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January 5, 2024

Via Drop Box

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

Re: Claimants' Comments on Draft Proposed Decision on *California Regional Water Quality Control Board, San Ana Region, Order No. R9-2010-0033, etc.* Test Claim 10-TC-07

Dear Ms. Halsey:

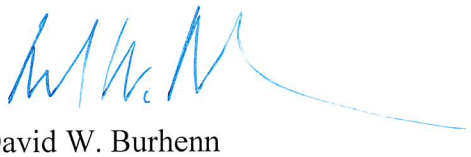
Attached please find the comments of Claimants County of Riverside, the Riverside County Flood Control and Water Conservation District, and the Cities of Beaumont, Corona, Hemet, Lake Elsinore, Moreno Valley, Perris and San Jacinto on the Draft Proposed Decision issued by Commission staff on the above-referenced Joint Test Claim. The comments consist of a comments document and attached Declaration of Rohini Mustafa P.E. plus exhibits.

On January 3, counsel for the Water Boards requested an extension of time to January 12, 2024 for the filing of comments. Claimants filed a non-opposition to the extension, requesting that if an extension were granted that Claimants receive the same extension. I understand that you are not available today to act on the requested extension.

In light of these facts, Claimants are filing these comments, subject to the ability to supplement/replace them in case the requested extension is granted and there were other parties that had not filed comments by the January 5 deadline.

Please let me know if you have any questions. Thank you.

I declare under penalty of perjury that the foregoing, signed on January 5, 2024, is true and correct to the best of my personal knowledge, information, or belief.



David W. Burhenn
Claimant Representative
Address, phone and e-mail set forth above

CLAIMANTS' COMMENTS ON DRAFT PROPOSED DECISION

***California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, Sections IV; VI.D.1.a.ii; VI.D.1.c.i.(8); VI.D.2.c; VI.D.2.d.ii(d); VI.D.2.i; VII.B; VII.D.2; VII.D.3; VIII.A; VIII.C; VIII.H; IX.C; IX.D; IX.E; IX.H; X.D; XI.D.1; XI.D.6; XI.D.7; XI.E.6; XII.A.1; XII.A.5; XII.B; XII.C.1; XII.D.1; XII.E.1; XII.E.2; XII.E.3; XII.E.4; XII.E.6; XII.E.7; XII.E.8; XII.E.9; XII.F; XII.G.1; XII.K.4; XII.K.5; XII.H; XIV.D; XV.A; XV.C; XV.F.1; XV.F.4; XV.F.5; XVII.A.3 and Appendix 3, Section III.E.3,* Adopted May 22, 2009, County of Riverside, Riverside County Flood Control & Water Conservation District, and Cities of Beaumont, Corona, Hemet, Lake Elsinore, Moreno Valley, Perris and San Jacinto, Claimants**

Claimants County of Riverside, Riverside County Flood Control and Water Conservation District ("District"), and Cities of Beamont, Corona, Hemet, Lake Elsinore, Moreno Valley, Perris and San Jacinto ("Claimants") herewith submit their comments on the Draft Proposed Decision ("DPD") issued by staff of the Commission on State Mandates ("Commission") on November 17, 2023 regarding the above-referenced test claim ("Test Claim").

While Claimants agree with the DPD that Claimants are entitled to a subvention of funds for various mandates in Order No. R8-2010-0033 (the "Test Claim Permit") adopted by the California Regional Water Quality Control Board, Santa Ana Region ("Water Board"), Claimants disagree with other conclusions in the DPD, as set forth in these comments.

Each section of the Test Claim Permit at issue is discussed in the order presented in the DPD.[1] Claimants respectfully submit that the arguments and evidence already submitted in support of the Test Claim and the additional arguments set forth in these comments and evidence submitted in support establish that a subvention of funds is required for the elements of the Test Claim Permit at issue in the Test Claim. Claimants also incorporate herein their comments made in the Section 5 Narrative Statement, the Supplemental Briefing, and Rebuttal Comments on the Test Claim.

I. INDEX OF COMMENTS

[1] These comments address the conclusions set forth in the DPD (pages 31-322) and to avoid repetition, do not separately address those in the Executive Summary. (DPD at 1-30). To the extent required, the arguments and evidence set forth in the Comments are similarly directed to the conclusions in the Executive Summary.

II. COMMENTS ON "BACKGROUND" SECTION OF DPD

While the "Background" section of the DPD (46-72) notes that operators of municipal separate storm sewer systems ("MS4s") covered by a National Pollutant Discharge Elimination System ("NPDES") permit are required to reduce pollutant discharges "to the maximum extent practicable" (DPD at 50), there is no further discussion as to how the Clean Water Act ("CWA") leaves substantial discretion to the states in adopting permit requirements which go beyond CWA requirements.

This feature of the CWA was addressed in *Defenders of Wildlife v. Browner,*[2] which considered whether MS4 operators were subject to the same standard of strict compliance with water quality standards mandated for industrial dischargers in 33 U.S.C. § 1311. The Ninth Circuit found that they were not, holding that in adopting 33 U.S.C. § 1342(p)(3)(B) (the subsection applicable to municipal discharges), Congress "*replaces* the requirements of § 1311 with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable . . . .'"[3]

Of relevance to these comments, *Defenders* held that the Environmental Protection Agency ("EPA") Administrator or a state (like California) authorized to carry out the NPDES program pursuant to 33 U.S.C. § 1342(a)(5) has the *discretion* to impose "such other provisions" as the Administrator or the state determines appropriate for the control of such pollutants. As the court held, "[t]hat provision gives the EPA discretion to determine what pollution controls are appropriate."[4]

Thus, California can tailor its MS4 permits to require strict compliance with water quality standards and adopt other MS4 permit requirements that go beyond the MEP standard. The California Supreme Court recognized the dual nature of NPDES permitting in *City of Burbank v. State Water Resources Control Board,*[5] where it held that more stringent permit requirements issued under the authority of California's Porter-Cologne Water Quality Act[6] contained in an NPDES permit were required to be evaluated under state requirements in Water Code §§ 13240 and 13241.[7]

Whether state mandated requirements in MS4 NPDES permits were subject to state constitutional requirements, and in particular article XIII B, section 6 of the California Constitution, was decided in *Department of Finance v. Comm. on State Mandates* (2016) 1 Cal. 5th 749 ("*LA County Permit Appeal I*"). That case held that certain provisions in the 2001 Los Angeles County MS4 permit constituted state mandates eligible for subvention. In so ruling, the Supreme Court expressly rejected an argument raised by the Department of Finance and the water boards that because a provision was in a stormwater NPDES permit, it was "ipso facto, required by federal law."[8]

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[2] 191 F.3d 1159 (9th Cir. 1999).

[3] 191 F.3d at 1165 (emphasis in original).

[4] 191 F.3d at 1166.

[5] (2005) 35 Cal. 4th 613.

[6] Water Code § 13000 *et seq.*

[7] *City of Burbank,* 35 Cal. 4th at 618.

[8] 1 Cal. 5th at 768.

III. COMMENTS ON DISCUSSION SECTION OF DPD

A. Timely Filing of Test Claim, Jurisdictional Status of Claimants, Exhaustion of Administrative Remedies and Effect of Report of Waste Discharge (ROWD)

The DPD (73-79) concludes that the Test Claim was timely filed, that the potential period of reimbursement commenced on the effective date of the Permit, January 29, 2010, that the District and the Cities of Murrieta and Wildomar are eligible claimants (the latter two until June 6, 2013), that Claimants were not required to exhaust their administrative remedies before the State Water Resources Control Board ("State Board") and that permit provisions presented by permittees in a ROWD required by law to be submitted were not "discretionary" and thus ineligible for reimbursement. Claimants concur with the analysis presented in the DPD as to these issues. With respect to the claimant status of the Cities of Eastvale and Jurupa Valley, Claimants note that Order No. R8-2013-0024 was merely an amendment to the Test Claim Permit to add those cities, to remove the Cities of Murrieta and Wildomar, and to add portions of the City of Menifee. As an amendment to the Test Claim Permit, the 2013 order itself had no substantive provisions. Thus, the Cities of Eastvale and Jurupa Valley should be considered as potential claimants under the Test Claim Permit.

B. Local Implementation Plan Requirements

The DPD (79-103) concludes that requirements in Test Claim Permit Sections IV, VI.D.1.a.vii, VI.D.1.c.i(8), VI.D.2.c, VI.D.2.d.(ii)(d), VI.D.2.i, VII.B. VII.D.2, VIII.A, VIIII.H, IX.C, IX.D, XII.A.1, XII.H, XIV.D and XV.A for the permittees to develop and update Local Implementation Plan ("LIP") requirements were mandated by the state and that these provisions represented new programs or a higher level of service. Claimants concur with this conclusion and will not address it further in these comments.

The DPD however, also concludes that Test Claim Permit Section VII.D.3, which provided, *inter alia,* that permittees must "Implement . . . applicable LIPs . . ." that have been adopted in response to continued exceedances of Water Quality Standards, as required in Section VII.D, was not "new."[9] The DPD cites a provision in the 2002 Permit[10] requiring permittees "to implement management programs, monitoring and reporting programs, all BMPs listed in the DAMP and related plans" and to "take such other actions as may be necessary to meet the MEP standard." It further notes that the 2002 Permit required the DAMP[11] and its components to be designed to achieve compliance with receiving water limitations.[12] The DPD concludes that the new LIP requirements "simply reflect a preexisting duty to implement additional BMPs to prevent

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[9] DPD at 96.

[10] 2002 Permit, Section I(B)(1).

[11] This acronym refers to "Drainage Area Management Plan."

[12] DPD at 97.

or reduce pollutants that are causing or contributing to exceedances of water quality standards."[13]

None of these citations to the 2002 Permit, however, refers specifically to the new LIP requirements mandated by the Test Claim Permit and the specific directive in the Permit that those LIP requirements be implemented. Under established mandates law, a "program is 'new' if the local government had not previously been required to institute it." *County of Los Angeles v. Comm. on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 ("*Lucia Mar*"). As the court held in *Dept. of Finance v. Comm. on State Mandates* (2022) 85 Cal.App.5th 535 ("*San Diego Permit Appeal II*"), in order 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."[14]

It is not in dispute that the 2002 Permit contained no references to LIPs or that the Test Claim Permit requirements for the development and updating of LIP requirements was new to that permit. *See generally,* DPD at 93-96. It thus makes no logical sense that the Test Claim Permit requirement to *implement* a revised LIP was not also "new." The Test Claim Permit required that LIPs incorporate a number of new requirements and that when required as a result of a failure to meet Water Quality Standards, to update and implement those LIPs.

The requirement to meet water quality standards in the 2002 Permit also is not relevant to determining whether the Test Claim Permit established a "new" program in Section VII.D.3. "The application of Section 6 . . . does not turn on whether the underlying obligations to abate pollution remain the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a higher level of existing services." *San Diego Permit Appeal II,* 85 Cal.App.5th at 559. The court found this "is so even though the [new] conditions *were designed to satisfy the same standard of performance*" in the earlier permit.[15]

Here, the Test Claim Permit incorporated legal requirements not found in the 2002 Permit. Those requirements related to an entirely new program, the LIP, its development and its implementation. Even if those requirements were intended to meet the same standard of performance as found in the 2002 Permit, they were still "new." They also represented a requirement for permittees to perform at a higher level of service, since the Test Claim Permit requirements were more comprehensive than those in the 2002 Permit.

The final Proposed Decision should reflect that all Test Claim Permit provisions set forth in the Test Claim concerning LIP requirements, including those in Section VII.D.3, are mandated new programs or a higher level of service.

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[13] *Ibid.*

[14] 85 Cal.App.5th at 559.

[15] *Id.* (emphasis added).

C. Pathogen and Bacteria Source Ordinance Requirement

The DPD (103-111) concludes that Test Claim Permit Section VIII.C, requiring permittees within three years of adoption of the permit, to "promulgate and implement ordinances that would control known pathogen or Bacterial Indicator sources such as animal wastes, if necessary," did not mandate a new program or higher level of service.

The DPD concludes that the 2002 Permit required permittees to implement ordinances to prevent illicit non-stormwater discharges to the MS4, to evaluate the effectiveness of ordinances in prohibiting such illicit discharges, including with regard to animal wastes, and to examine the source of pollutants in urban runoff and implement control measures to protect beneficial uses and attain water quality objectives, which include the control of coliform bacteria.[16] These 2002 Permit requirements, however, did not include the express requirement that permittees "promulgate and implement ordinances" that would address such sources.

First, the federal law requirements cited in the DPD, to "effectively prohibit non-stormwater discharges," including through the adoption of ordinances,[17] is not a federal mandate. The DPD, while citing those requirements, does not make this claim. To do so would be counter to governing case law, which holds that where federal regulatory language leaves the manner of implementation to the permittee, there is no federal mandate. *LA County Permit Appeal I,* 1 Cal. 5th at 756; *Dept. of Finance v. Comm. on State Mandates* (2017) 18 Cal.App.5th 661, 683 ("*San Diego Permit Appeal I*").[18] The federal stormwater permit application regulations do not specify how permittees are to comply with this requirement.

Second, the argument that, "[t]aken as a whole" permittees "were already required by the prior permit to evaluate the need within their jurisdictions for ordinances to 'control known pathogens or bacterial indicator sources'"[19] ignores the fact that the 2002 Permit contained no such express requirements. Of the 2002 Permit requirements cited in the DPD, none required permittees to "promulgate and implement" ordinances. Evaluation of general ordinance effectiveness was not promulgation and implementation. The implementation of unspecific control measures to address beneficial uses and achieve water quality objectives was not a requirement to promulgate and implement ordinances. And, as previously noted, a new permit requirement that is intended to implement an existing legal requirement is not therefore transformed into an existing requirement. *San Diego Permit Appeal II, supra.*

The requirements of Test Claim Permit Section VIII.C constituted a mandated new program and/or a higher level of service.

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[16] DPD at 103.

[17] DPD at 110-111.

[18] *See also* discussion in DPD at 97-98.

[19] DPD at 111.

