STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

October 12, 2026

Mr. Chris Hill
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Gregory Newmark
Duane Morris, LLP
865 South Figueroa Street, Suite 3100
Los Angeles, CA 90017-5450

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

Re: Decision
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, 16-TC-03
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, Provisions C.3.j, C.8., C.10.a., C.10.b., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e, Adopted on November 19, 2015 and Effective on January 1, 2016
City of Union City, Claimant

Dear Mr. Hill and Mr. Newmark:

On October 9, 2026, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-captioned matter.

Very truly yours,

Juliana F. Gmur
Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, Provisions C.3.j., C.8., C.10.a., C.10.b., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e., Adopted on November 19, 2015, and Effective on January 1, 2016 Filed on June 30, 2017 City of Union City, Claimant	Case No.: 16-TC-03 *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 9, 2026*) *(Served October 12, 2026)*

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on October 9, 2026.

Juliana F. Gmur, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM	Case No.: 16-TC-03
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, Provisions C.3.j., C.8., C.10.a., C.10.b., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e., Adopted on November 19, 2015, and Effective on January 1, 2016	*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049*
Filed on June 30, 2017	DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.
City of Union City, Claimant	(*Adopted October 9, 2026*)
	(*Served October 12, 2026*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on October 9, 2026. Jiwon Jeong appeared on behalf of the Department of Finance. Teresita Sablan and Stephanie Yu appeared on behalf of the State Water Resources Control Board and the San Francisco Bay Regional Water Quality Control Board. No witnesses appeared on behalf of the City of Union City.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 6-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Deborah Gallegos, Representative of the State Controller	Yes
Karen Greene Ross, Public Member	Yes
Monica Jimenez, Representative of the State Treasurer, Vice Chairperson	Yes
Michele Perrault, Representative of the Director of the Department of Finance, Chairperson	Yes
Alexander Powell, Representative of the Director of the Governor's Office of Land Use and Climate Innovation	Yes

Summary of the Findings

This Test Claim alleges reimbursable state mandated activities arising from Order R2-2015-0049, adopted by the San Francisco Bay Regional Water Quality Control Board effective January 1, 2016.[1] The claimant has pled the following provisions from Order R2-2015-0049, alleging these provisions impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Provision C.8., which the claimant included "out of an abundance of caution" as it sought reimbursement for the continued costs of monitoring programs that were originally imposed by the prior permit and which were addressed by the prior Test Claims in this series (*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05).[2]
- Provisions C.10.a.i., ii., and iii. and C.10.b.i. and ii., addressing the reduction of trash loads.[3]
- The following provisions which implement previously adopted TMDLs for mercury and PCBs:
    - Provision C.3.j. requires the permittees to develop a Green Infrastructure Plan, adopt policies and ordinances, conduct outreach, and report progress on the planning.[4]
    - Provisions C.11.c. and C.12.c. require the permittees to implement Green Infrastructure projects to achieve the load reductions for mercury and PCBs, in accordance with the TMDLs, prepare a reasonable assurance analysis of future mercury and PCBs load reductions, which demonstrate how Green Infrastructure projects will achieve the total load reduction by 2040, and to report on Green Infrastructure implementation.[5]
    - Provision C.11.a. requires the permittees to implement mercury source and treatment control measures and pollution prevention strategies to reduce loads throughout the permit area and submit various reports.[6]
    - Provision C.11.b. requires permittees to develop and implement an assessment methodology and data collection program to quantify mercury

[1] Exhibit A, Test Claim, page 4.

[2] Exhibit A, Test Claim, pages 30-31 (Written Narrative).

[3] Exhibit A, Test Claim, pages 476-478 (test claim permit, Provisions C.10.a.i.-iii.) and 478-479 (Test Claim Permit, Provisions C.10.b.i.-ii.).

[4] Exhibit A, Test Claim, pages 422-427 (test claim permit, Provision C.3.j.).

[5] Exhibit A, Test Claim, pages 488-490 (test claim permit, Provision C.11.c.) and 495-497 (Test Claim Permit, Provision C.12.c.).

[6] Exhibit A, Test Claim, pages 486-487 (test claim permit, Provisions C.11.a.).

loads reduced through implementation of any and all pollution prevention, source control and treatment control efforts required by the test claim permit's provisions or load reductions achieved through other relevant efforts.[7]

- Provision C.12.a. requires the permittees to implement PCBs source and treatment control measures and pollution prevention strategies to reduce loads throughout the permit area, develop and implement an assessment methodology and data collection program to quantify in a technically sound manner mercury and PCBs loads reduced; and submit various reports.[8]
- Provision C.12.d. requires the permittees to prepare a plan and schedule of future PCBs control measure implementation and reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[9]
- Provision C.12.e. requires permittees to evaluate the presence of PCBs in caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[10]

The Test Claim was timely filed on June 30, 2017, with a potential period of reimbursement beginning on the permit's effective date of January 1, 2016.[11]

The Commission does not have the authority to re-address the monitoring requirements in Provision C.8. The Commission addressed the monitoring requirements in Provision C.8. imposed by the prior permit in Test Claim *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05, and issued a Decision on January 24, 2025.[12] The claimant has not alleged that this test claim permit requires any new activities for Provision C.8. when compared to the prior permit, and there are no allegations that the activities in Provision C.8. found to be state mandates under the prior permit have changed. The Commission's Decision on the prior Test Claim is a final, binding decision, which cannot be disturbed unless

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[7] Exhibit A, Test Claim, page 487-488 (test claim permit, Provision C.11.b.).

[8] Exhibit A, Test Claim, pages 492-495 (test claim permit, Provision C.12.a.).

[9] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.).

[10] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.).

[11] Exhibit A, Test Claim, pages 4 (Written Narrative), 383 (test claim permit). See California Code of Regulations, title 2, section 1183.1(c) (Register 2016, No. 38); Government Code section 17557(e).

[12] See Commission on State Mandates, Test Claim Decision on *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074,* 10-TC-02, 10-TC-03, 10-TC-05, adopted January 24, 2025, https://csm.ca.gov/matters/10-TC-01-02-03-05/doc68.pdf (accessed February 27, 2025).

litigated and directed by the court to be set aside or modified pursuant to Government Code section 17559(b) or a request for a new test claim decision based on a subsequent change in the law is filed pursuant to Government Code section 17570.[13]

The Commission finds that the trash provisions are not new and do not mandate a new program or higher level of service. Provision C.10.a.i. requires permittees to reduce trash discharges to receiving waters from their 2009 levels according to a schedule that requires them to attain 70 percent reduction by July 1, 2017, and 80 percent reduction by July 1, 2019.[14] To comply with the reduction requirements, Provision C.10.a.ii. requires the implementation of "trash prevention and control actions, including full trash capture systems and other trash management actions, or combinations of actions, with trash discharge control equivalent to or better than full trash capture systems, to reduce trash to a Low trash generation rating or better," and to ensure that lands they do not own or operate but are plumbed directly to their storm drain system in a Very High, High, or Moderate trash generation area are either equipped with full trash capture systems or are managed with trash discharge control actions equivalent to or better than a full trash capture system.[15] Provision C.10.a.iii. requires permittees to install and maintain a mandatory minimum number of full trash capture systems, to treat runoff from an area equivalent to 30 percent of the retail/wholesale land area, as documented by the Association of Bay Area Governments, which drains into the storm drain system within their jurisdiction.[16] Provision C.10.b.i. provides specific standards for proper maintenance and documentation of permittees' full trash capture systems, and requires permittees to annually certify each of their full trash capture systems has been operated and maintained to meet those standards.[17] Provision C.10.b.ii. requires permittees to maintain documentation for all of their non-full trash capture system control actions, and to conduct visual on-land assessments of each area where they implemented non-full trash capture system control actions or a combination of actions other than full trash capture, to determine or verify the effectiveness of the action or combination of actions.[18]

The prior permit required the timely implementation of control measures to reduce trash loads by 40 percent by 2014, by 70 percent by 2017, and by 100 percent by 2022.[19] This is the same schedule for compliance as in the test claim permit and the requirement to reduce trash loads by 80 percent by 2019 is in line with the existing

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[13] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

[14] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.a.i.).

[15] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.).

[16] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.iii.).

[17] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.).

[18] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.).

[19] Exhibit A, Test Claim, page 174 (prior permit, Provision C.10).

schedule and therefore is not new. The prior permit also had a specific provision requiring permittees to install a mandatory minimum number of full trash capture systems, which has not changed with this permit and is not new.[20] For the requirement to inspect and maintain full trash capture systems, federal law has always required permittees to properly operate and maintain their facilities and systems of treatment and control, and to maintain documentation.[21] This duty also applies for non-full trash capture system control actions, and the on-land visual assessments are a quality assurance procedure, which federal regulations require for proper operation and maintenance of these facilities and systems of treatment and control.[22] Though the claimant may complain that these provisions are more prescriptive, burdensome, and costly than what was required under the prior permit, the fact is the permittees were always required to perform these activities; all the test claim permit has done is specify what proper performance entails.

The Commission further finds the test claim permit imposes the following new requirements when compared to prior law:

1. Green Infrastructure Plan (Provision C.3.j.i.-iv.):
    a. Green Infrastructure Plan (Provision C.3.j.i.)
        - Prepare a framework or workplan describing specific tasks and timeframes for development for its Green Infrastructure Plan, to be approved by the Permittee's governing body, mayor, city manager, or county manager by June 30, 2017. This framework or workplan shall include a statement of purpose, tasks, and timeframe needed to complete all requirements in Provision C.3.j.i.2. (discussed below).[23]
        - Prepare a Green Infrastructure Plan, subject to Executive Officer approval, that contains all the following:
            - A mechanism (such as SFEI's Green PlanIT tool) to prioritize and map areas for potential and planned projects, both public and private, on a drainage-area specific basis, for implementation by 2020, by 2030, and by 2040, that includes criteria for prioritization and outputs that can be incorporated into the Permittees' long-term planning and capital improvement processes.
            - Outcomes from the above-described mechanism, including but not limited to, the prioritization criteria, maps, lists, and all other information, as appropriate. Individual project-specific reviews do not need to be

[20] Exhibit A, Test Claim, page 175 (prior permit, Provision C.10.a.iii.).

[21] Code of Federal Regulations, title 40, sections 122.41(e), 122.41(j)(2), and 122.42(c)(4).

[22] Code of Federal Regulations, title 40, section 122.41(e).

[23] Exhibit A, Test Claim, page 423 (test claim permit, Provision C.3.j.i.1.).

submitted with the Plan, but shall be made available for review upon request.

- Targets for the amount of impervious surface from public and private projects within the Permittee's jurisdiction to be retrofitted by 2020, by 2030, and by 2040.
- A process for tracking and mapping completed projects, public and private, and making the information publicly available online (I.E., SFEI's Green PlanIT tool).
- General guidelines for overall streetscape and project design and construction so that projects have a unified complete design that implements the range of functions associated with the project.
- Standard specifications, and as appropriate, typical design details and related information necessary for the Permittee to implement Green Infrastructure Projects in its jurisdiction, which shall be sufficient to address the different street and project types within a Permittee's jurisdiction, as defined by land use and transportation characteristics.
- Requirements that projects be designed to meet the treatment and hydromodification sizing requirements outline in Provisions C.3.c. and C.3.d. For projects that are not subject to these requirements according to Provision C.3.b.ii. (non-regulated projects), Permittees may collectively propose a single approach for how to proceed when project constraints preclude fully meeting the sizing requirements, which can include options for addressing specific issues or scenarios.
- A summary of planning documents the permittee has updated or otherwise modified to incorporate Green Infrastructure requirements (General Plans, Specific Plans, Complete Street Plans, Active Transportation Plans, Storm Drain Master Plans, Pavement Work Plans, Urban Forestry Plans, Flood Control/Management Plans, and any other plans that may impact the future alignment, configuration or design of impervious surfaces within the Permittee's jurisdiction). These modifications are to be completed by no later than the end of the permit term.
- A workplan identifying how the Permittee will ensure that Green Infrastructure and low impact development are appropriately included in future plans.
- A workplan to complete prioritized projects identified as part of an Alternative Compliance Program or Early Implementation as outlined in Provision C.3.e. or C.3.j.ii.
- An evaluation of prioritized project funding options including, but not limited to: Alternative Compliance funds; grant monies, including transportation project grants from federal, State, and local agencies;

existing Permittee resources; new tax or other levies; and other sources of funds.[24]

- Adopt policies, ordinances, and/or other appropriate legal mechanisms to ensure implementation of the Green Infrastructure Plan in accordance with the requirements of this provision.[25]
- Conduct outreach and education in accordance with the following:
  - Conduct public outreach on the requirements of this provision, including outreach coordinated with adoption or revision of standard specifications and planning documents, and with the initiation and planning of infrastructure projects. Such outreach shall include general outreach and targeted outreach to and training for professionals involved in infrastructure planning and design.
  - Train appropriate staff, including planning, engineering, public works maintenance, finance, fire/life safety, and management staff on the requirements of this provision and methods of implementation.
  - Educate appropriate Permittee elected officials (e.g., mayors, city council members, county supervisors, district board members) on the requirements of this provision and methods of implementation.[26]
- Each permittee shall report on its planning progress as follows:
  - Submit documentation in the 2017 Annual Report that its framework or workplan for development of its Green Infrastructure Plan was approved by its governing body, mayor, city manager, or county manager by June 30, 2017.
  - Submit its completed Green Infrastructure Plan with the 2019 Annual Report.
  - Submit documentation of its legal mechanisms to ensure implementation of its Green Infrastructure Plan with the 2019 Annual Report.
  - Submit a summary of its outreach and education efforts in each Annual Report.[27]

b. Early Implementation – List of Green Infrastructure Projects (Provision C.3.j.ii.):

- *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, prepare and maintain a list of Green Infrastructure Projects, public and private, that are already planned for

[24] Exhibit A, Test Claim, pages 423-425 (test claim permit, Provision C.3.j.i.2.).

[25] Exhibit A, Test Claim, page 425 (test claim permit, Provision C.3.j.i.3.).

[26] Exhibit A, Test Claim, pages 425-426 (test claim permit, Provision C.3.j.i.4.).

[27] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.i.5.).

implementation during the permit term and infrastructure projects planned for implementation during the permit term that have potential for Green Infrastructure measures.[28]

- *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, submit the list with each Annual Report and a summary of planning or implementation status for each public Green Infrastructure Project and each private Green Infrastructure Project that is not also a Regulated Project as defined in Provision C.3.b.ii. Include a summary of how each public infrastructure project with Green Infrastructure potential will include Green Infrastructure measures to the maximum extent practicable during the permit term. For any public infrastructure project where implementation of Green Infrastructure measures is not practicable, submit a brief description of the project and the reasons Green Infrastructure measures were impracticable to implement.[29]

c. Participation in Processes to Promote Green Infrastructure (Provision C.3.j.iii.):

- Either individually or collectively, track processes, assemble and submit information, and provide informational materials and presentations as needed to assist relevant regional, State, and federal agencies to plan, design, and fund incorporation of Green Infrastructure measures into local infrastructure projects, including transportation projects. Issues to be addressed include coordinating the timing of funding from different sources, changes to standard designs and design criteria, ranking and prioritizing projects for funding, and implementation of cooperative in-lieu programs.[30]
- In each Annual Report, report on the goals and outcomes during the reporting year of work undertaken to participate in processes to promote Green Infrastructure.[31]
- In the 2019 Annual Report, submit a plan and schedule for new and ongoing efforts to participate in processes to promote Green Infrastructure.[32]

d. Tracking and Reporting Progress (Provision C.3.j.iv):

- Either individually or collectively, develop and implement regionally-consistent methods to track and report implementation of Green Infrastructure measures including treated area and connected and disconnected impervious area on both public and private parcels within their jurisdictions. The methods shall also address tracking needed to provide reasonable assurance that

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[28] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.1.).

[29] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.2.).

[30] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.iii.1.).

[31] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iii.2.).

[32] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iii.3.).

wasteload allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[33]

- In each Annual Report, report progress on development and implementation of the tracking methods.[34]
- In the 2019 Annual Report, submit the tracking methods and report implementation of Green Infrastructure measures including treated area, and connected and disconnected impervious area on both public and private parcels within their jurisdictions.[35]

2. Reasonable Assurance Analysis (Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.):
   - Prepare a reasonable assurance analysis of future mercury and PCBs load reductions by doing the following:
     - Quantify the relationship between areal extent of Green Infrastructure implementation and mercury and PCBs load reductions, taking into consideration the scale of contamination of the treated area as well as the pollutant removal effectiveness of likely green infrastructure strategies.[36]
     - Estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, 2030, and 2040.[37]
     - Estimate the amount of mercury/PCBs load reductions that will result from Green Infrastructure implementation by 2020, 2030, and 2040.[38]
     - Quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through implementation of Green Infrastructure Projects.[39]
     - Ensure that the calculation methods, models, model inputs, and modeling assumptions used to fulfill provisions C.11.c.ii.2.a.-d. and

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[33] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iv.1.).

[34] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.2.).

[35] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.3.).

[36] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.a., C.12.c.ii.2.a.).

[37] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.b., C.12.c.ii.2.b.).

[38] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.c., C.12.c.ii.2.c.).

[39] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.d., C.12.c.ii.2.d.).

C.12.c.ii.2.a.-d. above have been validated through a peer review process.[40]

- Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions. This submittal shall include all data used and a full description of the models and model inputs relied on to establish this relationship.[41]
- Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of the models and model inputs relied on to generate this estimate.[42]
- Submit in the 2020 Annual Report a reasonable assurance analysis to demonstrate quantitatively that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through the implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[43]

3. Progress Report on List of Watersheds and Management Areas Where Mercury Control Measures are or will be Implemented (Provision C.11.a.iii.1.):
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[44]
4. PCBs Reporting (Provisions C.12.a.iii.1. and C.12.a.iii.2.):
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs

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[40] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.e., C.12.c.ii.2.e.).

[41] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

[42] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[43] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

[44] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[45]

- In the 2016 Annual Report, include the following information:
  - A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
  - For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
  - Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures for PCBs.[46]

5. Prepare PCBs control measures implementation plan, schedule, and reasonable assurance analysis to achieve the PCBs TMDL wasteload allocations by 2030 (Provision C.12.d.):
   - Prepare a PCBs control measures implementation plan, which must identify all technically and economically feasible PCBs control measures to be implemented (including green infrastructure projects).[47]
   - Include a schedule for PCBs control measure implementation according to which these technically and economically feasible PCBs control measures will be fully implemented by 2030.[48]
   - Provide an evaluation and quantification of the PCBs load reduction of such measures as well as an evaluation of costs, control measure efficiency and significant environmental impacts resulting from their implementation.[49]
   - Prepare a reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[50]

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[45] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.iii.1.).

[46] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[47] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.1.).

[48] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.2.).

[49] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.3.).

[50] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.i.).

- Submit the plan and schedule required by Provision C.12.d. in the 2020 Annual Report.[51]

6. Evaluate the presence of PCBs in caulks/sealants in storm drain or roadway infrastructure in public rights-of-way (Provision C.12.e.):
    - Collect at least 20 samples from throughout the permit-area of the caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[52]
    - Analyze the samples taken for PCBs in such a way that is able to detect a minimum PCB concentration of 200 parts per billion.[53]
    - Report on the results of this investigation, including all data gathered, no later than the 2018 Annual Report.[54]

The remaining requirements alleged by the claimant are either not new, not mandated by the state, or are not a new program or higher level of service.

Finally, the Commission finds that the new state-mandated activities result in costs mandated by the state for some of the activities based on the following findings:

1. There is substantial evidence in the record that permittees incurred costs exceeding $1,000 and used proceeds of taxes to comply with the test claim permit.
2. Pursuant to Government Code section 17556(d), permittees have regulatory fee authority sufficient as a matter of law to fund the new state-mandated activities related to developing and implementing the Green Infrastructure Plan (Provision C.3.j.i.-iv.), and thus, there are no costs mandated by the state for these activities.
3. The Permittees have constitutional and statutory authority to charge property-related fees for the reasonable assurance analysis of future mercury and PCBs load reductions (C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.); required mercury progress report on list of watersheds and management areas where control measures are or will be implemented (C.11.a.iii.); PCBs reporting (C.12.a.iii.1. and 2.); PCBs control measures implementation plan (C.12.d.); and PCBs caulk and sealant testing (C.12.e.). However, from January 1, 2016 (the beginning date of the potential period of reimbursement) to December 31, 2017, these fees are subject to the voter approval requirement in article XIII D, section

[51] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.iii.).

[52] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[53] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[54] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.iii.).

6(c), and therefore fee authority is not sufficient as a matter of law.[55] Under these limited circumstances, Government Code section 17556(d) does not apply, and there are costs mandated by the state.[56] Any fee revenues received must be identified as offsetting revenue. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, other state funds, and other funds that are not a claimant's local proceeds of taxes shall be identified and deducted from this claim.

Based on *Paradise Irrigation District* case and the Legislature's enactment of Government Code sections 53750 and 53751 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state on or after January 1, 2018, to comply with these activities, because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

Accordingly, the Commission partially approves this Test Claim for the reasonable assurance analysis of future mercury and PCBs load reductions (C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.); required mercury progress report on list of watersheds and management areas where control measures are or will be implemented (C.11.a.iii.); PCBs reporting (C.12.a.iii.1. and 2.); PCBs control measures implementation plan (C.12.d.); and PCBs caulk and sealant testing (C.12.e.) from January 1, 2016, to December 31, 2017 only.

