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May 19, 2023

Via Drop Box

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

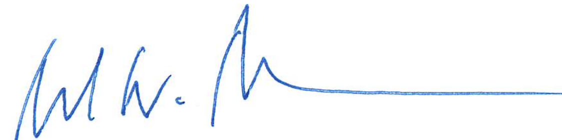
Re: Claimants' Comments on Draft Proposed Decision on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, etc.* Test Claim 11-TC-03

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 Murrieta, Temecula and Wildomar on the Draft Proposed Decision issued by Commission staff on the above-referenced Joint Test Claim.

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

I declare under penalty of perjury that the foregoing, signed on May 19, 2023, is true and correct to the best of my personal knowledge, information, or belief.



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CLAIMANTS' COMMENTS ON DRAFT PROPOSED DECISION

***California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections B.2, C., D., F.1.d.1., 2., 4.,7., F.1.f., F.1.h., F.l.i., F.2.d.3., F.2.e.6.e., F.2,b.4.a.ii., F.3.d.1-5., F.4.d., F.4.e., G.1.-5., K.3.a.-c., Attachment E., Sections II.C. and II.E.2.-5., and Sections F., F.1. F.1.d., F.2., F.3.A.-d., and F.6.*, 11-TC-03, adopted May 22, 2009**

Claimants County of Riverside, Riverside County Flood Control and Water Conservation District ("District"), and Cities of Murrieta, Temecula and Wildomar ("Claimants") herewith submit their comments on the Draft Proposed Decision ("DPD") issued by staff of the Commission on State Mandates ("Commission") on March 13, 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. R9-2010-0016 (the "Test Claim Permit") adopted by the California Regional Water Quality Control Board, San Diego 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 establish that a subvention of funds is required for 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 and Rebuttal Comments on the Test Claim.

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E. Response to Comments on Test Claim Permit Sections F.1.d.1.,

[1] These comments address the conclusions set forth in the DPD (pages 34-382) and to avoid repetition, do not separately address those in the Executive Summary. DPD at 1-33. To the extent required, the arguments and evidence set forth in the Comments are similarly directed to the conclusions in the Executive Summary.

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II. COMMENTS ON "BACKGROUND" SECTION OF DPD: THE 2009 PERMIT CAN AND DOES IMPOSE MANDATES THAT GO BEYOND THE "MEP" STANDARD OF COMPLIANCE

While the "Background" section of the DPD (at 51-72) 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 54), 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 was noted in *Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999), which addressed 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 relating 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 . . . .'"[2]

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."[3]

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* (2005) 35 Cal.4th 613, where it held that more stringent permit requirements issued under the authority of California's Porter-Cologne Water Quality Act[4] contained in an NPDES permit were required to be evaluated under state requirements in Water Code §§ 13240 and 13241.[5]

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."[6]

III. COMMENTS ON DISCUSSION SECTION OF DPD

A. Timely Filing of Test Claim

Claimants concur with the DPD's conclusion that the Test Claim was timely filed.

B. Requirements in Section B.2 Relating to Removal of Formerly Exempt Categories of Non-Stormwater Discharges

By removing certain categories of irrigation-related discharges (landscape irrigation, irrigation water and lawn watering) from an exemption to the prohibition on discharges of non-stormwaters in the previous MS4 permit issued to Claimants by the Water Board, Order No. R9-2004-0001 (the "2004 Permit"), Section B.2 of the Test Claim Permit created a state mandate.

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[2] 191 F.3d at 1165 (emphasis in original). Thus, the statement in the Background section at 60 that Section 1311 standards apply to all NPDES permits is incorrect.

[3] 191 F.3d at 1166.

[4] Water Code § 13000 *et seq.*

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

[6] 1 Cal. 5th at 768.

Claimants demonstrated in the Test Claim that, among other things, (1) the 2004 Permit included an exemption for such discharges; (2) federal law provides that unless "such discharges are identified *by the municipality* as sources of pollutants to waters of the United States"[7] it was within the permittees' discretion to allow such discharges to be exempted from prohibition; and (3) no such identification had been made here. Claimants introduced evidence of additional activities required by the removal of the exemption for irrigation-related discharges, including changes to permittees' Coordinated Monitoring Program ("CMP") and revisions to the Jurisdictional Runoff Management Plan ("JRMP"), as well as additional monitoring efforts. *See generally* Section 5 Narrative Statement at 15-19 and Claimants' Rebuttal Comments at 16-18.

The DPD, however, concludes that the elimination of the exemption for the irrigation-related discharges was required under 40 CFR § 122.26(d)(2)(iv)(B)(1) and thus was not a state mandate. DPD at 86-88. The DPD (at 81-82) concludes that Claimants identified the discharges as sources of pollutants to waters of the United States. In fact, that "identification" was language in educational outreach materials intended to prevent such discharges *before* they posed a threat, materials that were not specific to the Santa Margarita watershed. *See* discussion in Section 5 Narrative Statement at 17-18 and Claimants' Rebuttal at 16-18. Claimants thus did not specifically identify irrigation-related discharges in the Santa Margarita watershed as a source of pollutants to waters of the United States. And, the other findings cited by the DPD at 82-84 represent the conclusions either of municipalities in other counties (and watersheds), state agencies, or a MS4 permit issued to another county, none of which represents any determination by the municipalities in question, the Test Claim Permit permittees.[8]

Because the Water Board could impose additional permit requirements beyond those authorized by federal law (*Defenders of Wildlife, supra*), the Board had the discretion to remove the exemption for the irrigation-related discharges. This removal, however, was a state mandate, not a requirement of federal law.

The DPD also concludes that the removal of the exemption was "not a new program or higher level of service" because federal law "has long required that all dischargers, including private industrial dischargers and local governments, effectively prohibit 'all types' of non-stormwater discharges identified as sources of pollutants to waters of the United States." DPD at 88-89.[9] The DPD concludes that requirements associated with addressing irrigation-related

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[7] 40 CFR § 122.26(d)(2)(iv)(B)(1) (emphasis supplied).

[8] The DPD cites (at 82) the Smarttimer/Edgescape Evaluation Program (SEEP) as rationale for the removal of the exemption. This program, however, did not involve Riverside County municipalities but rather Orange County municipalities, the Metropolitan Water District of Southern California, the Department of Agriculture and south Orange County water districts. *See* Supplemental Fact Sheet, Tentative Order R9-2009-0002, San Diego Water Board, at 12-13. This Tentative Order can be found at https://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/oc_permit/updates_4_15_09/R9-2009-0002%20Supplemental%20Fact%20Sheet.pdf. Claimants request that the Commission take administrative notice of this document pursuant to Evidence Code § 452(c) as an "official act of the ... executive .... departments of ... any state of the United States"; Govt. Code § 11515; and Cal. Code Regs., tit. 2, § 1187.5(c).

[9] The DPD also concludes that the removal of the exemption was not a "new" requirement because the 2004 Permit gave both the permittees and the Water Board the discretion to remove the exemption. DPD at 87. But this provision did not remove the exemption; the Test Claim Permit did. The requirements of

discharges "do not change or increase [the] level or quality of service to the public; they simply make the claimants comply with existing federal law to prohibit non-stormwater discharges." DPD at 89.

Claimants disagree. First, "federal requirements" exempted irrigation-related discharges from the "effectively prohibit" non-stormwater discharge requirement *unless* they were identified by the *municipalities* as a source of pollutants to waters of the United States.[10] The 2004 Permit did *not* require Claimants to address these discharges unless, *in the discretion of permittee or the Water Board,* they should be. Test Claim Permit Section B.2 removed that discretion, requiring Claimants to now address such discharges -- a "new" requirement. 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*").

Second, general federal regulatory language does not impose a federal mandate if the regulation leaves the manner of implementation to the discretion of the permittee. *See LA County Permit Appeal I.*[11] Here, the language of the federal regulation left the discretion as to whether to include irrigation-related discharges to the permittees.

In addition, "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." *Dept. of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 559 ("*LA County Permit Appeal II*"). The additional obligations imposed on Claimants by removal of the exemption, such as required changes to the CMP and JRMP and additional monitoring, represented a "higher level of service" to the public, contrary to the conclusion in the DPD. What constitutes a "higher level of service" are "'state mandated increases in the services provided by local agencies in existing programs.'"[12]

The removal of the exemption for irrigation-related discharges in Section B.2 of the Test Claim Permit constitutes a state mandate for which a subvention of funds is required.

C. Requirements in Sections C., F.4.d. and e. and Section II.C. of Attachment E Relating to Non-Stormwater Action Levels

The above-cited Test Claim Permit requirements mandated Claimants to undertake an entirely new program relating to Non-Stormwater Action Levels ("NALs"). As described in the DPD (at 99-103), permittees were required to do the following tasks, among others:

- Monitor at specified locations, including major outfalls, and such other sampling points as identified by the permittees and map those locations on their MS4 map;

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the Test Claim Permit and the 2004 Permit were different and under *Lucia Mar, supra,* the removal of the exemption in the test Claim permit was a new requirement.

[10] 40 CFR § 122.26(d)(2)(iv)(B)(1).

[11] 1 Cal. 5th at 770.

[12] *LA County Permit Appeal II,* 59 Cal.App.5th at 556 (*quoting County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 56).

- Develop and/or update written procedures for effluent analytical monitoring, including the requirement to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea;
- Analyze samples for over 40 constituents, including conventional pollutants, nutrients, hydrocarbons, pesticides, metals and bacteriological pollutants;
- Collaborate to develop and implement a monitoring program to identify sources of pollutants in non-stormwater discharges;
- If the NAL exceedance was the result of an illicit discharge, and permittees determined that the discharges were part of a category of illicit discharges, report their investigation in their Annual Report to the Water Board, along with the steps taken to address the discharges;
- If permittees could not identify the source of the exceedance, perform additional focused monitoring;
- If permittees identified the source of the exceedance as natural, report those findings and documentation of their source investigation in their Annual Report;
- If permittees identified the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit, report to the Water Board within three business days, including all pertinent information regarding the discharge and the discharge characteristics.

The DPD concludes that these provisions, which were not in the 2004 Permit, nonetheless do not constitute a "new program" or "higher level of service." DPD at 104-113.