D. Requirements to Upgrade Illegal Connections/Illicit Discharges ("IC/ID") Program

The DPD (111-147) concludes that provisions in Test Claim Permit Sections IX.D, IX.E, IX.H, and Appendix 3, Section III.E.3, that required permittees to enhance and upgrade their IC/ID programs to incorporate a proactive Illicit Discharge Detection and Elimination ("IDDE") program, did not impose new requirements and thus was not a new program or higher level of service.

Claimants submit that this conclusion fails to follow applicable California case law, is rebutted by the language of the Test Claim Permit and overlooks relevant facts.

1. Claimants Properly Pled Inclusion of Appendix 3, Section III.E.3 in the Test Claim

The DPD first concludes that the Commission does not have jurisdiction over a sentence in Appendix 3, Section III.E.3, which reads: "The Dry Weather monitoring for nitrogen and total dissolved solids shall be used to establish a baseline dry weather flow concentration for TDS and TIN at each Core monitoring location."[20] In response, Claimants note that all of the requirements of Appendix E, Section III.E.3, including the sentence quoted above, were pled in the Test Claim. *See* Section 5 Narrative Statement in Support of Joint Test Claim of Riverside County Local Agencies Concerning Santa Ana RWQCB Order No. R8-2010-0033 (NPDES No. CAS 618033), Santa Ana Water Permit – County of Riverside, No. 10-TC-07 ("Narrative Statement"), filed March 28, 2017, at 15.

While the DPD asserts that the Test Claim documentation did not meet the requirements of Govt. Code § 17553(b)(1),[21] the CSM has previously found that the documentation in fact satisfied the requirements of the Government Code and constituted a complete test claim.

CSM staff's authority to determine the completeness of a test claim is found in Title 2 Cal. Code Regs. § 1183.1(f):

> Within 10 days of receipt of a test claim, or amendment thereto, Commission staff shall notify the claimant if the test claim is complete or incomplete. Test claims will be considered incomplete if any of the requirements of Government Code section 17553 or this section are illegible, not included, or are not met. If a complete test claim is not received within 30 calendar days from the date the incomplete test claim was returned, the executive director may disallow the original test claim filing date. A new test claim may be accepted on the same statute or executive order alleged to impose a reimbursable state-mandated program.

CSM staff thus are charged with notifying test claimants if any element of the test claim is missing and thus not in compliance with Govt. Code § 17553.

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[20] DPD at 111-113.

[21] DPD at 112.

On February 8, 2017, the CSM's Executive Director notified Claimants that certain required elements of the Test Claim originally filed by Claimants in 2011 were incomplete under the requirements of Section 17553 and 2 Cal. Code Regs. § 1183.1. In that letter (the "2/8/17 Letter"),[22] the Executive Director informed Claimants, *inter alia,* that the original Test Claim did not meet the requirements of Govt. Code § 17553 because it did not include certain cost information. The letter directed: "For this filing to be complete, the detailed costs description set forth in Government Code section 17553, must be included in the narrative of the Test Claim." 2/8/17 letter at 4. The letter nowhere stated that the description of new Section III.E.3 activities did not comply with Section 17553. Had the letter so indicated, Claimants would have amended the Narrative Statement to provide more detail than was already provided.

The 2/8/17 letter directed the Claimants, if they wished to preserve the original filing date, to submit "*only* the following required elements to cure this filing: (1) evidence of the date and amount of costs *first* incurred as a result of the alleged new activities required under the order; . . . (3) and revised written narratives and declarations as specified above to supersede your initial filing with the Commission . . ."[23]

On March 28, 2017, Claimants submitted a revised Test Claim package[24] and on April 7, 2017, the Executive Director wrote to confirm that the Test Claim was now considered to be "complete." In that letter, she stated:

> On March 28, 2017, as requested, the claimants filed revised test claims forms, the narrative statement, and declarations to replace the original test claim forms, narrative statement, and declarations filed with the Commission. Commission has replaced the revised pages of the Test Claim *and upon this review, finds this joint test claim filing to be complete* and it retains the original filing date of January 31, 2011 in accordance with section 1183.1(f) of the Commission's regulations.

April 7, 2017 letter, at 2 (emphasis added).

Having determined in 2017 that the requirements of Govt. Code § 17553 were satisfied, Claimants respectfully submit that Commission staff is estopped from now asserting that the Test Claim does not meet the requirements of Section 17553. Claimants note further that the Narrative Statement specifically referenced monitoring as part of the description of activities required of Claimants and included cost information for all parts of this Test Claim element. CSM staff in 2017 did not require Claimants to specify costs separately for the dry weather monitoring to establish baseline dry weather flow concentrations when it determined that the Test Claim was complete and in compliance with section 17553.

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[22] This letter is in the record before the Commission and is therefore not appended to these comments.

[23] 2/8/17 Letter at 6 (emphasis in original).

[24] This Test Claim package, including the response by the CSM Executive Director, is in the record before the Commission and is therefore not appended.

2. The Requirement to Add an IDDE Component to the IC/ID Provisions was New to the Test Claim Permit, both Factually and Legally

The DPD concludes that the IDDE component added to the IC/ID provisions in the Test Claim Permit was not "new" because it was not different from requirements that Claimants had previously been subject to, either under federal stormwater permit application regulations or the 2002 Permit.[25] The DPD does not rely on a comparison of the Test Claim Permit language with that in the 2002 Permit, but rather compares language in an IDDE guidance manual, the text of federal regulations and language in the 2002 Permit to conclude that the IDDE provisions in the Test Claim Permit were simply variations of those existing requirements, and thus could not be "new."

In the Test Claim Permit Fact Sheet,[26] however, the Water Board expressly stated that the requirements at issue in Section IX and Appendix E were added to the Test Claim Permit because the Water Board found that "a proactive [IDDE] program should be integrated with other LIP program elements as appropriate including: mapping of the Permittees' MS4 to track sources, aerial photography, Permittee inspection programs for construction, industrial, commercial, MS4, Permittee facilities, etc. watershed monitoring, public education and outreach, Pollution Prevention, and rapid assessment of stream corridors to identify dry weather flows and illegal dumping."[27]

Further, in Finding I.3 of the Test Claim Permit, the Water Board stated that audits of permittees' IC/ID performance under the 2002 Permit had "indicated that this program element is generally carried out passively through complaint response" or through inspection programs and maintenance activities. To address this "passive" approach to IC/ID issues, the Water Board explained that "[t]his Order requires each Permittee to *revise* this program element based on the Center for Watershed Protection's Illegal Discharge Detection and elimination: A Guidance Manual for Program Development and Technical Assessments, or equivalent program."[28]

Finally, in its comments on the Test Claim, the Water Board itself admitted that the IDDE requirements in the Test Claim Permit required a higher level of service by

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[25] See generally, DPD at 126-147.

[26] NPDES permit Fact Sheets are required, *inter alia,* to "briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 CFR § 124.8(a). In addition, the Fact Sheet must set forth "a brief summary of the basis for the draft permit conditions .... " 40 CFR § 124.8(b)(4). The requirement to prepare a Fact Sheet also applies to permits issued by authorized states, such as California. 40 CFR § 123.25. Fact Sheets therefore provide insight into the motivation of the permitting agency, here the Water Board, in devising permit conditions.

[27] Order No. R8-2020-0033 Fact Sheet ("Fact Sheet") at 36.

[28] Test Claim Permit, Section II.I.3 (emphasis added). The Guidance Manual is hereafter cited as "IDDE Guidance Manual."

permittees: "Accordingly, the 2010 Permit requires the development of a *more proactive* IDDE program to *increase* effective control of illicit discharges."[29]

Thus, the Test Claim Permit, the Fact Sheet, and the Water Board's own admission all reflect the Water Board's express intent to require *changes* to the permittees' existing IC/ID program in the 2002 Permit and further that these changes were to follow the IDDE Guidance Manual (first published in 2004, two years after the 2002 Permit[30]) or equivalent. It is the requirement that the IDDE Guidance Manual (or equivalent) be incorporated into the IC/ID program to add IDDE principles that makes the Section IX and Appendix 3 requirements "new."[31]

The DPD's analysis, moreover, does not follow the applicable legal test for determining whether a program is "new" for purposes of article XIII B, section 6: "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."[32] This test is a simple one and under it, the absence of IDDE requirements in the 2002 Permit and their presence in the Test Claim Permit indicates that the requirements are "new." *See also San Diego Unified School Dist. v. Comm. on State Mandates* (2004) 33 Cal. 4th 859, 878 (*"San Diego Unified"*); *Lucia Mar, supra,* 44 Cal. 3d at 835.

Similarly, the imposition of the IDDE requirements in the Test Claim Permit represents a "higher level of service" imposed on Claimants. "Higher level of service" refers to "state mandated increases in the services provided by local agencies in existing programs." *LA County Permit Appeal II.*[33] It is indisputable that the requirement to incorporate a new IDDE program into the existing IC/ID requirements represents an enhancement of those requirements, requiring permittees to upgrade their existing IC/ID programs with the IDDE elements set forth in the IDDE Guidance Manual (or equivalent) and to integrate those upgrades into revised IC/ID programs that meet the five requirements in Section XI.E of the Test Claim Permit, mapping, systemwide investigations, use of field indicators, tracking of illegal discharges to their sources and public education. It is also indisputable that the services required represent "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."[34]

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[29] Comments of Water Board on Test Claim, August 26, 2011, at 28 (emphasis added). This document is in the record before the Commission.

[30] DPD at 123, n.520.

[31] While the DPD quoted the Fact Sheet and Test Claim Permit language above (at 125-26), the DPD did not conclude that the quoted language meant that the IDDE provision was "new."

[32] *San Diego Permit Appeal II,* 85 Cal.App.5th at 559.

[33] 59 Cal.App.5th at 556.

[34] *County of Los Angeles v. State of California* (1987) 190 Cal.App.3d 521, 537. As the DPD notes, only one of these alternatives "is required to establish a new program or higher level of service." DPD at 99.

3. The Requirements of Test Claim Permit Sections IX.D and IX.E are New

In concluding that the IDDE requirements in the Test Claim Permit are not "new," the DPD focuses not on the Permit language but on external requirements, *e.g.,* the federal NPDES stormwater permit application regulations and the 2002 Permit. The DPD concludes that Section IX.D's mandate that permittees review and revise their IC/ID programs is not "new" because under the stormwater permit application regulations, permittees were required to have an IC/ID program as part of their stormwater management programs and to review such programs, meaning that permittees "already had to review and report on their IC/ID programs, including assessing the controls that comprise their IC/ID programs."[35] The DPD also cites provisions in the 2002 Permit requiring review and assessment of permittee IC/ID programs.[36]

This citation of external authorities, however, ignores the plain text of the Test Claim Permit itself. Section IX.D required that "Permittees shall review *and revise their IC/ID program* to *include a pro-active IDDE"* using the IDDE Guidance Manual or equivalent (emphasis supplied). Neither the stormwater permit application regulations nor the 2002 Permit required inclusion of that IDDE element. The Water Board (as it stated in the Findings and Fact Sheet) required permittees to upgrade their existing IC/ID programs in a new way, using the IDDE elements set forth in the IDDE Guidance Manual. This requirement was reflected in the language of Section IX.D. By focusing only on the phrase "review and revise their IC/ID program," the DPD ignores the requirement to incorporate the new IDDE element.

Further evidence of the Water Board's intent to *add* the IDDE program is found in the structure of Section IX. The Test Claim Permit requires, *separately from Section IX.D,* that permittees "annually review and evaluate their IC/ID Program . . . to determine if the program needs to be adjusted." Test Claim Permit, Section IX.G. This separate requirement for review and evaluation of the IC/ID program reflects that the Water Board intended the requirements of Section IX.D to cover the special new task of

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[35] DPD at 128. Further, the DPD quotes an April 2010 EPA "MS4 Permit Improvement Guide" and concludes that the Guide characterizes the federal IC/ID regulations "as requiring the permittees to develop a 'comprehensive, proactive [IDDE] program.'" DPD at 128. This citation does not, however, support the DPD's argument. The Permit Improvement Guide (published in April 2010, two months after the effective date of the Test Claim Permit) states: "*In addition* to requiring permittee to have the legal authority to prohibit non-stormwater discharges from entering storm sewers . . . *MS4 permits must also* require the development of a comprehensive, proactive [IDDE] program." Guide at 24 (emphasis added). This language reflects that the incorporation of IDDE concepts reflected EPA's view in 2010 as to what should be included in an MS4 permit, and that such a permit, in 2010, should include an IDDE program. The quoted language does not "characterize" or reflect requirements in MS4 stormwater regulations adopted 20 years before. Moreover, the Guide is not binding on the Water Board or permittees: "This Guide does not impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public." Guide at 3.

[36] DPD at 128-129.

reviewing the IC/ID programs to incorporate a pro-active IDDE program, and not the general requirement to review and revise the IC/ID program.

Finally, as discussed in Section III.B above, the DPD concludes that the requirement in Test Claim Permit Section IV.A.5 to amend the LIP to incorporate an IDDE program (a parallel requirement to Section IX.D's requirement that the "LIP shall be updated accordingly") was a state mandated new requirement eligible for reimbursement.[37] If updating the LIP to incorporate IDDE principles constituted a reimbursable new requirement in Section IV.A.5, the same requirement in Section XI.D must also be a new requirement.

Turning to Section IX.E, it provides that the permittees' "*revised* IC/ID shall specify *an IDDE program* for each Co-Permittee" to incorporate IDDE principles in five elements of their IC/ID programs.[38] The DPD focuses on the five elements listed in Section IX.E.a.-e. (develop an inventory and map of MS4 facilities and outfalls, develop a schedule to conduct investigations of MS4 open channels and major outfalls, use field indicators to identify potential illegal discharges, track such discharges to their sources and educate the public about illegal discharges and pollution prevention where problems are found) and concludes, "regardless of whether the permittees elect to use [the IDDE Guidance Manual] or another similar IDDE program guide when revising their IC/ID program, the IDDE component of their IC/ID program must satisfy the requirements of Section IX.E."[39] Since "none of the activities specified in Section IX.E are new,"[40]Section IX.E is not new.

