated program.<sup>1645</sup>

Moreover, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs, and thus a new program or higher level of service, compared to the law before the enactment of the test claim statute or executive order.<sup>1646</sup> This was the case in *Department of Finance. v.*

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*Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, 16-TC-03, <https://www.csm.ca.gov/matters/16-TC-03.shtml> (accessed on November 4, 2024).*

<sup>1643</sup> *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.

<sup>1644</sup> 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.

<sup>1645</sup> See also, Government Code sections 17514 (“Costs mandated by the state” means any increased costs which a local agency or school district is required to incur . . . as a result of any statute . . . which mandates a new program or higher level of service”); 17560 (“A local agency or school district may, by February 15 following the fiscal year in which costs are incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year”) and 17561 (“The state shall reimburse each local agency and school district for all “costs mandated by the state . . .”).

<sup>1646</sup> *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91; *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (see also page 869, footnotes 6 and 7, and page 870, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes).

*Commission on State Mandates* (2021) 59 Cal.App.5th 546, where the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections as required by that stormwater permit were both new duties that local governments were required to perform, when compared to the prior permit (“the mandate to install and maintain trash receptacles at transit stops is a ‘new program’ within the meaning of section 6 because it was not required prior to the Regional Board’s issuance of the permit”).<sup>1647</sup>

Order No. R2-2015-0049, as referenced by the Water Boards, is the subject of a pending Test Claim filed by the City of Union City.<sup>1648</sup>

The requirements imposed by the permit at issue in this case (Order No. R9-2009-0074) may continue uninterrupted in the 2015 permit, and the parties can address whether the costs to comply with the requirements of Order No. R9-2009-0074 continue. As demonstrated in this Decision, many requirements that were pled were shown to *not* be new when compared to the prior permit and reimbursement is not required in those cases. However, there is no evidence in this record that the new state-mandated activities are no longer required or mandated by the state on January 1, 2016, as asserted by the Water Boards.

Therefore, and as stated above, reimbursement for the costs incurred to comply with the new state-mandated activities that require the voter’s approval before property-related stormwater fees can be imposed, are eligible for reimbursement through December 31, 2017, and reimbursement ends beginning January 1, 2018.

## **V. Conclusion**

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

### Geomorphic Study

- Permittees shall select a waterbody/reach, preferably one that contains significant fish and wildlife resources, and conduct one of the following projects within each county, except that only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees’ jurisdictions:
  - (1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or

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<sup>1647</sup> *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

<sup>1648</sup> *Commission on State Mandates, Test Claim on California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R9-2015-0049, 16-TC-03, <https://www.csm.ca.gov/matters/16-TC-03.shtml>* (accessed on November 4, 2024).

(2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or

(3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach that is not undergoing changing land use. Collect and report the following data:

- Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
  - Contributing drainage area.
  - Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
  - Best available information on average annual rainfall in the study area.
- Report selected geomorphic project results in the Integrated Monitoring Report.<sup>1649</sup>

#### Sediment Delivery Estimate/Budget

- Permittees shall develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012.<sup>1650</sup>

#### Citizen Monitoring and Participation, which is Reimbursable for the City of Vallejo and Vallejo Sanitary District only:

- Encourage Citizen Monitoring.
- In developing Monitoring Projects and evaluating Status & Trends data, make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
- Demonstrate annually the permittee has encouraged citizen and stakeholder observations and reporting of waterbody conditions. Report on these outreach efforts in the annual Urban Creeks Monitoring Report.<sup>1651</sup>

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<sup>1649</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 221-222, 227 (Test claim permit, Sections C.8.d.iii.).

<sup>1650</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 225 (Test claim permit, Section C.8.e.vi.).

<sup>1651</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 225 (Test claim permit, Section C.8.f.).

## Monitoring Reporting and Notice

- Permittees shall maintain an information management system to support electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute.<sup>1652</sup>
- Permittees shall submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report.<sup>1653</sup>
- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list.<sup>1654</sup>

## Trash

- 1) Short-Term Trash Load Reduction Plan (Section C.10.a.i.). All permittees, except for flood management agencies, shall submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe the following:
  - Control measures and best management practices, including any trash reduction ordinances, currently being implemented and the current level of implementation.
  - Additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.
  - The Plan shall also “account for required mandatory minimum Full Trash Capture devices called for in Provision C.10.a.iii and Trash Hot Spot Cleanup called for in Provision C.10.b.”<sup>1655</sup>
- 2) Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). All permittees, except for flood management agencies, shall comply with the following new requirements:

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<sup>1652</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 226, footnote 46 (Test claim permit, Section C.8.g.ii.).

<sup>1653</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 226 (Test claim permit, Section C.8.g.ii.).

<sup>1654</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 228 (Test claim permit, Section C.8.g.vii.).

<sup>1655</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 233 (Test claim permit, Section C.10.a.i.).

- Determine the baseline trash load from its MS4.
  - Submit the load level to the Regional Board by February 1, 2012. The February 1, 2012, report shall include the following:
    - Documentation of the methodology used to determine the load level.
    - A description of the trash load reduction tracking method that will be used to account for trash load reduction actions and to demonstrate progress and attainment of trash load reduction levels.
    - The submittal shall account for the drainage areas of a Permittee's jurisdiction that are associated with the baseline trash load from its MS4, and the baseline trash load level per unit area by land use type and drainage area characteristics used to derive the total baseline trash load level for each Permittee.
  - Submit a progress report by February 1, 2011, indicating whether the permittee is determining its baseline trash load and trash load reduction method individually or collaboratively with other Permittees and a summary of the approach being used.<sup>1656</sup>
- 3) Minimum Full Trash Capture (Section C.10.a.iii.). Except as provided below, all permittees shall comply with the following requirements:
- Install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land draining to MS4s within their jurisdictions. The scope of this requirement is as follows:
    - A full capture system or device is “any single device or series of devices that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour, storm in the subdrainage area”.
    - The mandatory minimum number of full trash capture devices for each permittee is identified in Attachment J to the test claim permit, Tables 10-1 and 10-2. However, if the sum of the areas generating trash loads determined pursuant to Section C.10.a.ii is a smaller acreage than the required trash capture acreage, the minimum full trash capture requirement is reduced to the smaller acreage for the population-based permittee.<sup>1657</sup>

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<sup>1656</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 233-234 (Test claim permit, Section C.10.a.ii.).