1. The NAL Provisions are Not Federally Mandated

The DPD first concludes that federal law has long required MS4 permittees to effectively prohibit non-stormwater discharges into the MS4 and that the MS4 permit application regulations in 40 CFR § 122.26(d)(2)(B) required permittees to submit a management program "to detect and remove illegal discharges, which includes field screening and monitoring, preparing a map overlay of the monitoring stations and field screening points, procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illegal discharges or other sources of non-stormwater pollution; removal of the discharge; and reporting the results. These activities are not new." DPD at 107-108.

The DPD does not conclude that federal law mandated the NAL provisions. It cannot because even if a permit provision reflected a requirement of federal law, if "federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated." *LA County Permit Appeal I,* 1 Cal. 5th at 765. *See also Dept. of Finance v. Comm. on State Mandates* (2017) 18 Cal.App.5th 661, 683 ("*San Diego Permit Appeal I*") (to constitute "a federal mandate for purposes of section 6 . . . the federal law or regulation must 'expressly' or 'explicitly' require the condition contained in the permit.").

Here, the federal requirements cited in the DPD were general in nature and did not specify how permittees were to comply with them. The Water Board, using its independent power to act under California law, had true discretion in how it chose to implement those requirements in the context of an MS4 permit like the Test Claim Permit, and exercised that discretion in imposing the new requirements relating to NALs.

While stopping short of concluding that federal law compelled the NAL requirements, the DPD appears to "bootstrap" the federal illegal discharge requirements to support its conclusion that the NAL requirements are not "new" since these underlying federal requirements had been in place long before the Test Claim Permit.

Claimants disagree. In a recent case, *Dept. of Finance v. Comm. on State Mandates* (2022) 85 Cal.App.5th 535 ("*San Diego Permit Appeal II*"), the Third District Court of Appeal rejected a similar argument made by the state in an appeal of a test claim concerning the 2007 San Diego County MS4 Permit. That case is discussed next below.

2. The NAL Requirements Were "New" and Represented a "Higher Level of Service"

In *San Diego Permit Appeal II*, the state argued, *inter alia,* that various MS4 permit requirements were not "new" because permittees had an underlying obligation, dating from the adoption of the CWA's provisions addressing MS4 discharges, and permittees' first MS4 permit, to "prohibit nonstormwater discharges into their MS4s . . . ."[13]

The Court of Appeal rejected that argument:

> The application of [article XIIIB] Section 6 . . . does not turn on whether the underlying obligations to abate pollution remains the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a high level of existing services."[14]

The court held that in determining "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."[15] The court found that this "is so even though the [new] conditions *were designed to satisfy the same standard of performance.*"[16]

Here, the underlying obligations set forth in the CWA and in the cited MS4 permit application regulations have long existed and governed previous MS4 permits. The existence of any longstanding "underlying obligations," however, does not mean that the specific NALs requirements in the Test Claim Permit are not "new." To determine that, the inquiry must focus on whether the NAL requirements in the Test Claim Permit were required in the 2004 Permit. *See San Diego Unified School Dist. v. Comm. on State Mandates* (2004) 33 Cal. 4th 859, 878 (*San Diego Unified*"); *Lucia Mar, supra.*[17] That comparison shows that the NALs requirements in the Test Claim Permit were not present in the 2004 Permit.

Section II.C.1.a.(1) of the Test Claim Permit Monitoring and Reporting Program (Attachment E to the Test Claim Permit) ("Test Claim Permit MRP") required that permittees "must" sample "at major outfalls" and "[o]ther outfall sampling points . . . identified by the Copermittees as potential high risk sources of polluted effluent or as identified under Section C.4

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[13] 85 Cal.App.5th at 559.

[14] *Id.*

[15] *Id.*

[16] *Id.* (emphasis supplied).

[17] 44 Cal. 3d at 835.

of the Order." The Test Claim Permit also required permittees to develop monitoring plans "to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year."[18]

By comparison, the Monitoring and Reporting Program under the 2004 Permit, No. R9-2004-001 ("2004 Permit MRP") gave permittees the discretion to select "Illicit Discharge Monitoring stations" within their jurisdiction. The 2004 Permit MRP required that permittees "inspect" Illicit Discharge Monitoring stations twice per year. Only if there was the presence of ponded or flowing water was a "field screening" required, and then, only if the field screening indicated a potential illicit discharge, would a sample be required to be collected for analysis. 2004 Permit MRP at 9.

The Test Claim Permit afforded Claimants no such discretion; all sampling stations were required to be monitored and sampled for multiple additional analytes not required under the previous 2004 Permit. In the Test Claim Permit Fact Sheet, the Water Board itself acknowledged that this was an increase in services required of permittees: "The Order requires *an increase* in the number and type of pollutants sampled in non-storm water from major outfalls. . . . This Order requires non-storm water discharges to be sampled for *additional* pollutants . . . ."[19]

The DPD concludes that the outfall monitoring requirement, though not required in the 2004 Permit, was not "new" because federal NPDES regulations required that dischargers must effectively monitor for permit compliance. DPD at 111. However, those regulations did not specify where dischargers must monitor – the Test Claim Permit did, and the outfall monitoring represented a significant increase in the monitoring obligations imposed on permittees. Under *LA County Permit Appeal I, supra,* the general federal NPDES monitoring provisions did not represent a federal mandate. Similarly, those requirements did not mean that the increased sample analysis requirements in the Test Claim Permit were not "new," as the DPD concludes (at 112).

The Test Claim Permit also imposed increased programmatic requirements related to dry weather flows. The 2004 Permit allowed permittees the discretion to establish "numeric criteria" for field screening and analytical monitoring result "that will trigger follow-up investigations to identify the source causing the exceedance of the criteria" and to describe the numeric criteria and follow-up procedures in their Storm Water Management Plans.[20] By contrast, the Test Claim Permit specified a detailed reporting and analytical matrix for permittees. For example, if the permittees believed the source of a NAL exceedance was natural in origin, they were required to "report its findings and documentation of its source investigation" to the Water Board in their Annual Report.[21] There was no similar requirement in the 2004 Permit.

If water quality data or conditions indicated a potential illegal discharge or connection, the Test Claim Permit required permittees to address them "immediately" (for "obvious illicit discharges") and to initiate an investigation within two business days (of receiving dry weather

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[18] Test Claim Permit, Section C.4.

[19] Test Claim Permit Fact Sheet at 113 (emphasis supplied).

[20] 2004 Permit MRP at II.B.3; 2004 Permit at J.4.

[21] Test Claim Permit, Section C.2.a.

field screening results that exceeded NALs) or within five business days (of receiving analytical laboratory results that exceeded NALS) to identify the source or to document the rationale for why the discharge "does not pose a threat to water quality and does not need further investigation." Such documentation was to be included in the Annual Report.[22] The 2004 Permit required none of these specific investigation and documentation obligations.

Under the Test Claim Permit, if a permittee was unable to identify the source of a NAL exceedance "after taking and documenting reasonable steps to do so," it was required to perform "additional focused sampling."[23] If the results of that sampling indicated a recurring exceedance of NALs from an unidentified source, the permittee was required to "update its programs within a year to address the common contributing sources that may be causing such an exceedance."[24] The permittee's Annual Report was required to include such updates, including where applicable, updates to watershed workplans, retrofitting considerations and program effectiveness work plans.[25] None of these requirements was in the 2004 Permit.

Permittees were also required during any annual reporting period in which one or more NAL exceedances were documented to include "a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters."[26] This requirement was not in the 2004 Permit.

Thus, based on governing case law, the NALs requirements in the Test Claim permit were in fact "new." And, they represented a "higher level" of service required of Claimants in that they required additional monitoring and analysis, more thorough investigations of exceedances and to address illegal discharges in a more detailed, systemized and prompt manner when compared with the requirements of the 2004 Permit. These additional steps required by the Test Claim Permit represent a "higher level" of service under the test set forth in *LA County Permit Appeal II, supra,* and not, as the DPD concludes (at 113), merely increases in costs to provide the same services.

Claimants are entitled to a subvention of funds with respect to the NALs requirements set forth in the Test Claim.

D. Requirements in Section D Relating to Storm Water Action Levels

Section D of the Test Claim Permit established a new requirement for permittees to take into account Water Board-established Storm Water Action Levels ("SALs") in their monitoring and reporting efforts under the permit.

The requirements of Section D (and referenced companion requirements in Section II.B. of the Test Claim Permit MRP) are set forth in the DPD at 125-128. Briefly summarized, they required permittees to develop a year-round watershed-based wet weather MS4 discharge monitoring program; present an associated draft plan with the rationale, locations, frequency and

[22] Test Claim Permit, Section F.4.e.(2).

[23] Test Claim Permit, Section C.2.e.

[24] *Id.*

[25] *Id.*

[26] Test Claim Permit Section C.3.

analyses identified to conduct monitoring at a "representative percentage" of the major outfalls within each hydrologic subarea; conduct source identification monitoring to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea; take SAL exceedances into consideration when adjusting and executing annual work plans; sample for a broad suite of constituents (set forth in MRP Table 4); and, if permittees believed a SAL exceedance was caused by natural sources, demonstrate that the "likely and expected" cause of the exceedance was not "anthropogenic in nature."[27]

None of these requirements was contained in the 2004 Permit, which neither referenced SALs nor required monitoring at MS4 outfalls and which required more limited analysis of sampled stormwater.[28] Nevertheless, the DPD concludes that the requirements of Section D of the Test Claim Permit did not mandate a new program or higher level of service.

As with its analysis of the NALs requirements, the DPD focuses not on the specific requirements of the Test Claim Permit, which under applicable caselaw is the appropriate starting place to determine whether a program is "new," *San Diego Unified, supra; Lucia Mar, supra,* but rather on general, underlying legal requirements that applied to the Test Claim Permit and previous MS4 permits.

The DPD cites federal requirements that NPDES permittees monitor their discharges to determine whether they are meeting water quality standards, as well as other requirements relating to permittee monitoring and reporting arising either from the CWA, its implementing regulations, or the 2004 Permit. DPD at 130-131. The DPD also cites as authority 2004 Permit language requiring permittee discharges to not cause or contribute to the exceedance of water quality standards or receiving water objectives, for permittees to assess compliance with the permit and to suggest additional BMPs if compliance was not being attained, and for permittees to annually evaluate their monitoring and report the findings to the Water Board. DPD at 131.