This analysis misreads Section IX.E. That section required that each of the five IC/ID program elements had to incorporate an IDDE component. It was not the inventory and mapping, the schedule of investigations, etc. in Sections IX.E.a-e that was mandated -- it was the requirement for permittees to assess and potentially update those five IC/ID program elements by incorporation of the required proactive IDDE program. As Section IX.E. stated: "The Permittees' *revised* IC/ID programs *shall specify an IDDE program"* for each Co-permittee . . . to individually, or in combination" assess the inventory, mapping, schedule, source tracking and public education elements.[41]

The DPD does not address this language. For example, concerning the inventory and mapping requirement in Section IX.E.a,[42] the DPD concludes that this effort had been completed under the prior 2002 Permit. With regard to Section IX.E.b, the DPD similarly concluded that the requirement to schedule investigations and to inspect MS4 infrastructure had been both required under the federal stormwater regulations and been performed under the prior 2002 Permit; as such, the IX.E.b requirements were not

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[37] DPD at 83.

[38] Test Claim Permit Section IX.E (emphasis added).

[39] DPD at 131.

[40] DPD at 132.

[41] Section IX.E (emphasis added).

[42] Discussed in the DPD at 132-33.

"new."[43] Again, this analysis cites isolated provisions in the regulations and the 2002 Permit and characterizes those as being equivalent to what was required in Section IX.E. However, Section IX.E requires that an IDDE program (which was never part of either the regulations or the 2002 Permit) be incorporated, as required, into the five IC/ID elements.

The permittees understood that the requirements of Test Claim Permit Section IX.E required a new effort and careful review of their existing IC/ID programs, as reflected in contemporary documents. In May 2011, the District wrote to permittees requesting them to provide additional information on the location of their outfalls, which would both satisfy the inventory and mapping requirement of Section IX.E.a and the inspection scheduling required by Section IX.E.b. *See* Exhibit 1 to Declaration of Rohini Mustafa, P.E., May 11, 2011 letter to permittees from the District. This letter specifically references Section IX.E of the Test Claim Permit as the reason for the letter and reflects the requirement that the inventory and MS4 maps be upgraded to meet the IDDE program requirements. By reaching out to the permittees in May 2011, the District, and the permittees in response to the letter, were undertaking new tasks in conformance with the requirements of Section IX.E.

In addition, permittees reviewed their IC/ID programs in light of the Test Claim Permit Requirements and the permittees submitted a revised Consolidated Program for Water Quality Monitoring (CMP) to incorporate the IDDE requirements, which was submitted to the Water Board on May 31, 2011 and approved by the Board on March 26, 2012. See pages 4-6 of Exhibit 2 to Mustafa Decl., excerpts of 2011-2012 Annual Progress Report.[44] Thus, the requirements of Sections IX.D and IX.E caused permittees to take action to comply. If these requirements had already been met, no response would have been required of permittees.

With regard to Section IX.E.c, the requirement to specify an IDDE program to use field indicators to identify potential illegal discharges, the DPD asserts that it "requires the permittees to use data collected through field screening and indicator monitoring to identify potential illegal discharges."[45] This statement is only partially correct. Section IX.E.c actually requires permittees to "specify an IDDE program" to use field indicators to identify potential illegal discharges. This IDDE element, again, was part of neither the stormwater regulations nor the 2002 Permit cited in the DPD. Its presence in Section IX.E.c refutes the DPD's conclusion that "nothing requires the permittees to perform additional activities beyond the field screening data collection and analysis they were required to perform under the prior permit and federal law."[46]

Concerning Section IX.E.d, the requirement to specify an IDDE program to track illegal discharges to their sources, where feasible, the DPD argues that programs

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[43] DPD at 133-134.

[44] As the document reflects, it was accompanied by a Certification signed by a representative of the District stating, *inter alia,* that "the information submitted is, to the best of my knowledge and belief, true, accurate, and complete." Exhibit 2 to Mustafa Decl., at 2.

[45] DPD at 135.

[46] DPD at 137.

identified in the IDDE Guidance Manual are "comparable" to the requirements of federal regulations and thus are not "new."[47] However, the conclusion that the specific elements in a technical guidance document are "comparable" to unrelated requirements in stormwater regulations requires technical expertise in stormwater control programs. With respect, Commission staff do not have such expertise. Thus, the conclusion that federal regulatory requirements for investigating portions of the MS4 and dye testing and in-storm sewer inspections are "comparable" to IC/ID source tracking methods discussed in the IDDE Guidance Manual is, at best, non-expert speculation. And, it is speculation which conflicts with the fact that the incorporation of IDDE elements is specifically required as a new program by the Test Claim Permit.

Finally, concerning Section IX.E.e, the requirement to specify an IDDE program to educate the public about illegal discharges and pollution prevention where problems are found, the DPD again focuses only on public education efforts required by federal regulations or the 2002 Permit, and not on the integration of IDDE principles into public education.[48] By failing to recognize the ~~true nature of the~~ requirement of Section IX.E.e, the DPD incorrectly concludes that the requirements are not new.

Fundamentally, the DPD's attempt to characterize what is required in the IDDE Guidance Manual as not being different from what permittees were required to do under the federal stormwater regulations or the 2002 Permit is error because it ignores the appropriate legal test established by California courts to determine what mandates are "new" under article XIII B, section 6. That test is straightforward: Was the requirement at issue in the test claim permit contained in the prior permit or order? If not, it is new.[49]

The DPD ignores that test in favor of a making a qualitative judgment as to whether the on-its-face "new" requirement in the Test Claim Permit (i.e., incorporation of a pro-active IDDE program) is truly "new," based on speculation as to how IC/ID requirements laid down in 1990 stormwater regulations[50] or the 2002 Permit might correspond to requirements in the IDDE Guidance Manual published in 2004. That analysis second guesses the judgment already made by the Water Board itself – that the requirements of Section IX.E are in fact new.

4. The Requirements of Test Claim Permit Section IX.H are New

In discussing whether requirements to maintain and update a database summarizing IC/ID incident response and to submit that information in an annual report, required by Section IX.H of the Test Claim Permit, the DPD (141-143) concludes that it is not "new" by repeating the same "functional" analysis that characterized its review of Sections IX.D and IX.E. It concludes that the more limited database and annual

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[47] DPD at 138-139.

[48] DPD at 139-141.

[49] *San Diego Permit Appeal II,* 85 Cal.App.5th at 559.

[50] The federal MS4 permit application regulation, 40 CFR § 122.26, was promulgated in 55 Fed. Reg. 48063, November 16, 1990 (*see* note at end of Section 122.26.)

reporting requirements of the 2002 Permit were "not materially different" from those in Section IX.H.[51]

It is indisputable that the 2002 Permit did not require that permittees maintain a specific IC/ID incident response database. At most, the permit required that a summary of IC/ID investigations be included in permittee annual reports[52] and that permittees should "coordinate with the Regional Board" to develop a database of enforcement actions for stormwater violations and unauthorized, non-stormwater discharges.[53] The requirements of the federal stormwater regulations, also cited in the DPD,[54] were only to collect data on IC/ID inspections and investigations and to summarize that in annual reports.

By contrast, Section IX.H required permittees to maintain a database on an ongoing basis for all IC/ID incident responses, including those detected during field monitoring activities and to submit this information in annual reports, not just the summary of IC/ID investigations that was to be included in annual reports under the prior 2002 Permit and as required by federal regulations. The conclusion that this was not "materially different" is belied by the plain language of Section IX.H.

The requirements of Test Claim Permit IX.H are mandated by the state and constitute new and/or represent a higher level of service required of Claimants.

5. The Requirements in Appendix 3, Section III.E.3 are New

Finally, the DPD concludes that the IDDE monitoring and reporting requirements in Appendix 3, Section III.E.3 are not "new" because they were either required by the 2002 Permit or that existing monitoring practices were supposedly "consistent" with the requirements of the IDDE Guidance Manual.[55]

The language of Appendix 3, Section III.E.3 is direct: Permittees were to "*review and update*" their monitoring strategies to identify IC/IDs by "using" the IDDE Guidance Manual. The very language of the provision required new activities by permittees and, as with the other IDDE requirements in the Test Claim Permit, required that existing programs be reviewed *in accordance with* the IDDE Guidance Manual requirements or some equivalent. And, the entire provision itself is new and was not part of the 2002 Permit or its associated monitoring program, Appendix 3.

Instead of following California precedent and comparing the requirements of the 2002 Permit with those in the Test Claim Permit to see if the latter required a new program or higher level of service, the DPD again attempts to characterize the requirements of the IDDE Guidance Manual to see if they are functionally "consistent"

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[51] DPD at 143.

[52] 2002 Permit, Section VI.A.

[53] 2002 Permit, Appendix 3, Section III.B.4.

[54] DPD at 142.

[55] DPD at 143-147.

with elements in the permittees' existing CMP.[56] As discussed above, this attempt to characterize the functional requirements of technical documents is not the approach required of the Commission in assessing whether a provision in an executive order is "new." Again, Commission staff lack the expertise to compare monitoring requirements in a permit document and strategies set forth in a guidance manual and then to conclude whether they are "consistent" and thus not new. The DPD's conclusion also ignores the fact that the permittees were required to undertake a review, which itself is a new requirement and one representing a higher level of service.

The requirements of Appendix 3, Section III.E.3 are mandated by the state and constitute a new and/or represent a higher level of service required of Claimants.

E. Septic System Approval Database Update Requirement

The DPD finds (147-154) that the requirements of Section X.D of the Test Claim Permit that the County of Riverside ("County") maintain updates to a database of approvals for septic systems, is a state-mandated new program or higher level of service for the County. [57] Claimants concur with this finding and have no further comment on this requirement.

F. Inspection of Commercial Businesses and Residential Areas Requirements

The DPD concludes that the requirements of Section XI.D.1 of the Test Claim Permit constitute a state mandated new program or higher level of service but that the requirements of Sections XI.D.6, XI.D.7 and XI.E.6 do not.[58] With respect to the last three provisions, the DPD again reaches its conclusions based not on the plain language of the Test Claim Permit provisions (none of which were in the 2002 Permit), but rather by examining unrelated provisions in that earlier permit, characterizing those provisions as the functional equivalent of the Test Claim Permit requirements at issue, and concluding that the latter are not "new."

Again, this "functional" analysis is not in accord with California case law directing how the presence of a "new" requirement is to be identified for purposes of article XIII B, section 6 of the California Constitution.

1. Sections XI.D.6 and XI.D.7 are New Requirements

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[56] The DPD also concludes that the requirement to "review and update the IC/ID reconnaissance strategies is not new." DPD at 144. That is not what Section III.E.3 requires. It requires permittees to *review and update* those strategies "*using the [IDDE Guidance Manual].*" (emphasis added). As discussed with respect to Sections IX.D and IX.E above, the incorporation of the IDDE element is what is new, not a requirement to simply review and update IC/ID reconnaissance strategies.

[57] The DPD (at 154-157) also concludes that the reference to "Co-Permittees" in the Test Claim Permit means that these requirements are applicable only to the County and city permittees, and not the District. Claimants concur, except to note that in Section V of Appendix 3 of the Test Claim Permit, the District is shown as the responsible permittee for developing an enforcement strategy to address mobile businesses.

[58] DPD at 154-186.

Section XI.D.6 of the Test Claim Permit required the Co-Permittees, within 18 months of adoption of the Permit, to notify all mobile businesses within their jurisdictions concerning the minimum "Source Control and Pollution Prevention BMPs that they must develop and implement." The mobile businesses were then required to implement such BMPs after being notified. The Co-Permittees were further required to notify mobile businesses that were discovered operating within their jurisdiction.

This requirement specifically required outreach to those mobile businesses operating within a jurisdiction. It was a new requirement, not a continuation of a requirement in the previous 2002 Permit. The DPD, however, cites to inspection requirements for mobile businesses under the 2002 Permit or its associated DAMP to conclude that "the permittees were already required by the prior permit to provide mobile businesses with information about minimum source control and pollution prevention BMPs." DPD at 178. The 2002 Permit, however, did not require the notification of *all* mobile businesses.

Moreover, the 2002 Permit inspection and public information requirements cited in the DPD as authority for its conclusion that Section XI.D.6 is not "new" remain in the Test Claim Permit *separate from the requirements of Section XI.D.6. See* Test Claim Permit Sections XI.A, which requires permittees to "continue to maintain a database inventory of all . . . Commercial Facilities within their jurisdiction" and that "Co-Permittees shall enforce their Storm Water Ordinances and permits at all . . . Commercial Facilities;" XI.D.1-4, which require that permittees "shall *continue to* implement the CAP or equivalent," shall continue to develop BMPs applicable to each of the Commercial Facilities described in Section 8 of the DAMP" and, shall continue to prioritize Commercial Facilities and to inspect them, with "each Commercial Facility shall be required to implement source control and pollution prevention BMPs consistent with the requirements of Section 8 of the DAMP."

These requirements are separate from the mobile business notification requirements of Section XI.D.6, illustrating that the Water Board intended the latter to be a new and independent requirement. Again, there was no such notification requirement in the 2002 Permit, and its inclusion in the Test Claim Permit was a new program and/or higher level of service required of the Co-Permittees.

With respect to Section XI.D.7, which required the Co-Permittees to develop an enforcement strategy to address mobile businesses, the DPD concludes that "while not expressly referred to as a mobile business enforcement strategy," requirements in the 2002 Permit "*amount to* an enforcement strategy targeting mobile businesses."[59]

This conclusion does not, however, comport with the judgement of the Water Board. The Board in Section XI.D.7 required the Co-Permittees to develop a specific *enforcement strategy* for mobile businesses, not merely to continue the inspection, documentation and stormwater ordinance enforcement efforts required by the 2002 Permit (which, as noted above, are in the Test Claim Permit in separate places). A finding that the requirements of the 2002 Permit "amount to an enforcement strategy"

[59] DPD at 179 (emphasis added).

and thus are not "new" is, like the DPD's findings regarding the IDDE program, speculative and in any event, does not follow the test established by California courts to determine whether a requirement in an MS4 permit is "new" for purposes of article XIII B, section 6.[60]

The requirements of Sections XI.D.6 and XI.D.7 represent a new program and a higher, additional level of service required of the Co-Permittees by the Water Board.