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

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

Table of Contents

I. Chronology 15

II. Background 16

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[55] See *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[56] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581; Government Code sections 53750 and 53751 (SB 231, eff. January 1, 2018, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351); *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

A. Federal Clean Water Act. 16
B. The California Water Pollution Control Program 22
C. The Test Claim Permit 25
III. Positions of the Parties and Interested Parties 26
A. City of Union City 26
B. Regional Board 29
1. Not Mandated by the State 29
2. Not a New Program or Higher Level of Service 30
3. No Costs Mandated by the State Because the Claimants Have Fee Authority 31
4. Comments on the Draft Proposed Decision 32
B. Department of Finance 33
IV. Discussion 34
A. The Commission Has Jurisdiction Over This Test Claim. 35
1. The Test Claim Was Timely Filed and Has a Potential Period of Reimbursement Beginning January 1, 2016. 35
2. The Claimants Are Not Required to Exhaust Administrative Remedies with the State Water Board Prior to Filing a Test Claim with the Commission. 36
3. The Commission Does Not Have the Authority to Re-Address the Monitoring Requirements in Provision C.8. Imposed by the Prior Permit, Since the Legal Findings on that Provision in Test Claim *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05, Are Final and Binding. 38
4. The Requirements Pled in the 2015 Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the 2009 Permit, to Determine if the Activities Required by the 2015 Test Claim Permit Are New. 41
B. Some of the Requirements Imposed by the Provisions of the Test Claim Permit Pled Impose New State-Mandated Requirements that Constitute a New Program or Higher Level of Service Within the Meaning of Article XIII B, Section 6 of the California Constitution. 43
1. The Requirements Pled in Provisions C.10.a.i., ii., and iii. and C.10.b.i. and ii, Addressing the Reduction of Trash Loads, Do Not Mandate New Programs or Higher Levels of Service. 43
2. Some Requirements in the Provisions Implementing the Mercury and PCBs TMDLs (Provisions C.3.j., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e.) Impose State-Mandated New Programs or Higher Levels of Service. 66

C. Pursuant to Government Code 17556(d), There Are No Costs Mandated by the State When the Claimants Have the Authority to Impose Fees Sufficient to Pay for the New State-Mandated Requirements. 145

1. There Is Substantial Evidence in the Record that Permittees Incurred Increased Costs and Used Proceeds of Taxes to Comply with the Test Claim Permit. 155

2. Pursuant to Government Code Section 17556(d), Permittees Have Authority to Impose Regulatory Fees on Development Sufficient as a Matter of Law to Fund the New State-Mandated Activities Related to Developing and Implementing the Green Infrastructure Plan Requirements (Provision C.3.j.i.-iv.), and thus, There Are No Costs Mandated by the State for These Activities. Permittees also Have Authority to Impose Property-Related Stormwater Fees Sufficient as a Matter of Law to Fund the Remaining New State-Mandated Activities Imposed by Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., C.12.c.iii.1.-3., C.11.a.iii.1., C.12.a.iii.1.-2., C.12.d., and C.12.e., Beginning January 1, 2018, and, thus, There Are No Costs Mandated by the State for Those Activities Beginning January 1, 2018. 160

V. Conclusion 197

COMMISSION FINDINGS

I. Chronology

11/19/2015	The Test Claim Permit, San Francisco Bay Regional Water Quality Control Board, Order No. R2-2015-0049 was adopted; the test claim permit became effective on January 1, 2016.[57]
06/30/2017	The claimant filed the Test Claim.[58]
09/11/2017	Commission staff issued the Notice of Complete Test Claim Filing, Schedule for Comments, Request for Administrative Records, and Notice of Tentative Hearing Date.
10/10/2017	The Department of Finance (Finance) filed comments on the Test Claim.[59]
11/07/2017-11/16/2017	The claimant and the Regional Board each requested extensions of time to file comments, which were respectively granted and partially granted for good cause.
02/01/2018	The Regional Board submitted late comments on the Test Claim.[60]

[57] Exhibit A, Test Claim, page 374 (test claim permit).

[58] Exhibit A, Test Claim, page 4.

[59] Exhibit B, Finance's Comments on the Test Claim, page 1.

[60] Exhibit C, Regional Board's Late Comments on the Test Claim, page 1.

02/01/2018	The Regional Board filed the administrative record of the permit in eight parts.[61]
03/06/2018-04/19/2018	The claimant requested two extensions of time to file rebuttal comments, which were granted for good cause.
05/29/2018	The claimant filed rebuttal comments.[62]
12/23/2025	Commission staff issued the Draft Proposed Decision.[63]
01/09/2026-06/09/2026	The claimant, Water Boards, and Finance all requested extensions of time to file comments on the Draft Proposed Decision, which were approved for good cause.
07/13/2026	The claimant, Water Boards, and Finance all filed comments on the Draft Proposed Decision.[64]

II. Background

A. Federal Clean Water Act.

The federal Clean Water Act was enacted in 1972 and is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[65] The Act's national goal was to eliminate "the discharge of pollutants into the navigable waters" of the United States by the year 1985.[66] "To accomplish this goal the Act established 'effluent limitations,' which are restrictions on the 'quantities, rates, and concentrations of chemical, physical, biological, and other constituents'; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards."[67]

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[61] Because of its enormous size, this record cannot reasonably be included as an exhibit. Documents contained therein and cited in this document are being included as excerpts. However, the entirety of all eight parts are available on the Commission's website on the matter page for this Test Claim: https://csm.ca.gov/matters/16-TC-03.shtml.

[62] Exhibit D, Claimant's Rebuttal Comments, page 1.

[63] Exhibit E, Draft Proposed Decision.

[64] Exhibit F, Claimant's Comments on the Draft Proposed Decision; Exhibit G, Water Boards' Comments on the Draft Proposed Decision; Exhibit H, Finance's Comments on the Draft Proposed Decision.

[65] United States Code, title 33, section 1251 et seq.; *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 620; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757.

[66] United States Code, title 33, section 1251(a)(1).

[67] *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 620, citing United States Code, title 33, sections 1311, 1362(11).

The Clean Water Act prohibits pollutant discharges unless they comply with: (1) a permit; (2) established effluent limitations or standards; or (3) established national standards of performance.[68] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[69] A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[70]

The Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the Act or the EPA Administrator, which must be designed to ensure that discharges do not violate applicable water quality standards established by EPA or the state.[71] A state may administer its own permitting system if authorized by EPA, so long as those standards and limitations are not "less stringent" than those in effect under the Clean Water Act [72]

In 1973, EPA adopted regulations to implement the Act which provided exclusions for several types of discharges including "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity" and have not been identified "as a significant contributor of pollution."[73] This particular exclusion applied only to municipal separate storm sewer systems (MS4s). In 1977, however, the Court in *Natural Resources Defense Council v. Costle* held EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and doing so contravened Congress' intent.[74] Since the Act prohibits "the discharge of any pollutant by any person" without an NPDES permit, MS4 municipal storm sewer systems are included in the definition of a point source.[75]

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[68] United States Code, title 33, sections 1311(a), 1312, 1316, 1317, 1328, 1342, and 1344.

[69] United States Code, title 33, section 1362(12)(A), emphasis added.

[70] United States Code, title 33, section 1362(14).

[71] United States Code, title 33, section 1342(a)(1), (2).

[72] United States Code, title 33, section 1370.

[73] Code of Federal Regulations, title 40, sections 124.5 and 124.11 (30 FR 18003, July 5, 1973).

[74] *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1379 (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements).

[75] United States Code, title 33, section 1311(a).

Thus, the Clean Water Act was amended by the Water Quality Act of 1987 to require NPDES permits for stormwater discharges from MS4s, stormwater discharges associated with industrial and construction activities, and designated stormwater discharges considered significant contributors of pollutants to waters of the United States.[76] Federal law states that permits for discharges from MS4 municipal storm sewers:

- may be issued on a system- or jurisdiction-wide basis;
- shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[77]

Discharges from MS4s include stormwater runoff, which "…is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground."[78] Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies and, thus, stormwater runoff requires "best management practices" (BMPs) and controls to the maximum extent practicable to reduce the discharge of these pollutants as stated above. As the Ninth Circuit Court of Appeal stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial

[76] United States Code, title 33, section 1342(p)(3)(B).

[77] United States Code, title 33, section 1342(p)(3)(B).

[78] See Code of Federal Regulations, title 40, section 122.26(b)(13).

facilities, construction sites, and illicit discharges and connections to storm sewer systems.[79]

A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[80] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies.[81] Examples of illicit non-stormwater discharges include trash, sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[82] As stated above, federal law requires MS4 permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," except as authorized by an NPDES permit.[83]

On November 16, 1990, EPA published regulations (40 CFR Part 122), which prescribe permit application requirements for MS4s under the Clean Water Act. EPA regulations specify the information to be included in a permit application.[84] Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable; a program including inspections and ordinances to detect and remove prohibited, illicit discharges; a monitoring program to ensure compliance with water quality standards; an assessment of controls and reporting; and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the

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[79] *Environmental Defense Center, Inc. v. EPA* (9th Cir. 2003) 344 F.3d 832, 840-841(citing *Natural Res. Def. Council v. EPA* (9th Cir. 1992) 966 F.2d 1292, 1295, and Regulation for Revision of the Water Pollution Control Program Addressing Storm Water (64 Fed.Reg. 68722, 68724, 68727 (December 8, 1999) codified at Code of Federal Regulations, title 40, parts. 9, 122, 123, and 124)).

[80] Code of Federal Regulations, title 40, section 122.26(b)(2) defines "Illicit discharge" as "any discharge to a municipal separate storm sewer that is *not* composed entirely of storm water except discharges pursuant to a NPDES permit (*other than the NPDES permit for discharges from the municipal separate storm sewer*) and discharges resulting from firefighting activities." Emphasis added.

[81] Exhibit I (1), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

[82] Exhibit I (1), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

[83] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[84] Code of Federal Regulations, title 40, section 122.26(d)(1)(i-viii).

programs.[85] The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions to ensure compliance with water quality standards.[86] The state is required to transmit to EPA a copy of each permit application and permit proposed to be issued.[87]

In addition, the Clean Water Act requires states to develop water quality standards and criteria to protect the beneficial uses of any given waterbody, which are included in the Regional Board's Basin Plans.[88] States are required to adopt water quality standards and criteria based on sound scientific rationale that identifies sufficient parameters or constituents to protect the designated use, and numerical values related to any constituents should be based on the U.S. EPA's guidance documents or other defensible methods.[89] The water quality standard or criteria can be expressed in narrative form, which are broad statements of desirable water quality goals, or in a numeric form, which identifies specific pollutant concentrations.[90] When water quality criteria are met, water quality will generally protect the designated use."[91] Federal regulations state the purpose of a water quality standard as follows:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.[92]

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[85] Code of Federal Regulations, title 40, section 122.26(d)(2).

[86] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757, citing to Code of Federal Regulations, title 40, section 122.26(d)(2).

[87] United States Code, title 33, section 1342(d).

[88] United States Code, title 33, section 1313(a), (c)(1); Code of Federal Regulations, title 40, sections 131.6, 131.10-131.12; Water Code sections 13240, 13241.

[89] Code of Federal Regulations, title 40, section 131.11.

[90] *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1403.

[91] Code of Federal Regulations, title 40, section 131.3(b).

[92] Code of Federal Regulations, title 40, section 131.2.

EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.[93] In addition, on May 18, 2000, U.S. EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR).[94] As the courts have explained, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the CWA.'"[95]

States are required to hold public hearings from time to time but "at least once each three year period" for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

> Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [US EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[96]

When reviewing, revising, or adopting new water quality standards, the state is required to adopt numeric criteria for all toxic pollutants listed in federal law.[97]

The Clean Water Act also requires states to develop a list of "impaired" waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards necessary to permit the designated beneficial uses, such as fishing or recreation.[98] States must then rank those impaired waters by priority, and

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[93] United States Code, title 33, section 1314(a).

[94] Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31682, 31711, May 18, 2000).

[95] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

[96] United States Code, title 33, section 1313(c)(2)(A).

[97] United States Code, title 33, section 1313(c)(2)(B).

[98] See United States Code, title 33, section 1313(d)(1)(A) (codifying CWA § 303(d) and stating: "Each State shall identify [as impaired] those waters within its boundaries for which the effluent limitations … are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.")

establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[99]

B. The California Water Pollution Control Program

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[100] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[101]

The state water pollution control program was again modified, beginning in 1972, to substantially comply with the Clean Water Act, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[102]

Section 13160 provides the State Water Resources Control Board (State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto."[103] Section 13001 describes the state and the nine

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[99] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[100] Water Code section 13020.

[101] Water Code section 13000.

[102] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1565-1566. See also Water Code section 13370 *et seq*.

[103] Water Code section 13160.

regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the Clean Water Act, employs a combination of water quality standards and point source pollution controls.[104]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, or Basin Plans.[105] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[106] and provide the underlying basis for most of the regional board's actions (e.g., NPDES permit conditions, cleanup levels). Basin plans consist of three elements:

- Determination of beneficial uses;
- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[107]

Water Code sections 13240-13247 address the development and implementation of the basin plans, including "water quality objectives," defined in section 13050 as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[108] Section 13241 provides each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance."[109]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[110] In addition, section 13243 permits a regional board to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."[111]

Sections 13260-13274 address the development of "waste discharge requirements," which section 13374 states "is the equivalent of the term 'permits' as used" in federal

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[104] Water Code section 13142.

[105] Water Code sections 13240-13247.

[106] Water Code sections 11352–11354.

[107] Water Code section 13050(j), see also section 13241.

[108] Water Code section 13050.

[109] Water Code section 13241.

[110] Water Code section 13050.

[111] Water Code section 13243.

law.[112] Section 13263 authorizes the regional boards, after a public hearing, to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system." Section 13263 provides "[a]ll discharges of waste into waters of the state are privileges, not rights."[113] Section 13372 states "[t]his chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto." Section 13377 permits a regional board to issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act]."[114] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit "if a discharge is to waters of both California and the United States."

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

> California was the first state authorized to issue its own pollutant discharge permits. (Citations omitted.) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid*.) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (Citations omitted.)[115]

California has adopted an Ocean Plan in accordance with federal law, applicable to interstate waters, and two other state-wide plans (California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP)), which establish water

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[112] Water Code section 13374.

[113] Water Code section 13263(a-b); (g).

[114] Water Code section 13377.

[115] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757.

quality criteria or objectives for all fresh waters, bays and estuaries in the State.[116] These statewide plans contain narrative and numeric water quality criteria for toxic pollutants, in part to satisfy the Clean Water Act (United States Code, title 33, section 1313(c)(2)(B)). The water quality criteria contained in these statewide plans, together with the designated uses in each of the Basin Plans, create a set of water quality standards for waters within the State of California.[117]

C. The Test Claim Permit

The claimant contends that certain sections of the California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, impose a reimbursable state-mandated program. This is the second stormwater permit adopted by the San Francisco Bay Regional Water Quality Control Board the Commission has reviewed to determine if reimbursement is required under article XIII B, section 6.[118] The following local government permittees are subject to this permit:

- The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (Unincorporated area), the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, who joined together to form the Alameda Countywide Clean Water Program (collectively, the Alameda Permittees);
- The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, who joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program (collectively, the Santa Clara Permittees);
- The cities of Fairfield and Suisun City, and Fairfield-Suisun Sewer District, who joined together to form the Fairfield-Suisun Urban Runoff Management Program (collectively, the Fairfield-Suisun permittees);
- The cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut

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[116] United States Code, title 33, section 1313(c)(3)(A), (B).

[117] See also, Water Code section 13170, which provides that the statewide plans supersede the Basin Plans to the extent any conflict exists.

[118] The prior permit was R2-2009-0074, at issue in 10-TC-02-03-05 (https://www.csm.ca.gov/decisions/10-TC-02-03-05-012425.pdf). See Commission on State Mandates, *Test Claim Decision on California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074,* 10-TC-02, 10-TC-03, 10-TC-05, adopted January 24, 2025. A subsequent third permit, R2-2022-0018 (as modified by Order No. R2-2023-0019), is at issue in 22-TC-07, which is currently pending (https://csm.ca.gov/matters/22-TC-07.shtml).

Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District, who joined together to form the Contra Costa Clean Water Program (collectively the Contra Costa Permittees);

- The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District and San Mateo County, who joined together to form the San Mateo Countywide Water Pollution Prevention Program (collectively the San Mateo Permittees); and
- The City of Vallejo and the Vallejo Sanitary District (collectively the Vallejo Permittees).

III. Positions of the Parties and Interested Parties

A. City of Union City

The claimant sorts the provisions in the test claim permit it alleges to impose new, reimbursable state mandates into two main categories: trash load reduction (Provisions C.10.a. and C.10.b.); and mercury and PCBs control (Provisions C.3.j., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e.).[119] It also includes the continuation of monitoring costs from Provision C.8. imposed by the prior test claim permit (*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05), but states this is only included out of an abundance of caution, and acknowledged it would be willing to withdraw the C.8. issues from this Test Claim if the Commission provided assurance that no waiver, forfeiture, or abandonment of rights to subvention would result.[120]

The claimant says that Provision C.10.a. requires it to undertake new activities to achieve the goal of 100 percent trash load reduction by July 1, 2022, specifically by mandating compliance with a schedule that requires permittees to reduce their trash loads 70 percent by July 1, 2017, and by 80 percent by July 1, 2019.[121] Although the claimant acknowledges that the prior permit stated that permittees must achieve 100 percent trash load reduction by 2022, it claims the prior permit was rescinded when the test claim permit took effect, and that the prior permit described these requirements as goals. The claimant alleges the increased load reductions are new compared to the prior permit's planning and 40 percent load reduction requirements..[122] The claimant also states that "Provision C.10.b. requires Permittees to maintain, and provide for inspection and review upon request, documentation of the design, operation, and

[119] Exhibit A, Test Claim, page 20 (Written Narrative).

[120] Exhibit A, Test Claim, page 20 (Written Narrative).

[121] Exhibit A, Test Claim, page 21 (Written Narrative).

[122] Exhibit A, Test Claim, page 22 (Written Narrative).

maintenance of each of their full trash capture systems, including the mapped location and drainage area served by each system," and provides specific detailed instructions for installing and maintaining full trash capture systems.[123] The claimant alleges the state requires it to install full trash capture systems because the conditions for complying with its load reduction requirements through other trash management actions "has become so burdensome and costly" it determined full trash capture systems are "the least costly compliance option."[124]

For the Mercury and PCBs controls, the claimant says that Provision C.3.j. requires it to complete and implement a Green Infrastructure Plan for the inclusion of low impact development (LID) drainage design into storm drain infrastructure on public and private lands, concluding that this is a new program that did not exist in the prior permit.[125]

Provisions C.11.a. and C.12.a. require permittees to implement control measures to achieve mercury and PCBs load reductions, respectively, and that permittees are required to identify the watersheds and management areas where these measures will be implemented and submit a timed schedule of implementation.[126] Provision C.11.b. also requires permittees to develop and implement an assessment methodology and data collection program to quantify mercury loads reduced through control actions.[127] Provisions C.11.c. and C.12.c. require permittees to implement Green Infrastructure projects to reduce mercury loads by 48 g/year and PCBs loads by 120 g/year by June 30, 2020, which is a new program that was not required by the prior permit.[128] Lastly, Provision C.12.d. requires permittees to prepare a plan for implementing PCBs control measures and a corresponding reasonable assurance analysis that quantitatively demonstrates that sufficient control measures will achieve the PCBs TMDL, and Provision C.12.e. requires permittees to collect samples of caulks and sealants used in storm drains and between concrete curbs and street pavements and investigate whether PCBs are present in such materials and their concentrations, both of which are new.[129] The claimant argues these are new programs not required by the previous permit, which only required various pilot programs and monitoring and evaluation, but not these specific provisions.[130]

According to the claimant, *Department of Finance v. Commission on State Mandates*, (2016) 1 Cal.5th 749, holds that the burden is on the State to prove that it had "no true

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[123] Exhibit A, Test Claim, page 22 (Written Narrative).

[124] Exhibit A, Test Claim, pages 22-23 (Written Narrative).

[125] Exhibit A, Test Claim, page 25 (Written Narrative).

[126] Exhibit A, Test Claim, pages 26-27 (Written Narrative).

[127] Exhibit A, Test Claim, page 26 (Written Narrative).

[128] Exhibit A, Test Claim, pages 26-27 (Written Narrative).

[129] Exhibit A, Test Claim, pages 27-28 (Written Narrative).

[130] Exhibit A, Test Claim, pages 26-27 (Written Narrative).

choice" but to implement something allegedly required by a federal mandate, as well as any other exceptions the State may claim applies, such as fee authority under Government Code section 17556(d).[131] It claims that the Regional Board's argument that the mercury and PCBs provisions were necessary to meet the Mercury and PCBs TMDLs fail to meet this burden, because the Regional Board was the one who drafted the terms of those TMDLs in the first place.[132]

The claimant also disputes the argument raised in Finance's comments that the ability to propose new fees for voter approval is sufficient fee authority within the meaning of Government Code section 17556(d) and disagrees that Senate Bill 231 has any effect on this Test Claim, as it became effective in 2018, while this Test Claim must be approved based on fiscal years 2015-2016 and 2016-2017.[133]

The claimant states that its actual or estimated costs exceed $1,000.[134] The claimant further states that for fiscal year 2016-2017, the C.10. Trash Load Reduction mandates are estimated to cause $16,324,000 in costs statewide; the C.3.j., C.11. and C.12. Green Infrastructure mandates are estimated to cause $414,029 in costs statewide; and the continuation of the C.8. monitoring obligations is estimated to cause $1,397,892 in costs statewide.[135]

The claimant filed comments on the Draft Proposed Decision on July 13, 2026.[136] On the subject of fee authority, the claimant objects to the Commission applying SB 231 to this Test Claim, as it claims this improperly addresses an issue not currently before the Commission, and that the way the Commission has applied it to this Test Claim is inconsistent with *Department of Finance (2022)* and *City of Salinas (2002)*.[137] The claimant argues that SB 231 is irrelevant and inapplicable, and even if it were applicable, the appropriate approach the Commission should have taken would be to wait until a court of competent jurisdiction resolves the constitutionality of SB 231 in the context of a fee enacted under its provisions. The claimant thus believes that "the Commission should just delete all references to [SB 231] in the Proposed Decision."[138]

Regarding the analysis of which claimed provisions constitute state mandated activities, the claimant disagrees with the exclusion of permittees' own public projects from the

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[131] Exhibit A, Test Claim, page 17 (Written Narrative).