Thus, the DPD concludes that since federal law or prior permits set forth general underlying requirements regarding stormwater discharges (*e.g.,* requirements to monitor discharges, report exceedances, meet water quality standards, adjust BMPs, etc.), the specific SALs requirements in the Test Claim Permit were not new but "simply makes the claimants comply with existing federal law imposed on *all* dischargers to comply with water quality standards."[29] The DPD concludes further that instead of increasing the level or quality of service to the public, Section D "simply helps the claimants comply with existing law imposed on all discharges to meet water quality standards."[30]

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[27] *See generally* Test Claim Permit Section D and Section II.B of Test Claim Permit MRP.

[28] As the DPD acknowledges, wet and dry weather monitoring under the 2004 Permit involved only three "Triad" stations which, because they were not at MS4 outfalls, did not constitute a "representative percentage" of the major outfalls within each hydrologic subarea, the requirement in Test Claim Permit Section D. DPD at 119-120. Also, a comparison of the constituents required to be analyzed shows that the requirements in Test Claim Permit MRP Table 4 were more extensive than those in 2004 Permit MRP Table 1.

[29] DPD at 133. Significantly, as with the DPD's analysis of the NAL requirements in the Test Claim Permit, the DPD does not conclude that the SALs were mandated by federal law. Given governing case law, this is correct.

[30] DPD at 136.

Claimants disagree. As *San Diego Permit Appeal II* and other cases have held, when an executive order contains a requirement not found in a previous order, that additional requirement represents a "new" program. *San Diego Permit Appeal II* held that 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."[31] The court found that this "is so even though the [new] conditions *were designed to satisfy the same standard of performance*."[32] Thus, the arguments presented in the DPD (at 132) that the upgraded monitoring requirements in the Test Claim Permit were not "new" because such monitoring was required to monitor permit compliance, an existing standard, conflicts with the holding in *San Diego Permit Appeal II.* Again, the question that must be addressed is, does the requirement in the executive order at issue appear in previous permits? If not, it is "new."

The DPD cites various "standards of performance" contained in federal law/regulations or prior permits to support its conclusion that the SAL requirements are not "new."[33] These citations, however, do not rebut the fact that the above-mentioned specific requirements of Section D are "new" requirements which implement those standards of performance. Under the test laid down in *San Diego Permit Appeal II*, "the application of [article XIII B] Section 6 does not turn on whether the underlying obligation to abate pollution remains the same. It applies if any executive order . . . requires permittees to provide a new program or higher level of service."[34]

The DPD also asserts that Section D of the Test Claim Permit "does not increase the level or quality of service to the public; it simply helps the claimants comply with existing law imposed on all dischargers to meet water quality standards." DPD at 136. This assertion (which, under *Defenders of Wildlife, supra,* is incorrect) nevertheless errs in setting forth the analysis that the Commission is required to make. It can be argued that *any* provision in an MS4 permit is intended to "help" permittees to comply with the CWA, but that does not mean that those provisions, when they impose greater obligations on those permittees, are not state mandates. California appellate courts have decided otherwise. *See LA County Permit Appeal I, San Diego Permit Appeal I, and San Diego Permit Appeal II, supra.*

Implementation of Section D required Claimants to undertake a new program and provide a higher level of service. The DPD itself acknowledges that permittees "were not required to monitor MS4 outfalls under the prior permit."[35] Nor were permittees required under the 2004 Permit to develop a year-round watershed-based wet weather MS4 discharge monitoring program; to present a draft plan with the rationale, locations, frequency and analyses identified; to conduct monitoring at a "representative percentage" of the major outfalls within each hydrologic subarea; to conduct source identification monitoring to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea; to respond to SAL exceedances by taking them into consideration when adjusting and executing annual work plans; to sample for a broader suite of constituents obtained from monitoring; and, if a SAL exceedance

[31] 85 Cal.App.5th at 559.

[32] *Id.* (emphasis supplied).

[33] DPD at 133.

[34] 85 Cal.App.5th at 559.

[35] DPD at 128.

was believed to be from natural causes, to demonstrate that the "likely and expected" cause of the exceedance was not "anthropogenic in nature."

These requirements were new to the Test Claim Permit and thus represent "new" programs which trigger article XIII B, section 6 and as to which a subvention of funds is required. These requirements similarly represent the provision of a "higher level of service" to the public through the enhanced monitoring and required responses to exceedances of water quality standards in stormwater.

E. Requirements in Sections F.1.d., F.1.h. and F.3.d. Relating to Low Impact Development, Hydromodification Plans, Best Management Practices for Priority Development Projects and Retrofitting of Existing Development

The DPD concludes that the requirements in Sections F.1.d., F.1.h., and F.3.d. of the Test Claim Permit generally impose state-mandated new programs or higher levels of service, but that Sections F.1.d.1., 2., 4. 7., F.1.h., and F.3.d.1.-5, as they apply to Claimants' own municipal projects, do not. The DPD concludes that such costs were incurred at the discretion of the local agency, are not unique to government, and do not provide a governmental service to the public. DPD at 170-179. Claimants' comments focus on those conclusions.

1. The Low Impact Development (LID), Hydromodification Plan (HMP) and BMPs for Priority Development Projects (PDPs) Impose Mandates on Claimants; Claimants Do Not Have True Discretion as to the Sizing of Municipal Projects that Constitute PDPs

The DPD concludes that, like private developers, local governments construct PDPs at their discretion; thus, the imposition of LID and HMP requirements on such projects is not a state mandate. DPD at 171. Whether these requirements apply depends on the size of the project (specific categories of PDPs, such as automotive repair shops, restaurants and retail gasoline outlets, relate to private PDPs only and were not included in the Test Claim.).[36] Claimants submit, however, that when local governments undertake a PDP, 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 the project so as to avoid the LID and HMP 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. *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.[37] 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.[38]

KHSD concerned whether a local school district's 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

[36] *See* Section 5 Narrative Statement at 27.

[37] 153 Cal.App.3d at 782.

[38] *Id.* at 783.

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.

As explained more fully in Claimants' Narrative Statement,[39] *KHSD* is inapposite because in that case, the district chose to accept the grants to fund those meetings. Similarly, *City of Mercer* is inapposite because the city chose to exercise its power of eminent domain. Claimants here did 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. *San Diego Permit Appeal II, supra.*[40] Thus, the projects are "practically compelled."

The *San Diego Permit Appeal II* court 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.[41]

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."[42]

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 and were "compelled as a practical matter" to construct that infrastructure.

2. The LID and HMP Requirements Provide a Service to the Public

The DPD also concludes that the LID and HMP requirements did not impose a new program or higher level of service because the requirements "are not unique to government and do not provide a governmental service to the public." DPD at 176-179. It is not in dispute that those requirements apply to both private and public PDPs. However, the DPD errs in its conclusion that they do not provide a benefit to the public.

The three cases cited in the DPD pre-date the recent decision of the Second District Court of Appeal in *LA County Permit Appeal II, supra.* In that case, the court was presented with the question of whether, *inter alia,* a requirement to place trash receptacles at transit stops represented a "program" compensable under article XIII B, section 6. The court first noted that there were two separate tests to determine the existence of a "program," those of providing

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[39] Section 5 Narrative Statement at 33-35.

[40] 85 Cal.App.5th at 558.

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

[42] 170 Cal.App.4th at 1368.

services to the public and those which impose unique requirements on local governments, noting that the "two parts are alternatives; either will trigger the subvention obligation unless an exception applies."[43]

With regard to the trash receptacle requirement, the court held that receptacle placement met the requirement of providing services to the public, noting that even if the placement itself did not result in a higher level of stormwater drainage and flood control, "trash collection is itself a governmental function that provides a service to the public by producing cleaner transit stops, sidewalks, streets, and, ultimately, stormwater drainage systems and receiving waters."[44]

Here, the LID and HMP requirements, which were developed by the permittees in an exercise of their governmental function as operators of a stormwater drainage system, provided benefits to the public through the reduction of runoff carrying potential pollutants and the reduction of high flows that caused erosion. Under the test set forth in *LA County Permit Appeal II,* the LID and HMP requirements constitute a "program."

3. The Retrofitting Requirements in the Test Claim Permit Are Neither Discretionary Nor Apply to Non-Governmental Actors; They are Unique to Claimants

The DPD similarly concludes that the retrofitting requirements in Test Claim Permit Section F.3.d. were either not mandated by the state or were not unique to government and thus do not provide a governmental service to the public. DPD at 171-179.[45] Claimants disagree.

First, Claimants were required to identify and inventory existing municipal, industrial, commercial, and residential areas as candidates for retrofitting using criteria identified by the Water Board; to evaluate and rank those existing developments to prioritize retrofitting based on Water Board required criteria; and, to consider the results of the evaluation in prioritizing work plans for the following year.[46] None of these tasks was "discretionary." The evaluation required was of *existing* projects, not future projects which may be developed. Thus, the argument that the tasks required in Section F.3.d. is not "mandatory" is incorrect.

Second, the inventorying, evaluation and work plan development required in this section were obligations unique to local government – no private parties were required to undertake this work. And, given that the express purpose of the work was to improve the quality of stormwater discharges from existing development, there was a benefit to the public, as the Water Board itself found: "Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or

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[43] 59 Cal.App.5th at 557.

[44] *Id.* at 558-59.

[45] The DPD combines into the same discussion LID/HMP requirements, which in the Test Claim were addressed only as they applied to municipal projects, and retrofitting requirements, which the Test Claim addressed as it applied to all projects. *See* Section 5 Narrative Statement at 45-48. Thus, the argument that the Test Claim intended to address only F.3.d. retrofitting requirements to municipal projects is incorrect.

[46] *See* DPD at 165-66.

contribute to a condition of pollution or a violation of water quality standards."[47] *See LA County Permit Appeal II, supra.*

Additionally, Section F.3.d. required evaluation of *existing* municipal projects, so the work to evaluate, prioritize and report on municipal projects is not the same as the requirements in Section F.1. of the Test Claim Permit, which set forth LID and HMP requirements for *future* development. The retrofitting requirements constituted a new program and/or a higher level of service.