2. Section XI.E.6 is a New Requirement

Section XI.E.6 of the Test Claim Permit required the Co-Permittees to "include an evaluation of its residential program" in Annual Reports starting with the second Annual Report after adoption of the Permit. The DPD concludes that because the "activities required by the residential program are not new and the requirement to evaluate those activities in the annual report is mandated by federal law and was required under the prior permit."[61]

The DPD acknowledges that the requirement to evaluate the permittees' residential programs was not in the 2002 Permit, stating that the prior permit "did not expressly identify a 'residential program.'"[62] In fact, the Test Claim Permit specifically required each Co-Permittee to "*develop and implement a residential program*;"[63] no clearer indication can be given that the Water Board intended to create such a new program under the Permit.

It is further undisputed that there was no requirement in the 2002 Permit for permittees to annually evaluate such a program. That should be the end of the analysis. Under applicable law, the presence of a program in a test claim permit that was not in the prior permit means that it is "new."[64]

The DPD instead cites isolated residential elements contained in the stormwater management program required of all MS4 permittees in the federal stormwater permit application regulations, and that because federal regulations require annual reporting, consideration of proposed changes to the program, and revisions to the assessment of controls (including some controls which apply to discharges from residential areas, such as lawn watering), this supports its conclusion.[65] The DPD also cites isolated provisions in the 2002 Permit prohibiting discharges of non-stormwater to the MS4s and various public education requirements applicable to residential (as well as non-residential) activities, including household hazardous waste collections.[66]

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[60] E.g., *San Diego Permit Appeal II,* 85 Cal.App.5th at 559.

[61] DPD at 181.

[62] *Ibid.*

[63] Test Claim Permit, Section XI.E.1(emphasis added). In fact, Section XI.E of the Test Claim Permit is entitled "RESIDENTIAL PROGRAM."

[64] *San Diego Permit Appeal II, supra.*

[65] DPD at 181-182.

[66] DPD at 183-186.

However, none of these requirements represents a "residential program" that is required to be evaluated on its own, as Section XI.E.6 requires. The DPD is correct that stormwater management programs relating to residential area discharges were part of the 2002 Permit; the *evaluation* of the residential program (not to mention the creation of a "residential program" in the first place), however, was new to the Test Claim Permit.

The requirements of Section XI.E.6 of the Test Claim Permit were a new program and/or higher level of service mandated by the state.

G. New Development and Redevelopment Requirements

The DPD first finds that the requirements of Test Claim Permit Sections XII.A.5, XII.C.1, XII.D.1, XII.E.1, XII.E.2, XII.E.3, XII.E.4, XII.E.9, XII.F, XII.G.1 and XII.K.5, which set forth Low Impact Development (LID) and hydromodification program requirements on certain large new development and redevelopment projects (hereinafter, collectively, "Significant Development Projects"), as they apply to municipal projects, are not mandated by the state because the construction of such projects is the product of discretionary decisions of the permittees.[67]

The DPD also notes in passing that "some" of these provisions do not impose a new program or higher level of service."[68] The DPD does not, however, further explain its rationale for this conclusion, stating only that the 2002 Permit "imposed requirements with respect to new development and significant redevelopment and thus, some of the above requirements are not new."[69] The DPD does not identify which provisions at issue in the Test Claim are not "new," so this conclusion cannot be addressed in these Comments. Claimants assert that all of the above-listed Test Claim Permit requirements are "new," and this assertion has not been contradicted by the DPD.

The DPD next concludes that Sections XII.A.5, XII.C.1, XII.D.1, XII.E.1, XII.E.2, XII.E.3, XII.E.4, XII.E.9 and XII.G.1, which impose LID and hydromodification requirements on municipal Significant Development Projects, do not qualify for a subvention of state funds because they are not uniquely imposed on government nor provide a peculiarly governmental service to the public.[70]

The DPD finally concludes that Sections XII.A.5, XII.C.1, XII.D.1, XII.E.1-4 and 6-9, XII.G.1, and XII.K.4-5, all of which require Claimants to regulate development projects to require LID and hydromodification features, while they "may be mandated by the state and impose a new program [or] higher level of service" (DPD at 205), do not result in costs mandated by the state because Claimants "have fee authority sufficient as a matter of law to pay for these regulatory activities and, thus, there are no costs mandated by the state pursuant to Government Code section 17556(d)."[71]

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[67] DPD at 191-201.

[68] DPD at 190.

[69] *Ibid.*

[70] DPD at 201-203.

[71] DPD at 203-206.

The first two conclusions in the DPD are addressed in this section of Claimants' Comments. The third conclusion, relating to whether Claimants have sufficient regulatory or development fee authority, will be addressed in Section IV.B of these Comments.

1. Requirements in Sections XII.C.1, XII.D.1, XII.E.1, XII.E.4, XII.F, and XII.G.1 are General Guidance and Planning Requirements Triggered by Operation of the Test Claim Permit, not Local Agency Decisions to Build Development Projects; Moreover, a Municipality's Decision to Construct a Significant Development Project is not Truly "Discretionary"

The DPD concludes that certain requirements in Section XII of the Test Claim Permit (190-193), e.g., "the activities pertaining to municipal development projects *proposed by the permittees* stem from a discretionary decision by local government to construct, expand, and improve municipal projects, including roads."[72] As such, concludes the DPD, those requirements are "not mandated by the state."[73] However, a number of those identified requirements in fact are *not* triggered by a decision by a municipality to build a municipal development or redevelopment project. They are triggered by operation of the Test Claim Permit itself, and thus are "mandated by the state."

Section XII.C.1 required each Co-Permittee, within 24 months of adoption of the Test Claim Permit, to review its General Plan and related development documents "to eliminate any barriers to implementation of the LID principles and HCOC discussed in Section XII.E of this Order." The results of this review were to be reported in the Annual Report for the corresponding reporting year, with any changes in the project approval process or procedures to be reflected in the LIP. This requirement applied to the Co-Permittees absolutely independent of any decision by them to construct a municipal Significant Development Project. Even if a Co-Permittee constructed no project that would be required to meet Section XII LID and hydromodification BMP requirements, it would still have to comply with Section XII.C.1.

A similar analysis applies to Section XII.D.1 and the first two sentences of Section XII.E.1, which required the Permittees to update their Water Quality Management Plan ("WQMP") to incorporate the new LID principles and hydrologic constituents of concern ("HCOC") and to submit that updated WQMP to the Water Board Executive Officer for approval. Again, this requirement applied irrespective of the Permittees' decision to construct a municipal project subject to LID and HCOC requirements. This was true as well with respect to the requirements of Test Claim Permit Section XII.E.4, which required that Permittee ordinances, codes, building and landscape design standards had to be revised, where feasible, to promote green infrastructure LID techniques. The imposition of this requirement was, again, not triggered by the local agency deciding to build a development project. It was triggered by operation of the Test Claim Permit, and thus represents a state mandate.

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[72] DPD at 193 (emphasis in original).

[73] *Ibid.*

With respect to Section XII.F, which applies only to road programs under Permittee jurisdiction, Test Claim Permit Section XII.F.1 required all Co-Permittees to, within 24 months of adoption of the Permit, develop standard design and post-development BMP guidance to be incorporated into projects for streets, roads, highways, and freeway improvements. This draft guidance was to be submitted to the Water Board Executive Officer for review and approval. Section XII.F.2 required that such guidance be implemented for "all road projects." While road projects would arguably be commenced at the discretion of the Co-Permittees (but see discussion below concerning the non-discretionary nature of municipal Significant Development Projects), the guidance being employed was not. And if a Co-Permittee built no road projects during the term of the Test Claim Permit, it still was required to comply with Section XII.F.1.

Section XII.G.1, like other requirements in Section XII of the Test Claim Permit, required that permittees develop guidance for development projects, in particular, technically-based feasibility criteria to determine the feasibility of implementing LID BMPs. A discretionary municipal project may employ that guidance, but development of that guidance was required whether or not there was a municipal project to employ it.

2. Requirements in Sections XII.A.5, XII.D.1, XII.E.1-3, XII.E.7, XII.E.9, XII.F and XII.G.1, as they apply to Municipal Significant Development Projects, are Practically Compelled and Thus Represent State Mandates

In addition, with respect to Test Claim Permit Sections XII.A.5 (requiring BMPs for culverts and bridge crossings), XII.D.1 (requiring project-specific WQMPs for municipal projects), XII.E.1 (requiring, as to municipal projects, implementation of updated WQMPs); XII.E.2 (requiring projects to infiltrate, harvest and use or evapotranspire and or bio-treat the 85th percentile storm event), XII.E.3 (requiring maintenance or replication of pre-development hydrologic regime), XII.E.7 (requiring use of Site Design BMPs) XII.E.9 (requiring evaluation of HCOC factors and additional BMPs if there are adverse impacts from HCOCs), XII.F (requiring implementation of standard design and post-development BMPs for road projects) and XII.G.1 (requiring evaluation and implementation of alternative or in-lieu LID BMPs) while these requirements apply to both private and municipal Significant Development Projects, the nature of the latter is fundamentally different.

These requirements of Test Claim Permit Section XII apply depending on the size of the development project. Claimants submit, however, that when local governments undertake a Significant Development Project, it is because they must build that project in the public interest. Local governments do not have the same ability as a private developer to adjust the size of a project so as to avoid the LID and hydromodification requirements, since the size of the project must reflect civic requirements and needs.

The DPD cites *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Dept. of Finance v. Commission on State Mandates* (2003) 30 Cal. 4th 727 *("KHSD")* in support

of its position.[74] *City of Merced* involved the question of whether a local government, when it exercised the power of eminent domain, must include the loss of business goodwill as part of the compensation for the taking.[75] The court held that it did, given that the city was not required to exercise its eminent domain powers and by choosing to do so, was liable for resulting costs.[76]

KHSD concerned whether a local school district being required to comply with notice and agenda requirements in conducting certain public committee meetings was a state mandate. The Court held that since the committees in question were part of separate grant-funded programs in which the district chose to participate and that such costs were incidental to such programs, the notice and agenda requirements were not a state mandate.

Neither case is controlling here. *KHSD* is inapposite because, in that case, the district chose to accept the grants to fund those meetings. Similarly, *City of Merced* is inapposite because the city chose to exercise its power of eminent domain. Claimants here do not "choose" to build public projects in the same sense. They must either build such projects to fulfill their civic obligations or they or their constituents could face "certain and severe penalties or consequences" for not providing necessary public services.[77] Thus, the projects are "practically compelled."

The court in *San Diego Permit Appeal II* discussed this issue in response to an argument by the state that permittees "chose" to obtain an NPDES permit to discharge stormwater. The court rejected that argument:

> 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. Permittees were thus compelled as a practical matter to obtain an NPDES permit and fulfill the permit's conditions.[78]

In *Dept. of Finance v. Comm. On State Mandates* (2009) 170 Cal.App.4th 1358 ("*POBRA*"), the court provided further guidance in setting forth whether a state requirement was "practically compelled," holding that the question was whether the action "is the only reasonable means to carry out [the local agency's] core mandatory functions."[79]

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[74] The Commission also cites *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal. 5th 800, but that opinion did not reach the question of whether the programs at issue were "practically compelled," the Court having sent that question back to the Court of Appeal for consideration. *Id* at 822.

[75] 153 Cal.App.3d at 782.

[76] *Id.* at 783.

[77] *San Diego Permit Appeal II, supra,* 85 Cal.App.5th at 558.

[78] *Ibid.* (citations omitted).

[79] 170 Cal.App.4th at 1368.

Here, in similarly urbanized areas of Riverside County, the construction of essential infrastructure is the only reasonable means by which core mandatory governmental functions can be carried out; Claimants were "compelled as a practical matter" to construct that infrastructure.

The DPD's conclusion that claimants have discretion as to whether to construct a project the size of a Significant Development Project is essentially a conclusion that a Claimant, for police, fire, public safety or cost-effective administrative purposes, will never have to build such a project. There is no evidence or other basis for concluding that a Claimant will *never* be practically compelled to build such a project. For this reason alone, the DPD's conclusion is in error and Test Claim Permit Sections XII.A.5, XII.D.1, XII.E.1-3, XII.E.7, XII.E.9, XII.F and XII.G.1 constitute state mandates for municipal Significant Development Projects.

3. Section XII.K.5 of the Test Claim Permit, which requires inspection of Permittee-owned post-construction BMPs, is not directly triggered by local agency action

Section XII.K.5 of the Test Claim Permit required pre-rainy season inspections of "all Permittee-owned structural post construction BMPs installed after the date of this Order." It further required Co-permittees to develop an inspection frequency for new development and significant redevelopment projects, based on project type and type of structural post construction BMPs deployed.

Neither the inspection of BMPs nor the development of an inspection frequency is directly triggered by the action of a local agency. The Test Claim Permit established a requirement that such BMPs be inspected and the schedule developed. There was no choice by the local agency here.

As noted above, the DPD cites, among other cases, *City of Merced* to argue that municipal discretionary projects are not state mandates. However, the California Supreme Court has questioned how far "downstream" the applicability of a determination that a requirement was discretionary, not mandated, should extend. In *San Diego Unified, supra,* the Court expressed the following concern regarding the scope of *City of Merced:*

> [W]e agree with the District and amici curiae that *there is reason to question an extension of the holding of City of Merced so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514 whenever an entity makes an initial discretionary decision that in turn triggers mandated costs.* Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper.

33 Cal. 4th at 887 (emphasis supplied). The Court cited *Carmel Valley Fire Protection Dist. v. State of California*[80] (concerning whether a fire district's purchase of protective clothing and safety equipment for firefighters was state mandated), as an example of a case where a strict application of *City of Merced* would prohibit reimbursement for those costs because the district used its discretion to determine how many firefighters needed to be employed. Yet in that case, a "new program" was found.[81] The Court concluded:

> We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.[82]

Here, the projects served by the structural post-construction BMPs had been constructed. The requirement to inspect and devise a schedule relate to such completed projects and are not triggered by any discretionary act by the local agency.