<sup>1657</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 234, 411 et seq., and 415 et seq. (Test claim permit, Section C.10.a.iii., Attachment J, Tables 10-1, 10-2).

The requirements to install and maintain full trash capture devices **does not apply**:

- To a population-based permittee with a population less than 12,000 and retail/wholesale land less than 40 acres, or a population less than 2000.<sup>1658</sup>
- To full trash capture devices installed by a permittee *before* the effective date of the test claim permit, which may be counted towards the minimum number of full trash capture devices identified in Attachment J, provided the device meets the permit's definition of a full trash capture device.<sup>1659</sup>

4) Trash Hot Spots (C.10.b.ii. and iii.)

- The permittees shall each submit selected Trash Hot Spots to the Regional Board by July 1, 2010. (Section C.10.b.ii.)<sup>1660</sup>
- Hot Spot Assessments. (Section C.10.b.iii.)

The San Mateo and Fairfield-Suisun permittees shall comply with the following new requirements:

- Identify the dominant types of trash (e.g., glass, plastics, paper) removed.
- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Contra Costa permittees shall comply with the following new requirement:

- Document the trash conditions before and after clean-up of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length.

The Vallejo permittees shall comply with the following new requirements:

- Quantify the volume of material removed from each trash hot spot cleanup.
- Identify the dominant types of trash removed (e.g., glass, plastics, paper).

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<sup>1658</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 234 (Test claim permit, Section C.10.a.iii.).

<sup>1659</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 234 (Test claim permit, Section C.10.a.iii.); Code of Federal Regulations, title 40, section 122.41(e).

<sup>1660</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 235 (Test claim permit, Section C.10.b.ii.).

- Document the trash condition before and after cleanup using photo documentation, with a minimum of one photo per 50 feet of hot spot length.<sup>1661</sup>
- 5) Long-Term Trash Load Reduction Plan (Section C.10.c.). All permittees, except for flood management agencies, shall submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Water Board by February 1, 2014. The Plan shall describe the control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.<sup>1662</sup>
- 6) Reporting and Document Retention (Sections C.10.d.i. and C.10.d.ii.)

The Fairfield-Suisun, San Mateo, and Vallejo permittees shall comply with the following new requirement:

- In each annual report, report on the dominant types of trash removed and retain these records.<sup>1663</sup>

All permittees shall comply with the following new requirements:

- In each Annual Report, provide total trash loads and dominant types of trash *for each type of action, including each trash hot spot selected* pursuant to Section C.10.b. and retain these records.<sup>1664</sup>
- Beginning with the 2012 annual report, report the percent annual trash load reduction relative to the permittee's baseline trash load.<sup>1665</sup>

#### Mercury and PCB Diversion Studies

- Permittees shall conduct feasibility evaluations for mercury and PCBs by selecting five stormwater pump stations and five alternates for each pollutant and evaluate drainage characteristics and the feasibility of diverting flows of each to

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<sup>1661</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 235 (Test claim permit, Section C.10.b.iii.).

<sup>1662</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, page 235 (Test claim permit, Section C.10.c.).

<sup>1663</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1664</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 235-236 (Test claim permit, Sections C.10.d.i. and C.10.d.ii.).

<sup>1665</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 235-236 (Test claim permit, Section C.10.d.i.).

the sanitary sewer. The feasibility evaluations shall include, but not be limited to, costs, benefits, and impacts on the stormwater and wastewater agencies and the receiving waters relevant to the diversion and treatment of the dry weather and first flush flows.

- From these feasibility evaluations, select five pump stations and five alternates for the pilot diversion studies for each pollutant. At least one urban runoff diversion pilot project shall be implemented in each of the five counties (San Mateo, Contra Costa, Alameda, Santa Clara, and Solano). The pilot and alternate locations should be located in industrially-dominated catchments where elevated PCB concentrations are documented.
- Implement flow diversion of mercury and PCBs to the sanitary sewer at five pilot pump stations.
- As part of the pilot studies, the permittees shall monitor, measure, and report mercury and PCBs load reduction.
- Report the following information to the Regional Board:
  - Summarize the results of the feasibility evaluations in the 2010 Annual Report. The reports shall include the selection criteria leading to the identification of the five candidate and five alternate pump stations for pilot studies; time schedules for conducting the pilot studies; and a proposed method for distributing mercury load reductions to participating wastewater and stormwater agencies.
  - Report annually on the status of the pilot studies in each subsequent annual report.
  - Include in the March 15, 2014 Integrated Monitoring Report, the following information for each study: evaluation of pilot programs effectiveness, mercury and PCBs loads reduced, and updated feasibility evaluation procedures to guide future diversion project selection.<sup>1666</sup>

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, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

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<sup>1666</sup> Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, pages 240-241, 248-249 (Test claim permit, Sections C.11.f., C.12.f.).



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

## 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 January 8, 2025, I served the:

- **Current Mailing List dated January 8, 2025**
- **Proposed Decision issued January 8, 2025**

*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 January 8, 2025 at Sacramento, California.



---

Jill Magee  
Commission on State Mandates  
980 Ninth Street, Suite 300  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 1/8/25

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

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

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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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