F. Requirements in Section F.1.f. Relating to BMP Maintenance Tracking

Test Claim Permit Section F.1.f. contained requirements relating to the tracking of BMP maintenance. The DPD concludes that some of these requirements were "new" while others were not.

The DPD also concludes that requirements in Section F.1.f applicable to municipal projects were not mandated by the state, and thus are not eligible for a subvention of funds, stating: "Nothing in state statute or case law imposes a legal obligation on local agencies to construct, expand, or improve municipal projects. Nor is there evidence in the record that the claimants would suffer certain and severe penalties such as 'double . . . taxation' or other 'draconian' consequences if they fail to comply with the permit's annual reporting requirements for municipal projects." DPD at 200-201.

Claimants disagree. There *was* a legal obligation imposed here on Claimants – it was the obligation to create a BMP maintenance tracking database for completed development projects, whether they be industrial/commercial, residential *or* municipal. It was the *creation of the database and the other Section F.1.f. requirements* that constituted the legal compulsion on Claimants, not the allegedly discretionary decision to construct a municipal project in the first place. Claimants were legally compelled to perform the requirements in Section F.1.f., and the reference in the DPD (at 201) to "certain and severe penalties," one test for requirements that may be "practically compelled," is irrelevant.

The question of how far "downstream" the applicability of a determination that a requirement was discretionary, not mandated, should extend was raised by the Supreme Court in *San Diego Unified, supra.* There, the Court expressed 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. For example, as explained above, in *Carmel Valley, supra,* 190 Cal.App.3d 521, an executive order requiring that county

[47] Test Claim Permit Finding 3.3.

> firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (Id., at pp. 537–538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. 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.

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

Here, the BMP tracking database requirements were unconnected to the original decision to build a municipal project that required those BMPs. The projects were built and the BMPs were installed. Section F.1.f. made the tracking of those BMPs mandatory, not discretionary. Having exercised their alleged discretion to build the project, Claimants had *no* discretion as to whether to include their completed municipal projects in the database and otherwise follow the requirements of Section F.1.f. Extension of the *City of Merced* rule to such requirements is not appropriate.

G. Requirements in Section F.2.d.3. and F.2.e.(6) Relating to Implementation of Active/Passive Sediment Treatment and Review of Monitoring Data at Construction Sites

Section F.2.d.3. of the Test Claim Permit required the installation of Active/Passive Sediment Treatment systems ("AST") at construction sites where the permittees determined that the site posed an exceptional threat to water quality due to high turbidity or suspended sediment levels in the site's effluent. The DPD concluded that this requirement imposed a state-mandated new program or higher level of service (DPD at 209-211), but not for permittee construction sites. DPD at 211-214.

The rationale cited in the DPD is the same as for other construction-related requirements in the Test Claim Permit: the State did not mandate Claimants to build projects that would require the installation of AST systems. In response, Claimants refer to and incorporate their arguments at Section III.E.1, *supra,* which addresses these contentions.

The DPD also concludes that the requirement in Test Claim Permit Section F.2.e.(6) for permittees to review monitoring results at the construction sites where the site monitored its runoff did not impose a new program or higher level of service. DPD at 218-222. The 2004 Permit required that construction sites be inspected, and the DPD concludes that "although the prior permit did not expressly state that reviewing construction site monitoring data results if the site monitors its runoff was required as [art of the inspection], it did expressly require the claimants to conduct inspections for compliance with local stormwater ordinances on construction site and to enforce its ordinances" as necessary to maintain compliance with the

2004 Permit.[48] The DPD further concludes that "the requirement to review monitoring results if the site monitors its runoff simply *clarifies* the existing legal requirement to assess a site's compliance with local ordinances and water quality standards." DPD at 221 (emphasis supplied).

The DPD acknowledges that the 2004 Permit did not require permittees to review water quality monitoring data. The addition of this requirement was a "new" program as well as a higher level of service required of permittees; the argument that this was a mere "clarification" of the predecessor permit's requirements creates an exception that would swallow the rule. Calling any change to requirements of a prior order a "clarification" writes out of the law the requirement that the provisions of the test claim order must be compared with those in the preceding order. *Lucia Mar, supra.* And, the tasks required by the two permits were different – an "inspection" can be conducted entirely visually; the review of monitoring data requires an analysis of the results and comparison to the standards applicable to the receiving water, a task potentially requiring office work. Claimants in fact introduced evidence that additional costs were expended for training of permittee staff. *See* Declarations in Support of Test Claim, Section 5(f).

Finally, the DPD concludes that there was no shift of costs from the state to the local agencies, contending that "[t]he Copermittees enforce their local permits, plans, and ordinances, and the State Water Boards enforce the General Construction Permit." DPD at 222.

The General Construction Permit ("GCP") requires certain construction site operators to monitor stormwater discharges from their sites and to maintain records of the monitoring.[49] The Test Claim Permit made no distinction between monitoring required under local ordinances (if any) and the GCP. The Test Claim Permit thus required permittees to review GCP-mandated records, which is a function reserved to the State Water Board and the regional water boards, which collect an inspection fee from such permittees pursuant to Water Code § 13260(d)((2)(B)(iii).

Requiring permittees to review monitoring data collected as an enforceable requirement in the CGP and charging a fee for such review duplicated the fees assessed by the state for the same service, thus exceeding the reasonable cost of providing services for which the fee is charged and not bear a fair or reasonable relationship to the pertinent burdens or benefits. Similarly, the local fee for investigating GCP monitoring data would duplicate state law, rendering it invalid under the doctrine of preemption. *See O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1067.[50]

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[48] DPD at 221, citing 2004 Permit Section G.

[49] *See* State Water Board Order 2009-0009-DWQ, as amended, Section J.

[50] This matter differs from that at issue in *LA County Permit Appeal II,* where the court held that there was no evidence that local governments would replace or supplant inspections by the regional water board. 59 Cal.App.5th at 563. Here, there is such evidence in the requirement to review monitoring data.

H. Requirements in Sections F.1.i. and F.3.a.10 Regarding Construction and Maintenance Requirements for Unpaved Roads

The Test Claim Permit required Claimants to incorporate BMPs to be applied in the construction and maintenance of unpaved roads. The DPD concludes that the decision to construct and maintain unpaved roads is discretionary and thus not mandated by the state and that the unpaved road requirements are not "new." Claimants disagree.

1. The Construction and Maintenance of Unpaved Roads is an Essential Function of Local Government; Claimants were "Practically Compelled" to Maintain Such Roads

The DPD asserts that Claimants "have provided no evidence to support that they have a legal or practical compulsion to construct or maintain unpaved roads." DPD at 230. In reply, Claimants first note that the construction and maintenance of roads, including unpaved roads, is an essential function of local government. For that reason, the decision to build or accept unpaved roads is, like those of other municipal facilities discussed in Sections III.E., III.F., and III.G., *supra,* is different from the discretionary acts described in *City of Merced* and *KHSD.* Claimants hereby reincorporate the arguments presented therein.

Moreover, the maintenance of unpaved municipal roads is "practically compelled" under the test set forth in *San Diego Permit Appeal II.* There, the court found that in some cases, a municipality and its constituents could face "certain and severe penalties or consequences" if the municipality did not undertake certain civic tasks. Here, the failure to maintain unpaved roads would not only put Claimants' residents served by those roads in jeopardy of not being able to leave their homes for work, recreation or emergencies, but also would place any person driving on such unmaintained roads in jeopardy for potential harm to themselves or to others.

Further, as held in *POBRA, supra,* a municipality may be practically compelled to follow statutory or regulatory requirements in carrying out a facially discretionary project if the project was "the only reasonable means to carry out [the claimant's] core mandatory functions."[51] The maintenance of unpaved roads dedicated to municipal use is certainly a core mandatory function of municipal government and maintenance of those roads is the only reasonable means by which such critical infrastructure can continue to be used. Local governments have no option; either the roads are maintained (and unpaved roads in particular, due to their soft surfaces, are susceptible of deterioration) or they become unusable, resulting in a failure of that core function of local government.

As importantly, local governments, such as Claimants here, face legal liability for the consequences of not maintaining unpaved roads. "The County owes a duty to maintain safe roads for all foreseeable uses . . . ." *Williams v. County of Sonoma* (2020) 55 Cal.App.5th 125, 132 (failure to maintain road caused injury to bicyclist). *Williams* cited Govt. Code § 835, which provides in relevant part that "a public entity is liable for injury caused by a dangerous condition of its property." While a plaintiff must establish certain prerequisites to establish liability, the failure to maintain an unpaved road known to require such maintenance would establish either "a negligent or wrongful act or omission of an employee of the public entity within the scope of his

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[51] 170 Cal.App.4th at 1368.

employment" which created the dangerous condition (Govt. Code § 835(a)) or the public entity had "actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition" (Govt. Code § 835(b)).[52]

The Government Code defines "protect against" to mean in part "repairing, remedying or correcting a dangerous condition." Govt Code § 830(b). Thus, the failure to effect repairs of a dangerous unpaved road can readily establish a failure "to have taken measures to protect against the dangerous condition."

Local governments have been found liable under this statute and a predecessor statute for liability stemming from unsafe road surfaces. *See Williams, supra; Alvarez v. County of Los Angeles* (1955) 132 Cal.App.2d 525, where the court upheld the liability of the county due to negligent maintenance of an unpaved road which caused injuries to a driver and his passenger.

Thus, the failure to maintain unpaved roads accepted by a municipality does, under governing statutes and case law, lead to "certain and severe penalties or consequences" and thus is "practically compelled."

2. The Test Claim Permit Requirements Regarding Unpaved Road Construction and Maintenance Were "New" and Required a Higher Level of Public Service

The unpaved road construction and maintenance requirements in the Test Claim Permit are, moreover, "new." The DPD concludes (at 230-233) that several requirements in the 2004 Permit to implement BMPs for the construction of municipal "facilities and activities" (which were defined to include "roads") and to impose BMPs meant to achieve the MEP standard meant that the requirement for Claimants to include unpaved road BMPs was not new. Citing language in Section F.1.i. that permittees could, instead of implementing BMPs following the permit requirements, implement "alternative BMPs that are equally effective," the DPD concludes that this simply meant that permittees were "to implement effective BMPs after construction," similar to the generic requirements in the 2004 Permit. DPD at 231.