4. The Requirements in Test Claim Permit Sections XII.A.5, XII.C.1, XII.D.1, XII.E.1-4, XII.E.9 and XII.G.1 are both uniquely imposed on government and/or provide a governmental service to the public through improvements in water quality

The DPD contends that the above-noted provisions in the Test Claim Permit do not impose a new program or higher level of service within the meaning of article XIII B, section 6 because the provisions "apply to both public and private project proponents, are not unique to government, and do not provide a governmental service to the public."[83] These contentions are incorrect.

First, these provisions require services unique to government and are not applicable to both public and private project proponents. Section XII.A.5 requires each "*Permittee*" "to ensure that appropriate BMPs to reduce erosion and mitigate hydromodification are included in the design for replacement of existing culverts or construction of new culverts and/or bridge crossings to the MEP." This language is on its face applicable *only* to the Test Claim Permit permittees, thus meaning it is *not* applicable to "both public and private project proponents." That the BMP requirements may be imposed on both public and private projects containing culverts and bridge crossings is irrelevant to the fact that the Test Claim Permit design mandate applies only to local agencies.

Similarly, the requirements of Sections XII.C.1, by requiring review of the municipality's General Plan, development standards, zoning codes, development, guidance, etc. to remove barriers to implementation of LID principles and HCOC, and also to report the results of the review and any response in the Co-Permittee's annual report, can apply *only* to the Co-Permittees. The same is true of Section XII.D.1, which

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[80] (1987) 190 Cal.App.33 521.

[81] 190 Cal.App.3d at 534.

[82] 33 Cal. 4th at 887-88 (emphasis supplied).

[83] DPD at 202.

requires "*the Permittees*" to submit a revised WQMP to incorporate the new elements required in the Test Claim Permit. Both of these provisions required only the local agencies subject to the Permit to undertake specific steps.

The same analysis applies to Sections XII.E.1-4 and 9. Each of these provisions is addressed to actions that must be taken by the Permittees in their capacity as regulators of development within their borders, a function which is, under the test in *County of Los Angeles v. State of California,*[84] "peculiar to government."[85] This is evident from the language of these provisions:

XII.E.1: "Within 19 months of adoption of this Order, the *Permittees* shall update the WQMP . . . .

XII.E.2: "*The Permittees* shall require [significant development and redevelopment projects] to infiltrate, harvest and use . . . .

XII.E.3: "*The Permittees* shall incorporate LID site design principles into the revised WQMP . . . "*The Co-Permittees* shall require that New Development and Significant Redevelopment projects include Site Design BMPs . . ."

XII.E.4: "Within 18 months of adoption of this Order, *each Permittee* shall revise, where feasible its ordinances, codes, building and landscape design standards to promote green infrastructure/LID techniques . . . .

XII.E.9: "*The Permittees shall continue to ensure. . .* that New Development and Significant Redevelopment projects do not pose a HCOC due to increased runoff volumes and velocities;

Test Claim Permit Sections XII.E.1-4, 9, emphasis added. All of these provisions are directed solely to Permittees, and do *not* apply to both public and private project proponents.

Finally, Test Claim Permit Section XII.G.1 provides, in relevant part, that "the *Permittees* shall develop technically-based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs . . . ." Again this provisions is directed solely to the permittees.

The DPD appears to mix the project-specific development BMP requirements of the Test Claim Permit, which can apply to both public and private projects, and requirements for BMP design criteria, which the Test Claim Permit required be established only by the permittees. The Permit those local agencies to perform functions peculiar to government, e.g., mandated new requirements in the performance of a function "peculiar to government," the regulation of development.[86]

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[84] (1987) 43 Cal. 3d 46, 56-57.

[85] Laws regulating developing, such as planning and zoning laws, are a "traditional municipal concern." *California Renters Legal Advocacy & Educ. Found. v. City of San Mateo* (2021) 68 Cal.App.5th 820, 896.

[86] *City of San Mateo, supra,* 68 Cal.App.5th at 896.

The DPD also concludes that the provisions discussed above "do not provide a peculiarly governmental service to the public."[87] This conclusion is incorrect. As the previous discussion illustrates, these Test Claim Permit provisions applied to local agencies acting in their capacity as regulators of development, which is a core function of government. And, as the court held in *LA County Permit Appeal II,* there is a governmental service to the public when activity, such as trash collection in that case, "is itself a government function that provides a service to the public by producing cleaner transit stops, sidewalks, streets, and, ultimately, stormwater drainage systems and receiving waters."[88]

Here, the requirements in the development section of the Test Claim Permit were intended to improve water quality by reducing erosive stormwater flows through efforts by the permittees, acting in their capacity as regulators of development within their jurisdictions (a function peculiar to government) to require proponents of development projects to install LID and hydromodification BMPs.

H. Watershed Action Plan Requirements

The DPD (206-214) concludes that the requirements in Section XII.B of the Test Claim Permit requiring permittees to develop and implement a Watershed Action Plan imposes a state-mandated new program or higher level of service on claimants. Claimants concur with this finding and have no further comment on this requirement.

I. Training Requirements for Project-Specific WQMPs Requirements

The DPD (214-238) concludes that requirements in Sections XV.C, XV.F.1, XV.F.4 and XV.F.5 of the Test Claim Permit requiring permittees to develop and conduct formal training programs on project-specific WQMP reviews and CEQA requirements constitutes a state-mandated new program or higher level of service. Claimants concur with this finding and have no further comment on these requirements.[89]

J. Requirement to Develop Proposal to Assess the Effectiveness of Urban Runoff Management Program

The DPD (238-254) concludes that Section XVII.A.3 of the Test Claim Permit, which requires the development and inclusion in the first annual report of a proposal to assess the effectiveness of the Urban Runoff Management Program using guidance developed by the California Storm Water Quality Association imposes a state-mandated new program or higher level of service. Comments concur with this conclusion.

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[87] DPD at 203.

[88] *LA County Permit Appeal II,* 59 Cal.App.5th at 558-59.

[89] The DPD notes (at 214-216) that there was some confusion in the Test Claim pleadings concerning the provisions cited from the Test Claim Permit. Claimants can confirm that Sections XV.C, XV.F.1, XV.F.4, and XV.F.5 are at issue in this Test Claim, as the DPD also concluded.

IV. COMMENTS ON FUNDING SOURCES

The DPD (makes several findings regarding the sources of funding for requirements in the Test Claim Permit that it identified as new state-required mandates. These conclusions are:

1. There is no substantial evidence in the record that the District was required to use "proceeds of taxes" to pay for the requirements at issue in the Test Claim;

2. Claimants had the authority to charge "regulatory fees" or "development fees" sufficient to pay for certain mandates; and

3. Beginning on January 1, 2018, the effective date of legislation known as Senate Bill 231 ("SB 231"), the ability of Claimants to seek a subvention of funds for mandates fundable through property-related fees ended. SB 231 re-defined the term "sewer" to include storm drains, thereby expanding the categories of projects for which a fee may be imposed without a majority vote of approval.

Each of these findings is addressed below.

A. Flood Control District Assessments

Without agreeing to the correctness of the DPD's conclusions regarding the use of benefit assessment funds and "proceeds of taxes," to the extent that the District identifies further evidence relevant to this section of the DPD, it will consider presenting such evidence at the hearing on the Test Claim.

B. Authority to Impose Regulatory or Development Fees

The DPD concludes (at 285-300) that Claimants have fee authority within the meaning of Govt. Code § 17556(d) to obtain funding for certain Test Claim Permit provisions identified in the DPD. Claimants respond to those conclusions next below.

1. Authority for, and Limits on, Regulatory and Development Fees

Article XI, section 7 of the California Constitution provides that a municipality "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Courts have traditionally interpreted this power to authorize "valid regulatory fees."[90] This fee-setting power is, however, limited by California caselaw as well as amendments to the Constitution adopted through the initiative process in Propositions 218 and 26. *LA County Permit Appeal II, supra,* outlines these limitations:

> A regulatory fee is valid "if (1) the amount of the fee does not exceed the reasonable costs of providing the services for which it is charged, (2) the fee is not levied for unrelated revenue purposes, and (3) the amount of the fee bears a

[90] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662.

reasonable relationship to the burdens created by the fee payers' activities or operations" or the benefits the fee payers receive from the regulatory activity. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, citing *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881).[91]

Additional restrictions are contained in Proposition 26 (incorporated into the California Constitution as article XIII C) which provides that any levy, charge or exaction of any kind imposed by a local government is a "tax," except the following:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Cal. Const. article XIII C, section 1.

While these constitutional provisions and case law authorizes some regulatory costs, such as those for inspections, to be recovered as fees, that authority is limited by the other requirements of the Constitution. It is within that framework that Claimants respond to the conclusions in the DPD concerning their ability to assess regulatory fees on various Test Claim Permit provisions.

2. Availability of Regulatory Fees for Inspection Activities

The DPD concludes at 297-298 that the costs of Test Claim Permit Section XI.D.1 can be recovered as regulatory fees and thus are not reimbursable under article XIII B, section 6. This section requires Co-Permittees to identify "any facilities that transport, store or transfer pre-production plastic pellets and managed turf facilities . . .

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[91] 59 Cal.App.5th at 562.

within their jurisdiction and determine if these facilities warrant additional inspection to protect water quality."

Claimants do not agree that the costs to identify facilities for the purpose of determining whether additional inspections are required are recoverable as regulatory fees. There is no regulatory or development event to tie the fee to; if an inspection is conducted, the reasonable costs of that inspection can be recovered from the facility. The costs incurred under Section XI.D.1, however, are for the express purpose of giving the municipal permittee information that the permittee needs to plan and prioritize its water quality enforcement activities. Those costs are not directly tied to any particular investigation or inspection of any individual plastic pellet or managed turf facilities.[92]

Claimants also contend that two additional provisions, Sections XI.D.6 and XI.D.7, represent new state-mandated requirements (see discussion in Section III.F, above). The costs associated with implementing these provisions are also not recoverable as regulatory costs. The first requires permittees to notify all mobile businesses within their jurisdictions concerning the minimum "Source Control and Pollution Prevention BMPs that they must develop and implement. As with the requirements of Section XI.D.1, this provision is not tied to any regulatory or development event. With regard to Section XI.D.7, that requires the Co-Permittees to develop an enforcement strategy for mobile businesses. This requirement also is unrelated to any regulatory action toward any specific mobile business. It is to address the enforcement priorities of the Co-Permittees.

3. Availability of Regulatory and Development Fees for New Development and Significant Redevelopment Activities

Section XII of the Test Claim Permit sets forth LID and hydromodification requirements applicable to projects which qualify as new development or significant redevelopments. The DPD asserts that the costs of Section XII.A.5, XII.C.1, XII.D.1, XII.E.1-4, XII.E.6-9, XII.G.1, XII.K.4 and XII.K.5 are recoverable as regulatory or development fees.[93]

Claimants acknowledge that recent appellate court cases have more clearly defined the authority of MS4 permittees to collect stormwater-related fees from private parties. Claimants also agree that reasonable costs incurred by municipality staff in working with private development project proponents as to the specific LID and hydromodification requirements applicable to their projects can be recovered from the private developers. However, the Test Claim's focus on the Section XII requirements was not on private developers with project-specific WQMP or other stormwater issues, but rather on either general requirements to amend ordinances, general plans and similar documents or the application of the project-specific requirements to municipal projects, from which no fees could be recovered.

Claimants disagree with the DPD conclusions concerning several of the identified provisions. First, with respect to Section XII.C.1, this provision requires the Co-

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[92] Similarly, there is no "development" project here which might invoke the Mitigation Fee Act.

[93] DPD at 296-297.

Permittees to review their General Plans and related documents, such as development standards, zoning codes, conditions of approval and development project guidance to eliminate barriers to implementing of LID principles and HCOC considerations. As such, this provision addresses a requirement to review general guidance documents to ensure that they do not pose barriers, not documents which would assist private developers in specific project guidance, which were at issue in *San Diego Permit Appeal II.*

There, the Court found that the costs of planning documents that could be used to guide private developers in the development of LID and hydromodification BMPs in specific development projects were recoverable as regulatory and development costs.[94] The costs associated with the Section XII.C.1 requirements were not recoverable, since the object of the review of the general plan and development guidance review was to identify and remove barriers to LID and HCOC principles, not to provide guidance to any specific development project.

Moreover, costs for requirements which "redound to the benefit of all," such as those at issues with respect to Section XII.C.1 costs, are not recoverable as regulatory fees. *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. *Newhall County* held that a charge imposed by a water agency for creating "groundwater management plans" as part of the agency's groundwater management program could not be imposed as a fee. The court reasoned that the charge was "not [for] specific services the Agency provides directly to the [payors], and not to other [non-payors] in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin – not just the [payors]."[95] *See also LA County Permit Appeal II, supra,* holding that placing trash receptacles at transit stops benefitted the "public at large"[96] and that associated costs could not be passed on to any particular person or group.[97]

Section XII.E.1, to the extent it requires permittees to update the WQMP to address LID principles and HCOC and to submit that to the Water Board, Section XII.E.3, to the extent that it requires permittees to incorporate LID site design principles into the revised WQMP to reduce runoff, Section XII.E.6, requiring permittees to educate property owners, and Section XII.E.7-8, to the extent it requires the permittee WQMP to specify preferential use and prioritization of Site Design BMPs, are also requirements applicable to the permittees which are arguably not recoverable through development fees.

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[94] 85 Cal.App.5th at 590, 592-93.

[95] *Ibid.*

[96] 59 Cal.App.5th at 569. Similarly, costs associated with Test Claim Permit Section XII.D.1, to the extent that they stem from the requirement for permittees to submit a WQMP to the Water Board for approval, benefit all..

[97] *See also* Calif. Const. article XIII D, section 6(b)(5), which prohibits fees "for general governmental services . . . where the service is available to the public at large in substantially the same manner as it is to property owners."

Section XII.E.4 does not apply to any project specific document but rather requires the permittees to revise ordinances, codes, building and landscape design standards to promote green infrastructure/LID techniques. Like the requirements of Section XII.C.1, the tasks required by Section XII.E.4 do not provide guidance to any specific development project.