[132] Exhibit D, Claimant's Rebuttal Comments, pages 5-6.

[133] Exhibit D, Claimant's Rebuttal Comments, page 3.

[134] Exhibit A, Test Claim pages 19 (Written Narrative), and 42-46 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[135] Exhibit A, Test Claim, pages 31 (Written Narrative), and 75-77 (Declaration of James Scanlin, Associate Environmental Compliance Specialist, Alameda County).

[136] Exhibit F, Claimant's Comments on the Draft Proposed Decision.

[137] Exhibit F, Claimant's Comments on the Draft Proposed Decision, pages 1-2.

[138] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 1.

early implementation requirements in the Green Implementation Plan provisions, which require permittees to prepare and maintain a list of public and private Green Infrastructure projects that were already planned for implementation during the permit term and infrastructure projects that were already planned for implementation during the permit term that have potential for Green Infrastructure measures, and to submit this list with each Annual Report along with a summary of the planning or implementation status for each public Green Infrastructure project (section C.3.j.ii.1. and 2.).[139] The claimant argues these projects were not voluntary, but legally and practically compelled by the permit's regulatory framework.

Regarding green infrastructure requirements to achieve TMDLs not being new because they were required by the prior permit and receiving water limitations, the claimant points out that *San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334 invalidated the use of receiving water limitations under federal law, and argues this invalidates the Commission's reasoning.[140] Similarly, the claimant insists the trash provisions are new and not continuations of the prior permit on the same grounds.[141]

Finally, the claimant disagrees with the findings that some of the green infrastructure and trash provisions are federally mandated, arguing that *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661 held that when federal law leaves states discretion in determining specific implementation requirements, as is the case here, the state exercising that discretion creates a reimbursable state mandate.[142]

B. Regional Board

The Regional Board filed late comments opposing the Test Claim, and raises the following objections:[143]

1. Not Mandated by the State

The Regional Board argues that the test claim permit is required by the Clean Water Act and its regulations, and each of the contested provisions is compelled by federal law. The provisions are required by TMDLs, the EPA-approved Basin Plan, the Clean Water Act and other federal statutes.

The Clean Water Act requires that MS4 permittees effectively prohibit non-stormwater discharges to their MS4s, while Section 301 prohibits the discharge of any pollutant by any person without a permit.[144] Federal law mandates that permits issued to MS4s must require management practices that will result in reducing stormwater pollutants to

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[139] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[140] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[141] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[142] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[143] Exhibit C, Regional Board's Late Comments on the Test Claim.

[144] Exhibit C, Regional Board's Late Comments on the Test Claim, page 18.

the maximum extent practicable (MEP) yet at the same time requires that non-stormwater discharges be effectively prohibited from entering the MS4. The San Francisco Bay is impaired for both mercury and PCBs, and the EPA approved TMDLs for both pollutants.[145] These TMDLs require municipal stormwater agencies to take aggressive actions to reduce mercury and PCBs from their stormwater discharges that are anticipated to be implemented over multiple permit terms. Requirements in Provisions C.3.j., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e. are thus required by section 303(d), and are not part of a new program, do not impose a higher level of service, and are not unique to local government.[146]

2. Not a New Program or Higher Level of Service

The Regional Board argues that the test claim permit does not impose a new program or higher level of service as a whole because it is just a continuation of the prior permit. Furthermore, the mercury and PCBs provisions are based on the TMDLs and their respective implementation plans, which the EPA approved in 2008 and 2010, respectively.[147] Both TMDLs anticipated taking approximately 20 years, or four five-year permit cycles, and anticipated that this permit term would include broadly applicable requirements based on information gathered during the prior permit term.[148] The mercury TMDL anticipated these requirements would include source and treatment controls and management methods, while anticipated PCBs control actions included technologies to treat or filter stormwater, increased use of routine maintenance BMPs, industrial inspections to identify and direct removal PCBs-containing equipment, and a program to control demolition waste.[149] Permittees have been aware of the TMDL load reduction requirements for years, and had opportunities to participate, and did participate in, TMDL development. If there was concern that the TMDLs imposed unfunded state mandates they should have been challenged on such grounds, and to do so now is not timely.[150]

Additionally, the schedule for trash load reduction is not new, but based on the schedule laid out in the prior permit, which required 40% reduction by 2014, 70% reduction by 2017, and 100% reduction by 2022.[151] While the claimant argues that these were merely goals in the prior permit whereas now they are enforceable deadlines, the Regional Board asserts this is a distinction without a difference.[152]

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[145] Exhibit C, Regional Board's Late Comments on the Test Claim, page 13.

[146] Exhibit C, Regional Board's Late Comments on the Test Claim, page 13.

[147] Exhibit C, Regional Board's Late Comments on the Test Claim, page 38.

[148] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 38-39.

[149] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[150] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[151] Exhibit C, Regional Board's Late Comments on the Test Claim, page 40.

[152] Exhibit C, Regional Board's Late Comments on the Test Claim, page 40.

The permit requirements for trash are also not a higher level of service because they are uniformly applied to all stormwater dischargers. Federal law requires all NPDES permits to include monitoring "sufficient to yield data which are representative of the monitored activity including, when appropriate continuous monitoring." The specific monitoring provisions in the test claim permit are common to non-municipal NPDES permits in the Bay Area. Discharging any solid waste and floating materials, including trash, is prohibited, and outside the context of municipal stormwater, would require strict compliance, and achieving zero discharge over a period of time would not be allowed. In this sense the test claim permit's requirements are generally applicable to all dischargers, but are less stringent than individual permits.[153]

3. No Costs Mandated by the State Because the Claimants Have Fee Authority

The Regional Board asserts that there are no costs mandated by the state because the claimants have fee authority sufficient to cover costs pursuant to Government Code section 17556(d) and they have not been forced to use their proceeds of taxes.

The Regional Board contends that voter approval under Proposition 218 is not required to impose or increase fees, as demonstrated by the Legislature's recent approval of Senate Bill 231, which reiterated that the exception from the voter approval requirements for fees and charges for sewer, water, and refuse collection services found in Article XIII D, Section 6, subdivision (c), of the California Constitution, included stormwater in the definition of "sewer," and statutorily overturned *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351.[154]

The Regional Board also argues that the provisions at issue regarding trash, mercury, PCBs, and Green Infrastructure are all issues for which the claimant is capable of crafting regulatory fees. "Permittees' police power is 'broad enough to include mandatory remedial measures to mitigate the *past, present or future* adverse impact of the fee payer's operations,' in situations, like those present here, where there is a causal connection or nexus between the adverse effects and the fee payer's activities."[155] It also asserts that permittees' authority to impose regulatory fees for these services comes from Public Resources Code section 40059(a)(1) and Health and Safety Code section 5471(a), which each grant fee authority for "aspects of solid waste

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[153] The Regional Board's comments also made arguments that Provisions C.11.f and C.12.f have general applicability as well. These sections were plead in the prior Test Claim for MRP1, (*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05) and the pilot feasibility study required was not carried over to the test claim permit. The claimant did not identify these sections as requiring anything new of them in this Test Claim.

[154] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 6-7.

[155] Exhibit C, Regional Board's Late Comments on the Test Claim, page 7 quoting *Sinclair Paint Co. v. State Board of Equalization,* (1997) 15 Cal.4th 866, 877, emphasis added by Regional Board.

handling," and "services…furnished…in connection with…storm drainage," respectively.[156]

Additionally, the Regional Board argues that the record shows that permittees are not required to use their proceeds of taxes for these programs, as they have been able to use other funding sources. Examples include:

- A presentation made at the 2017 Stormwater Finance Forum held in Oakland on how to fund various stormwater related programs including street sweeping and installing and maintaining full trash capture systems and catch basins by imposing trash and sewer related fees and surcharges that would not be subject to Proposition 218;
- Records that other permittees such as the cities of Alameda and Palo Alto have implemented or raised their stormwater fees to fund their programs;
- Alternate funding methods used by other permittees such as Oakland's excess litter fee for high trash generating business;
- The claimant's own Test Claim, which acknowledges that it has so far avoided needing to raise its stormwater fees through the use for grant money for most of the claimed expenses for Green Infrastructure Projects;
- The use of Business Improvement Districts (BID) or Community Benefit Districts (CBD) in which property owners within specific areas vote on assessment fees used to pay for maintenance and beautification within the district; and
- Multiple instances of CalTrans offering grants or partnerships to cities to install full trash capture devices or Green Infrastructure Projects.[157]

4. Comments on the Draft Proposed Decision

On July 13, 2026, the Regional Board jointly filed comments on the Draft Proposed Decision with the State Water Resources Control Board (collectively, the Water Boards).[158] They concur with the parts of the Draft Proposed Decision that denied reimbursement, but disagree with the conclusion that some of the provisions constitute reimbursable state-mandated new programs or higher levels of service, and maintain the arguments raised in the Regional Board's previous comments on those issues.[159]

On the subject of fee authority, the Water Boards disagree with the conclusion that permittees lacked fee authority prior to 2018 due to Proposition 218's voter approval provisions, and maintain that permittees had sufficient fee authority as a legal matter

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[156] Exhibit C, Regional Board's Late Comments on the Test Claim, page 8.

[157] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 9-12.

[158] Exhibit G, Water Boards' Comments on the Draft Proposed Decision.

[159] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 1.

under Government Code section 17556(d) for the entire test claim period.[160] They rely on *Paradise Irrigation District,* which considered whether majority protest procedures added by Proposition 218 deprived local agencies of authority to impose fees for water services, and found that "majority protest procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority."[161] The fact that the majority protest procedure allowed water customers to defeat the District's authority to levy fees was not dispositive, as fee authority is an issue of law rather than a question of fact. The Water Boards acknowledge that *Paradise Irrigation District* did not consider whether local agencies have fee authority as a matter of law when the fees are subject to the voters' approval instead of a majority protest, however they argue that the court's reasoning should apply with equal force here.[162] The Water Boards acknowledge the Third District Court of Appeal already rejected this argument, however as other districts and the California Supreme Court are not bound by that decision and could rule differently, the Water Boards continue to maintain this position.[163]

B. Department of Finance

Finance defers to the State Water Resources Control Board and the Regional Board on whether there is a state-mandated program and whether any asserted activities impose a new program or higher level of service.[164] Finance's comments address only the fee authority issue. Finance contends there are no costs mandated by the state pursuant to Government Code 17556(d), as it argues that the ability to propose fees for voter approval under Proposition 218 is sufficient fee authority as a matter of law, regardless of whether it is politically feasible to get those fees approved.[165]

Alternatively, if the Commission does find the test claim permit imposes reimbursable mandated costs, Finance points out that the claimant identified potentially offsetting revenue that should reduce costs and be identified by the Commission to reduce the claims; namely Proposition 84 grant funds, other grant funds, and the Clean Water Fund.[166]

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[160] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 2.

[161] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 2, quoting *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 182.

[162] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 3.

[163] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 3.

[164] Exhibit B, Finance's Comments on the Test Claim, page 1.

[165] Exhibit B, Finance's Comments on the Test Claim, page 1.

[166] Exhibit B, Finance's Comments on the Test Claim, page 2.

Finance filed comments on the Draft Proposed Decision on July 13, 2026.[167] Finance concurs with the parts of the Draft Proposed Decision that denied reimbursement for provisions that were not found to be new state mandates, concurs with and joins the Water Boards' comments, and provides its own comments specifically on the fee authority issue. Regarding state mandated costs prior to 2018, Finance maintains its position that claimants have sufficient fee authority under Propositions 218 and 26. "Proposition 26 addresses voter approval requirements and it specifically excludes assessment and property related fees imposed in accordance with Proposition 218."[168] Finance insists that claimants are not prohibited by Proposition 26 from levying fees or assessments without voter approval, so long as they are imposed in accordance with Proposition 218, and this fee authority thereby negates the need for any reimbursement from the state.[169]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[170] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[171]

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

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[172]
- The mandated activity constitutes a "program" that either:

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[167] Exhibit H, Finance's Comments on the Draft Proposed Decision.

[168] Exhibit H, Finance's Comments on the Draft Proposed Decision, page 1.

[169] Exhibit H, Finance's Comments on the Draft Proposed Decision, pages 1-2.

[170] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[171] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[172] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

a. Carries out the governmental function of providing a service to the public; or

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[173]

- The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[174]
- The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[175]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[176] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[177] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[178]

A. <u>The Commission Has Jurisdiction Over This Test Claim.</u>

1. The Test Claim Was Timely Filed and Has a Potential Period of Reimbursement Beginning January 1, 2016.

Government Code section 17551(c) provides that Test Claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[179] The Commission's regulations effective at the time this claim was

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

[174] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

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

[176] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[177] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[178] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[179] Government Code section 17551(c) (Stats. 2007, ch. 329).

filed provided that "[f]or purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[180]

The Test Claim was filed on June 30, 2017, more than a year after the effective date of the stormwater permit on January 1, 2016.[181] However, evidence shows that the earliest date when costs were first incurred as a result of the permit after its effective date was January 4, 2016.[182] Thus under the regulations at the time of filing, the claimant had until June 30, 2017 to file its claim. The Test Claim was filed on June 30, 2017, and is therefore timely.[183]

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claim was filed on June 30, 2017, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2015. However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or January 1, 2016.

2. The Claimants Are Not Required to Exhaust Administrative Remedies with the State Water Board Prior to Filing a Test Claim with the Commission.

The Regional Board asserts that the Test Claim is untimely since the claimant should have challenged the provisions implementing the TMDLs to the State Water Board. It contends that the load reduction requirements in the mercury and PCBs TMDLs have been known about since their adoption in 2008, and that permittees had been active participants in the TMDLs development.[184] Furthermore the permittees were active participants in the pilot Green Infrastructure program and discussions on scaling up the program over the course of the prior permit.[185] If the claimant was concerned that the TMDLs created unfunded state mandates, it should have challenged them on such grounds.[186] The Regional Board asserts that this Test Claim is a collateral attack on the TMDLs by way of the test claim permit's provisions, and is not timely.[187]

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[180] California Code of Regulations, title 2, section 1183.1(c) (Register 2016, No. 38).

[181] Exhibit A, Test Claim, pages 4 (Written Narrative), 383 (test claim permit).

[182] Exhibit A, Test Claim, page 78 (Declaration of James Scanlin, Associate Environmental Compliance Specialist, Alameda County).

[183] Exhibit A, Test Claim, page 4.

[184] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[185] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[186] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[187] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

The Regional Board's argument is unfounded. The Commission, and not the State Water Board, has exclusive jurisdiction to determine whether a statute or executive order imposes a reimbursable state-mandated program.[188]

In *Department of Finance v. Commission on State Mandates*, the Court explained, "The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims and created the Commission to adjudicate them."[189] The Court distinguished between challenging the substance of a stormwater permit and seeking reimbursement under article XIII B, section 6 in the context of a test claim:

> Certainly, in a trial court action challenging the board's authority to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd*. (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817-818, 85 Cal.Rptr.2d 696, 977 P.2d 693) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga*, at p. 1387, 38 Cal.Rptr.3d 450; *Building Industry* [*Assn. of San Diego County v. State Water Resources Control Board* (2004)] 124 Cal.App.4th [866,] 888-889, 22 Cal.Rptr.3d 128.)
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> Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.
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> [¶…¶]
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> Moreover, the policies supporting article XIII B of the California Constitution and section 6 would be undermined if the Commission were

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[188] Government Code section 17552; *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 917-920, which concludes that NPDES permits are executive orders pursuant to Government Code section 17516 and that the existence of a state mandate is a matter for the Commission's determination.

[189] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 759.

required to defer to the Regional Board on the federal mandate question.[190]

Thus, the Commission's role is different from a direct challenge on the merits of the permit's TMDL load allocations: "[t]he narrow question here [is] who will pay" for an alleged mandate, which the Commission is charged with determining in the first instance.[191]

Therefore, the claimant is not required to exhaust administrative remedies with the State Water Board prior to filing a Test Claim with the Commission.

3. The Commission Does Not Have the Authority to Re-Address the Monitoring Requirements in Provision C.8. Imposed by the Prior Permit, Since the Legal Findings on that Provision in Test Claim *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05, Are Final and Binding.

The claimant seeks reimbursement for the continuing costs to comply with the monitoring requirements found in Provision C.8., which were originally required by the prior 2009 permit (Order R2-2009-0074). The Test Claim acknowledges these activities were already addressed in the prior Test Claim (*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05) and the claimant has not alleged any new requirements imposed by Provision C.8. of the test claim permit, but the claimant pled the activities again "out of an abundance of caution."[192]

The Commission addressed the monitoring requirements in Provision C.8. imposed by the prior permit (Order R2-2009-0074) in Test Claim *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, and 10-TC-05 and issued a Decision on January 24, 2025.[193] In its Decision, the Commission found that reimbursement was required under article XIII B, section 6 for the following activities arising out of Provision C.8. until December 31, 2017:

<u>Geomorphic Study</u>

- Permittees shall select a waterbody/reach, preferably one containing significant fish and wildlife resources, and conduct one

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[190] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768-769.

[191] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[192] Exhibit A, Test Claim, page 11 (Written Narrative).

[193] See Commission on State Mandates, Test Claim Decision on *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074,* 10-TC-02, 10-TC-03, 10-TC-05, adopted January 24, 2025, https://csm.ca.gov/matters/10-TC-01-02-03-05/doc68.pdf (accessed February 27, 2025).

of the following projects within each county, except only one such project must be completed within the collective Fairfield-Suisun and Vallejo Permittees' jurisdictions:

(1) Gather geomorphic data to support the efforts of a local watershed partnership [fn. omitted] to improve creek conditions; or

(2) Inventory locations for potential retrofit projects in which decentralized, landscape-based stormwater retention units can be installed; or

(3) Conduct a geomorphic study which will help in development of regional curves which help estimate equilibrium channel conditions for different-sized drainages. Select a waterbody/reach not undergoing changing land use. Collect and report the following data:

- Formally surveyed channel dimensions (profile), planform, and cross-sections. Cross-sections shall include the topmost floodplain terrace and be marked by a permanent, protruding (not flush with ground) monument.
- Contributing drainage area.
- Best available information on bankfull discharges and width and depth of channel formed by bankfull discharges.
- Best available information on average annual rainfall in the study area.

- Report selected geomorphic project results in the Integrated Monitoring Report. [R2-2009-0074 section C.8.d.iii]

<u>Sediment Delivery Estimate/Budget</u>

- Permittees shall develop a design for a robust sediment delivery estimate/sediment budget in local tributaries and urban drainages by July 1, 2011, and implement the study by July 1, 2012. [R2-2009-0074 section C.8.e.vi]

<u>Citizen Monitoring and Participation – for the City of Vallejo and the Vallejo Sanitary District only:</u>

- Encourage Citizen Monitoring
- In developing Monitoring Projects and evaluating Status & Trends data, make reasonable efforts to seek out citizen and stakeholder information and comment regarding waterbody function and quality.
- Demonstrate annually the permittee has encouraged citizen and stakeholder observations and reporting of waterbody conditions. Report on these outreach efforts in the annual Urban Creeks Monitoring Report. [R2-2009-0074 section C.8.f]

Monitoring Reporting and Notice

- Permittees shall maintain an information management system that supports electronic transfer of data to the Regional Data Center of the California Environmental Data Exchange Network (CEDEN), located within the San Francisco Estuary Institute. [R2-2009-0074 section C.8.g.ii, footnote 46]
- Permittees shall submit an Electronic Status Monitoring Data Report, compatible with the SWAMP database, no later than January 15 of each year, reporting on all data collected during the previous October 1-September 30 period. Water quality objective exceedances are required to be highlighted in the report. [R2-2009-0074 section C.8.g.ii]
- Permittees shall notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports through notices distributed through appropriate means, such as an electronic mailing list. [R2-2009-0074 section C.8.g.vii][194]

All other activities in the prior permit's Provision C.8. were denied.

The Commission's Decision on the prior Test Claim is a final, binding decision, which cannot be disturbed unless litigated and directed by the court to be set aside or modified pursuant to Government Code section 17559(b) or a request for a new test claim decision based on a subsequent change in the law is filed pursuant to Government Code section 17570.[195]

Moreover, Government Code section 17553(b)(1) requires that a test claim include a detailed description of the new activities and costs that arise from the alleged mandate and a detailed description of existing activities and costs that are modified by the alleged mandate. The claimant does not allege that this Test Claim permit requires any new activities for Provision C.8. when compared to the prior permit, and there are no allegations that the activities in Provision C.8. found to be state mandates under the prior permit have changed.

Therefore, the Commission does not have the authority to re-address the monitoring requirements in Provision C.8. of the test claim permit.

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[194] Commission on State Mandates, Test Claim Decision on *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074,* 10-TC-02, 10-TC-03, 10-TC-05, adopted January 24, 2025, https://csm.ca.gov/matters/10-TC-01-02-03-05/doc68.pdf (accessed February 27, 2025), pages 370-372.

[195] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

4. The Requirements Pled in the 2015 Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the 2009 Permit, to Determine if the Activities Required by the 2015 Test Claim Permit Are New.

The claimant also argues that the trash load reduction deadlines required by the test claim permit of 70 percent reduction by July 1, 2017 and 100 percent reduction by July 1, 2022 are new, even if they were required by the prior 2009 permit, because the 2009 prior permit was rescinded when the test claim permit took effect.[196]

In other words, the claimant wants the Commission to interpret stormwater permits as contracts that expire, and that every permit is a new contract, at least for this specific issue, as it does not attempt to take this position with any other requirements continued from the prior permit. This interpretation is not consistent with article XIII B, section 6 or the courts' interpretation of these permits as executive orders.

Under the Clean Water Act, the term of an NPDES permit is five years.[197] However, states authorized to administer the NPDES program may continue the state-issued permit until the effective date of a new permit, if state law allows.[198] California's regulations provide that the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.[199] Thus, there was no gap in time between the prior permit and the test claim permit.

The courts have found NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.[200] The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to the prior year.[201] This was the case in *Department of*

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[196] Exhibit A, Test Claim, page 22 (Written Narrative).