These conclusions disregard the fact that in the 2004 Permit, which must be compared against the Test Claim Permit to determine whether the latter's requirements are "new," *Lucia Mar, supra,* there were no BMP requirements explicitly applicable to roads, much less unpaved roads. Even though the Test Claim Permit allowed permittees to implement "alternative BMPs," those BMPs still had to be shown to be "equally effective" with the specific new requirements in the Test Claim Permit, i.e., that there be practices to minimize road related erosion and sediment transport; sloping the grading of unpaved roads outward; installation of water bars; and, adopting

[52] Govt. Code § 835.2 provides that a public entity has actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. The statute provides further that a public entity has constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

road and culvert designs that did not impact creek functions or migratory fish passages.[53] *None* of those criteria was contained in the 2004 Permit.

The DPD also cites (at 231-232) requirements in the 2004 Permit for permittees to implement BMPs to reduce pollutants in urban runoff to the MEP from municipal facilities and activities and to require additional BMPs for "facilities and/or activities" (not "roads," as stated in the DPD at 231) that were tributary to waterbodies listed as impaired under CWA Section 303(d). Again, these generic and limited requirements do not support the DPD's contention that the requirements of Section F.1.i. were not "new." The requirement to reduce pollutants in urban runoff to the MEP was a subset of the underlying requirement in the 2004 Permit prohibiting discharges from MS4s "which have not been reduced to the MEP."[54] As discussed in Section III.C.2 above, the presence of such underlying obligations in previous permits does not mean that more specific requirements in a subsequent permit are not "new." And, under the 2004 Permit, permittees were free to design and implement their own BMPs to meet that general standard; under the Test Claim Permit, the BMP types were dictated.

The same issues are posed by the DPD's conclusion that the requirements of Section F.3.a.10. of the Test Claim Permit were not new. The reference to the need for additional control measures for facilities tributary to Section 303(d) impaired waterbodies contained in 2004 Permit Section H.1.c.(2) was far more limited than requirements in the Test Claim Permit, which applied to unpaved roads wherever they may be located, including those "particularly in or adjacent to receiving waters." Section F.3.a.10. The Water Board applied the unpaved road BMP requirements to *all* unpaved roads, not only those which could discharge pollutants into Section 303(d) impaired waters. This section also required permittees to develop specific BMPs to address the maintenance of existing unpaved roads, none of which was required in the 2004 Permit.

Thus, the requirements in the Test Claim Permit were more comprehensive and different than those in the 2004 Permit cited in the DPD, e.g., those applicable only to "facilities" tributary to 303(d) listed waterbodies and adjacent to or discharging to receiving waters with Environmentally Sensitive Areas. Moreover, those 2004 Permit provisions required permittees only to implement unspecified "additional controls" to address such discharges, not the specific BMPs required in the Test Claim Permit. Thus, with respect to both Sections F.1.i. and F.3.a.10., the Test Claim Permit required a "higher level of service" to the public through the governmental activity of public road construction and maintenance.

The DPD concludes its analysis by stating that "the requirements in the test claim permit regarding unpaved roads simply clarify the existing legal requirements to assess a site's compliance with local ordinances and water quality standards." DPD at 233. This conclusion, however, is not supported by the Water Board's own stated rationale for those provisions. Finding D.1.c. of the Test Claim Permit recites, in relevant part:

> This Order contains *new or modified* requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and to achieve water quality standards. . . . Other requirements, such as for unpaved

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[53] Test Claim Permit, Section F.1.i.

[54] *See* 2004 Permit, Section A.3.

> roads, are a result of San Diego Water Board's identification of water quality problems through investigations and complaints *during the previous permit period.*"

(Emphasis supplied).

In addition to the reference to "new or modified" requirements, this finding states that the unpaved roads requirements came about as a result of investigations and complaints *"during the previous permit period,"* demonstrating that the specific focus on unpaved road requirements was new to the Test Claim Permit, and not a continuation of existing requirements from the 2004 Permit.

The Test Claim Permit Fact Sheet similarly stated that Section F.1.i. "specifically requires" permittees to implement or require implementation of BMPs for erosion and sediment control after construction of new unpaved roads.[55] In discussing Section F.3.a.10., the Fact Sheet stated that "[t]his requirement is necessary to ensure the Copermittees minimize the discharge of sediment from their unpaved roads used for their maintenance activities."[56]

The record reflects that the Water Board paid particular and new attention to perceived sediment issues from unpaved roads and in response, mandated new and higher levels of service of permittees in the Test Claim Permit.

I. Requirements in Section F.3.b.4.a.ii. Regarding Industrial and Commercial Inspections

Similar to Section F.2.e.(6) of the Test Claim Permit relating to construction sites (discussed in Section III.G. above), Section F.3.b.4.a.ii. required that permittee inspections of commercial and industrial facilities had to include a "[r]eview of facility monitoring data if the site monitors its runoff."

The DPD concludes that this requirement was not "new," claiming that requirements in the 2004 Permit imposed essentially the same standard, and that "the requirement to review monitoring data results if the site monitors its runoff simply clarifies the existing legal requirement to assess a site's compliance with local ordinances." DPD at 241. The DPD cites in support inspection requirements in the 2004 Permit that required permittees to assess industrial and commercial facilities' compliance with local ordinances and permits related to stormwater runoff. DPD at 241.

However, the 2004 Permit's only monitoring requirement for such inspections was that permittees were to conduct "visual observations for non-stormwater discharges, potential illicit connections, and potential discharge of pollutants in stormwater runoff." DPD at 241.[57] Nowhere in the 2004 Permit was there any express requirement that, during inspections of industrial and commercial facilities, permittees were required to review facility monitoring results, as the DPD acknowledges. DPD at 240.

The DPD bridges this gap by arguing that introductory language in the 2004 Permit's inspection requirements, stating that inspections of industrial and commercial facilities "shall

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[55] Test Claim Permit Fact Sheet at 144.

[56] *Id.* at 153.

[57] Citing 2004 Permit Sections H.2.a., H.2.b. and H.2.d.

include, *but not be limited to*" were not limited to visual observations of the site "but had to include whatever was necessary to ensure that discharges into the MS4 were complying with the claimants' local ordinances enforcing the prohibitions and receiving water limitations of the permit . . . ." DPD at 241.

The DPD's conclusion that the new requirement to review monitoring results simply "clarified" existing legal requirements to assess a site's compliance with local ordinances and water quality standards ignores unfunded mandates jurisprudence, cited above, which requires a comparison of the language of the executive order at issue and its predecessor. *E.g., San Diego Permit Appeal II; Lucia Mar, supra.*

A new program or higher level of service is created when an executive order, such as the Test Claim Permit, *requires* certain actions that previously had only been suggested or encouraged. *Long Beach Unified School Dist. v. State of California ("Long Beach Unified").*[58] Here, the Test Claim Permit required permittees to perform an additional new task not formerly specified.

The DPD apparently concludes that the "but not limited to" language represented an unstated, inherent mandate for permittees to review monitoring results. But to be a "mandate," a requirement must be express. *Long Beach Unified, supra.* The 2004 Permit contained no mandate to review monitoring results; the Test Claim Permit does. Under the 2004 Permit, permittees might, but were not specifically required to, inspect monitoring records. Under the Test Claim Permit, they were mandated to do so.

The DPD also concludes that there "has been no shift of costs from the state to the claimants" because the stormwater discharges from industrial sites "are subject to stormwater regulation under both state and local systems . . . [t]he claimants enforce their local permits, plans, and ordinances, and the Water Boards enforce the General Industrial Permit." DPD at 242.

Industrial and commercial facilities covered by the Industrial General Permit ("IGP")[59] are required to monitor discharges and to maintain records of such monitoring in facility records.[60] The Test Claim Permit made no distinction between monitoring conducted under the auspices of local ordinances (if any) and the IGP. The Test Claim Permit required permittees to review those IGP-required records, which is a function reserved to the State Water Board and the regional water boards, which collect an inspection fee from such permittees pursuant to Water Code § 13260(d)((2)(B)(iii).

Requiring permittees to review monitoring data collected as an enforceable requirement in the IGP and charging a fee for such review duplicated the fees assessed by the state for the same service, thus exceeding the reasonable cost of providing services for which the fee is charged and not bear a fair or reasonable relationship to the pertinent burdens or benefits. Similarly, the local fee for investigating ICP monitoring data would duplicate state law,

[58] (1990) 225 Cal.App.3d 155, 173.

[59] State Water Resources Control Board, General Industrial Permit, Order 97-03-DWQ ("1997 IGP"); State Water Resources Control Board, General Industrial Permit, Order 2014-0057-DWQ (effective July 1, 2015) ("2014 IGP"). These versions of the IGP were in effect during the term of the Test Claim Permit.

[60] 1997 IGP at Section B; 2014 IGP at Sections XI; XII.

rendering it invalid under the doctrine of preemption. *See O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1067.[61]

J. Requirements in Sections G.1.-5. Addressing the Watershed Workplan

The DPD concludes that some requirements in Sections G.1.-5. of the Test Claim Permit relating to watershed workplan requirements are "new" while others reflect requirements in the prior 2004 Permit. These comments focus on the latter conclusion.

Before addressing these watershed workplan requirements, it is useful to review what the Water Board intended in adopting them. The Test Claim Permit Fact Sheet (quoted in the DPD at 248) acknowledged that the Water Board was adopting a new approach. The 2004 Permit required "selection and implementation of watershed activities," but the Water Board found that program to be unsatisfactory. Fact Sheet at 166. The Water Board thus revised those watershed provisions in the Test Claim Permit, requiring permittees to develop a workplan that would now assess receiving waterbody conditions, prioritize the highest water quality problems, implement effective BMPs and measure water quality improvement. In so doing, the Water Board explicitly acknowledged that the "implementation approach has changed." Fact Sheet at 166.

If the Water Board did not intend Claimants to initiate new programs or a higher level of service in Section G, the Board would have continued the requirements in the 2004 Permit. It did not do so. Instead, the Water Board found that the 2004 Permit requirements "were not able to demonstrate improvements to water quality." Fact Sheet at 166. The Water Board therefore revised and supplemented the requirements in the 2004 Permit in Section G of the Test Claim Permit. The Water Board's dissatisfaction with the prior permit's stormwater management program and its revision and supplementation of that program in the Test Claim Permit is evidence that the Board intended a change from the prior permit, *i.e.,* that it intended to require in the permit a new program or higher level of service.