Section XII.G.1 also does not provide any specific project guidance but rather involves a requirement that permittees develop technically based feasibility criteria for the implementation of LID BMPs, including with respect to groundwater protection assessments for infiltration BMPs.

Section XII.K.4 requires each Co-Permittee to maintain a database to track the operation and maintenance of structural post-construction BMPs. Such a database is tracking the BMPs *after* construction of the specific project. The creation of the database provided permittees with a way to track such BMPs and did not itself provide a benefit to the owners/operators of those BMPs.

Finally, Section XII.K.5, which requires the annual inspection of all "Permittee-owned" structural post-construction BMPs before the Rainy Season cannot be funded through regulatory or development fees since the inspection is of BMPs, not private parties. Claimants obviously cannot charge fees for their own projects, making it impossible to recover costs through development or other regulatory fees. With regard to development of an inspection frequency for New Development and Significant Redevelopment projects, this too is a task unrelated to any specific development project nor the inspection of any individual project.

In addition to these points, and as discussed in Section III.G.2 above, Claimants submit that the costs borne by permittees for project-specific costs borne by municipal projects should be recoverable since there is obviously no private party from which any fees can be recovered and Claimants disagree that such projects are not discretionary. Thus, municipal project-specific costs required to comply with Sections XII.A.5, XII.D.1, XII.E.1-3, XII.E7, XII.E.9, XII.F and XII.G.1 should be recoverable under article XIII B, section 6.

4. Other Test Claim Permit Requirements As to Which Claimants Lack Regulatory or Development Fee Authority

In Section III of these comments, Claimants have identified additional Test Claim Permit requirements which represented unfunded state mandates. These are:

- Section VII.D.3, requirement to implement LIPs modified to address exceedances of water quality standards.
- Section VIII.C, requirement to promulgate and implement ordinance to address sources of pathogens and bacterial indicators.
- Sections IX.D, IX.E, IX.H, Appendix III, Section III.E.3, all relating to the incorporation of IDDE into IC/ID programs.
- Section XI.E.6, requirement to evaluate Co-Permittee residential program.

- Section XII.F, requirement to develop BMP guidance for permittee road construction projects.

None of the costs of these requirements could be recovered as regulatory or development fees, as the provisions constitute property-related fees subject to the majority vote requirement in Calif. Const. article XIII D, section 6(c) or are requirements directed to municipal projects, on which no regulatory or development fees can be levied. Because of that voter approval requirement, the Commission has in past MS4 permit test claims determined that Claimants did not have the authority to charge or assess such fees as a matter of law. This same determination was made in the DPD. DPD at 267.

C. SB 231, Which Claims to "Correct" a Court's Interpretation of article XIII D, section 6 of the California Constitution, Misinterprets Proposition 218 and the Historical Record and Should Not Be Relied Upon by the Commission

The DPD concludes that the Commission is required to presume that SB 231, which purports to change the definition of "sewers" to provide authority for local government to assess such charges subject only to the voter protest provisions of article XIII D of the California Constitution.[98] Claimants submit that SB 231 is unconstitutional and should not be relied on by the Commission.

The rationale for SB 231 was *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 *("City of Salinas")*, which held that the exclusion from the majority taxpayer vote requirement for property-related fees for "sewer services" in article XIII D, section 6(c) of the California Constitution did not cover storm sewers or storm drainage fees.[99]

In 2017, fifteen years after *City of Salinas,* the Legislature enacted SB 231, which amended Govt. Code § 53750 to define the term "sewer" (which is contained in Calif. Const. article XIII D, section 6(c)):

> "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

Govt. Code § 53750(k).

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[98] DPD at 312-315.

[99] 98 Cal.App.4th at 1358-359.

SB 231 also added Govt. Code § 53751, which sets forth findings as to the legislative intent in amending § 53750 to encompass storm sewers and drainage in the definition of "sewer." Section 53751 states that the Legislature intended to overrule *City of Salinas* because that court failed, among other things, to recognize that the term "sewer" had a "broad reach" "encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff."[100]

Section 53751 also included a finding that "[n]either the words 'sanitary' nor 'sewerage' are used in Proposition 218, and the common meaning of the term 'sewer services' is not 'sanitary sewerage.' In fact, the phrase 'sanitary sewerage' is uncommon."[101] SB 231 further cited a series of pre-Proposition 218 statutes and cases which, it asserted, "reject the notion that the term 'sewer' applies only to sanitary sewers and sanitary sewerage."[102]

The DPD concludes that the adoption of SB 231, combined with the decision of the court in *Paradise Irrigation Dist. v. Commission on State Mandates*[103] renders any costs incurred by Claimants after January 1, 2018 (the effective date of SB 231) not eligible for reimbursement.[104]

1. SB 231 Does Not Apply Retroactively

The DPD correctly concludes that the amendments to Govt. Code §§ 53750 and 53751 operate *prospectively* from January 1, 2018 and do not have retroactive effect.[105] The Third District Court of Appeal so held in *San Diego Permit Appeal II*.[106]

2. The Plain Language and Structure of Proposition 218 Do Not Support SB 231's Definition of "Sewer" in Govt. Code § 53750

The final word as to the validity of any statute purporting to interpret the California Constitution is left to the courts.[107] For this reason, the ultimate validity of SB

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[100] Govt. Code § 53751(h).

[101] Govt. Code § 53751(g).

[102] Govt. Code § 53751(i).

[103] (2019) 33 Cal.App.5th 205.

[104] DPD at 314. The applicability of *Paradise Irrigation Dist.* to the Test Claim depends on whether SB 231 is valid. If it is not, as Claimants assert, a local government cannot assess a fee without it being subject to a majority vote.

[105] DPD at 314.

[106] 85 Cal.App.5th at 577.

[107] *Cf. City of San Buenaventura v. United Water Conservation Dist.* (2017 Cal. 5th 1191, 1209 n.6 ("the ultimate constitutional interpretation must rest, of course, with the judiciary."); *see also County of Los Angeles v. Comm'n on State Mandates, supra,* 150 Cal.App.4th at 921

231 is not before the Commission. It would be error, however, for the Commission to cite SB 231 to deny Claimants a subvention of funds for costs expended after January 1, 2018. This is so because in seeking to overrule *City of Salinas,* SB 231 attempts to reinterpret the Constitution in contradiction of the intent of the voters when they adopted Proposition 218. Because the Constitution cannot be modified by a legislative enactment,[108] SB 231 is unconstitutional on its face, and should not be relied upon by the Commission.

SB 231 attempted to re-define the meaning of a Constitutional provision, article XIII D, section 6, through an amendment to the Proposition 218 Omnibus Implementation Act, Govt. Code § 53750 *et seq.* ("Implementation Act"). The Legislature made no attempt to define "sewer" when it adopted the original Act in 1997, nor in subsequent amendments prior to SB 231, which was adopted 21 years after passage of Proposition 218. Notably, the Legislature waited 15 years after the allegedly erroneous holding in *City of Salinas* to enact this "correction."

In Govt. Code § 53751(f), the Legislature found that *City of Salinas* "failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." In so finding, the Legislature itself ignored these principles. In construing voter initiatives, courts are charged with determining the intent of the voters. *Professional Engineers in California Government v. Kempton* ((2007) 40 Cal. 4th 1016, 1037. To ascertain that intent, courts turn first to the initiative's language, giving words their ordinary meaning as understood by "the average voter." *People v. Adelmann* (2018) 4 Cal. 5th 1071, 1080. The initiative must also be construed in the context of the statute as a whole and the scheme of the initiative. *People v. Rizo* (2000) 22 Cal. 4th 681, 685. In addition, if there is ambiguity in the initiative language, ballot summaries and arguments may be considered as well as reference to the contemporaneous construction of the Legislature. *Professional Engineers, supra;*[109] *Los Angeles County Transportation Comm. v. Richmond* (1982) 31 Cal.3d 197, 203.

In construing a statute or initiative, every word must be given meaning. *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 617. If the Legislature (or the voters) use different words in the same sentence, it must be assumed that their intent was that the words have different meanings. *K.C. v. Superior Court* (2018) 24 Cal.App.5th 1001, 1011 n.4.

In Proposition 218, the word "sewer" is used both in article XIII D, section 5 and in article XIII D, section 6. Section 5 exempts from the majority protest requirement in article XIII D, section 4 "[a]ny assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, *sewers*, water,

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(overruling statute that purported to shield MS4 permits from article XIII B section 6 and holding that a "statute cannot trump the constitution.")

[108] *County of Los Angeles, supra,* 150 Cal.App.4th at 921.

[109] 40 Cal. 4th at 1037.

flood control, *drainage systems* or vector control."[110] There, the term "sewer" is set forth separately from "drainage systems," which the Legislature defined as "any system of public improvements that is intended to provide for erosion, control, for landslide abatement, or for *other types of water drainage.*"[111] Since both "sewer" and "drainage systems" (which refer to systems which drain stormwater, including storm sewers) are contained in the same sentence, it must be presumed that the voters intended that "sewer" mean something other than "public improvements . . . intended to provide for . . . other types of water drainage."

Moreover, the word "sewer," but not the term "drainage systems," appears in article XIII D, section 6. A longstanding principle of statutory construction is that when language is included in one portion of a statute, "its omission from a different portion addressing a similar subject suggests that the omission was purposeful." *E.g., In re Ethan C* (2012) 54 Cal. 4th 610, 638. In *Richmond v. Shasta Community Services Dist.,* the Supreme Court used this tool to analyze article XIII D to determine if a capacity charge and a fire suppression charge imposed by a water district were "property related":

> Several provisions of article XIII D tend to confirm the Legislative Analyst's conclusion that charges for utility services such as electricity and water should be understood as charges imposed "as an incident of property ownership." For example, subdivision (b) of section 3 provides that 'fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership' under article XIII D. Under the rule of construction that the expression of some things in a statute implies the exclusion of other things not expressed (*In re Bryce C.* (1995) 12 Cal.4th 226, 231), the expression that electrical and gas service charges are not within the category of property-related fees implies that similar charges for other utility services, such as water and sewer, are property-related fees subject to the restrictions of article XIII D."[112]

A similar analysis of Article XIII D supports the conclusion that the voters' intent was that "sewers" referred to sanitary sewers, not storm drainage systems. As noted above, the municipal infrastructure listed in article XIII D, section 5 includes both "sewers" and "drainage systems." By contrast, article XIII D, section 6(c) refers only to "sewer" in exempting "sewer, water and refuse collection services" from the majority vote requirement. Given that another section of the proposition specifically identified "drainage systems" as different from "sewers," the absence of the former term requires that it be presumed that the voters understood "sewer" or "sewer services" in section

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[110] Calif. Const. article XIII D, section 5(a) (emphasis added).

[111] Govt. Code § 53750(d) (emphasis added).

[112] (2004) 32 Cal. 4th 409, 427.

6(c) to be limited to sanitary sewers. This was the holding of the court in *San Diego Permit Appeal II.*[113]

The proponents of Proposition 218 also expressed an intent that it "be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted by local governments without taxpayer consent."[114] Any interpretation of the meaning of "sewer services" must take that intent into account and interpret exceptions to limits on the taxing or fee power narrowly.[115]

Thus, the plain meaning of article XIII D, section 6(c) is that the term "sewer" or "sewer services" pertains only to sanitary sewers and not to MS4s. In attempting to expand the facilities and services covered by this term, SB 231 is an invalid modification of Proposition 218 that seeks to override voter intent. SB 231 does not provide authority to bar Claimants from seeking a subvention of funds for costs incurred after January 1, 2018.

While resort to interpretive aids is not required when the meaning of a statutory term is clear, the Legislature justified its amendment of Govt. Code § 53750 by asserting that "[n]umerous sources predating Proposition 218 reject the notion that the term "sewer" applies only to sanitary sewers and sanitary sewerage." Govt. Code § 53751(i). These include:

(a) Pub. Util. Code § 230.5: This statute is referenced[116] as the source for the "definition of 'sewer' or 'sewer service' that should be used in the Implementation Act. It defines "sewer system" to include both sanitary and storm sewers and appurtenant systems. However, this is an isolated statutory example and is found in a section of the Public Utilities Code dealing with privately owned sewer and water systems regulated by the Public Utilities Commission,[117] and not a "system of public improvements that is intended to provide . . . for other types of water drainage." Govt. Code § 53750(d). Such small systems may well serve both as a sanitary and storm system, but they are not typical of the MS4 systems being regulated by the Test Claim Permit or of the public projects that Proposition 218 was written to address. Moreover, the fact that the statute goes to the effort to define "sewer system" to include both sanitary and storm sewers shows that, without such an explicit definition, the default would be to consider only sanitary sewers to fall under the definition of "sewer."

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[113] 85 Cal.App.5th at 568.

[114] *City of Salinas,* 98 Cal.App.4th at 1357-58.

[115] *Ibid.*

[116] Govt. Code § 53751(i)(1).

[117] *See* Pub. Util. Code § 230.6, defining "sewer system corporation" to include "every corporation or person owning, controlling, operating, or managing any sewer system for compensation within this state."

(b) Govt. Code § 23010.3. This statute[118] relates to the authorization for counties to spend money for the construction of certain conveyances, and defines those conveyances as "any sanitary sewer, storm sewer, or drainage improvements . . ." This does not further the arguments made in SB 213, since the statutory language calls out "sanitary sewer," "storm sewer" and "drainage improvements" as separate items, and also contradicts the statement in Govt. Code § 53751(g) that the phrase "sanitary sewerage" is uncommon. The similar phrase "sanitary sewer" is commonly found, as noted below.

(c) The Street Improvement Act of 1913: Govt. Code § 53751(i)(3) references only the name of this statute, Streets & Highways Code §§ 10000-10706, but cites no section supporting SB 231's interpretation of Proposition 218. However, a section within this Act, Streets & Highways Code § 10100.7, which allows a municipality to establish an assessment district to pay for the purchase of already constructed utilities, separately defines "water systems" and "sewer systems," with the latter defined as being limited to sanitary sewers: "sewer system facilities, including sewers, pipes, conduits, manholes, treatment and disposal plants, connecting sewers and appurtenances for providing sanitary sewer service, or capacity in these facilities . . . ." *Ibid.*

(d) *Los Angeles County Flood Cont. Dist. v. Southern Cal. Edison Co.* (1958) 51 Cal. 2d 331 is cited[119] for the proposition that the California Supreme Court "stated that 'no distinction has been made between sanitary sewers and storm drains or sewers.'" This case involved the question of whether defendant Edison had to pay to relocate its gas lines to allow construction of District storm drains. In finding that there was no distinction *as to the payment obligation* between sanitary sewers and storm drains or sewers, the Court was not holding that a "sewer" *qua* "sewer" necessarily filled both sanitary and storm functions. And, again, the Court distinguished between "sanitary sewers" and "storm drains or sewers" in the language of the opinion.