[197] 33 United States Code section 1342(b).

[198] Code of Federal Regulations, title 40, section 122.6(d).

[199] California Code of Regulations, title 23, section 2235.4.

[200] *County of Los Angeles v. Commission on State Mandates* (2007) Cal.App.4th 898, 905, 919-920; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[201] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000)

Finance. v. Commission on State Mandates (2021) 59 Cal.App.5th 546. There, the court found installing and maintaining trash receptacles at transit stops and performing certain inspections, as required by that stormwater permit, were *new duties* that local governments were required to perform, when compared to prior law ("the mandate to install and maintain trash receptacles at transit stops is a 'new program' within the meaning of section 6 because it was not required prior to the Regional Board's issuance of the permit").[202]

Other examples include *Lucia Mar Unified School Dist.*, which addressed a 1981 test claim statute requiring local school districts to pay the cost of educating pupils in state schools for the severely handicapped — costs the state had previously paid in full until the 1981 statute became effective.[203] The court held the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the education of students from their districts at such schools."[204] The same analysis was applied in *County of San Diego*, where the court found the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[205] In *City of San Jose*, the court addressed a 1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[206] The court denied the city's claim for reimbursement, finding the costs were not shifted by the state since "*at the time [the test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[207] In *San Diego Unified School District*, the court determined the required activities imposed by test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of [the test claim statutes]."[208]

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84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763.

[202] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[203] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

[204] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

[205] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[206] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

[207] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

[208] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; see also page 869, footnotes 6 and 7, and page 870, footnote 9, where the

Thus, it is not legally correct or consistent with article XIII B, section 6 to ignore the requirements imposed on the claimants by the prior permit to determine what is new.

Therefore, the requirements pled in the 2015 test claim permit are compared to the law in effect immediately prior to the adoption of the test claim permit, including the 2009 permit, to determine if the activities required by the 2015 test claim permit are new.

B. Some of the Requirements Imposed by the Provisions of the Test Claim Permit Pled Impose New State-Mandated Requirements that Constitute a New Program or Higher Level of Service Within the Meaning of Article XIII B, Section 6 of the California Constitution.

1. The Requirements Pled in Provisions C.10.a.i., ii., and iii. and C.10.b.i. and ii, Addressing the Reduction of Trash Loads, Do Not Mandate New Programs or Higher Levels of Service.

a. The claimant's pleadings regarding Provisions C.10.a. and C.10.b. are vague and ambiguous; the written narrative and declarations only identify some of the requirements found in Provisions C.10.a.i., ii., and iii., relating to the schedule and deadline for the reduction of trash and the installation of full trash capture devices and other control measures, and in C.10.b.i. and ii., to maintain their full trash capture systems, and thus discussion of the trash provisions is limited to these provisions.

The Government Code requires that a test claim's written narrative identify the specific sections of the statutes or executive orders pled and provide a detailed description of the new activities that are alleged to contain a mandate.[209] The Government Code also requires the Test Claim to be supported with declarations signed under penalty of perjury, which identify the actual or estimated increased costs incurred to implement the alleged new mandated activities.[210] It is not enough under the Government Code to generally cite a statute or executive order in the test claim, without a discussion of the specific sections and detailed discussion of the new activities and costs alleged to be reimbursable.

This Test Claim requests reimbursement to comply with Provisions C.10.a. (Trash Reduction Requirements) and C.10.b. (Demonstration of Trash Reduction Outcomes).[211] These provisions contain several subsections each, but the Test Claim does not specifically identify the subsections or all of the requirements in these subsections. Instead, the narrative and the declaration filed with the Test Claim

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court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes.

[209] Government Code section 17553(b)(1)(A).

[210] Government Code section 17553(b)(2).

[211] Exhibit A, Test Claim, pages 21-24 (Written Narrative).

generally refer to Provisions C.10.a. and C.10.b. and limit the discussion of the "new" requirements as described below.

With respect to Provision C.10.a., the Test Claim requests reimbursement for the following requirements:

- Compliance with "a new schedule and deadline" for the reduction of trash; namely, 70 percent reduction by July 1, 2017, and 80 percent reduction by July 1, 2019.

  The Test Claim narrative and declaration acknowledge that the prior permit required the permittees to achieve phased annual reductions in trash loading, culminating in a 100 percent reduction by 2022 and included an enforceable deadline of 40 percent reduction by 2014. However, the narrative and declaration allege that the prior permit was rescinded when the test claim permit took effect, that the 2017 deadline is a new enforceable mandatory deadline where previously it was only a goal, and the 2019 deadline requiring an 80 percent reduction in trash is a new mandated requirement.[212]

  The schedule and deadlines for the reduction of trash are in Provision C.10.a.i. of the test claim permit.[213]

- The Test Claim also identifies costs incurred under the prior permit to install full trash capture systems and estimates costs to install trash capture devices "to comply with MRP2" (the test claim permit) as follows:

  > As part of the City's Long Term Trash Reduction Plan, in June 2015, the City commissioned United Storm Water, Inc. to install an additional 200 full trash capture devices for a total of $99,994.52. The City had anticipated the new full trash capture installation requirements set forth in the MRP2 and commissioned the installation of the trash capture devices in order to comply with Provision C.10 just prior to the MRP2's effective date. This cost was paid out of the City's clean water fund. The City had previously installed 150 units, paid by a grant from the EPA. The City is planning to install an additional 200 units in the summer of 2018, totaling 550 full trash capture devices. It is estimated that the purchase and installation of the additional 200 devices will cost the City another $100,000. Therefore, in total, Union City's cost to install trash capture devices required to comply with the MRP2 is approximately $200,000.[214]

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[212] Exhibit A, Test Claim, pages 21-22, 38-39 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[213] Exhibit A, Test Claim, page 476 (Test Claim Permit, Provision C.10.a.i.).

[214] Exhibit A, Test Claim, pages 23, 42-43 (Declaration of Thomas Ruark, City Engineer, City of Union City).

- The Test Claim identifies the following best management practices and control measures, including those other than full trash capture devices, used by the claimant to achieve the reduction deadlines:

  > City staff has worked to identify best management practices and control measures that they believe will be necessary in order to achieve the target of 100% trash reduction from municipal separate storm sewer systems by July 1, 2022, and with interim milestones of 70% reduction by July 1, 2017 and 80% by July 1, 2019, as required by Provision C.10.a. These practices and measures include the following:
  >
  > - Installed full trash capture devices in our high trash generating areas
  > - Increased cleaning of Continuous Deflection Separators (CDS) Units and Catch basins pre and post storm event season.
  > - Increased public awareness by installing clean water advertisement in all of Union City's transit buses
  > - Increased Public Outreach with at least 8 different yearly events
  > - Distributed over 500 reusable bags
  > - Passed a Plastic Bag Ban
  > - Conducted a least two creek clean up events per year
  > - Utilized Work furlough crews to assist in weekly trash pick-up along major arterials and collector streets.
  > - Installed over 150 trash capture devices (TCD) in our city-owned catch basins which surround our retail and commercial properties as well as a portion of our high density residential properties.
  > - In addition, the City has a total of 12 CDS units installed on both private and public properties.
  >
  > It is estimated that these measures serve a combined area of 293.28 acres.[215]

Implementing trash prevention and control actions such as full trash capture devices and other control measures to achieve the reduction of trash requirements are in Provisions C.10.a.ii. and C.10.a.iii. and, although not specifically cited in the Test Claim, this Decision will address those provisions with respect to full trash capture devices and other control measures since activities and costs have been alleged.

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[215] Exhibit A, Test Claim, pages 23-24 (Written Narrative); 43-44 (Declaration of Thomas Ruark, City Engineer, City of Union City).

However, Provision C.10.a.ii. imposes additional requirements to map the location, or otherwise record the location, of all lands greater than 10,000 square feet not owned by the permittee but plumbed to the permittee's storm drain systems in Very High, High, or Moderate trash generation areas by July 1, 2018, identify the trash control status of these areas, and retain this documentation for inspection.[216] These requirements have not been identified in the Test Claim or the declaration submitted with the Test Claim and, thus, have not been pled in accordance with Government Code section 17553 and, therefore, this Decision will not address those requirements.

The Test Claim's allegations regarding Provision C.10.b. are also not clear. The Test Claim states the following:

> Provision C.10.b requires Permittees to maintain, and provide for inspection and review upon request, documentation of the design, operation, and maintenance of each of their full trash capture systems, including the mapped location and drainage area served by each system. (MRP2 at 99-102.) This provision specifies detailed full trash capture system installation and maintenance instructions, which are more prescriptive, burdensome and costly than MRP1 to fulfill. The MRP1 generally required Permittees to install and maintain full trash capture devices, which allowed each municipality greater discretion in identifying effective as well as cost efficient methods for meeting trash load reduction goals. Now, under the MRP2, compliance by means of Other Trash Management Actions (meaning non-full trash capture systems) has become so burdensome and costly that Union City has determined installation of full trash capture systems is the least costly compliance option. Provision C.10.b requires increased activities by Union City that are best characterized as a higher level of service in comparison to the MRP1.[217]

Although the paragraph above references the pages in the test claim permit for Provision C.10.b. in its entirety, the only activity specifically identified by the Test Claim is the "detailed full trash capture system installation and maintenance instructions, which are more prescriptive, burdensome and costly than MRP1 to fulfill." The Test Claim makes the following claims regarding the costs incurred to maintain the full capture systems:

> In April 2017, the City adopted a resolution approving an appropriation of $432,500.57 from the City's Vehicle Replacement Fund and awarded a contract in the amount of $432,423.57 to Owen Equipment of Fairfield, California for the procurement of one Storm Drain Cleaner. This contract award was determined to be vital to minimize stormwater pollution, and maintain and clean the newly installed full trash capture devices so as to

[216] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.b.).

[217] Exhibit A, Test Claim, pages 22-23 (Written Narrative); see also, page 39 (Declaration of Thomas Ruark, City Engineer, City of Union City).

> be in compliance with the MRP2. The City had already owned a Vactor truck; however, it is an old device and unable to fulfill the full trash capture maintenance requirements set forth in the MRP2. Renting a Vactor truck costs $10,000 per month. The City ultimately determined that purchasing a new Vactor truck would be more cost effective than renting a device. The procurement for the equipment purchase was made available from the City's Vehicle Replacement Fund.
>
> The MRP2 requires the City to clean the trash capture devices twice a year. It will take an estimated three months to clean all 550 units once. Three months of crew time of the Vactor crew is estimated to cost $42,500. Thus, cleaning the units twice per year will take the City six months. At a cost of $85,000 for labor for six months of the crew time, yearly maintenance costs are estimated to total $145,000.[218]

Provision C.10.b.i.a.-c. addresses the requirements to maintain, and provide for inspection and review upon request, documentation of the design, operation, and maintenance of each of their full trash capture systems, and this Provision is addressed in this Decision.[219]

And Provision C.10.b.ii. addresses the maintenance and inspection of documentation for the non-full trash capture control actions.[220] Since performing non-full trash capture control actions is discussed in the Test Claim narrative, this Decision will address Provision C.10.b.ii.

However, there is no discussion, request for reimbursement, or identification of any costs incurred to comply with Provisions C.10.b.iii., iv., and v. These provisions state the formula to be used when calculating a permittee's total percent trash load reduction; allow permittees to claim up to ten percent of their trash load reduction using jurisdiction-wide source control actions, with substantive and credible evidence of the control action's claimed effectiveness; and require permittees to conduct receiving water monitoring and develop receiving water monitoring tools and protocols and a receiving water monitoring program to determine if their control actions are effective.[221] Thus, the requirements in Provision C.10.b.iii.-v. have not been pled in accordance with Government Code section 17553 and this Decision will not address these subsections.

Accordingly, based on the Test Claim pleading, the activities in Provision C.10.a. specifically identified above, and Provisions C.10.b.i. and ii., are addressed below.

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[218] Exhibit A, Test Claim, pages 23-24 (Written Narrative); 42-44 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[219] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.).

[220] Exhibit A, Test Claim, pages 478-479 (test claim permit, Provision C.10.b.ii.).

[221] Exhibit A, Test Claim, pages 479-481 (test claim permit, Provisions C.10.b.iii., iv., and v.).

b. Provision C.10.a.i., ii., and iii. require permittees to implement trash control measures and other actions to reduce trash loads by a specified schedule, and Provision C.10.b.i. and ii. require permittees to maintain documentation on their full trash capture systems and other control actions and specify adequate inspection and maintenance as specified.

Provision C.10., in its introductory paragraph, requires permittees to "demonstrate compliance with Discharge Prohibition A.1., for trash discharges, Discharge Prohibition A.2., and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems."[222] Discharge prohibitions A.1. and A.2. prohibit non-stormwater discharges and states that "[i]t shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas."[223]

Provisions C.10.a.i., ii. and iii. and C.10.b.i. and ii. describe the following requirements:

- Trash Reduction Requirements:

  Provision C.10.a.i. requires that the permittees shall implement trash load reduction control actions in accordance with the following schedule, to meet the goal of 100 percent trash load reduction or no adverse impact to receiving waters from trash by July 1, 2022. Permittees shall reduce trash discharges from their 2009 levels to receiving waters in accordance with the following schedule:

  a. 70 percent by July 1, 2017; and

  b. 80 percent by July 1, 2019.[224]

  Provision C.10.a.ii.a. states that "Permittees shall implement trash prevention and control actions, including full trash capture systems or other trash management actions, or combinations of actions, with trash discharge control equivalent to or better than full trash capture systems, to reduce trash generation to a Low trash generation rate or better."[225]

  Provision C.10.a.ii.b. states that "Permittees shall ensure that lands that they do not own or operate, but that are plumbed directly to their storm drain systems in Very High, High, and Moderate trash generation areas are equipped with full trash capture systems or are managed with trash discharge control actions equivalent to or better than full trash capture systems."[226]

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[222] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.).

[223] Exhibit A, Test Claim, page 384 (test claim permit, Provisions A.1 and A.2).

[224] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.a.i.).

[225] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.a.).

[226] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.b.).

Provision C.10.a.iii. requires that "Permittees shall install and maintain a mandatory minimum number of full trash capture devices, to treat runoff from an area equivalent to 30 percent of retail/wholesale land area, as documented by the Association of Bay Area Governments, which drains to the storm drain system within their jurisdictions."[227]

- Maintenance of Full Trash Capture Systems:

  Provision C.10.b.i.a. requires that the maintenance of each full capture device shall be adequate to prevent plugging, including plugging of the 5 mm screen leading to trash overflow and bypass, flooding, or a full condition of the device's trash reservoir causing bypassing of trash.[228]

  This provision also requires that all full trash capture devices shall be inspected and maintained at least once per year. All such devices in High or Very High trash generation areas shall be inspected at least two times per year, with the inspections spaced at least three months or more apart. If this frequency of inspection is found excessive after two inspections, the inspection frequency can be reduced to once per year.[229]

  Finally, this provision states that "[i]f any such device is found to have a plugged or blinded screen or is greater than 50 percent full of trash during a maintenance event, the maintenance frequency shall be increased so that the device is neither plugged nor more than half full of trash at the next maintenance event."[230]

  Provision C.10.b.i.b. requires permittees to retain device specific maintenance records, including, at a minimum: the date(s) of maintenance, the capacity condition of the device at the time of maintenance (full and overflowing or with storage capacity remaining), any special problems such as flooding, screen blinding or plugging from leaves, plastic bags, or other debris causing overflow, damage reducing function, or other negative conditions. A summary of this information shall be reported in each Annual Report which may be limited to the number of full capture devices maintained that exhibited a plugged, full or overflowing condition upon maintenance.[231]

  Provision C.10.b.i.c. requires the permittees to annually certify that each of their full trash capture systems is operated and maintained to meet full trash capture system requirements.[232]

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[227] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.iii.).

[228] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.a.).

[229] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.a.).

[230] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.a.).

[231] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.b.).

[232] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.c.).

- Maintenance of Other Trash Actions:

  Provision C.10.b.ii.a. requires permittees to maintain, and provide for inspection and review upon request, documentation of non-full trash capture system control actions that verify implementation of each action. The provision states:

  "Permittees shall maintain documentation of trash control actions that describes each action or combination of actions, the level of implementation, the timing and frequency of implementation, standard operating procedures if applicable, location(s) of implementation actions including mapped location(s) and drainage area(s) affected or description of areal extent, tracking and enforcement procedures if applicable, and other information relevant to effective implementation of the action or combination of actions."[233]

- Visual Assessment of Outcomes of Other Trash Management Actions:

  Provision C.10.b.ii.b. requires permittees to conduct visual on-land assessment, including photo documentation, or other acceptable assessment method, of each trash generation area within which it is implementing other trash management actions or combination of actions other than full trash capture, to determine or verify the effectiveness of the action or combination of actions. Permittees may assess and account for one or more trash generation areas in a single trash management area within which a control action or combination of control actions is implemented. The visual on-land assessment method used shall meet or exceed the following criteria: conduct observations of the sidewalk, curb and gutter, locations associated with trash generation sources, randomly selected locations covering at least ten percent of a trash management area's street miles, and at a frequency consistent with known or estimated trash generation rates.[234]

The test claim permit specifies that flood management agencies are not subject to the requirements in C.10. "except for continued implementation of requirements for full trash capture systems. . . , as specified in subsection C.10.b.i. . . ."[235]

Additionally, C.10.a.i also states that permittees "should" achieve 60 percent reduction by July 1, 2016, but clarifies this is not a mandatory deadline, but rather a performance guideline.[236] It is essentially meant to show the permittee is on track to meet its actual deadlines, or to give warning if a permittee needs to step up its efforts. If a permittee does not meet this performance guideline, it shall submit documentation of a plan and schedule of additional trash load reduction control actions that will attain the

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[233] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.a.).

[234] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.b.).

[235] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.).

[236] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.a.i.).

July 1, 2017 deadline.[237] This is not a required activity from the state, as the additional documentation is only required if a permittee fails to meet the performance guideline, which will not happen if the permittee is complying with its existing obligation to attain 70 percent reduction by July 1, 2017.

Both the prior permit and the test claim permit indicate trash to be a pervasive problem near and in creeks and in San Francisco Bay. Trash is defined to consist of litter and particles of litter, using the definition of litter from Government Code section 68055.1(g) to mean "all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, and manufacturing."[238] The Fact Sheet explains the significant impact of trash on the environment as follows:

> Controlling trash continues to be one of the priorities for this Permit reissuance, not only because of the trash discharge prohibition, but also because trash causes major impacts on our enjoyment of creeks and the Bay. There are also significant impacts on aquatic life and habitat in those waters, and eventually to the global ocean ecosystem, where plastic often floats; persists in the environment for hundreds of years - if not forever; concentrates organic toxins; and is ingested by aquatic life. There are also physical impacts, as aquatic species can become entangled and ensnared, and can ingest plastic that looks like prey, losing the ability to feed properly.[239]

The Commission finds that these requirements do not impose a new program or higher level of service, as discussed below.

c. <u>The requirements pled in Provisions C.10.a.i., ii., and iii. and C.10.b.i. and ii. are not new.</u>

i. Prior law required the permittees to implement control measures and other actions to comply with federal and state prohibitions on discharging trash; the prior permit set a schedule for achieving compliance of 40% reduction by 2014, 70% reduction by 2017, and 100% by 2022.

Federal law prohibits non-stormwater discharges and requires controls to reduce the discharge of pollutants to the maximum extent possible. Trash is addressed in the CWA as both a stormwater discharge and an illicit non-stormwater discharge. Federal law defines stormwater as "storm water runoff, snow melt runoff, and surface runoff and

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[237] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.a.i.).

[238] Exhibit A, Test Claim, page 619 (test claim permit, Fact Sheet, Finding C.10-1.).

[239] Exhibit A, Test Claim, page 619 (test claim permit, Fact Sheet, Finding C.10-1.).

drainage; events related to precipitation," which can carry with it pollutants such as trash.[240] A discharge to an MS4 that "is *not* composed entirely of stormwater" is considered a non-stormwater, or dry weather discharge.[241] A non-stormwater discharge that is prohibited by law is an illicit discharge.[242]

Federal law requires permits for discharges from municipal stormwater systems "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[243] Trash is not an exempted discharge and, thus, must be effectively prohibited under federal law. The test claim permit defines trash as follows:

> Trash consists of litter and particles of litter. California Government Code Section 68055.1 (g) defines litter as all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other product packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the State, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing.[244]

To "effectively prohibit" non-stormwater discharges requires implementation of a program to detect and remove illicit discharges. This shall include:

- A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.
- A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-stormwater.

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[240] Code of Federal Regulations, title 40, section 122.26(b)(13).

[241] Code of Federal Regulations, title 40, section 122.26(b)(2) defines "illicit discharge" as "any discharge to a municipal separate storm sewer that is *not* composed entirely of storm water except discharges pursuant to a NPDES permit (*other than the NPDES permit for discharges from the municipal separate storm sewer*) and discharges resulting from firefighting activities." Emphasis added.

[242] Exhibit A, Test Claim, page 527 (test claim permit, Glossary).

[243] United States Code, title 33, section 1342(p)(3)(B)(ii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1).

[244] Exhibit A, Test Claim, page 540 (test claim permit, Glossary).

- A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer.[245]

Federal law also requires permits for discharges from municipal stormwater systems "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[246]

Applications for a large or medium municipal separate storm sewer discharge permit are required to include, "A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs."[247]

The application shall also include a proposed management program, which involves public participation and intergovernmental coordination, "to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate."[248] The proposed management program is specifically required to include "A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls."[249] Among other things, the control measures shall include "a description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers,"[250] and "a description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the

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[245] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(2)-(4).

[246] United States Code, title 33, section 1342(p)(3)(B)(iii).

[247] Code of Federal Regulations, title 40, section 122.26(d)(1)(v)(A).

[248] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[249] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A).