1. Requirements in Section G.1

Test Claim Permit Section G.1. required permittees to develop the components of a Watershed Workplan to characterize the receiving water quality in the watershed, including using specified data sources (Section G.1.a.), to identify and prioritize water quality problems "in terms of constituents by location" in receiving waters (Section G.1.b.), to identify likely sources causing the highest priority water quality problems within the watershed, including additional focused monitoring (Section G.1.c.), to develop a BMP implementation strategy including a schedule for implementation of the BMPs to abate specific receiving water quality problems and a list of criteria to evaluate BMP effectiveness (Section G.1.d.), to develop a monitoring strategy to monitor improvements in water quality from BMPs (Section G.1.e.) and to establish a schedule for development and implementation of the Watershed Workplan strategy (Section G.1.f.).[62] The DPD concludes that "[m]ost of these requirements are *not* new." *Id.* at 250, emphasis in original. Claimants disagree.

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[61] This matter differs from that at issue in *LA County Permit Appeal II,* where the court held that there was no evidence that local governments would replace or supplant inspections by the regional water board. 59 Cal.App.5th at 563. Here, there is such evidence in the requirement to review monitoring data.

[62] *See* DPD at 249-250.

First, the DPD contends that Section G.1.a.'s requirement to consider "applicable information available from other public and private organizations" in characterizing receiving water quality is not "new," citing Section K.2(c) of the 2004 Permit, which required an assessment of receiving water quality based upon "existing water quality data." A comparison of the two permits refutes this conclusion. The phrase "existing water quality data" is undefined and does not require permittees to resort to "information" obtained from other public and private sources. The DPD concludes that this phrase "does not have any limiting language and thus, includes relevant data from any source" and further that the addition of "public and private organizations" in the Test Claim Permit merely "provides additional detail" to the requirement and did not create a new requirement. DPD at 251. But the 2004 Permit did not require permittees to review "all" existing water quality data nor did the permit provide any guidance as to the source of such data.

Second, Section G.1.b. required permittees to identify *by constituent and location* major water quality problems in the receiving waters. 2004 Permit Section K.2.d. only required permittees to include in their Stormwater Management Plans "[a]n identification and prioritization of major water quality problems in the watershed caused or contributed to by MS4 discharges and the likely source(s) of the problem(s)." The DPD concludes that this did not mean that Section G.1.b. constituted a new requirement, quoting from the 2004 Permit Fact Sheet the statement that the Water Board's intent was identify and mitigate sources of pollutants in urban runoff. DPD at 251. While a Fact Sheet can provide useful information on the Water Board's intent in including a permit provision, it is the operative language in permit directives which governs the conduct of the permittees and constitutes the mandates. No language in the 2004 Permit required permittees to identify by constituent and location problems in the receiving waters. The Test Claim Permit's language thus was new and required an increase in services.[63]

Third, Section G.1.c., which specified particular sources of information that had to be reviewed to identify factors causing the highest water quality problems within the watershed, including performing "additional focused water quality monitoring to identify specific sources within the watershed," reflected new requirements compared to 2004 Section K.2.d. (quoted above) and required that permittees provide a higher level of service. The DPD concludes that because receiving waters limitations provisions in the 2004 Permit (and the Test Claim Permit) prohibited discharges that caused or contributed to the violation of water quality standards, and that permittees were required "to assure compliance with the prohibition by providing notice and a report regarding BMPs," such provisions would in turn "require sufficiently focused water quality monitoring to identify the specific source of the exceedance." DPD at 253.

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[63] The DPD also cites receiving waters monitoring requirements under the 2004 Permit requiring permittees to monitor at stations for pollutants and toxicity using Toxicity Identification Evaluations and Toxicity Reduction Evaluations, and to implement tributary monitoring. DPD at 252. Taken together, concludes the DPD, this "would yield a quantified water quality problem in terms of constituent by location." *Ibid.* This is not correct. "Toxicity" in the 2004 Permit is defined to mean in part, "Adverse responses of organisms to chemicals or physical agents from mortality to physiological responses such as impaired reproduction or growth anomalies." 2004 Permit, Attachment C, "Definitions," at C-6. Pollutants causing toxicity are only a subset of all constituents, which Section G.1.b. required Claimants to assess in order to identify the highest water quality problems within the watershed, e.g., "TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or other impacts to benefici9al uses, and other pertinent conditions."

This conclusion relies on an inference that there would have to be "sufficiently focused" monitoring required by the 2004 Permit to make the explicit monitoring requirements in the Test Claim Permit not "new." Inferences are not mandates. The Test Claim Permit required focused monitoring without reference to any other provision in the permit. The 2004 Permit did not. Under governing mandates law, that means that the requirements of Section G.1.c. are "new." *E.g., San Diego Permit Appeal II, supra.* Moreover, under *San Diego Permit Appeal II*, reliance on underlying obligations that have appeared in multiple permits, such as the receiving water limitations provision cited in the DPD, does not mean that additional mandates intended to implement that underlying provision are not "new" and thus do not trigger article XIII B, section 6.

Fourth, concerning requirements in Sections G.1.d., G.1.e. and G.1.f., the DPD similarly references language in the CWA and federal regulations to argue that those provisions – which required development of a watershed BMP implementation strategy as part of the workplan to attain receiving water quality objectives; a schedule for BMP implementation and identification of criteria used to evaluate BMP effectiveness; development of a strategy to monitor improvements in water quality from implementation of the BMPs, including reviewing data to report on the measured pollutant reduction; and establishment of a schedule for development and implementation of the watershed strategy outlined in the workplan – also were not "new."[64]

None of these requirements is contained in the 2004 Permit. The DPD cites 2004 Permit Sections K.2.l and K.2.m., which generally required permittees to adopt short and long-term strategies for assessing the activities and programs implement as part of the watershed SWMP. But these provisions required none of the specific steps required in Test Claim Permit Sections G.1.d., G.1.e. and G.1.f.

The DPD acknowledges that the Test Claim Permit "clarified that the implementation strategies include the development of BMPs," but finds that this requirement was not "new" because claimants "have long been required" to reduce discharges to the MEP through BMPs. DPD at 254. The DPD again cites the "underlying requirements" applicable to MS4 permits in the CWA as the basis for its conclusion that requirements in the Test Claim Permit that *not* contained in the 2004 Permit, were not "new." As previously discussed, *San Diego Permit Appeal II*[65] held that the presence of continuing underlying obligations in successive MS4 permits does not mean that new ways of implementing those obligations was not a "new" requirement triggering article XIII B, section 6. The 2004 Permit and the Test Claim Permit both were authorized by the requirements of the CWA and implementing regulations; the fact that the latter contained specific additional requirements to implement those statutory requirements means that those additional requirements are "new" and not merely "clarifications."[66]

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[64] *See* DPD at 253-254.

[65] 85 Cal.App.5th at 559.

[66] In addition, Section G.3. of the Test Claim Permit set forth requirements relating to collaboration with other permittees in development and implementation of the Workplan. While the DPD finds that the requirement in Section G.3. to pursue interagency agreements to be new (DPD at 256) the requirement for "frequent regularly scheduled meetings" is not. DPD at 255. The DPD concludes that collaboration requirements under the 2004 Permit would "mean that the claimants had to meet frequently on these issues." Again, this is an implied requirement, not the express requirement set forth in the Test Claim Permit.

2. Requirements in Section G.4

The DPD concludes that requirement in Section G.4 for permittees to implement a "watershed-specific public participation mechanism within each watershed," a minimum 30-day public review of and opportunity to comment on the Watershed Workplan and a description in the workplan of the public participation mechanisms to be used were not new, with the exception of a requirement relating to the identification of persons and entities anticipated to be involved during the development and implementation of the Watershed Workplan. DPD at 256-257.

While the Water Boards appeared to concede that these requirements were "new" in their comments on the Test Claim (DPD at 256), the DPD disagrees, citing Section E.3 of the 2004 Permit, which provided: "Each permittee shall incorporate a mechanism for public participation during the development and implementation of its SWMP." The more specific requirements of Test Claim Permit Section G.4, however, which require a "watershed-specific public participation," a 30-day public review and comment period and a description in the workplan of the public participation mechanisms to be used are not mirrored in the simple 2004 Permit requirement for permittees to incorporate public participation during development and implementation of the SWMP. This citation does not support a finding that the requirements in Section G.4 are not "new" or provide a higher level of service.

The DPD also cites federal regulations requiring public participation in the comprehensive planning process to reduce discharges to the MEP. DPD at 257. Neither these regulations nor the non-mandatory EPA MS4 Program Evaluation Guidance specify how public participation is to be incorporated into the Watershed Workplan. Under governing caselaw, they do not represent a federal mandate on Claimants. *LA County Permit Appeal I,* 1 Cal. 5th at 756; *San Diego Permit Appeal I,* 18 Cal. App. 5th at 683 (general federal regulatory language does not impose a federal mandate where regulation leaves the manner of implementation to the permittee). Citation of the regulations and Guidance is inapposite.

K. Requirements in Sections K.3.a.-c. Regarding Permittee Annual Reporting

Sections K.3.a.-c. of the Test Claim Permit specify the contents of the Annual Report each permittee was required to submit to the Water Board. A number of those requirements represented new mandates and/or higher levels of service to be performed by Claimants, as discussed below.[67]

1. Section K.3.c.(2)

This section requires that the Annual Report include matters required to be reported pursuant to Section J of the Test Claim Permit, which covers program effectiveness assessments. The DPD concludes that with the exception of one requirement,[68] these requirements were not "new." DPD at 270.

While the 2004 Permit MRP required that permittees include in their annual reports "[p]roposed revisions to the Individual SWMP, including areas in need of improvement based on

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[67] Claimants concur with the DPD's conclusions with respect to Sections K.3.a. and K.3.b.