(e) *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, *Ramseier v. Oakley Sanitary Dist.* (1961) 197 Cal.App.2d 722, and *Torson v. Fleming* (1928) 91 Cal. App. 168. These cases are cited in Govt. Code § 53751(i)(5) as examples of "[m]any other cases where the term 'sewer' has been used interchangeably to refer to both sanitary and storm sewers." However, the holdings in these cases are more limited. *County of Riverside* refers to "sewer" only in a footnote, which quotes from an Interim Assembly Committee Report discussing public improvements including "streets, storm and sanitary sewers, sidewalks, curbs, etc." (language which does not distinguish between storm and sanitary sewers).[120] Moreover, in another footnote which quoted from Street & Highways Code § 2932 regarding assessments for public improvements, the phrase "sewerage or drainage facilities" is employed, again reflecting a distinction

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[118] Cited in Govt. Code § 53751(i)(2).

[119] Cited in Govt. Code § 53751(i)(4)

[120] 22 Cal.App.3d at 874 n.9.

between these functions and assigning the function of sanitary services to "sewerage."[121]

Ramseier involved a dispute over a contract to expand the district's "storm and sanitary sewer system." [122] This was the only reference to "sewers" in the case, and that reference distinguished between "storm" and "sanitary" sewers. The rationale for citation to *Torson* is unclear, though the case involved a requested extension of a sanitary sewer, and the statutes cited in the case referred, separately, to both "sanitary" and "storm" sewers.[123] While these cases present only limited examples of how the term "storm sewer" or "sanitary sewer" were employed, in all, a distinction was drawn between sanitary sewers and storm sewers.

3. There is Significant Evidence that the Legislature and the Courts Considered "Sewers" to be Different from "Storm Drains" Prior to the Adoption of Proposition 218

There are numerous examples in pre-Proposition 218 California statutes and caselaw of the term "sewer" being used to denote sanitary sewers and not storm sewers. For example, Education Code § 81310, in identifying the power of a community college board to convey an easement to a utility, refers to "water, *sewer*, gas, or *storm drain* pipes or ditches, electric or telephone lines, and access roads." (emphasis added). There is no ambiguity in this statute – the "sewer" being referred cannot be a storm sewer, as "storm drain" pipes are specifically referenced.[124]

Another example is Govt. Code § 66452.6, relating to the timing of extensions for subdivision tentative map act approval, and defining "public improvements" to include "traffic controls, streets, roads, highways, freeways, bridges, overcrossings, street interchanges, *flood control or storm drain facilities*, *sewer facilities*, water facilities, and lighting facilities."[125] Again, there is no ambiguity; the Legislature separately defined "flood control or storm drain facilities" from "sewer facilities," with the latter taken on the same meaning ascribed to it in *City of Salinas*.

Similarly, Health & Safety Code § 6520.1 provides that a sanitary district can prohibit a private property owner from connecting "any house, habitation, or structure requiring *sewerage or drainage* disposal service to any privately owned *sewer* or *storm drain* in the district." Again, the Legislature used "sewer" here as a sanitation utility separate and apart from drainage. This practice of defining "sewer" as a sanitary utility distinct from "storm drain" has continued after the adoption of Proposition 218. In Water Code § 8007, effective May 21, 2009, the Legislature made the extension of certain

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[121] 22 Cal.App.3d at 869 n.8.

[122] 197 Cal.App.2d at 723.

[123] 91 Cal. App. at 172.

[124] *K.C., supra,* 24 Cal.App.5th at 1011 n.4 (when Legislature uses different words in the same sentence, it is assumed that it intended the words to have different meanings).

[125] Govt. Code § 66452.6(a)(3) (emphasis added).

utilities into disadvantaged unincorporated areas subject to the prevailing wage law, and defined those utilities as the city's "water, *sewer, or storm drain* system." (emphasis added).

Cases, too have used the term "sewer" to mean a sanitary sewer handling sewage as opposed to storm drains. For example, in *E.L. White, Inc. v. Huntington Beach* (1978) 21 Cal. 3d 497, the Supreme Court used the terms "storm drain" and "sewer" separately in discussing the liability of the city and a contractor for a fatal industrial accident. Also, in *Shea v. Los Angeles* (1935) 6 Cal.App.2d 534, 535-36, the court referred to the "sanitary sewer" and "sewers" in addition to a "storm drain." In *Boynton v. City of Lockport Mun. Sewer Dist.* (1972) 28 Cal.App.3d 91, 93-96, the court discussed whether "sewer rates" were properly assessed by the city, and in that case, the court consistently used the term "sewer" to refer to sanitary sewers handling sewage.

These examples demonstrate that there was no "plain meaning" of "sewer" as a term that encompassed both sanitary and storm sewers. In fact, as the Third District Court of Appeal recently held in *San Diego Permit Appeal II*, the term was understood by the voters to mean solely sanitary sewers.

Thus, there is significant evidence, in the language of the ballot measure, in the interpretation courts are required to give to the measure, and in the prevailing legislative and judicial usage of the term "sewer," to find that the voters on Proposition 218 intended the result found by the court in *City of Salinas.* As such, SB 231 is an unconstitutional attempt by the Legislature to rewrite history and should not be relied upon by the Commission to refuse a subvention of funds for the costs of unfunded state mandates in the Test Claim Permit incurred after January 1, 2018.

V. CONCLUSION

In summary, Claimants respectfully request that the Commission consider the arguments set forth in these Comments in their consideration of the Decision to be rendered on the Test Claim. Claimants appreciate this opportunity to provide their comments on the DPD.

I declare under penalty of perjury that the foregoing, signed on January 5, 2024, is true and correct to the best of my personal knowledge, information, or belief.

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN

By: _____
David W. Burhenn, Claim Representative
12401 Wilshire Boulevard, Suite 200
Los Angeles, CA 90025
(213) 629-8788
dburhenn@burhenngest.com

DECLARATION OF ROHINI MUSTAFA, P.E. AND EXHIBITS 1 AND 2

DECLARATION OF ROHINI MUSTAFA, P.E.

I, ROHINI MUSTAFA, hereby state and declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am a Professional Engineer in the State of California and an Engineering Project Manager and I work in the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District ("District"). The District is the Principal Permittee under Order No. R8-2010-0033, the municipal separate storm sewer system permit issued to the District, the County of Riverside and other permittees by the California Regional Water Quality Control Board, Santa Ana Region ("Water Board"). In my capacity, I oversee the efforts of the District in working with permittees on a variety of issues relating to compliance with the 2010 Permit.

3. As part of my duties, I am familiar with how District documents relating to the compliance of permittees with the 2010 Permit are kept in the ordinary course of business at the District. I am also familiar with the requirements of the 2010 Permit as they apply to the District and to the other permittees.

4. Exhibit 1 to my declaration is a true and correct copy of a letter dated May 11, 2011 sent by the District to permittees under the 2010 Permit requesting them to identify outfalls and "Major Outfalls" for purposes of compliance Section IX.E of the 2010 Permit. An electronic version of this document is maintained in the ordinary course of business in the files and records of the District.

5. Exhibit 2 to my declaration is a true and correct copy of excerpts of the 2011-2012 Annual Progress Report submitted to the Water Board by the permittees, including the District. The District assembled the information set forth in the excerpt, based on information supplied by the permittees. An electronic version of the document from which these excerpts were taken is maintained in the ordinary course of business in the files and records of the District.

6. The preparation and submittal of the Annual Progress Report to the Water Board is required by Section III.A of the 2010 Permit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 2nd, 2024 at Riverside, California.

Rohini Mustafa, P.E.

EXHIBIT 1

WARREN D. WILLIAMS
General Manager-Chief Engineer

1995 MARKET STREET
RIVERSIDE, CA 92501
951.955.1200
FAX 951.788.9965
www.rcflood.org

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

May 11, 2011

SAR Permittees (see attached list)
Letter sent via e-mail only

Dear SAR Permittee:

Re: Request for Permittee MS4 and Major Outfall Data – Santa Ana Region

The Riverside County Flood Control and Water Conservation District (District) is requesting that the Permittees within the Santa Ana Region (SAR) provide updated data for the MS4 facilities and Major Outfalls that they own and/or operate. In compliance with Board Order No. R8-2010-0033 (2010 MS4 Permit), information provided by the SAR Permittees pursuant to this request will be used to revise Section 4 of the Drainage Area Management Plan (DAMP), incorporate IC/ID procedures for the Local Implementation Plans, and develop a Major Outfall investigation schedule for the term of the 2010 MS4 Permit.

Specifically, Section IX.E of the 2010 MS4 Permit requires that by July 29, 2011, the following be completed:

a. Develop an inventory and map of Permittee MS4 facilities and Outfalls to Receiving Waters; and
b. Develop a schedule to conduct and implement systematic investigations of MS4 open channel facilities and Major Outfalls.

For the purposes of this letter, 'Major Outfalls' refers to the point where an MS4 with a diameter of 36 inches or greater discharges into Receiving Waters, whereas, 'Outfalls' refers to all MS4 facility outfalls into Receiving Waters regardless of the size of the outfall. The Santa Ana Regional Water Quality Control Board has outlined the following water bodies as Receiving Waters in the Basin Plan:

- Mill Creek, Prado Area
- Chino Creek, Reach 1A
- Chino Creek, Reach 1B
- Temescal Creek
- San Timoteo Wash
- Little San Gorgonio Creek
- Santa Ana River, Reach 3
- Santa Ana River, Reach 4
- Cucamonga Creek
- San Jacinto River, Reaches 1-4
- Lake Elsinore
- Canyon Lake
- Strawberry Creek
- Lake Hemet
- Salt Creek
- Poppet Creek
- Indian Creek
- Bautista Creek
- Day Creek
- East Etiwanda Creek

- Yucaipa Creek
- Anza Park Drain
- Sunnyslope Channel
- Tequesquite Arroyo (Sycamore Creek)
- Coldwater Canyon Creek
- Bedford Canyon Creek
- Dawson Canyon Creek
- Fuller Mill Creek
- Stone Creek
- Logan Creek
- Black Mountain Creek
- Juaro Canyon Creek
- Hurkey Creek
- Potrero Creek
- Lake Evans
- Lee Lake
- Lake Mathews
- Mockingbird Reservoir
- Lake Norconian
- Lake Fulmor
- Lake Perris

To assist in complying with these requirements, the District has created maps of these Receiving Waters that are within your jurisdiction, and overlaid those maps with MS4 data previously provided by your agency. Based on a desktop-level GIS analysis of that information, and a visual assessment of available aerial photography, the District has identified a preliminary list of potential Outfalls within your jurisdiction. Via e-mail to your staff, the District will make available the described maps in PDF format, an excel file with the preliminary list of Outfalls and associated GIS 'shape files'.

Having accurate MS4 and Major Outfall information will inform the development of the schedule that is required for investigations of those Major Outfalls. The District is therefore requesting your agency verify and complete your list of Outfalls and Major Outfalls, and provide pertinent information for each. It is each Permittee's responsibility to identify any known Outfalls they own or operate, regardless of whether or not it is shown on the preliminary information to be provided by the District. Please review the attached list of Outfalls and:

- By June 3, 2011:
  - Confirm which, if any, of the listed Outfalls are <u>not</u> owned/operated by your Agency. In other words, if the MS4 leading up to the Outfall is owned/operated by private land owners, Caltrans or other state agencies, federal government, etc., it should be identified for removal from the preliminary list of Outfalls. Those MS4 facilities and Outfalls may be regulated directly by the Regional Board.
  - Identify any known Outfalls owned/operated by your agency that are not already identified on the provided lists/maps.
  - Identify the size of each Outfall (diameter if it is a pipe, or otherwise provide the width).

- By July 8, 2011:
  - For each Major Outfall (over 36" diameter) that is owned/operated by your agency, provide the information requested in the Excel file that will be provided. In addition, please make any corrections to the data on the .pdf drawing or to the shape files as necessary.

In order to meet the 2010 MS4 Permit requirements listed above, please provide the requested data via CD-ROM or DVD-ROM by the dates shown above to Albert Martinez of my staff. If you have any questions, please feel free to contact Albert (amart@rcflood.org or 951.955.2901).

The District appreciates your cooperation in this effort to geo-locate MS4 Outfalls and Major Outfalls within the Santa Ana Region. It is the District's goal to correctly represent each SAR Permittee's MS4 on every Annual Reporting MS4 map. Furthermore, proper identification of MS4 facilities and Major Outfalls will help lead to effective elimination of Illegal Discharges, and lead us closer to achieving our goal of "*Only Rain Down the Storm Drain*".