[250] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(1). Code of Federal Regulations, title 40, section 122.41(e) also requires "The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit."

impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."[251]

Finally, federal law requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit, which must ensure compliance with the Clean Water Act and its implementing regulations.[252]

Besides federal law, the state also adopted several statewide plans, including the prior permit, that prohibit trash. The 2007 Basin Plan prohibits floating materials, settleable materials, and suspended materials.[253] The Basin Plan also prohibits the discharge of rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or any place where they would contact or eventually be transported to surface waters.[254] These prohibitions have existed in the Basin Plan since it was adopted in 1975. In 2015, the Water Board amended the Ocean Plan and Inland Surface Waters and Inland Bays and Estuaries Plans to establish a narrative water quality objective prohibiting the discharge of trash.[255] Additionally, 26 water bodies in the permit area are listed on the Clean Water Act section 303(d) list as being impaired for trash, most of which are receiving waters for permittees' municipal storm drain systems.[256]

The prior permit required compliance with water quality standards and objectives and imposed monitoring requirements to ensure water quality standards were met as required by federal law. Specifically, the prior permit contained discharge prohibitions and receiving water limitations that required the permittees to effectively prohibit the discharge of non-stormwater into the storm drain systems and required discharges shall not cause or contribute to a violation of any applicable water quality standard or objective for the receiving waters that were contained in the Regional Board's Basin Plan.[257]

The prior permit further said that discharges shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of waters of the State:

a. Floating, suspended, or deposited macroscopic particulate matter, or foam;

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[251] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(3).

[252] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.44(i)(1), 122.43(a).

[253] Exhibit I (2), Basin Plan 2007, pages 74-75.

[254] Exhibit I (2), Basin Plan 2007, page 203 (Table 4-1).

[255] Exhibit I (3), Amendment to the Water Quality Control Plan for the Ocean Waters of California to Control Trash.

[256] Exhibit A, Test Claim, page 621 (test claim permit, Attachment A, Finding C.10-7).

[257] Exhibit A, Test Claim, page 91 (prior permit, Provision A).

b. Bottom deposits or aquatic growths;

c. Alteration of temperature, turbidity, or apparent color beyond present natural background levels;

d. Visible, floating, suspended, or deposited oil or other products of petroleum origin; and

e. Substances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, or waterfowl, or that render any of these unfit for human consumption.[258]

Additionally, the prior permit included specific provisions regarding trash, which required that "[t]he Permittees shall demonstrate compliance with Discharge Prohibition A.2 and trash-related receiving water limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems (MS4s) by 40% by 2014, 70% by 2017, and 100% by 2022 as further specified below," giving the permittees more time to comply with the Basin Plan and discharge prohibitions on trash.[259] During the permit term, permittees were required to develop and implement a Short-Term Trash Load Reduction Plan to attain 40% reduction in trash loads by July 1, 2014, which included implementing a mandatory minimum level of full trash capture devices and maintenance of these devices; cleanup and abatement progress on a mandatory minimum number of Trash Hot Spots; and implementation of other control measures and best management practices.[260] One of the activities required as part of performing Trash Hotspot cleanup was to document the cleanup activities and assess their effectiveness by taking before and after photographs along the entire Trash Hotspot area at a minimum rate of one photo for every 50 feet of hot spot length.[261] The prior permit also required permittees to develop and begin implementation on a Long-Term Trash Load Reduction Plan to attain a 70% reduction in trash loads from their MS4s by July 1, 2017, and 100% by July 1, 2022.[262]

ii. The requirements in Provision C.10.a.i., ii., and iii. are not new and do not mandate a new program or higher level of service.

The plain language of Provision C.10.a.i. requires permittees to reduce trash discharges into receiving waters from their 2009 levels by 70 percent by July 1, 2017, and by 80 percent by July 1, 2019, with the ultimate goal of 100 percent trash load reduction or no adverse impact to receiving waters from trash by July 1, 2022.[263] Provision C.10.a.ii.a. states that "Permittees shall implement trash prevention and control actions, including

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[258] Exhibit A, Test Claim, page 91 (prior permit, Provision B).

[259] Exhibit A, Test Claim, page 174 (prior permit, Provision C.10).

[260] Exhibit A, Test Claim, page 174 (prior permit, Provision C.10.).

[261] Exhibit A, Test Claim, page 176 (prior permit, Provision C.10.b.iii.).

[262] Exhibit A, Test Claim, pages 174, 176 (prior permit, Provisions C.10 and C.10.c.).

[263] Exhibit A, Test Claim, page 476 (test claim permit, Provision C.10.a.i.).

full trash capture systems or other trash management actions, or combinations of actions, with trash discharge control equivalent to or better than full trash capture systems, to reduce trash generation to a Low trash generation rate or better."[264] The Fact Sheet explains that the permittees can use a variety of means to comply with this requirement.[265] Provision C.10.a.ii.b. states that "Permittees shall ensure that lands that they do not own or operate, but that are plumbed directly to their storm drain systems in Very High, High, and Moderate trash generation areas are equipped with full trash capture systems *or* are managed with trash discharge control actions equivalent to or better than full trash capture systems."[266] And Provision C.10.a.iii. requires that "Permittees shall install and maintain a mandatory minimum number of full trash capture devices, to treat runoff from an area equivalent to 30 percent of retail/wholesale land area, as documented by the Association of Bay Area Governments, which drains to the storm drain system within their jurisdictions."[267] The Fact Sheet explains that the requirement in Provision C.10.a.iii. "is carried forward from the previous permit."[268]

The claimant argues Provision C.10.a's requirements are new and increase the level of service because they increase the expectations placed on permittees over the prior permit by turning the prior permit's trash reduction goals into mandatory deadlines.[269]

The Commission finds these requirements do not mandate a new program or higher level of service.

As was explained above, the receiving water limitations and discharge prohibitions of the prior 2009 permit required compliance with the water quality standards in the Basin Plan, including the prohibition on the discharge of trash, by stating the following:

> A.2. It shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas.
>
> […]
>
> B.1. The discharge shall not cause the following conditions to create a condition of nuisance or to adversely affect beneficial uses of the waters of the State:
>
> a. Floating, suspended, or deposited macroscopic particulate matter, or foam;

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[264] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.a.).

[265] Exhibit A, Test Claim, page 622 (Fact Sheet).

[266] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.b.).

[267] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.iii.).

[268] Exhibit A, Test Claim, page 623 (Fact Sheet).

[269] Exhibit A, Test Claim, pages 21-23.

b. Bottom deposits or aquatic growth;

c. Alteration of temperature, turbidity, or apparent color beyond natural background levels;

d. Visible, floating, suspended, or deposited oil or other products of petroleum origin; and

e. Substances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, or waterfowl, or that render any of these unfit for human consumption.[270]

Additionally, the prior permit required permittees to notify and submit a report to the Regional Board when discharges cause an exceedance of an applicable water quality standard, including the BMPs that are currently being implemented and additional BMPs and monitoring that will be implemented to prevent or reduce the pollutants that are causing or contributing to the exceedance in water quality standards.[271]

Although the Basin Plan prohibited the discharge of trash, the prior permit gave the permittees additional time to comply with this prohibition. The prior permit required permittees to develop and implement a Short-Term Trash Load Reduction Plan to reduce trash load from their MS4s by 40 percent by July 1, 2014, and to develop and begin implementation of a Long-Term Trash Load Reduction Plan that would attain 70 percent reduction in trash loads from their MS4s by July 1, 2017 and 100 percent reduction by July 1, 2022.[272] This is the same schedule for compliance in Provision C.10.a. and C.10.a.i. of the test claim permit and, thus, the schedule for compliance is not new.

In addition, the requirement to reduce trash by 80 percent by July 1, 2019, is not new and does not mandate a new program or higher level of service. The fact sheet notes that "the compliance deadlines are consistent with the previous permit goals of 70 percent trash load reduction by 2017 and 100 percent trash load reduction (or no adverse trash impact) by 2022."[273] The prior permit gave permittees five years, from 2009 to 2014, to reduce trash loads by 40 percent; three years, from 2014 to 2017, to reduce trash an additional 30 percent for 70 percent reduction total; and five years, from 2017 to 2022, to achieve that final 30 percent reduction for 100 percent trash load reduction total. The additional interim deadline of 80 percent trash load reduction by July 1, 2019, is in line with the prior requirement to attain a 100 percent trash load reduction by 2022 and therefore abiding by this interim deadline does not impose a new program or higher level of service.

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[270] Exhibit A, Test Claim, page 91 (prior permit, Provisions A and B).

[271] Exhibit A, Test Claim, page 92 (prior permit, Provision C.1.).

[272] Exhibit A, Test Claim, pages 174, 176 (prior permit, Provisions C.10.a.i. and C.10.c.).

[273] Exhibit A, Test Claim, page 622 (test claim permit, Fact Sheet).

Furthermore, the activities required to implement the trash load deadlines are not new. Permittees already had a duty to implement control measures and best management practices to comply with the discharge prohibitions and prevent all trash discharges in receiving waters. Federal law requires the implementation of a program to effectively prohibit illicit, non-stormwater discharges, and trash is an illicit discharge.[274] Federal law also requires controls to prevent the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods.[275] Since 1975, the San Francisco Bay Basin Plan has contained a narrative water quality objective which prohibits all floating material (waters shall not contain floating material, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses); settleable material (waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses); and suspended material (waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses).[276]

The prior permit's trash provisions also required installing a minimum number of full trash capture systems and performing annual cleanups of a minimum number of trash hot spots as part of permittees' trash load reduction actions. Permittees were required to install and maintain a mandatory minimum number of full trash capture systems that treat runoff from an area equivalent to 30% of the retail/wholesale land that drain to MS4s within their jurisdiction, excluding population-based permittees with a population less than 2,000 or a population less than 12,000 and retail/wholesale land less than 40

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[274] United States Code, title 33, section 1342(p)(3)(B)(ii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1). All non-stormwater discharges are illicit unless they have been permitted with an NPDES permit or are conditionally exempt. There is no exemption for trash.

Moreover, the claimant disputes any findings that the trash and green infrastructure requirements are federally mandated, as "Under *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, when federal law leaves states discretion in determining specific implementing requirements, as here, the state's exercise of that discretion creates a reimbursable state mandate." (Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.) However, the reference to federal law here is not a finding these activities were mandated by federal law, just an analysis of whether they were already required under prior law. The questions of whether a mandated activity is new compared to what was required by prior law, and whether it was mandated by the state, are separate issues in the mandate determination process. See *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875.

[275] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B).

[276] Exhibit I (2), Basin Plan 2007, pages 58-59.

acres.[277] Permittees were also required to identify a minimum number of high-trash impacted locations along state waters, or "Hot Spots" — one per 30,000 population or one per 100 acres of retail/wholesale land, whichever was greater, minimum one — and cleanup those locations for at least 100 yards of creek length or 200 yards of shoreline length to a level of no visible impact at least once per year.[278] Non-population based permittees were each given a specific number of full trash capture systems they were required to install and maintain and trash hot spots they were required to identify and cleanup.[279] These requirements dictating the permittees' trash load reduction methods still carry on in the test claim permit, and have not increased.[280]

In its comments on the Draft Proposed Decision, the claimant argues that the Commission cannot rely on the prior permit's receiving water limitations when determining what was previously required because the U.S. Supreme Court invalidated the use of receiving water limitations in *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334 (*City and County of San Francisco*).[281] In *City and County of San Francisco*, the city petitioned for review of an order issued by U.S. EPA denying review of an NPDES permit for a combined stormwater and wastewater treatment facility, challenging two "end result" requirements contained the permit.[282] The first "end result" requirement prohibits the facility from making any discharge that "contribute[s] to a violation of any applicable water quality standard" for receiving waters. The second provides that the city cannot perform any treatment or make any discharge that "create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050.[283] The U.S. Supreme Court agreed with the city and held that that the two challenged provisions exceed EPA's authority,[284] and concluded as follows:

> §1311(b)(1)(C) [of the U.S. Code, the Clean Water Act] does not authorize the EPA to include "end-result" provisions in NPDES permits. Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools

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[277] Exhibit A, Test Claim, page 175 (prior permit, Provision C.10.a.iii.).

[278] Exhibit A, Test Claim, page 176 (prior permit, Provision C.10.b.).

[279] Exhibit A, Test Claim, page 357 (prior permit, Attachment J, Table 10-2).

[280] Exhibit A, Test Claim, pages 477-478, 481-482, 684-692 (test claim permit, Provisions C.10.a.iii. and C.10.c., Attachment E).

[281] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[282] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 338.

[283] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 343.

[284] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 339.

> needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.[285]

The court came to the conclusion, in part, by recognizing that the Clean Water Act's permit shield provision, under which a permittee is deemed to be in compliance with the Clean Water Act if it follows all the terms of the permit, would be eviscerated:

> If the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard. A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences. It is therefore exceedingly hard to reconcile the Government's interpretation of § 1311(b)(1)(C) with the permit shield.[286]

The court also stated that "EPA possesses the expertise (which it regularly touts in litigation) and the resources necessary to determine what a permittee should do" to meet water quality standards.[287]

However, the court also clarified that its holding "does not rule out 'narrative limitations'"[288]; "provisions demanding compliance with 'best management practices' and 'operational requirements and prohibitions.' Our decision allows such requirements."[289]

Before the *City and County of San Francisco* decision was issued, the State Water Board took the position that its precedential orders requiring compliance with water quality standards did not provide a "safe harbor" even if the iterative process was followed and several courts agreed.[290] While the *City and County of San Francisco*

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[285] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.

[286] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 351.

[287] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 353.

[288] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 354.

[289] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.

[290] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1200, 1210; see also, *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866; and *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1388.

decision may impact the interpretation of permits still open for review, the decision does not invalidate the prior permit in this case because the prior permit is final and no longer subject to review. The courts have been clear that "[w]hen the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review*."[291] The prior permit was adopted as a quasi-judicial order on October 14, 2009, was revised on November 28, 2011,[292] and is no longer open on direct review.[293] Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.[294] Thus, the prior permit is binding, and the Commission has no authority to invalidate its provisions.

Thus, the requirements imposed by Provision C.10.a.i., ii., and iii. are not new and do not mandate a new program or higher level of service.

iii. The requirements in Provisions C.10.b.i. and ii. are not new and do not mandate a new program or higher level of service.

Provision C.10.b.i. requires permittees to maintain their full trash capture systems, as follows:

a. **Maintenance** – The maintenance of each full capture device shall be adequate to prevent plugging, including plugging of the 5 mm screen leading to trash overflow and bypass, flooding, or a full condition of the device's trash reservoir causing bypassing of trash. All full trash capture devices shall be inspected and maintained at least once per year. All such devices in high or very high trash generation areas shall be inspected at least two times per year, with the inspections spaced at least three months or more apart. If this frequency of inspection is found excessive after two inspections, the inspection frequency can be reduced to once per year.

   If any such device is found to have a plugged or blinded screen or is greater than 50 percent full of trash during a maintenance event, the

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[291] *Harper v. Virginia Dept of Taxation* (1993) 509 U.S. 86, 97; *Citicorp North America, Inc. v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1422-1423.

[292] See Exhibit A, Test Claim, page 82 (prior permit).

[293] Pursuant to Water Code section 13320, any aggrieved party may petition the State Water Board for review of the permit within 30 days of the action by the Regional Board. Water Code section 13330 then provides that "A party aggrieved by a final decision or order of a regional board subject to review under Section 13320 may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review." The petition for review is governed by Code of Civil Procedure section 1094.5. (Water Code section 13330(e).)

[294] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

maintenance frequency shall be increased so that the device is neither plugged nor more than half full of trash at the next maintenance event.[295]

b. **Maintenance Records** – Permittees shall retain device specific maintenance records, including, at a minimum: the date(s) of maintenance, the capacity condition of the device at the time of maintenance (full and overflowing or with storage capacity remaining), any special problems such as flooding, screen blinding or plugging from leaves, plastic bags, or other debris causing overflow, damage reducing function, or other negative conditions. A summary of this information shall be reported in each Annual Report which may be limited to the number of full capture devices maintained that exhibited a plugged, full or overflowing condition upon maintenance.[296]

c. **Certification** – Permittees shall certify annually that each of their full trash capture systems is operated and maintained to meet full trash capture system requirements. Drainage areas served by an adequately maintained full trash capture system will be considered equivalent to or better than a Low trash generation area.[297]

Provision C.10.b.ii. also requires permittees to maintain documentation of implementation for their non-full trash capture system control actions; to conduct assessments of the effectiveness of these control actions; and to provide documentation of the control measure implementation and assessments upon request for review. Specifically, Provision C.10.b.ii.a. and b. requires as follows:

a. **Implementation Documentation** – Permittees shall maintain documentation of trash control actions that describes each action or combination of actions, the level of implementation, the timing and frequency of implementation, standard operating procedures if applicable, location(s) of implementation actions including mapped location(s) and drainage area(s) affected or description of areal extent, tracking and enforcement procedures if applicable, and other information relevant to effective implementation of the action or combination of actions.[298]

b. **Visual Assessment of Outcomes of Other Trash Management Actions** – Permittees shall conduct visual on-land assessment, including photo documentation, or other acceptable assessment method (see C.10.b.ii.b.(iv.)), of each trash generation area within which it is implementing other trash management actions or combination of actions other than full trash capture, to determine or verify the effectiveness of the

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[295] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.a.).

[296] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.b.).

[297] Exhibit A, Test Claim, page 478 (test claim permit, Provision C.10.b.i.c.).

[298] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.a.).

action or combination of actions. Permittees may assess and account for one or more trash generation areas in a single trash management area within which a control action or combination of control actions is implemented. The visual on-land assessment method used shall meet or exceed the following criteria:

(i) Conduct observations within a trash management area of the sidewalk, curb and gutter, or locations associated with trash generation sources.

(ii) Conduct observations at randomly selected locations covering at least ten percent of a trash management area's street miles; or conduct observations at strategic locations with justification they are representative of trash generation in the management area and they will represent the effectiveness of the control action(s) implemented or planned in the management area.

(iii) Conduct observations at a frequency consistent with known or estimated trash generation rate(s) within a trash management area and the time frequency of implementation of the control action(s) implemented or planned in the management area. Conduct observations for effectiveness approximately at the halfway point of the interval between instances of recurring trash control actions such as street sweeping and on-land cleanup.

(iv) Permittees may put forth substantive and credible evidence that certain management actions or sets of management actions when performed to a specified performance standard yield a certain trash reduction outcome reliably. Such a proposal shall be made to the Executive Officer as a submittal separate from any other submittals or reports. If this evidence is accepted by the Executive Officer, the Permittees may claim a similar trash reduction outcome by demonstrating that they have performed these trash reduction actions within certain trash management areas to the same performance standard accepted by the Executive Officer.[299]

The claimant contends that the full trash capture system inspection and maintenance requirements are new because they are "more prescriptive, burdensome and costly," than what was required under the prior permit, and that the requirements for non-full trash capture system control actions are so burdensome and costly that it determined full trash capture systems to be the least costly method of compliance.[300]

However, it is not a new requirement to inspect and maintain full trash capture systems. Federal law requires that applications for a large or medium municipal separate storm sewer discharge permit to include a description of the structural controls that will be

[299] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.b.).

[300] Exhibit A, Test Claim, pages 22-23.

used to prevent pollutants, and more importantly to this issue, "a description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[301] Federal regulations further require "[t]he permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit."[302] Keeping maintenance records is also required by federal regulations, as is summarizing these records in permittees' Annual Reports.[303] Permittees are also required to certify all applications reports, or information they submit.[304]

The prior permit also specified that permittees were required to perform maintenance on the full trash capture systems in their jurisdiction.[305] Regular maintenance is necessary to ensure that full trash capture systems are operating properly. Inspecting full trash capture systems, though discussed as a separate action from maintenance, is a step to the maintenance process, a preliminary act to determine whether further maintenance is necessary.

This duty to properly operate and maintain all facilities and systems of treatment and control also applies to the activities required by Provision C.10.b.ii for their non-full trash capture system control actions. Permittees have a duty to reduce trash loads as specified by implementing control measures and other actions, and such actions taken to fulfill this duty qualify as "facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance."[306] Permittees are required by federal regulations to ensure these control actions are being performed as specified, which requires them to document or keep records of their implementation.[307] Federal regulations require permittees to provide access to copies of any records they are required to keep as a permit condition.[308] It is therefore not a new requirement to maintain documentation of implementing a control action and provide that documentation for review upon request.

As for the visual assessments of the outcomes of other trash management actions, according to federal regulations, proper operation and maintenance of these facilities and systems of treatment and control includes appropriate quality assurance

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[301] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(1).

[302] Code of Federal Regulations, title 40, section 122.41(e).

[303] Code of Federal Regulations, title 40, sections 122.41(j)(2), 122.42(c)(4).

[304] Code of Federal Regulations, title 40, section 122.41(k)(1).

[305] Exhibit A, Test Claim, page 175 (prior permit, Provision C.10.a.iii.).

[306] Code of Federal Regulations, title 40, section 122.41(e).

[307] Code of Federal Regulations, title 40, section 122.41(h).

[308] Code of Federal Regulations, title 40, section 122.41(i)(2).

procedures.[309] The test claim permit requires permittees' combination of non-full trash capture system control actions to be "equivalent to or better than full trash capture systems," which it defines to mean the control actions would "send no more trash down the storm drain system than a full trash capture device would allow, which is essentially no trash discharge except in very large storm flows."[310] To provide appropriate quality assurance, there needs to be a method for assessing non-full trash capture system control actions to determine their effectiveness. "The primary tool currently available for determining trash reduction action success and positive outcomes is visual assessment, with photo documentation of trash generation and conditions in areas that drain to storm drains."[311] This history of visual assessments documented with photographic records being the primary tool for determining a trash control action's effectiveness can be seen in the Trash Hotspot Cleanup program that was first required under the prior permit, where permittees' documented their trash hotspot cleanup activities by taking before and after photographs every 50 feet along the trash hotspot cleanup area.[312] Permittees also have the option of avoiding performing these visual assessments by providing substantial and credible evidence that a control measure will reliably yield a certain trash reduction outcome when performed to a certain standard, and then provide evidence they performed the trash control action to that standard.[313] These activities all are meant as quality assurance procedures, which are required by federal law, and thus are not mandated by the state.