[68] Relating to the requirement to include in the Annual Report an updated timeframe of a desired outcome level. See DPD at 270-271.

the assessment of effectiveness of each program component,"[69] the Test Claim Permit requirements went further, requiring that in responding to a finding in the program assessment that a desired outcome had not been achieved, a workplan was to be prepared, one that was required to contain eight specified elements, none of which was contained in the prior permit or MRP.[70]

This analysis applies to other sections of the 2004 Permit cited to support the conclusion that the Test Claim Permit requirements were not new. 2004 Permit Section C.2.a. merely required that upon a determination by a permittee that MS4 discharges were causing or contributing to an exceedance of a water quality standard, a report was to be submitted to the Water Board describing "additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards." This requirement is in no sense a cognate to the more detailed requirements of Section K.3.c.(2) (preparation of a description of the response to the effectiveness assessment required pursuant to Section J.2) and thus does not refute the conclusion that the former is a new program or higher level of service. *San Diego Unified, supra.* This requirement was also new and one that requiring a higher level of service by Claimants.

2. Section K.3.c.(4)

This section of the Test Claim Permit required that Claimants' Annual Report include information on various program components set forth in Table 5. The DPD (at 274-299) concludes that a number of requirements in the Section were new, but that some were not. In addition, the DPD concludes that the inclusion of information in the Annual Report regarding municipal projects was not eligible for a subvention of funds, because such projects were "discretionary." DPD at 292-293. The following are Claimants' comments on those conclusions.

a. Conclusions Regarding Table 5 Elements

The Test Claim asserted that a number of the requirements in Section K.3.c.(4) went beyond the requirements in the 2004 Permit, including the requirement in the Construction section of Table 5 to provide a "brief description of each high-level enforcement actions at construction sites including the effectiveness of enforcement." (A similar requirement was contained in the Commercial/Industrial section of Table 5). These additional requirement goes beyond the summary requirements in federal regulation and the requirements in the 2004 Permit and is thus a new program and higher level of service. Similarly, the Table 5 requirement under New Development to summarize the effectiveness of enforcement activities went beyond the 2004 Permit's requirement to assess "program effectiveness."

Claimants also take issue with the DPD's conclusion regarding Annual Report elements relating to municipal projects. The DPD concludes that requirements in Section K.3.c.(4) requiring permittees to "report on their own municipal projects, including unpaved road construction and maintenance, and identify a description and implementation of BMPs and inspection activities on those municipal projects" were discretionary, and thus not subject to a requirement for a subvention of funds. DPD at 292-293.

[69] 2004 Permit MRP, III.A.1.g.

[70] Test Claim Permit, Section J.2.b.

The DPD, citing *City of Merced* and *KHSD,* concludes that the "courts have made clear that costs incurred as a downstream result of a local discretionary decision is not legally compelled by state law." DPD at 293. Neither case, however, should be read so broadly. In both cases, the ancillary costs found to be within the ambit of the same discretionary, non-mandated act by local government. Thus, in *City of Merced,* the cost (loss of business goodwill) was simply another element of compensation associated with the same governmental act, exercise of the power of eminent domain on property. Similar, in *KHSD,* the cost (of public notice and agenda) was directly related to the discretionary act of holding a public meeting associated as part of a grant program the district had voluntarily entered into.

In those cases, the "downstream" costs were part and parcel of the package of costs incurred in the discretionary activity. That is not true of Section K.3.c.(4). Here, Claimants were mandated to include in their Annual Report a description of programs relating to various categories of projects, including municipal projects. That reporting had nothing to do with the imposition of conditions on the construction or operation of those municipal projects, but merely *the reporting to the Water Board of information concerning such projects.* This was no different than the requirement for Claimants to include information in their Annual Reports about private development projects. The mandate for Claimants here was to *report*, not to *apply conditions* required by the Test Claim Permit on municipal projects. The projects were already built. Whether or not the decision to build them was discretionary on the part of the municipality, the Test Claim Permit's obligation on permittees to report on them was not.[71]

L. Requirements in Section II.E.2.-5. of Attachment E Regarding Special Studies

The DPD concludes, correctly, that four "special studies" required by Section II.E.2.-5. of the Test Claim Permit MRP mandates a new program or higher level of service for Claimants. DPD at 300-311. There is no discussion in the DPD, however, regarding a fifth special study ordered to be conducted.

As set forth in Claimants' Rebuttal Comments, the Water Board ordered Claimants, in lieu of completing a study into intermittent and ephemeral stream conversion into perennial streams as well as performance of monitoring in an MS4 and receiving waters management study, to perform a study on the impacts of LID protections on downstream flows to Camp Pendleton and potential impacts on downstream beneficial uses ("LID Impacts Study"). *See* Rebuttal Comments at 52-53 and Exhibits A and B to Declaration of Claudio M. Padres, P.E., attached thereto.

While the LID Study was not required by the Test Claim Permit, it was required by the Water Board, acting under the powers granted by the Test Claim Permit; in fact in a letter from Water Board Assistant Executive Officer James G. Smith (Exhibit B to Padres Declaration), Mr.

[71] Claimants again note that they disagree with the conclusions in the DPD concerning whether the response of Claimants to Test Claim Permit requirements concerning municipal projects are "discretionary." *See* discussions in Sections III.E, III.F, III.G, and III.H, above. Additionally, Claimants reference their argument that certain municipal projects, such as the maintenance of unpaved roads, in fact were "practically compelled" and a core function of municipal government. *See* discussion in Section III.F above; *San Diego Permit Appeal II, supra.*[71]

Smith stated that he would not recommend that the Water Board enforce the requirements in Section II.E.5 and II.E.6 of the Test Claim Permit MRP for Claimants to complete the other two special studies if they conducted the LID Study.

Claimants request that the Commission also award a subvention of funds for the LID Impacts Study.

M. Requirements in Sections F., F.1., F.1.d, F.2., F.3.a.-d., and F.6. of the Test Claim Permit Regarding Prevention of Discharges

Finally, the Test Claim raised the inclusion of new language in Test Claim Permit Sections F., F.1., F.1.d., F.2., F.2.a.-d. and F.6 which required that permittees be "effectively prohibiting" non-stormwater discharges from the MS4, "prevent" illegal discharges into the MS4" and "prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. *See* Section 5 Narrative Statement at 61-63 and the DPD at 317-319 for the specific language at issue.

The DPD concludes that these provisions were not "new," that to "prevent" non-stormwater discharges was no more stringent than to "effectively prohibit" such discharges into the MS4 and that the "effectively prohibit" requirement had been in previous MS4 permits issued to Claimants. DPD at 324-325. The DPD also concludes that discharge prohibition and receiving water limitations language in the 2004 Permit which prohibited, *inter alia,* creation of a nuisance, discharges from MS4s that caused or contributed to exceedances of water quality objectives for surface water or groundwater and discharges from MS4s that caused or contributed to the violation of water quality standards, meant that the specific language in the above-cited provisions was not "new."

However, the Water Board in these Test Claim Permit Section F programmatic requirements was establishing a new program or higher level of service by including these additional specific requirements. For example, the industrial/commercial program in the 2004 Permit required the implementation of BMPs "to reduce the discharge of pollutants in runoff *to the MEP*."[72] The 2004 Permit BMP program programs for residential areas and municipal facilities also were required to reduce pollutants "*to the MEP*."[73] The construction program in the 2004 Permit required the permittees to implement a program "to address construction sites to reduce pollutants in runoff *to the MEP* during all construction phases."[74] (The 2004 Permit contained no provision requiring retrofitting of existing development.) By contrast, the counterpart provisions in the Test Claim Permit required a higher level of pollution control, e.g., requiring that discharges from the MS4 not cause or contribute to violations of water quality standards.[75]

With respect to the CWA requirement that MS4 permittees "effectively prohibit" the discharge of non-stormwater into the MS4, 33 U.S.C. § 1342(p)(3)(B)(ii), the regulatory language refers to programs that are to be implemented over time, not the immediate "prevents illicit discharges into the MS4" language found in the cited Section F provisions. For example,

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[72] 2004 Permit, Section H.2.c. (emphasis added).

[73] 2004 Permit, Sections H.1.c.(1); H.3.c. (emphasis added).

[74] 2004 Permit, Section G (emphasis added).

[75] *See* Test Claim Permit, Sections F.1 and F.1.d; F.2; F.3.a.; F.3.b.; F.3.c.; F.3.d.; F.6.

regulations regarding the proposed stormwater management program require the description of a program "including a *schedule*, to detect and remove . . . illicit discharges." 40 CFR § 122.26(d)(2)(iv)(B) (emphasis supplied). In the preamble to the final stormwater regulations, the requirement is that *"[u]ltimately*, such non-storm water discharges through a municipal storm sewer must either be removed from the system . . . ." (55 Fed. Reg. 47990, 47995 (November 16, 1990) (emphasis supplied)).

The counterpart provisions in the 2004 Permit also did not contain language requiring the prevention or elimination of such non-stormwater discharges. *See* 2004 Permit, Section F (Development Planning); Section G (Construction); Section H (Existing Development, including H.1 (municipal facilities), H.2 (industrial/commercial facilities) and H.3 (residential)); or Section I (Education). It is those specific counterparts that the Commission must evaluate in determining whether the Section F requirements of the 2010 Permit were a new program or higher level of service than that required under the previous 2004 Permit. *San Diego Unified, supra; Lucia Mar, supra.*

IV. COMMENTS ON FUNDING SOURCES

The DPD concludes that with regard to certain activities it identified as new state-required mandates in the Test Claim Permit, Claimants are not entitled to a subvention of funds under article XIII B, section 6 of the California Constitution. 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" sufficient to pay for certain mandates; and

3. Beginning on January 1, 2018, the adoption of new California legislation cut off the ability of Claimants to seek a subvention of funds after that date for mandates fundable through property-related fees, by re-defining the term "sewer" in a statute interpreting terms in the state Constitution to include storm drains, and thereby expanding the categories of projects for which a fee may be imposed without a majority vote of approval.

Each of these conclusions 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 Fees

The DPD concludes (at 365-368) 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 as constituting new state mandates. Claimants respond to those allegations next below.

1. Non-Applicability of Regulatory Fee Authority to Public Facilities and Activities

Claimants obviously cannot charge fees for their own projects, making it impossible to recover costs through development or other regulatory fees. The DPD concludes that public development projects are "discretionary" and thus not mandated by the state. In response, Claimants have demonstrated in Section III above that such projects are not "discretionary" as being legally or practically compelled. In addition, ancillary requirements associated with public projects, such as reporting, inventorying and others, are mandatory for permittees. *See* discussions at Sections III.E, III.F., III.G. and III.H, above.