Very truly yours,

CLAUDIO M. PADRES
Senior Civil Engineer

ec: SAR Permittees

AM:cw
P8\137611

May 11, 2011

Request letter sent to:

Re: Request for Permittee MS4 and Major Outfall Data – Santa Ana Region

Mr. Mike Shetler
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Mr. Bob French
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Ms. Lori Moss
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Ms. Linda Nixon
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Mr. Roy Stephenson
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VIA EMAIL ONLY

Ms. Rita Thompson
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Mr. Don Allison
City of Menifee
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Mr. Kent Wegelin
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14177 Frederick Street, P.O. Box 88005
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Ms. Lori Askew
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2870 Clark Avenue
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May 11, 2011

Request letter sent to:

Re: Request for Permittee MS4 and Major Outfall Data – Santa Ana Region

Mr. Michael Morales
City of Perris
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Mr. Kevin Street
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Mr. Mike Emberton
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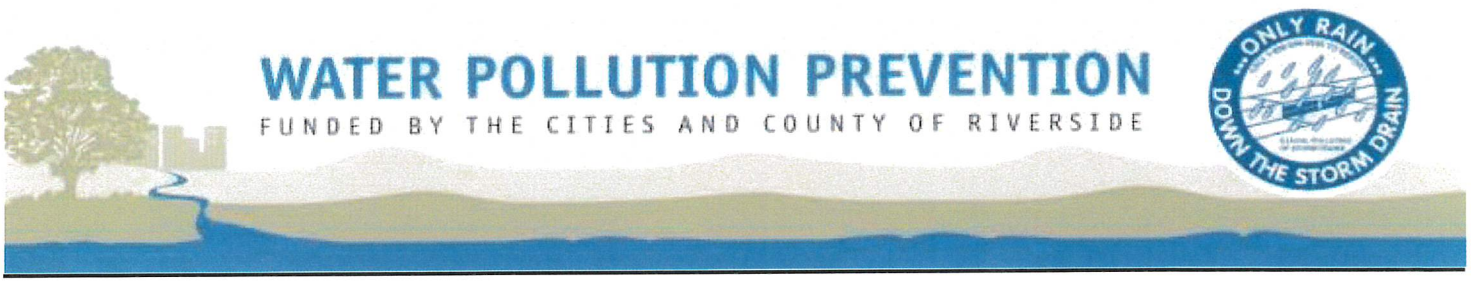
memberton@sanjacintoca.us

AM:cw
P8/137611

EXHIBIT 2



2011-2012
ANNUAL PROGRESS REPORT

TO THE
SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD

SARWQCB ORDER NO. R8-2010-0033
NPDES NO. CAS 618033

NOVEMBER 30, 2012

BY THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,
COUNTY OF RIVERSIDE AND CITIES OF RIVERSIDE COUNTY (SANTA ANA REGION)

CERTIFICATION

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signed: _____

JASON E. UHLEY
Chief of Watershed Protection Division
Riverside County Flood Control
and Water Conservation District

stormwater BMPs and facilitate consistent and coordinated enforcement of local stormwater quality ordinances. Site visits included use of a survey checklist to document stormwater management practices for each facility. In addition, surveys found to have revealed problems at the inspection site are now scanned and immediately forwarded to the respective Co-Permittee for follow-up.

REPORTING FORMAT

The current MS4 Permit requires the Permittees to report on the progress and status of their stormwater program activities in an Annual Report. This Annual Report is intended to comply with that requirement and chronicle the Permittees' progress in implementing the provisions of the MS4 Permit. In addition, the Annual Report serves to identify potential problem areas and planned improvements.

As Principal Permittee, the District has attempted to focus attention on the principal components of the Permittees' municipal stormwater management programs and convey relevant information to the SARWQCB in a clear and concise manner. To facilitate the reporting process, District staff prepared the summary tables that appear throughout this report. These forms are intended to summarize the information pertaining to the various program activities implemented by the Permittees, and to facilitate a consistent annual reporting process. While the District aggregates the information presented in the summary tables, the information is provided by each of the individual Permittees. For additional information regarding any individual Permittee's program, the readers of this report should refer to that Permittee's reporting forms provided in **Appendix J** – Permittee Reports.

The remainder of this report reviews the Permittees' accomplishments over the course of the reporting period and presents the status of the Permittees' ongoing efforts and planned activities to implement their respective municipal stormwater programs and comply with the provisions of the MS4 Permit. During the last fiscal year reporting period, the Permittees were required to develop a proposal for assessment of the Urban Runoff management program effectiveness on an area wide as well as jurisdiction specific basis. Permittees utilized the CASQA Guidance for developing these assessment measures at the six outcome levels. The assessment measures targeted both water quality outcomes and the results of municipal enforcement activities consistent with the requirements of Appendix 3, Section IV.B. The new reporting forms developed by the Permittees now feature these measure metrics which will be utilized going forward to help quantify the ongoing progress of the program.

Table 5-1 – Illicit Connections/Illegal Discharges

ILLICIT CONNECTION/ILLEGAL DISCHARGE; LITTER, DEBRIS AND TRASH CONTROL 2011-2012 ANNUAL PROGRESS REPORT SANTA ANA REGION NPDES MUNICIPAL STORMWATER PERMIT	
Provision No. IX.D of the MS4 Permit requires the Permittees to review and revise their IC/ID program to include a pro-active IDDE using the Guidance Manual for Illicit Discharge, Detection, and Elimination by the Center for Watershed Protection or any other equivalent program by July 29, 2011.	
PERMITTEE	**1. Please provide the result from this review and a description of your agency's revised pro-active program, procedures, and schedules.**
Beaumont	City and Contract Staff during inspections emphasizes to business owners/ operators to refrain from any illicit and unauthorized discharges and makes them aware of enforcement implications in accordance with City municipal code.
Calimesa	The City of Calimesa reviewed and revised their IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Canyon Lake	The City of Canyon Lake is proactive in ensuring compliance with the MS4 Permit IC/ID requirements and regularly reviews the Canyon Lake Municipal Code. Community Patrol, Marine Patrol and Special Enforcement perform visual inspections, monitor discharge sites, educate the public and perform periodic water quality tests (Attachment 9). The City of Canyon Lake reviewed and revised their IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and the Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Corona	The City of Corona reviewed and revised their IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Eastvale	City of Eastvale contracted with the Riverside County. The County Code Enforcement and Environmental Health provide complaint investigations with written warning and notices of violation. Required cleanup by the responsible party of non-compliant activities is a part of the compliance strategy.

Table 5-1 – Illicit Connections/Illegal Discharges

Hemet	The City of Hemet reviewed and revised their IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the Comprehensive Monitoring Program (CMP), which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co tPermThe CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Jurupa Valley	See Riverside County Individual Report
Lake Elsinore	The City's program review showed the need for additional staffing, more tracking, both through database and GIS and increased legal authority. The City's efforts to revise its IDDE program included participation as Co-Permittee of a coordinated effort to update the DAMP Section 4.0, "Elimination of Illicit Connections and Illegal Discharges" to provide for a region-wide pro-active IDDE effort. The City complies with the IDDE provisions in the DAMP. Those provisions included: Staffing – As a small City with a small staff, other than the NPDES Coordinator and Public Works Inspectors, all City field personnel act as NPDES inspectors, reporting any IC/ID to the NPDES Coordinator for action. City field staff and management are required to attend NPDES training to alert them to potential IC/ID. Legal Authority – The City's Stormwater Ordinance has been updated to ensure sufficient legal authority to take action in the event of an IC/ID. Mapping – The City cooperated with the Principal Permittee mapping efforts in providing coordinates and data relative to the Major Outfalls in the City limits and contracted for a GIS layer of its catch basins. The City has also agreed to share costs with EVMWD in creation of a Citywide GIS storm drain map.
Lake Elsinore Continued	Tracking - The City maintains excel databases for IC/ID incident/response of Industrial and Commercial Facilities, Construction sites and Residential. The City has purchased software that will help with the tracking process. Public Education – The City as Co-Permittee participates in the Public Education Subcommittee and benefits from the Principal Permittee established hotline and combined public education efforts. The City has also taken steps to air EPA's stormwater related videos on its public access channel, routinely distributes brochures to groups visiting City Hall and flyers to residential areas throughout the City. IC/ID Detection and Elimination – During the regular maintenance of MS4s, the MS4 facilities are inspected to identify Illicit Connections, and evidence is noted of any Illegal Discharges. This is the most direct method to detect IC/IDs, and enables the Permittees to look for discharges that appear unusual or may produce a foul odor or coloring. Field personnel are trained to identify potential IC/IDs during the course of their normal duties. The NPDES Coordinator has also established a procedure for review of tenant improvements and site inspection of commercial and industrial facilities to ensure compliance with stormwater ordinances and NPDES Permits IC/ID Response and Reporting – The City's program indicated a need for additional staff; budget constraints prevented hiring. To fill the void, existing City field staff were trained to identify IC/ID situations and notify the NPDES Coordinator. Action is taken on reports of IC/ID within 24 hours.
Menifee	The City of Menifee's Storm Water Procedural Manual addresses Illicit Discharge, Detection and Elimination. The City takes a proactive stance on Illicit Discharges through public education. The City encourages Illicit Discharge reporting by it's citizens and staff. The City's website and the Riverside County Flood Control District's website provides a hotline for reporting of illicit discharges.

Table 5-1 – Illicit Connections/Illegal Discharges

Moreno Valley	The City Moreno Valley reviewed and revised its IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Norco	The City Norco has reviewed their IC/ID program to compare the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures ad schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Perris	*See Permittee Individual Report*
Riverside	The City of Riverside reviewed and revised their IC/ID program to reflect the IDDE elements using the above referenced guidance manual. The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to the Santa Ana Regional Board on May 31, 2011 by Riverside County Flood Control and Water Conservation District on behalf of the Co-Permittees. The CMP was approved by the Santa Ana Regional Board in a letter dated March 26, 2012. IC/ID investigations are ongoing and due to be completed by the end of the Permit term.
Riverside County	Code Enforcement and Environmental Health provide complaint investigations with written warning and notices of violation. Required cleanup by the responsible party of non compliant activities is a part of the compliance strategy.
RCFC&WCD	The proposed IC/ID program (including procedures and schedules) was incorporated into Volume IV of the CMP which was submitted to SA Regional Board staff on May 31, 2011 by the District on behalf of the Co-Permittees. The CMP was approved, with conditions, by the Santa Ana Regional Board in a letter dated March 26, 2012. Work related to addressing these conditions in the Final CMP has carried over into FY 12-13. However, IC/ID investigations are ongoing throughout the Permit term.
San Jacinto	Staff reviewed its IDDE approaches against the Guidance Manual and believe that the current program is effective in the identification and elimination of illicit discharges and connections. City staff in Parks, Public Works, Building and Code Enforcement, as well as landscape maintenance contractors performing work in the Lighting and Landscape Maintenance District routinely look for any evidence of illegal connections to the storm drain system. These may include evidence of new curb drains, concrete swales or other unpermitted construction within or into the system. Upon discovery of what appears to be an illegal connection, the staff member will notify the Public Works Department and Code Enforcement to conduct an investigation. This may include a site visit, review of building permits and other investigations as necessary. When it is determined that a connection is illegal, staff will work with the property/business owner to either permit the connection or to remove it. The City may use the administrative citation process when violations are noted.

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.

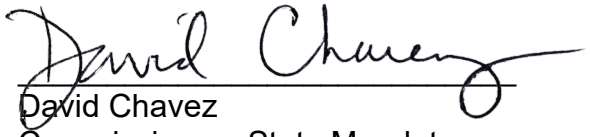
On January 8, 2024, I served the:

- **Current Mailing List dated January 3, 2024**
- **Claimant's Comments on the Draft Proposed Decision filed January 5, 2024**

  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07
  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, Sections IV; VI.D.1.a.vii; VI.D.1.c.i(8); VI.D.2.c; VI.D.2.d.ii(d); VI.D.2.i; VII.B; VII.D.2; VII.D.3; VIII.A; VIII.C; VIII.H; IX.C; IX.D; IX.E; IX.H; X.D; XI.D.1; XI.D.6; XI.D.7; XI.E.6; XII.A.1; XII.A.5; XII.B; XII.C.1; XII.D.1; XII.E.1; XII.E.2; XII.E.3; XII.E.4; XII.E.6; XII.E.7; XII.E.8; XII.E.9; XII.F; XII.G.1; XII.K.4; XII.K.5; XII.H; XIV.D; XV.A; XV.C; XV.F.1; XV.F.4; XV.F.5; XVII.A.3; and Appendix 3, Section III.E.3, Adopted January 29, 2010
  County of Riverside, Riverside County Flood Control & Water Conservation District, and Cities of Beaumont, Corona; Hemet, Lake Elsinore, Moreno Valley, Perris, and San Jacinto, 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, 2024, at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/3/24

Claim Number: 10-TC-07

Matter: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033

Claimants: City of Beaumont
City of Corona
City of Hemet
City of Lake Elsinore
City of Moreno Valley
City of Perris
City of San Jacinto
County of Riverside
Riverside County Flood Control and Water Conservation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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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.

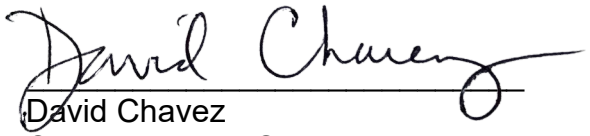
On January 9, 2024, I served the:

- **Current Mailing List dated January 3, 2024**
- **Notice of Extension Request Approval issued January 9, 2024**
- **Claimants' Request for Extension of Time filed January 3, 2024**
- **Water Boards' Request for Extension of Time filed January 3, 2024**
- **Claimants' Comments on the Draft Proposed Decision filed January 5, 2024**

  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07
  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, Sections IV; VI.D.1.a.vii; VI.D.1.c.i(8); VI.D.2.c; VI.D.2.d.ii(d); VI.D.2.i; VII.B; VII.D.2; VII.D.3; VIII.A; VIII.C; VIII.H; IX.C; IX.D; IX.E; IX.H; X.D; XI.D.1; XI.D.6; XI.D.7; XI.E.6; XII.A.1; XII.A.5; XII.B; XII.C.1; XII.D.1; XII.E.1; XII.E.2; XII.E.3; XII.E.4; XII.E.6; XII.E.7; XII.E.8; XII.E.9; XII.F; XII.G.1; XII.K.4; XII.K.5; XII.H; XIV.D; XV.A; XV.C; XV.F.1; XV.F.4; XV.F.5; XVII.A.3; and Appendix 3, Section III.E.3, Adopted January 29, 2010
  County of Riverside, Riverside County Flood Control & Water Conservation District, and Cities of Beaumont, Corona; Hemet, Lake Elsinore, Moreno Valley, Perris, and San Jacinto, 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 9, 2024, at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/3/24

Claim Number: 10-TC-07

Matter: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033

Claimants: City of Beaumont
City of Corona
City of Hemet
City of Lake Elsinore
City of Moreno Valley
City of Perris
City of San Jacinto
County of Riverside
Riverside County Flood Control and Water Conservation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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