Though the claimant complains that the specifications laid out in the test claim permit for what is considered adequate inspection and maintenance of their full trash capture systems make these acts "more prescriptive, burdensome, and costly" than what was required by the prior permit, and that the documentation and assessments required for other trash management activities are so "burdensome and costly" they determined full trash capture systems to be the least costly method of complying with their trash load reduction requirements, the fact is they were always required to perform maintenance on their full trash capture devices as part of their duty to keep their structural source controls operating effectively. Documentation and assessment of their other trash management activities is likewise required by federal law to ensure those activities are being performed to an adequate quality standard. All the test claim permit has done is

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[309] Code of Federal Regulations, title 40, section 122.41(e).

[310] Exhibit A, Test Claim, page 477 (test claim permit, Provision C.10.a.ii.a.).

[311] Exhibit A, Test Claim, page 623 (test claim permit, Fact Sheet).

[312] Exhibit A, Test Claim, page 176 (prior permit, Provision C.10.b.iii.). This requirement has carried on in the test claim permit, although it decreased the number of photographs needed to document Trash Hotspot Cleanup activities to one photograph for every 100 feet of hot spot length. See Exhibit A, Test Claim, page 482 (test claim permit, Provision C.10.c.iii.).

[313] Exhibit A, Test Claim, page 479 (test claim permit, Provision C.10.b.ii.b.iv.).

provide additional detail as to what proper maintenance, documentation, and assessment of the effectiveness of Permittees' trash management activities entails.

Thus, the requirements to inspect and maintain full trash capture systems; to keep records of their maintenance records and provide them for inspection upon request; to annually certify their full trash capture systems are being operated and maintained to the prescribed standard; to maintain documentation of their other trash management control actions; and to perform assessments as to the effectiveness of these other trash management control actions, are not new and do not mandate a new program or higher level of service.

2. Some Requirements in the Provisions Implementing the Mercury and PCBs TMDLs (Provisions C.3.j., C.11.a., C.11.b., C.11.c., C.12.a., C.12.c., C.12.d., and C.12.e.) Impose State-Mandated New Programs or Higher Levels of Service.

The claimant pleads various provisions of the test claim permit that implement TMDLs previously adopted for mercury and PCBs. These provisions generally do the following:

- Provision C.3.j. requires the permittees to develop a Green Infrastructure Plan, adopt policies and ordinances, conduct outreach, and report progress on the planning.[314]
- Provisions C.11.c. and C.12.c. require the permittees to implement Green Infrastructure projects to achieve the load reductions for mercury and PCBs, in accordance with the TMDLs; prepare a reasonable assurance analysis of future mercury and PCBs load reductions, which demonstrate how Green Infrastructure projects will achieve the total load reduction by 2040; and to report on Green Infrastructure implementation.[315]
- Provision C.11.a. requires the permittees to implement mercury and PCBs source and treatment control measures and pollution prevention strategies to reduce loads throughout the permit area, develop and implement an assessment methodology and data collection program to quantify in a technically sound manner mercury and PCBs loads reduced; and submit various reports.[316]
- Provision C.11.b. requires the permittees to develop and implement an assessment methodology and data collection program to quantify mercury loads reduced through implementation of any and all pollution prevention, source control and treatment control efforts required by the test claim permit's provisions or load reductions achieved through other relevant efforts.[317]

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[314] Exhibit A, Test Claim, pages 422-427 (test claim permit, Provision C.3.j.).

[315] Exhibit A, Test Claim, pages 488-490 (test claim permit, Provision C.11.c.) and 495-497 (test claim permit, Provision C.12.c.).

[316] Exhibit A, Test Claim, pages 486-487 (test claim permit, Provisions C.11.a.).

[317] Exhibit A, Test Claim, page 487-488 (test claim permit, Provision C.11.b.).

- Provision C.12.a. requires the permittees to implement PCBs source and treatment control measures and pollution prevention strategies to reduce loads throughout the permit area, develop and implement an assessment methodology and data collection program to quantify in a technically sound manner mercury and PCBs loads reduced, and submit various reports.[318]
- Provision C.12.d. requires the permittees to prepare a plan and schedule of future PCBs control measure implementation and reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[319]
- Provision C.12.e. requires permittees to evaluate the presence of PCBs in caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[320]

As explained below, some of the requirements imposed by these provisions constitute state-mandated new programs or higher levels of service.

a. Federal law requires Regional Boards to include effluent limits consistent with the assumptions and requirements of any wasteload allocations in an established TMDL.

The CWA requires states to develop a list of "impaired" waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards necessary to permit the designated beneficial uses, such as fishing or recreation. States must then rank those impaired waters by priority, and establish a Total Maximum Daily Load (TMDL), which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[321] A TMDL represents the total assimilative capacity of a water body for a specific constituent pollutant, with a margin of safety, which is protective of that water body's identified beneficial uses. Usually, a TMDL will also include wasteload allocations (WLAs), which divide up the total assimilative capacity of the receiving waters among the known point source dischargers, and load allocations (LAs) for non-point source discharges.[322] The development of a TMDL triggers further regulatory action by the state, as explained by the court in *City of Arcadia v. U.S. EPA*:

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[318] Exhibit A, Test Claim, pages 492-495 (test claim permit, Provisions C.12.a.).

[319] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.).

[320] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.).

[321] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[322] United States Code, title 33, section 1313(d). Code of Federal Regulations, title 40, section 130.2(h) defines WLA as "The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." Code of Federal Regulations, title 40, section 130.2(g) defines LA as "The portion of a receiving water's

> TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir.2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–85 (9th Cir.1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g., *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies.... The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D.Wash.1996) ("TMDL development in itself does not reduce pollution.... TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes ... state or local plans for point and nonpoint source pollution reduction ...."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir.1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.
>
> For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id*.[323]

Once a TMDL is adopted, it must be approved by U.S. EPA. If U.S. EPA does not approve the TMDL, it must, within 30 days after disapproval "establish such loads for such waters as [it] determines necessary to implement the water quality standards

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loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished."

[323] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

applicable to such waters."[324] A regional board is then required by federal law to incorporate the TMDL into the Basin Plan.[325] Basin Plan amendments do not become effective until approved by the State Water Board and the Office of Administrative Law (OAL).[326]

Federal law then requires regional boards to include effluent limits in compliance with "all applicable water quality standards" and "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" in NPDES permits as follows:

> When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:
>
> (A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and
>
> (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.[327]

b. <u>Mercury and PCBs TMDLs were approved prior to the permit term establishing mercury allocations of 82 kg/year for urban stormwater runoff, and PCBs allocations of 2 kg/year for urban stormwater runoff and requiring load reductions by the permittees.</u>

The San Francisco Bay is impaired for both mercury and PCBs, and accordingly TMDLs have been established for both pollutants.[328]

i. The Mercury TMDL.

Before the adoption of the TMDL for mercury, the Basin Plan provided that surface waters shall not contain concentrations of chemical constituents in amounts that

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[324] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, section 130.7(d)(2).

[325] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, sections 130.6, 130.7(d)(2).

[326] California Government Code section 11353.

[327] Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

[328] California Code of Regulations, title 23, section 3915 (Register 2007, No. 45) (codifying the San Francisco Bay mercury TMDL adopted by R2-2006-005). California Code of Regulations, title 23, section 3919.6 (Register 2010, No. 9) (codifying the San Francisco Bay PCBs TMDL adopted by R2-2008-0012).

adversely affected any designated beneficial use.[329] In 1998, the Regional Board adopted a 303(d) impaired water body list classifying all of San Francisco Bay as impaired due to mercury.[330] Mercury concentrations in the Bay were high enough to threaten the health of humans who consume fish caught in the Bay, accounted for abnormally high rates of bird eggs failing to hatch, and adversely affected beneficial uses of the Bay including sport fishing and preservation of endangered species and wildlife habitat.[331]

The Regional Board adopted the mercury TMDL on August 9, 2006, to ensure attainment of the water quality objectives and beneficial uses; it was adopted by the State Board on July 17, 2007; was approved by the Office of Administrative Law on November 7, 2007; and was approved by the U.S. EPA on February 12, 2008.[332] The aggregate, regionwide urban runoff wasteload allocation from the San Francisco Bay mercury TMDL to meet water quality standards is 82 kg/yr.[333] The mercury TMDL implementation plan calls for attaining the allocation by February 2028, with an interim milestone of 120 kg/yr by February 2018.[334] Of the 82 kg/yr aggregate mercury allocation for urban stormwater runoff, approximately 64.41 kg/yr were allocated to permittees, requiring a 62.87 load reduction from permittees.[335] Wasteload allocations were also established for other entities, including industrial companies discharging wastewater and petroleum wastewater.[336]

Order R2-2006-0052 imposed the following mercury load allocations and resulting required load reductions for permittee's stormwater programs:

Entity	Allocation (kg/year)	Reduction (kg/year)
Santa Clara Valley Urban Runoff Pollution Prevention Program	23	21
Alameda Countywide Clean Water Program	20	19

[329] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 6.

[330] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 1.

[331] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 10.

[332] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 4, 10, 11; California Code of Regulations, title 23, section 3915.

[333] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 14; Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.).

[334] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 19; Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.).

[335] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 14.

[336] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 15-17.

Contra Costa Clean Water Program	11	11
San Mateo County Stormwater Pollution Prevention Program	8.4	8.0
Vallejo Sanitation and Flood Control District	1.6	1.6
Fairfield-Suisun Urban Runoff Management Program	1.6	1.5
Solano County Area	0.81	0.77[337]

The mercury TMDL says that the urban stormwater management agencies' NPDES permit shall require implementation of best management practices and control measures designed to achieve the load allocations or accomplish the load reductions derived from the allocations, and include actions to reduce mercury-related risks to humans and wildlife.[338] Requirements shall be based on an updated assessment of control measures intended to reduce pollutants in stormwater to the maximum extent practicable and consistent with the TMDL.[339] Additionally, the mercury TMDL said that stormwater permits shall incorporate the following requirements:

i) Evaluate and report on the spatial extent, magnitude, and cause of contamination for locations where elevated mercury concentrations exist;

ii) Develop and implement a mercury source control program;

iii) Develop and implement a monitoring system to quantify either mercury loads or loads reduced through treatment, source control, and other management efforts;

iv) Monitor levels of methylmercury in discharges;

v) Conduct or cause to be conducted studies aimed at better understanding mercury fate, transport, and biological uptake in San Francisco Bay an tidal areas;

vi) Develop an equitable allocation-sharing scheme in consultation with Caltrans (see below) to address Caltrans roadway and non-roadway facilities in the program area, and report the details to the Water Board;

vii) Prepare an annual report that documents compliance with the above requirements and documents either mercury loads discharged, or loads reduced through ongoing pollution prevention and control activities; and

[337] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 14.

[338] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 19.

[339] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 19.

viii) Demonstrate progress towards (a) the interim load milestone, or (b) attainment of the allocations shown in Table 4-w, by using one of the following methods:

1) Quantify the annual average mercury load reduced by implementing (a) pollution prevention activities, and (b) source and treatment controls. The benefit of efforts to reduce mercury-related risk to wildlife and humans should also be quantified. The Water Board will recognize such efforts as progress towards achieving the interim milestone and the mercury-related water quality standards upon which the allocations and corresponding load reductions are based. Loads reduced as a result of actions implemented after 2001 (or earlier if actions taken are not reflected in the 2001 load estimate) may be used to estimate load reductions.

2) Quantify the mercury load as a rolling five-year annual average using data on flow and water column mercury concentrations.

3) Quantitatively demonstrate that the mercury concentration of suspended sediment that best represents sediment discharged with urban runoff is below the suspended sediment target.[340]

ii. The PCBs TMDL.

PCBs are a potential carcinogen and are suspected of having negative impacts on the human immune system, reproductive system, nervous system, endocrine system, and digestive system. Although their manufacture is banned in the United States, PCBs continue to pose a serious risk due to their presence in the environment and tend to accumulate in fatty tissue in fish.[341]

Before the adoption of the TMDL, the Basin Plan contained a narrative water quality objective stating that controllable water quality factors shall not cause a detrimental increase in toxic substances found in bottom sediments or aquatic life.[342] In addition, in May 2000, the CTR established numeric water quality criteria of 0.00017 ug/L total PCBs in water that apply to the San Francisco Bay.[343] As indicated above, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the CWA.'"[344] However, all segments of the San Francisco Bay were impaired for PCBs and were 303(d) listed in 1998 because neither the narrative nor numeric water quality

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[340] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 19-20; see also Exhibit A, Test Claim, page 635-636 (test claim permit, Fact Sheet, Finding C.11-6).

[341] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 6.

[342] Exhibit I (2), Basin Plan 2007, page 57 (Section 3.3.2.); Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 5.

[343] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 1, 5.

[344] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

objectives were being met and the beneficial uses of the water bodies of commercial and sport fishing were not fully supported.[345]

The Regional Board adopted the PCBs TMDL on February 13, 2008, to ensure attainment of the water quality objectives and beneficial uses; it was approved by the State Board on October 20, 2009; was approved by the Office of Administrative Law on March 1, 2010; and was approved by the U.S. EPA on March 29, 2010.[346] The PCBs TMDL found the baseline of PCBs loads into the San Francisco is 33 kg/yr total from all sources, of which 20 kg/yr came from urban and non-urban stormwater runoff.[347] The TMDL set the wasteload allocation for the entire Bay at 10 kg/yr, of which 2 kg/yr is allotted to stormwater runoff.[348] And 1.6 kg/yr of the wasteload allocation was allocated to permittees, to be achieved by March 2030.[349] This is an 18 kg/yr reduction from the 2003 PCBs baseline, with the permittees responsible for 14.4 kg/yr of that reduction.[350] The TMDL also established WLAs for municipal and industrial wastewater dischargers.[351]

Order R2-2008-0012 imposed the following PCBs load allocations for stormwater runoff based on county:[352]

County	Allocation (kg/year)
Alameda	0.5
Contra Costa	0.3
San Mateo	0.2
Santa Clara	0.5
Solano	0.1

According to the PCBs TMDL, requirements in the NPDES permits shall be based on an updated assessment of the best management practices and control measures intended to reduce PCBs in stormwater runoff, and control measures shall reduce PCBs to the maximum extent practicable.[353] The PCBs TMDL laid out the following roadmap for

[345] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 5.

[346] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 3, 5; California Code of Regulations, title 23, section 3919.6.

[347] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 6, 7.

[348] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 7.

[349] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.).

[350] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.).

[351] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 7, 8.

[352] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 10.

[353] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 11.

how it intended urban stormwater permittees to achieve their WLAs over several permit terms:

> In the first five-year permit term, stormwater permittees will be required to implement control measures on a pilot scale to determine their effectiveness and technical feasibility. In the second permit term, stormwater permittees will be required to implement effective control measures, that will not cause significant adverse environmental impacts, in strategic locations, and to develop a plan to fully implement control measures that will result in attainment of allocations, including an analysis of costs, efficiency of control measures and an identification of any significant environmental impacts. Subsequent permits will include requirements and a schedule to implement technically feasible, effective and cost efficient control measures to attain allocations. If, as a consequence, allocations cannot be attained, the Water Board will take action to review and revise the allocations and these implementation requirements as part of adaptive implementation.
>
> In addition, stormwater permittees will be required to develop and implement a monitoring system to quantify PCBs urban stormwater runoff loads and the load reductions achieved through treatment, source control and other actions; support actions to reduce the health risks of people who consume PCBs-contaminated San Francisco Bay fish; and conduct or cause to be conducted monitoring, and studies to fill critical data needs identified in the adaptive implementation section.[354]

c. <u>The prior permit implemented the mercury and PCBs TMDLs by requiring regulated projects treat their stormwater runoff using low-impact development (LID); and by implementing mercury and PCBs control measures, primarily a series of pilot projects and studies to determine which methods were feasible, effective, and economically feasible.</u>

The TMDL for mercury was adopted, became effective, and was included in the Basin Plan before the prior permit became effective on December 1, 2009.[355] The TMDL for PCBs had been adopted by the Regional Board and State Water Board when the prior permit became effective, but was awaiting approval from OAL and U.S. EPA, which came in 2010.[356] The prior permit implemented the PCBs TMDL, however, stating that one of the goals was to "achieve Waste Load Allocations adopted under Total Maximum Daily Loads" and "to implement the urban runoff requirements of the PCBs TMDL and

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[354] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 12.

[355] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 4, 10, 11; California Code of Regulations, title 23, section 3915.

[356] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 3, 5; California Code of Regulations, title 23, section 3919.6.

reduce PCBs loads to make substantial progress toward achieving the urban runoff PCBs load allocation."[357]

The prior permit's receiving water limitations prohibited discharges from causing or contributing to any applicable water quality standard for receiving waters contained in the Basin Plan.[358] The prior permit also prohibited discharges from creating a condition of nuisance or adversely affecting beneficial uses of waters of the State through any of the following conditions: floating, suspended, or deposited macroscopic particulate matter, or foam; bottom deposits or aquatic growths; alteration of temperature, turbidity, or apparent color beyond present natural background levels; visible, floating, suspended, or deposited oil or other products of petroleum origin; and substances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, or waterfowl, or that render any of these unfit for human consumption.[359] Compliance with the prior permit's receiving water limitations required timely implementation of control measures pursuant to Provision C.1 "and other actions specified in Provisions C.2 through C.15" and if an exceedance was detected through monitoring, permittees were required to report to the Regional Board and modify their BMPs.[360]

The prior permit's new development and redevelopment provisions required permittees to use their planning authorities to include appropriate source control, site design, and stormwater treatment in new development and redevelopment projects to address both soluble and insoluble stormwater runoff pollutant discharges, primarily through the use of low-impact development (LID).[361] Because these provisions were intended to address soluble and insoluble stormwater runoff discharges, and mercury and PCBs are two such examples of these types of discharges, these provisions are part of how the prior permit implemented control measures for mercury and PCBs.[362]

The prior permit required permittees to require all Regulated Projects[363] to treat 100 percent of their stormwater runoff by implementing onsite LID measures, although

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[357] Exhibit A, Test Claim, pages 185, 220 (prior permit, Provision C.12. and Fact Sheet); see also page 299 "The C.12 provisions are consistent with the regulatory approach and implementation plan of the San Francisco Bay PCBs TMDL adopted by the Water Board." (prior permit, Fact Sheet).

[358] Exhibit A, Test Claim, page 91 (prior permit, Provision B.2.).

[359] Exhibit A, Test Claim, page 91 (prior permit, Provision B.1.).

[360] Exhibit A, Test Claim, page 92 (prior permit, Provision C.1.).

[361] Exhibit A, Test Claim, page 99 (prior permit, Provision C.3.).

[362] Exhibit A, Test Claim, page 239 (prior permit, Fact Sheet, Finding C.3-2.).

[363] Regulated Projects either: 1) create or replace 5,000 square feet or more of impervious surfaces collectively over the project site and include development or redevelopment of auto service facilities, retail gasoline outlets, restaurants, or uncovered parking lots; 2) create or replace 10,000 square feet or more of impervious

alternative compliance methods were allowed, such as treatment at an off-site joint stormwater treatment facility.[364] Non-Regulated Projects were encouraged, but not required, to also include source control measures to limit pollutant generation, discharge, and runoff.[365]

The prior permit also required permittees to collectively complete ten pilot green streets projects, which would incorporate LID techniques for site design and be sized according to hydraulic sizing criteria.[366] The green street pilot projects contained the following elements:

(i) Stormwater storage for landscaping reuse or stormwater treatment and/or infiltration for groundwater replenishment through the use of natural feature systems;

(ii) Creation of attractive streetscapes that enhance neighborhood livability by enhancing the pedestrian environment and introducing park-like elements into neighborhoods;

(iii) Service as an urban greenway segment that connects neighborhoods, parks, recreation facilities, schools, mainstreets, and wildlife habitats;

(iv) Parking management that includes maximum parking space requirements as opposed to minimum parking space requirements, parking requirement credits for subsidized transit or shuttle service, parking structures, shared parking, car sharing, or on-street diagonal parking;

(v) Meets broader community goals by providing pedestrian and, where appropriate, bicycle access; and

(vi) Located in a Priority Development Area as designated under the Association of Bay Area Government's and Metropolitan Transportation Commission's FOCUS4 program.[367]

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surface collectively over the project site for development or redevelopment of all other land use types, except detached single-family homes that aren't part of a larger development plan; or 3) road projects that create 10,000 square feet or more of new contiguous impervious surface, including sidewalks, bicycle lanes, and impervious trails that are greater than 10 feet wide or are creek-side. See Exhibit A, Test Claim, pages 100-105 (prior permit, Provision C.3.b.).

[364] Exhibit A, Test Claim, pages 108, 114-115 (prior permit, Provisions C.3.c. and C.3.e.).

[365] Exhibit A, Test Claim, page 99 (prior permit, Provision C.3.a.i.7.).

[366] Exhibit A, Test Claim, pages 105-106 (prior permit, Provision C.3.b.iii.).

[367] Exhibit A, Test Claim, pages 105-106 (prior permit, Provision C.3.b.iii.4.).