Claimants submit that the requirements of the following Test Claim Provisions, as they apply to their public facilities or projects,[76] are eligible for reimbursement:

- Sections F.1.d.1., 2., 4., 7., h., F.3.d.1.-5.
- Section F.1.f.
- Sections F.2.d.3. and F.2.e.(6)(e)
- Sections F.1.i. and F.3.a.10.
- Sections G.1.-5.
- Sections K.3.a.-c.

2. Claimants Lack Regulatory Fee Authority For Numerous Test Claim Permit Provisions

The DPD concludes that with respect to a number of Test Claim Permit provisions, Claimants had regulatory fee authority to charge third parties for the costs of such provisions. However, an examination of the provisions in question rebuts that conclusion.

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."[77] 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 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).[78]

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:

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[76] As discussed in Section IV.B.2. next below, Claimants also lack regulatory fee authority to assess fees from private developments or projects for certain of these provisions because they involved reporting or other obligations unrelated to the construction or development of the projects.

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

[78] 59 Cal.App.5th at 562.

(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 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 the Test Claim Permit provisions identified in the DPD at 365.

a. Retrofitting Provisions in Section F.3.d.

The DPD concludes, without discussion, that Claimants can assess regulatory fees to pay costs relating to the retrofitting of existing development. But in such a situation, there is no property owner or developer upon which fees can be assessed to pay such costs as identifying and inventorying existing areas of development (Section F.3.d.1.); costs to "evaluate and rank" the inventoried areas to prioritize retrofitting (Section F.3.d.2.); or, costs to consider the results of the evaluation in prioritizing Claimant work plans for the following year.

All of these requirements are unrelated to potential future private development, for which development fees can be obtained, but rather to how Claimants must evaluate *existing* developments.[79] And, as the Test Claim Permit expressly provided, the work required of Claimants was not intended to benefit or burden any particular parcel but to improve water quality generally by addressing "the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat

[79] In this way, the factual situation can be distinguished from that present in *San Diego Permit Appeal II,* where the question related to how the costs of preparing LID and HMP documentation was to be allocated amongst future development projects. 85 Cal.App.5th at 586-95.

restoration, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards." Test Claim Permit, Section F.3.d.

Fees for requirements which "redound to the benefit of all" 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]."[80] *See also LA County Permit Appeal II, supra,* holding that placing trash receptacles at transit stops benefitted the "public at large"[81] and that associated costs could not be passed on to any particular person or group.[82]

b. BMP Maintenance Tracking in Section F.1.f.1

Section F.1.f.1 of the Test Claim Permit required permittees to maintain a database of all projects with a structural post-construction BMP implemented since 2005. 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. Moreover, the requirement to include BMPs implemented starting in 2005, five years before the effective date of the Test Claim Permit, meant that permittees would have been unable to recover costs of entering those pre-Permit BMPs on the database through the development process, if that were even possible.

c. Annual JRMP Reporting Checklist in Section K.3.c.3.

The DPD concludes that Claimants' cost for the JRMP annual report checklist requirements relating to Construction, New Development, Post Construction Development, Municipal (other than their own)/Commercial/Industrial could be recovered as regulatory fees. Section K.3.c.3. of the Test Claim Permit mandated a reporting requirement intended to inform the Water Board of the status of permittees' program. The checklist served as a statistical tool but provided no benefits to any of the projects which were among the statistics reported. The purpose of the checklist, and the other annual reporting requirements in Test Claim Permit Section K.3.c., was not to administer or facilitate any inspection or other interaction with [property-related] but rather to "maintain records demonstrating that Permit activity requirements have been met, which allows the San Diego Water Board to confirm compliance as needed . . . ." Test Claim Permit Fact Sheet at 175.

d. Annual JRMP Program Component Table 5 in Section K.3.c.4.

A similar analysis to that above applies to the requirement to provide the information specified in Test Claim Permit Table 5 in the JRMP annual report. The DPD concludes that such

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[80] *Ibid.*

[81] 59 Cal.App.5th at 569.

[82] *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."

costs, as they apply to New Development, Construction, Municipal (other than own), Commercial/Industrial, Residential and Retrofitting Existing Development, could be covered through regulatory fees. DPD at 343. While the informational requirements of Table 5 are more comprehensive than those in the checklist required by Section K.3.c.3., their purpose is no different. It is not to administer or facilitate the interaction between the Claimants and property owners/operators or projects within their jurisdictions, a task which potentially could be funded through regulatory fees, but rather to "maintain records." As such, the costs associated with such activities are not recoverable as regulatory fees.

3. Other Test Claim Permit Requirements As to Which Claimants Lack Regulatory Fee Authority

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

- Section B.2., removing categories of irrigation-related discharges from the list of exempt non-stormwater discharges.
- Sections C., F.4.d. and e., and Section II.C. of the MRP, relating to NALs.
- Section D, relating to SALs.
- Section F.2.e.(6)(e), referring to the preempted costs of reviewing monitoring data required by the State GCP.
- Section F.3.b .4.a.ii.m referring to the preempted costs of reviewing monitoring data required by the State IGP.

None of the costs of the first three of these requirements could be recovered as regulatory fees, as the provisions constitute property-related fees subject to the majority vote requirement in Calif. Const. article XIII D, section 6(c). 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 356. With respect to the last two requirements, please see the final paragraph of Sections III.G and III.I, above.[83]

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

Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal.App.4th 1351 *("City of Salinas")* determined 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.[84]

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)):

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[83] In addition, to the extent the "Section F" Test Claim Permit requirements discussed in Section III.M above cannot be funded by regulatory fees, they would represent unfunded mandates.

[84] 98 Cal.App.4th at 1358-359.

> "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).

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." Govt. Code § 53751(h).

The Legislature 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." Govt. Code § 53751(g). SB 231 further cites a series of pre-Proposition 218 statutes and cases which, the legislation asserts, "reject the notion that the term 'sewer' applies only to sanitary sewers and sanitary sewerage." Govt. Code § 53751(i). 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*[85] renders any costs incurred by Claimants after January 1, 2018 (the effective date of SB 231) not eligible for reimbursement. DPD at 379.[86]

1. SB 231 Does Not Apply Retroactively

While not expressly so finding, the DPD implicitly concludes that the amendments to Govt. Code §§ 53750 and 53751 operate *prospectively* from January 1, 2018 and do not have retroactive effect. The Third District Court of Appeal so held in *San Diego Permit Appeal II.*[87]

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

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[85] (2019) 33 Cal.App.5th 205.

[86] 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.

[87] 85 Cal.App.5th at 577.

When it comes to the validity of any statute purporting to interpret the California Constitution, it is undisputed that the final word is left to the courts.[88] For this reason, the ultimate validity of SB 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,[89] 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 a "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;*[90] *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 the case of 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, flood control,

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

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

[90] 40 Cal. 4th at 1037.

drainage systems or vector control." Calif. Const. article XIII D, section 5(a) (emphasis added). 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."* Govt. Code § 53750(d) (emphasis added). 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."[91]

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 from the majority vote requirement "sewer, water and refuse collection services." Given that another section of the proposition specifically called out "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 6(c) to be limited to sanitary sewers. This was the holding of the Third District Court of Appeal in *San Diego Permit Appeal II*.[92]

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

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[91] (2004) 32 Cal. 4th 409, 427.

[92] 85 Cal.App.5th at 568.

without taxpayer consent."[93] Any interpretation of the breadth of the meaning of the exception for "sewer services" must therefore take that intent into account and interpret exceptions to limits on the taxing or fee power narrowly.[94]

Thus, the unambiguous, 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, SB 231 justifies 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[95] 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,[96] 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 tendency would be to consider only sanitary sewers to fall under the definition of "sewer."

(b) Govt. Code § 23010.3. This statute[97] 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 to the name of this statute, Streets & Highways Code §§ 10000-10706, but cites no section supporting SB 231's interpretation of Proposition 218. Moreover, within this Act, Streets &

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

[94] *Ibid.*

[95] Govt. Code § 53751(i)(1)

[96] *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."

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

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 clearly 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[98] 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 whether defendant Edison's had to pay to relocate its gas lines to allow construction of District storm drains. In stating that there was no distinction (as to the payment obligation) between sanitary sewers and storm drains or sewers, the Court was not commenting on whether 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).[99] However, 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 between these functions and assigning the function of sanitary services to "sewerage."[100]

Ramseier involved a dispute over a contract to expand the district's "storm and sanitary sewer system."[101] This was the only reference to "sewers" in the case, and that reference distinguishes 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.[102] While these cases present only limited examples of how the term "storm sewer" or "sanitary sewer" were employed, it is clear that in all, a distinction is drawn between sanitary sewers and storm sewers.

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

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

[99] 22 Cal.App.3d at 874 n.9.

[100] 22 Cal.App.3d at 869 n.8.

[101] 197 Cal.App.2d at 723.

[102] 91 Cal. App. at 172.

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 referring to 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.[103]

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."[104] 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 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.

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[103] *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).

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

Thus, there is significant evidence, in the language of the ballot measure itself, 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 May 19, 2023, is true and correct to the best of my personal knowledge, information, or belief.

BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN

By:______________________________
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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.

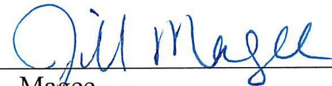
On May 22, 2023, I served the:

- **Finance's Late Comments on the Draft Proposed Decision filed May 22, 2023**
- **Claimants' Comments on the Draft Proposed Decision filed May 19, 2023**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, 11-TC-03
  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections B.2., C., D., F.1.d.1., 2., 4., 7., F.1.f., F.1.h., F.1.i., F.2.d.3., F.2.e.6.e., F.3.a.10., F.3.b.4.a.ii., F.3.d.1.-5., F.4.d., F.4.e., G.1.-5., K.3.a.-c., Attachment E., Sections II.C. and II.E.2.-5., and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6.,
  Adopted November 10, 2010
  County of Riverside, Riverside County Flood Control and Water Conservation District, and Cities of Murrieta, Temecula, and Wildomar, 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 May 22, 2023 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/17/23

Claim Number: 11-TC-03

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016

Claimants: City of Murrieta
City of Temecula
City of Wildomar
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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