Permittees annually reported on the status of the green street pilot projects; reported each completed project's capital costs, operational and maintenance costs, legal and procedural arrangements, the sustainable landscaping measures incorporated into the project, and its score according to the Bay-Friendly Landscape Scorecard; and summarized in the 2013 Annual Report each project's location, size, including impervious surface treated, maps of areas treated, types of LID treatment measures included, total and specific project costs, funding sources broken down by percentage paid by each funding source, lessons learned and recommendations for future projects, and identification of the responsible party and funding source for operation and maintenance.[368]

The prior permit also identified specific provisions to implement the mercury and PCBs TMDLs. With respect to mercury, Provision C.11. of the prior permit stated the following:

> The Permittees shall implement the following control programs for mercury. The Permittees shall perform the control measures and provide reporting on those control measures according to the provisions below. The purpose of this provision is to implement the urban runoff requirements of the San Francisco Bay mercury TMDL and reduce mercury loads to make substantial progress toward achieving the urban runoff mercury load allocation established for the TMDL. The aggregate, regionwide, urban runoff wasteload load allocation is 82 kg/yr. This allocation should be achieved by February 2028 and, as a way to measure progress, an interim loading milestone of 120 kg/yr, halfway between the current load and the allocation, should be achieved by February 2018. If the interim loading milestone is not achieved, the Permittees shall demonstrate reasonable and measurable progress toward achieving the milestone. The Permittees may comply with any requirement of this provision through a collaborative effort.[369]

The prior permit required the permittees to implement a series of mercury control programs and report on their findings.[370] These programs required permittees to: a) implement a region-wide mercury collection and recycling program for consumer-level devices and equipment containing mercury such as thermometers, thermostats, switches, and bulbs; b) monitor methylmercury in runoff discharges; c) conduct a pilot program to investigate and abate mercury sources in drainages, including public rights-of-way, and stormwater conveyances with accumulated sediment that contains elevated mercury concentrations; d) conduct a pilot program to evaluate and enhance municipal sediment removal and management practices; e) complete pilot projects to evaluate on-site stormwater treatment via retrofit; f) complete pilot projects to evaluate reducing mercury loads by diverting dry weather and first flush stormwater flows to sanitary

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[368] Exhibit A, Test Claim, pages 107-108 (prior permit, Provision C.3.b.v.2.).

[369] Exhibit A, Test Claim, page 178 (prior permit, Provision C.11.).

[370] Exhibit A, Test Claim, page 178 (prior permit, Provision C.11.).

sewers; g) develop and implement a monitoring program to quantify mercury loads and loads reduced through source control treatment and other management measures; h) conduct studies aimed to better understand the fate, transport, and biological uptake of mercury discharged in urban runoff to the San Francisco Bay and tidal areas; i) develop effective programs to reduce mercury-related risks to humans and quantify the resulting risk reduction; and j) develop an allocation sharing scheme with Caltrans.[371]

The pilot program evaluating on-site stormwater treatment via retrofit involved implementing on-site treatment projects at ten locations during the permit term to evaluate and quantify the removal of mercury by retrofitting on-site treatment systems into existing storm drain systems.[372] Examples of on-site treatment systems included detention basins, bioretention units, sand filters, infiltration basins, and treatment wetlands.[373] When choosing project locations, permittees were required to identify locations draining to a variety of land uses, evaluate the technical feasibility, and discuss economic feasibility.[374] Permittees reported the results of these retrofitting projects in their 2014 integrated monitoring report, reporting on the project status, results, mercury removal effectiveness, and lessons learned from the pilot projects, and a plan for implementing this type of treatment on an expanded basis throughout the jurisdiction during the next permit term.[375]

Provision C.12. in the prior permit said the following regarding PCBs:

> The Permittees shall implement the following control programs for PCBs. The Permittees shall perform the control measures and provide reporting on those control measures according to the provisions below. The purpose of these provisions is to implement the urban runoff requirements of the PCBs TMDL and reduce PCBs loads to make substantial progress toward achieving the urban runoff PCBs load allocation. The Permittees may comply with any requirement of this Provision through a collaborative effort.[376]

As directed in the PCBs TMDL, the prior permit's PCBs control measures primarily involved a series of pilot programs, many of which were the same programs required by the mercury provisions. These control actions required permittees to implement: a) a region-wide program to train municipal building inspectors to identify PCBs and PCBs-containing equipment during the course of routine inspections; b) pilot programs to evaluate managing PCBs-containing materials and wastes during building demolition and renovation; c) pilot projects to investigate and abate on-land locations with elevated

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[371] Exhibit A, Test Claim, pages 178-184 (prior permit, Provisions C.11.a-j.).

[372] Exhibit A, Test Claim, page 180 (prior permit, Provision C.11.e.i.).

[373] Exhibit A, Test Claim, page 180 (prior permit, Provision C.11.e.ii.).

[374] Exhibit A, Test Claim, page 180 (prior permit, Provision C.11.e.ii.).

[375] Exhibit A, Test Claim, page 181 (prior permit, Provision C.11.e.iii.2.).

[376] Exhibit A, Test Claim, page 185 (prior permit, Provision C.12.).

PCBs concentrations, including public rights-of-way, and stormwater conveyances with accumulated sediments with elevated PCBs concentrations; d) pilot projects to evaluate and enhance municipal sediment removal and management practices; e) pilot projects to evaluate on-site stormwater treatment via retrofit; f) pilot projects to evaluate reducing PCBs loads through diverting dry weather and first flush stormwater to sanitary sewers; g) a monitoring program to quantify PCBs loads reduced through the source control, treatment, and other management measures implemented as part of the pilot studies; h) studies on the fate, transport, and biological uptake of PCBs discharged in urban runoff; and i) programs to reduce PCBs-related risks to humans and quantify the resulting risk reduction from these activities.[377] The pilot projects evaluating on-site stormwater treatment via retrofit imposed the same conditions as the pilot projects evaluating the effectiveness of using retrofit to treat mercury, and the two provisions acknowledged that a project at a site with both elevated mercury and PCBs concentrations could satisfy both provisions.[378]

d. Some of the requirements in Provisions C.3.j., C.11.c., and C.12.c. of the test claim permit, regarding the development and implementation of Green Infrastructure plans to achieve the TMDL reductions in mercury and PCBs are state-mandated new programs or higher levels of service.

The Test Claim pleads Provisions C.3.j., C.11.c., and C.12.c. of the test claim permit, which require permittees to develop and implement Green Infrastructure plans and projects to comply with mercury and PCBs load reduction requirements imposed by two prior TMDLs.[379]

Green infrastructure is defined in the test claim permit as: "Infrastructure that uses vegetation, soils, and natural processes to manage water and create healthier urban environments. At the scale of a city or county, green infrastructure refers to the patchwork of natural areas that provides habitat, flood protection, cleaner air, and cleaner water. At the scale of a neighborhood or site, green infrastructure refers to stormwater management systems that mimic nature by soaking up and storing water."[380] "A critical part of the strategy to reduce urban runoff mercury loads will be the widespread implementation of Green Infrastructure control measures to intercept mercury-containing sediment and stormwater before it is discharged to receiving water."[381]

Provision C.3.j. requires permittees to "complete and implement a Green Infrastructure Plan for the inclusion of low impact development (LID) drainage design into storm drain infrastructure on public and private lands, including streets, roads, storm drains, parking

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[377] Exhibit A, Test Claim, pages 185-191 (prior permit, Provisions C.12.a-i.).

[378] Exhibit A, Test Claim, pages 188-189 (prior permit, Provision C.12.e.).

[379] Exhibit A, Test Claim, pages 25-27 (Written Narrative).

[380] Exhibit A, Test Claim, page 526 (test claim permit, Glossary).

[381] Exhibit A, Test Claim, page 639 (test claim permit, Fact Sheet).

lots, building roofs, and other storm drain infrastructure elements."[382] The purpose of this plan is to serve as an implementation guide and reporting tool to provide reasonable assurance that the San Francisco Bay mercury and PCBs TMDL wasteload allocations will be met.[383] The Fact Sheet explains that the Green Infrastructure Plan "is in lieu of expanding the definition of Regulated Projects" for this permit term.[384] Over the long term, the Plan is intended to describe how the permittees will shift their impervious surfaces and storm drain infrastructure from gray to green; i.e., "to a more resilient, sustainable system that slows runoff by dispersing it to vegetated areas, harvests and uses runoff, promotes infiltration and evapotranspiration, and uses bioretention and other Green Infrastructure practices to clean stormwater runoff."[385]

Provision C.11. establishes mercury controls to implement the urban runoff requirements in the mercury TMDL and reduce mercury loads to achieve the TMDL waste load allocations.[386] Provision C.11.c. says that permittees shall implement Green Infrastructure projects during the permit term to collectively achieve 48 g/year mercury load reduction through Green Infrastructure by June 30, 2020, and prepare a reasonable assurance analysis quantitatively demonstrating they can achieve mercury load reductions of at least 10 kg/year through green infrastructure by 2040.[387]

Provision C.12. implements the urban runoff requirements of the PCBs TMDL and establishes control measures to achieve the wasteload allocations adopted in the TMDL.[388] Provision C.12.c. also requires permittees to implement Green Infrastructure projects and prepare a reasonable assurance analysis, but with a goal of achieving a total of 120 g/year PCBs load reduction through Green Infrastructure by June 30, 2020, and the reasonable assurance analysis demonstrating they can achieve 3 kg/year PCBs load reduction by 2040.[389] The Fact Sheet explains that mercury is distributed more evenly throughout the Bay Area than PCBs which tend to be highly concentrated in areas where PCBs were historically heavily used, however both benefit from widespread implementation of Green Infrastructure.[390] The Green Infrastructure projects required by Provisions C.11.c. and C.12.c. are thus one and the same, and

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[382] Exhibit A, Test Claim, page 422 (test claim permit, Provision C.3.j.).

[383] Exhibit A, Test Claim, page 422 (test claim permit, Provision C.3.j.).

[384] Exhibit A, Test Claim, page 575 (test claim permit, Fact Sheet).

[385] Exhibit A, Test Claim, pages 575-576 (test claim permit, Fact Sheet).

[386] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.).

[387] Exhibit A, Test Claim, pages 488-490 (test claim permit, Provision C.11.c).

[388] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.).

[389] Exhibit A, Test Claim, pages 495-497 (test claim permit, Provision C.12.c).

[390] Exhibit A, Test Claim, pages 639, 652 (test claim permit, Fact Sheet).

recognize that the "planning, financing and implementation of green infrastructure is going to take a long time, perhaps as much as 25 years or more."[391]

Because the requirements for Green Infrastructure projects are based on the Green Infrastructure plan in Provision C.3.j, Provisions C.3.j, C.11.c., and C.12.c. are discussed together.

The claimant asserts that Green Infrastructure is a new term that was not used at all in the prior permit, making the requirements to create a Green Infrastructure plan and to implement Green Infrastructure to reduce mercury and PCBs loads by specified amounts by June 30, 2020 new requirements.[392] The claimant states that it adopted a Green Infrastructure Plan, is hiring a consultant for preparation of some of the tasks in the "Framework for Green Infrastructure Plan Development," and has identified the following Green Infrastructure projects and the costs to comply with the test claim permit:

- First Green Street Infrastructure Project. The claimant awarded the first green street contract to Star Construction, for a total cost of $1,405,840.
- South Decoto Green Streets Project. This is a sustainable redevelopment project in the Decoto district that aims to create Green Infrastructure that mimics natural systems to reduce reliance on the city's storm drain, with costs totaling $3,618,712.
- H Street Green Street Improvements, for estimated costs of $3,874,000.[393]

The claimant also estimates future costs of $72.5 million ($3 million per year for 23 years) to achieve the load reductions for mercury and PCBs.[394]

The claimant argues in its Rebuttal Comments that the Regional Board exercised discretion and implemented a true choice when it developed and implemented the mercury and PCBs TMDLs, as it controls how load allocations are distributed among known dischargers.[395]

The Regional Board's response is that the Green Infrastructure requirements are required by federal law, as they are meant to implement the mercury and PCBs TMDLs.[396] Although the term "Green Infrastructure" did not appear in the prior permit, the prior permit had requirements regarding low impact development (LID), which is

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[391] Exhibit A, Test Claim, page 640 (test claim permit, Fact Sheet).

[392] Exhibit A, Test Claim, pages 25-27 (Written Narrative).

[393] Exhibit A, Test Claim, pages 29-30 (Written Narrative), 44-45 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[394] Exhibit A, Test Claim, pages 30 (Written Narrative), 45 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[395] Exhibit D, Claimant's Rebuttal Comments, page 5.

[396] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 14-15.

defined as a type of Green Infrastructure.[397] The Board also alleges that the Green Infrastructure planning requirements were included in the test claim permit at permittees' request as a means for them to meet their TMDL load reduction requirements.[398] The EPA supported including Green Infrastructure requirements in the test claim permit, and as there is evidence EPA commonly includes Green Infrastructure or low impact development requirements in federally issued permits, it is likely the EPA would have imposed the same or similar requirements, further supporting they are federally mandated.[399] The Board also argues that the Green Infrastructure program was not new to permittees in 2015, as permittees have been aware of the TMDL load reduction requirements since 2008; had opportunities to and did in fact participate in TMDL development; were aware that achieving load allocations would be difficult and that the permits were designed to become more stringent as implementation deadlines approached; and permittees actively participated in a pilot Green Infrastructure program and workshops discussing how to "scale up" Green Infrastructure implementation during the prior permit's life cycle.[400] It argues that the permit's provisions cannot be viewed in isolation, but must be viewed in the greater context of TMDL adoption and implementation as a whole, and that "[v]iewed in this way, the green infrastructure provisions are not a new program at all, but the continuation of a program that had been ongoing for the better part of a decade by the time the Board adopted MRP 2.0."[401]

As described below, the Commission finds that the some of the activities required by Provisions C.3.j., C.11.c., and C.12.c., impose a state mandated new program or higher level of service.

i. Provision C.3.j. imposes new requirements to develop a Green Infrastructure Plan, adopt policies and procedures, conduct outreach, conduct early implementation activities, and report progress on the planning. Except for the "early implementation" requirements for a permittee's own public projects, which do not mandate a new program or higher level of service, the remaining requirements in Provision C.3.j. mandate a new program or higher level of service.

Provision C.3.j. requires permittees to comply with the following activities to develop a Green Infrastructure Plan, adopt policies and ordinances, conduct outreach, and report progress as follows:

1. Green Infrastructure Plan Development (Provision C.3.j.i.):

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[397] Exhibit C, Regional Board's Late Comments on the Test Claim, page 15.

[398] Exhibit C, Regional Board's Late Comments on the Test Claim, page 15.

[399] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 15-16, 22-25.

[400] Exhibit C, Regional Board's Late Comments on the Test Claim, page 39.

[401] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 39-40; see also Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 1.

- Prepare a framework or workplan describing specific tasks and timeframes for development for its Green Infrastructure plan, to be approved by the Permittee's governing body, mayor, city manager, or county manager by June 30, 2017. This framework or workplan shall include a statement of purpose, tasks, and timeframe needed to complete all requirements in Provision C.3.j.i.2. (discussed below).[402]
- Prepare a Green Infrastructure Plan, subject to Executive Officer approval, that contains all the following:
    - A mechanism (such as SFEI's Green PlanIT tool) to prioritize and map areas for potential and planned projects, both public and private, on a drainage-area specific basis, for implementation by 2020, by 2030, and by 2040, that includes criteria for prioritization and outputs that can be incorporated into the Permittees' long-term planning and capital improvement processes.
    - Outcomes from the above-described mechanism, including but not limited to, the prioritization criteria, maps, lists, and all other information, as appropriate. Individual project-specific reviews do not need to be submitted with the Plan, but shall be made available for review upon request.
    - Targets for the amount of impervious surface from public and private projects within the Permittee's jurisdiction to be retrofitted by 2020, by 2030, and by 2040.
    - A process for tracking and mapping completed projects, public and private, and making the information publicly available online (I.E., SFEI's Green PlanIT tool).
    - General guidelines for overall streetscape and project design and construction so that projects have a unified complete design that implements the range of functions associated with the project.
    - Standard specifications, and as appropriate, typical design details and related information necessary for the Permittee to implement Green Infrastructure projects in its jurisdiction, which shall be sufficient to address the different street and project types within a Permittee's jurisdiction, as defined by land use and transportation characteristics.
    - Requirements that projects be designed to meet the treatment and hydromodification sizing requirements outline in Provisions C.3.c. and C.3.d. For projects that are not subject to these requirements according to Provision C.3.b.ii. (non-regulated projects), Permittees may collectively propose a single approach for how to proceed when project constraints

[402] Exhibit A, Test Claim, page 423 (test claim permit, Provision C.3.j.i.1.).

preclude fully meeting the sizing requirements, which can include options for addressing specific issues or scenarios.

  - A summary of planning documents the permittee has updated or otherwise modified to incorporate green infrastructure requirements (General Plans, Specific Plans, Complete Street Plans, Active Transportation Plans, Storm Drain Master Plans, Pavement Work Plans, Urban Forestry Plans, Flood Control/Management Plans, and any other plans that may impact the future alignment, configuration or design of impervious surfaces within the Permittee's jurisdiction). These modifications are to be completed by no later than the end of the permit term.
  - A workplan identifying how the Permittee will ensure that Green Infrastructure and low impact development are appropriately included in future plans.
  - A workplan to complete prioritized projects identified as part of an Alternative Compliance Program or Early Implementation as outlined in Provision C.3.e. or C.3.j.ii.
  - An evaluation of prioritized project funding options including, but not limited to: Alternative Compliance funds; grant monies, including transportation project grants from federal, State, and local agencies; existing Permittee resources; new tax or other levies; and other sources of funds.[403]

- Adopt policies, ordinances, and/or other appropriate legal mechanisms to ensure implementation of the Green Infrastructure Plan in accordance with the requirements of this provision.[404]
- Conduct outreach and education in accordance with the following:
  - Conduct public outreach on the requirements of this provision, including outreach coordinated with adoption or revision of standard specifications and planning documents, and with the initiation and planning of infrastructure projects. Such outreach shall include general outreach and targeted outreach to and training for professionals involved in infrastructure planning and design.
  - Train appropriate staff, including planning, engineering, public works maintenance, finance, fire/life safety, and management staff on the requirements of this provision and methods of implementation.

[403] Exhibit A, Test Claim, pages 423-425 (test claim permit, Provision C.3.j.i.2.).

[404] Exhibit A, Test Claim, page 425 (test claim permit, Provision C.3.j.i.3.).

- Educate appropriate Permittee elected officials (e.g., mayors, city council members, county supervisors, district board members) on the requirements of this provision and methods of implementation.[405]

- Each permittee shall report on its planning progress as follows:
  - Submit documentation in the 2017 Annual Report that its framework or workplan for development of its Green Infrastructure Plan was approved by its governing body, mayor, city manager, or county manager by June 30, 2017.
  - Submit its completed Green Infrastructure Plan with the 2019 Annual Report.
  - Submit documentation of its legal mechanisms to ensure implementation of its Green Infrastructure Plan with the 2019 Annual Report.
  - Submit a summary of its outreach and education efforts in each Annual Report.[406]

2. Early Implementation – List of Green Infrastructure Projects (Provision C.3.j.ii.):
   - Prepare and maintain a list of Green Infrastructure Projects, public and private, that are already planned for implementation during the permit term and infrastructure projects planned for implementation during the permit term that have potential for Green Infrastructure measures.[407]
   - Submit the list with each Annual Report and a summary of planning or implementation status for each public Green Infrastructure Project and each private Green Infrastructure Project that is not also a Regulated Project as defined in Provision C.3.b.ii. Include a summary of how each public infrastructure project with Green Infrastructure potential will include Green Infrastructure measures to the maximum extent practicable during the permit term. For any public infrastructure project where implementation of Green Infrastructure measures is not practicable, submit a brief description of the project and the reasons Green Infrastructure measures were impracticable to implement.[408]
3. Participation in Processes to Promote Green Infrastructure (Provision C.3.j.iii.):
   - Either individually or collectively, track processes, assemble and submit information, and provide informational materials and presentations as needed to assist relevant regional, State, and federal agencies to plan, design, and fund incorporation of Green Infrastructure measures into local infrastructure

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[405] Exhibit A, Test Claim, pages 425-426 (test claim permit, Provision C.3.j.i.4.).

[406] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.i.5.).

[407] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.1.).

[408] Exhibit A, Test Claim, page 426 (test claim permit, section C.3.j.ii.2.).

projects, including transportation projects. Issues to be addressed include coordinating the timing of funding from different sources, changes to standard designs and design criteria, ranking and prioritizing projects for funding, and implementation of cooperative in-lieu programs.[409]

- In each Annual Report, report on the goals and outcomes during the reporting year of work undertaken to participate in processes to promote Green Infrastructure.[410]
- In the 2019 Annual Report, submit a plan and schedule for new and ongoing efforts to participate in processes to promote Green Infrastructure.[411]

4. Tracking and Reporting Progress (Provision C.3.j.iv.):

- Either individually or collectively, develop and implement regionally-consistent methods to track and report implementation of Green Infrastructure measures including treated area and connected and disconnected impervious area on both public and private parcels within their jurisdictions. The methods shall also address tracking needed to provide reasonable assurance that wasteload allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[412]
- In each Annual Report, report progress on development and implementation of the tracking methods.[413]
- In the 2019 Annual Report, submit the tracking methods and report implementation of Green Infrastructure measures including treated area, and connected and disconnected impervious area on both public and private parcels within their jurisdictions.[414]

a) <u>The requirements imposed by Provision C.3.j. are new.</u>

These requirements are new. Under the prior permit, permittees were required to impose low impact development (LID) requirements and hydraulic sizing design criteria on Regulated Projects.[415] Projects that required permittees' review but did not meet the

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[409] Exhibit A, Test Claim, page 426 (test claim permit, section C.3.j.iii.1.).

[410] Exhibit A, Test Claim, page 427 (test claim permit, section C.3.j.iii.2.).

[411] Exhibit A, Test Claim, page 427 (test claim permit, section C.3.j.iii.3.).

[412] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iv.1.).

[413] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.2.).

[414] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.3.).

[415] Exhibit A, Test Claim, pages 108-114 (test claim permit, Provisions C.3.c. and C.3.d.). Regulated Projects are all projects that are within a permittee's building and planning authority that fall into one of three main categories: 1) development and redevelopment projects for a finite list of land use categories that create or replace 5,000 square feet or more of impervious surface over the project area; 2) all

definition of a Regulated Project were encouraged, but not required, to include site design measures, such as minimizing land disturbances, directing roof runoff to vegetated areas, or including restoration of riparian areas and wetlands as a project amenity.[416] Permittees were also required to install ten green streets pilot projects which tested the effectiveness of such projects at treating stormwater through the use of natural feature systems, and ten pilot projects which tested treating mercury and PCBs through retrofitting on-site treatment systems such as detention basins, bioretention units, sand filters, infiltration basins, and treatment wetlands onto existing storm drain systems.[417] LID, green street projects, and retrofitting, are all examples of Green Infrastructure[418]

Although these types of Green Infrastructure were required by the prior permit, there were no prior requirements to have a specific plan for implementing Green Infrastructure into public and private projects which sets targets for the amount of impervious surfaces to be retrofitted within certain timeframes, and to provide guidelines for project design and standard specifications. In addition, there was no prior requirement to create a framework or workplan for developing a Green Infrastructure Plan. While federal law does require permittees to have adequate legal authority to implement permit conditions and submit annual reports on permit conditions' implementation status, and the prior permit specifically required permittees to train staff and conduct outreach for the public on the conditions in Provision C.3. of the prior permit, here the state has specifically imposed a new requirement to develop and

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development and redevelopment projects that create or replace 10,000 square feet or more of impervious surface, excluding single family homes that are not part of a larger development project; and 3) Road projects that create 10,000 square feet or more of newly constructed contiguous road surface for new streets, roads, bike lanes, sidewalks, or trails, or when widening existing roads by adding additional lanes. Interior remodels and routine maintenance and repair are exempt from these categories, as are Caltrans projects, and bike lane, sidewalk, or trail projects that are designed to direct stormwater runoff into adjacent vegetated areas or use permeable surfaces. See Exhibit A, Test Claim, pages 101-105 (prior permit, Provision C.3.b.ii.).

[416] Exhibit A, Test Claim, pages 99, 391 (prior permit, Provision C.3.a.i.6.; test claim permit, Provision C.3.a.i.6.).

[417] Exhibit A, Test Claim, pages 105-106, 180-181, and 188-189 (prior permit, Provisions C.3.b.iii., C.11.e., and C.12.e.).

[418] Exhibit A, Test Claim, page 526 (test claim permit, Glossary), which defines Green Infrastructure as "infrastructure that uses vegetation, soils, and natural processes to manage water and create healthier urban environments. At the scale of a city or county, green infrastructure refers to the patchwork of natural areas that provides habitat, flood protection, cleaner air, and cleaner water. At the scale of a neighborhood or site, green infrastructure refers to stormwater management systems that mimic nature by soaking up and storing water."

implement a Green Infrastructure Plan.[419] Since the plan is new, adopting legal authority to implement the plan, educating people on the plan's requirements, and reporting on the plan's implementation are all new requirements as well. Thus, the activities required for C.3.j.i. are new.

The requirement in Provision C.3.j.ii. to compile a list of all projects already planned for implementation during the permit term that either include Green Infrastructure or are an infrastructure project with potential to add Green Infrastructure measures, is also new. The prior permit required the permittees to list in each Annual Report each Regulated Project approved during that fiscal year.[420] All Regulated Projects are required to either treat 100% of their stormwater runoff using LID treatment measures, or to follow an alternative compliance method where it is not feasible to treat 100% through LID, and LID is defined as a type of green infrastructure, meaning most Regulated Projects would also be considered Green Infrastructure Projects.[421] However, the requirement to maintain the list required by Provision C.3.j.ii. is separate from and in addition to the requirement to list approved Regulated Projects, which is still required by the test claim permit..[422] Moreover, not all Green Infrastructure Projects are Regulated Projects, as one of the purposes of the Green Infrastructure Plan is to require all Green Infrastructure Projects to meet the treatment and hydromodification sizing requirements already imposed on regulated projects, and to plan an approach for how to deal with non-regulated projects where project constraints prevent fully meeting the sizing requirements.[423] Although non-Regulated Projects were previously encouraged to include site design measures that could be considered Green Infrastructure under the test claim permit's requirements, such measures were voluntary and there were no requirements to report that a non-Regulated Project chose to incorporate such measures.[424]

Provision C.3.j.ii. also requires permittees to annually report on the planning and implementation status for each public Green Infrastructure Project and private Green Infrastructure Project that is not also a Regulated Project. Although permittees previously reported on Regulated Projects, this requirement specifically calls out public infrastructure and private non-Regulated Projects, and requires specific analysis of information on public infrastructure projects that was not previously required for Regulated Projects, namely a summary of how public infrastructure projects with Green Infrastructure potential included Green Infrastructure to the maximum extent practicable,

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[419] 33 U.S. Code section 1342(a)(2); 40 C.F.R. section 122.42(c).

[420] Exhibit A, Test Claim, pages 106-107, (prior permit, Provision C.3.b.v.1.); 396-397 (test claim permit, Provision C.3.b.iv.2.).

[421] Exhibit A, Test Claim, pages 109-110, (prior permit, Provision C.3.c.i.2.b.).

[422] See Exhibit A, Test Claim, page 396 (test claim permit, Provision C.3.b.iv.2.) (The requirement to annually report on each Regulated Project approved each year).

[423] Exhibit A, Test Claim, page 424, (test claim permit, Provision C.3.j.i.2.g.).

[424] Exhibit A, Test Claim, page 99 (prior permit, Provision C.3.a.i.6.).

or a description of the reasons why it was deemed impracticable to implement these measures. Thus, the requirements in C.3.j.ii. are new.

The requirements in Provision C.3.j.iii. to participate in processes to promote Green Infrastructure, which involves tracking processes, assembling and submitting information, and providing informational materials and presentations as needed to assist regional, State, and Federal agencies to plan, design, and fund incorporation of green infrastructure into local infrastructure projects; reporting on the goal and outcomes of the work done to satisfy this requirement in the Annual Report; and submit a plan and schedule for new and ongoing efforts to participate in processes to promote Green Infrastructure in the 2019 Annual Report, are new. Provision C.3.a.i.5. of both the prior permit and this permit require the permittees to "provide outreach adequate to implement the requirements of Provision C.3., including providing educational materials to municipal staff, developers, contractors, construction site operators, and owners/builders, early in the planning process and as appropriate."[425] Although providing educational materials to municipal staff, developers, contractors, construction site operators, and owners/builders sounds similar to the requirement in Provision C.3.j.iii., Provision C.3.j.iii. adds a separate requirement to track processes, assemble, and submit information, and provide the informational materials and presentations to regional, state, and federal agencies. Regional, State, and federal agencies may be involved in implementing infrastructure projects, but the specific roles they play may not always fit into the categories of "municipal staff, developers, contractors, construction site operators, and owners/builders." Additionally, although federal law requires annual reports that include the status of implementing components of the stormwater management program that are established as permit conditions, to the extent it was the State's discretionary decision to require permittees participate in processes to promote Green Infrastructure, the reporting requirements are new.[426] The requirements in Provision C.3.j.iii. are therefore new.

Lastly, Provision C.3.j.iv. requires permittees to develop and implement regionally-consistent methods for tracking and reporting implementing Green Infrastructure measures; to report progress on developing these methods in each Annual Report; and to submit the tracking methods and report implementation of Green Infrastructure measures in the 2019 Annual Report. These requirements are new. Although federal law requires permittees to file an annual report on the status of implementing established permit conditions, proposed changes to the stormwater management program, and a summary of data accumulated throughout the reporting year, to the extent it was the State's discretionary decision to require green infrastructure plans, the reporting requirements in C.3.j.iv. are new.

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[425] Exhibit A, Test Claim, pages 99, 391 (prior permit, Provision C.3.a.i.5.; test claim permit, Provision C.3.a.i.5.).

[426] United States Code, title 33, section 1342(a)(2); 40 Code of Federal Regulations, section 122.42(c).

b) Except for the "early implementation" requirements for a permittee's own public projects, which do not mandate a new program or higher level of service, the remaining requirements in Provision C.3.j. are new, mandated by the state, and impose a new program or higher level of service.

However, the following "early implementation" requirements imposed by Provision C.3.j.ii.1. and 2. are *not* mandated by the state for a permittee's own public projects.

- Prepare and maintain a list of *public* Green Infrastructure Projects that are already planned for implementation during the permit term and *public* infrastructure projects planned for implementation during the permit term that have potential for Green Infrastructure measures.[427]
- Submit the list with each Annual Report and a summary of planning or implementation status for each *public* Green Infrastructure Project that is not also a Regulated Project as defined in Provision C.3.b.ii. Include a summary of how each public infrastructure project with Green Infrastructure potential will include Green Infrastructure measures to the maximum extent practicable during the permit term. For any *public* infrastructure project where implementation of Green Infrastructure measures is not practicable, submit a brief description of the project and the reasons Green Infrastructure measures were impracticable to implement.[428]

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[429] When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.[430]

Thus, the issue is whether the underlying decision of the claimants to develop a municipal project is mandated by the state or is a discretionary decision of local government. Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[431]

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[427] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.1.).

[428] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.2.).

[429] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[430] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[431] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of*

There are two distinct theories for determining whether a program is compelled or mandated by the state: legal compulsion and practical compulsion.[432] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[433]
>
> * * *
>
> "[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.[434]

Thus, in the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[435]

All costs incurred by a municipality as a project proponent can be analogized to *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission*

Finance v. Commission on State Mandates (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

[432] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

[433] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, internal quotation marks and citations omitted.

[434] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[435] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

on State Mandates (*Kern*) (2003) 30 Cal.4th 727. In *City of Merced*, the statute at issue required a local government when exercising the power of eminent domain to compensate a business owner for the loss of business goodwill, as part of compensating for the property subject to the taking.[436] The court found that nothing *required* the local entity to exercise the power of eminent domain, and thus any costs experienced as a result of the requirement to compensate for business goodwill was the result of an initial discretionary act.[437]

In *Kern*, the statute at issue required certain local school committees to comply with notice and agenda requirements in conducting their public meetings.[438] There, the Court held that the underlying school site councils and advisory committees were part of several separate voluntary grant-funded programs, and therefore any notice and agenda costs were an incidental impact of participating or continuing to participate in those programs.[439] The Court acknowledged that the district was already participating in the underlying programs, and "as a practical matter, they feel they must participate in the programs, accept program funds, and…incur expenses necessary to comply with the procedural conditions imposed on program participants."[440] However, the Court held that "[c]ontrary to the situation that we described in *City of Sacramento* [*v. State* (1990)] 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face 'certain and severe…penalties' such as 'double…taxation' or other 'draconian' consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."[441]

Although the claimant argues that the requirements imposed by Provision C.3.j.ii.1. and 2. are mandated by the state for all projects, including public projects, because "the permit's regulatory framework rendered compliance legally and practically compulsory,

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[436] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

[437] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

[438] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 732.

[439] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 744-745.

[440] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753.

[441] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74 (The "certain and severe…penalties" and "double…taxation" referred to the situation in *City of Sacramento* in which the state was compelled, by the potential loss of *both* federal tax credits *and* subsidies provided to businesses statewide, to impose mandatory unemployment insurance coverage on public agencies consistent with a change in federal law.).

leaving permittees no genuine choice but to undertake these projects,"[442] the permittees have the authority to develop property,[443] but are not legally compelled by state law to develop property. Moreover, there is no evidence that local agencies are practically compelled, as the only reasonable means necessary to carry out core mandatory functions, to develop or redevelop property and comply with the Green Infrastructure requirements on their own public property.[444] Nor is there evidence that a failure to develop property would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[445]

Moreover, in addition to not being mandated by the state, compliance with the Green Infrastructure requirements on a permittee's own public development is not unique to government, does not provide a governmental service to the public, and thus does not impose a new program or higher level of service since the test claim permit subjects both public and private projects to the requirements.[446]

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[442] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

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

[444] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (POBRA).

[445] *Department of Finance v. Commission on State Mandates* (*Kern)* (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74.

[446] Exhibit A, Test Claim, pages 488, 496 (Test Claim Permit, Provisions C.11.c.i. and C.12.c.i.) (Stating that Green Infrastructure Projects on both public and private lands can serve towards achieving the stated mercury and PCBs load reduction requirements).

Thus, the "early implementation" requirements imposed by Provision C.3.j.ii.1. and 2. are not mandated by the state for a permittee's own public projects.

The remaining new requirements in Provisions C.3.j. impose a state-mandated new program or higher level of service, however, and are not triggered by a permittee's local discretionary decision. Permittees are legally compelled to develop and implement the Green Infrastructure Plan outlined in Provision C.3.j., including each of the remaining components for private and public development projects within a permittee's regulatory authority. The subsections within C.3.j. use the mandatory language "shall" to preface each requirement.

Moreover, these activities are mandated by the state, and not the federal government. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[447]

The courts have also explained "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[448]

Here, the Regional Board argues that Provision C.3.j. is federally mandated, because the San Francisco Bay is impaired for mercury and PCBs, and the Green Infrastructure Plan is needed to ensure compliance with the respective TMDLs for those pollutants.

> The [Green Infrastructure] Plan is intended to serve as an implementation guide and reporting tool during this and subsequent Permit terms to provide reasonable assurance that urban runoff TMDL wasteload allocations (e.g., for the San Francisco Bay mercury and PCBs TMDLs) will be met, and to set goals for reducing, over the long term, the adverse water quality impacts of urbanization and urban runoff on receiving waters.
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> The [Green Infrastructure planning and tracking] methods shall also address tracking needed to provide reasonable assurance that wasteload

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[447] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[448] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

> allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[449]

While the EPA supported the inclusion of a Green Infrastructure Plan in its comments on the draft test claim permit, there is nothing that supports that this is the only means of meeting the maximum extent practicable standard. As the court pointed out in *Department of Finance v. Commission on State Mandates (Municipal Stormwater),* when drafting permit conditions regional boards are authorized to impose conditions that are more exacting than what is required by federal law.[450] The federal government approving of a regional board's permit conditions only shows that the conditions would satisfy federal law, not that they are the only means by which to do so, or even that the EPA would have imposed the same conditions if this were a federal permit. Even if the EPA might have included some sort of Green Infrastructure provision in a federal permit, there is no evidence that supports this would have looked identical or even similar to the requirements imposed by the Green Infrastructure Plan, or that these requirements were the only way to meet the maximum extent practicable standard. The Regional Board has therefore exercised a true choice in making these requirements mandated by the state.

Finally, these activities constitute a new program or higher level of service. Courts have found two ways in which a mandated program constitutes a new program or higher level of service. The first is if the activities carry out the governmental function of providing services to the public.[451] The second is if the activities impose unique requirements on local government that do not apply to all residents and entities within the state.[452] Here, the requirements are unique to government and provide a governmental service to the public. The Fact Sheet described the importance of Green Infrastructure as follows:

> Available information suggests that mercury is distributed more uniformly throughout the Bay Area landscape than is the case for PCBs. Therefore, a focus on highly contaminated areas (with mercury) may not be enough to achieve the TMDL-required load reductions. A critical part of the strategy to reduce urban runoff mercury loads will be the widespread implementation of green infrastructure control measures to intercept

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[449] Exhibit C, Regional Board's Late Comments on the Test Claim, page 14 quoting findings in the test claim permit.

[450] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768.

[451] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, (finding that regulations requiring that firefighters be given protective clothing and equipment constituted a new program or higher level of service since fire protection is a basic function of local government).

[452] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, (finding that regulations imposing certain safety precautions for all elevators, both public and private alike, was not unique to local government).

> mercury-containing sediment and stormwater before it is discharged to receiving water.
>
> […]
>
> Some Bay Area drainages contain notably elevated PCBs concentrations in suspended or bedded sediment (e.g., > 500 ppb in bedded sediment). A recent analysis of soil PCBs and mercury data collected in the Bay Area identifies 15 sites where maximum concentrations exceed 3.8 mg/kg for PCBs and 1.6 mg/kg for total mercury. Areas with moderately high PCBs concentrations (e.g., 100-500 ppb) were found throughout areas where historical industrial activity involved use of PCBs (McKee and Yee 2015). Placing green infrastructure in highly- and moderately-contaminated areas will form an important element in achieving the PCBs TMDL-required load reductions. However, green infrastructure implementation is a long-term proposition and there is value in placing green infrastructure across the broader landscape to intercept PCBs before they are discharged to receiving water.[453]

Thus, by requiring permittees to develop and implement a Green Infrastructure Plan, to require early implementation of the plan for Green Infrastructure Projects approved to be implemented during the permit term, to participate in processes to promote Green Infrastructure, and to track and report progress, the Regional Board is requiring permittees to exercise its authority over regulating development and redevelopment projects within its jurisdiction, which is both a governmental service to the public as well as a requirement imposed uniquely on local governments and not on all residents or entities within the state.

Accordingly, the following requirements in Provision C.3.j. mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

1. Green Infrastructure Plan Development (Provision C.3.j.i.):
    - Prepare a framework or workplan describing specific tasks and timeframes for development for its Green Infrastructure Plan, to be approved by the Permittee's governing body, mayor, city manager, or county manager by June 30, 2017. This framework or workplan shall include a statement of purpose, tasks, and timeframe needed to complete all requirements in Provision C.3.j.i.2 (discussed below).[454]
    - Prepare a Green Infrastructure Plan, subject to Executive Officer approval, that contains all the following:
        - A mechanism (such as SFEI's Green PlanIT tool) to prioritize and map areas for potential and planned projects, both public and private, on a

[453] Exhibit A, Test Claim, pages 639, 652 (test claim permit, Fact Sheet).

[454] Exhibit A, Test Claim, page 423 (test claim permit, Provision C.3.j.i.1.).

drainage-area specific basis, for implementation by 2020, by 2030, and by 2040, that includes criteria for prioritization and outputs that can be incorporated into the Permittees' long-term planning and capital improvement processes.

- Outcomes from the above-described mechanism, including but not limited to, the prioritization criteria, maps, lists, and all other information, as appropriate. Individual project-specific reviews do not need to be submitted with the Plan, but shall be made available for review upon request.
- Targets for the amount of impervious surface from public and private projects within the Permittee's jurisdiction to be retrofitted by 2020, by 2030, and by 2040.
- A process for tracking and mapping completed projects, public and private, and making the information publicly available online (I.E., SFEI's Green PlanIT tool).
- General guidelines for overall streetscape and project design and construction so that projects have a unified complete design that implements the range of functions associated with the project.
- Standard specifications, and as appropriate, typical design details and related information necessary for the Permittee to implement Green Infrastructure Projects in its jurisdiction, which shall be sufficient to address the different street and project types within a Permittee's jurisdiction, as defined by land use and transportation characteristics.
- Requirements that projects be designed to meet the treatment and hydromodification sizing requirements outline in Provisions C.3.c. and C.3.d. For projects that are not subject to these requirements according to Provision C.3.b.ii. (non-regulated projects), Permittees may collectively propose a single approach for how to proceed when project constraints preclude fully meeting the sizing requirements, which can include options for addressing specific issues or scenarios.
- A summary of planning documents the permittee has updated or otherwise modified to incorporate Green Infrastructure requirements (General Plans, Specific Plans, Complete Street Plans, Active Transportation Plans, Storm Drain Master Plans, Pavement Work Plans, Urban Forestry Plans, Flood Control/Management Plans, and any other plans that may impact the future alignment, configuration or design of impervious surfaces within the Permittee's jurisdiction). These modifications are to be completed by no later than the end of the permit term.
- A workplan identifying how the Permittee will ensure that Green Infrastructure and low impact development are appropriately included in future plans.

- A workplan to complete prioritized projects identified as part of an Alternative Compliance Program or Early Implementation as outlined in Provision C.3.e. or C.3.j.ii.
- An evaluation of prioritized project funding options including, but not limited to: Alternative Compliance funds; grant monies, including transportation project grants from federal, State, and local agencies; existing Permittee resources; new tax or other levies; and other sources of funds.[455]

- Adopt policies, ordinances, and/or other appropriate legal mechanisms to ensure implementation of the Green Infrastructure Plan in accordance with the requirements of this provision.[456]
- Conduct outreach and education in accordance with the following:
  - Conduct public outreach on the requirements of this provision, including outreach coordinated with adoption or revision of standard specifications and planning documents, and with the initiation and planning of infrastructure projects. Such outreach shall include general outreach and targeted outreach to and training for professionals involved in infrastructure planning and design.
  - Train appropriate staff, including planning, engineering, public works maintenance, finance, fire/life safety, and management staff on the requirements of this provision and methods of implementation.
  - Educate appropriate Permittee elected officials (e.g., mayors, city council members, county supervisors, district board members) on the requirements of this provision and methods of implementation.[457]
- Each permittee shall report on its planning progress as follows:
  - Submit documentation in the 2017 Annual Report that its framework or workplan for development of its Green Infrastructure Plan was approved by its governing body, mayor, city manager, or county manager by June 30, 2017.
  - Submit its completed Green Infrastructure Plan with the 2019 Annual Report.
  - Submit documentation of its legal mechanisms to ensure implementation of its Green Infrastructure Plan with the 2019 Annual Report.

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[455] Exhibit A, Test Claim, pages 423-425 (test claim permit, Provision C.3.j.i.2.).

[456] Exhibit A, Test Claim, page 425 (test claim permit, Provision C.3.j.i.3.).

[457] Exhibit A, Test Claim, pages 425-426 (test claim permit, Provision C.3.j.i.4.).

- Submit a summary of its outreach and education efforts in each Annual Report.[458]

2. Early Implementation – List of Green Infrastructure Projects (Provision C.3.j.ii.):
   - *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, prepare and maintain a list of Green Infrastructure Projects, public and private, that are already planned for implementation during the permit term and infrastructure projects planned for implementation during the permit term that have potential for Green Infrastructure measures.[459]
   - *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, submit the list with each Annual Report and a summary of planning or implementation status for each public Green Infrastructure Project and each private Green Infrastructure Project that is not also a Regulated Project as defined in Provision C.3.b.ii. Include a summary of how each public infrastructure project with Green Infrastructure potential will include Green Infrastructure measures to the maximum extent practicable during the permit term. For any public infrastructure project where implementation of Green Infrastructure measures is not practicable, submit a brief description of the project and the reasons Green Infrastructure measures were impracticable to implement.[460]
3. Participation in Processes to Promote Green Infrastructure (Provision C.3.j.iii.):
   - Either individually or collectively, track processes, assemble and submit information, and provide informational materials and presentations as needed to assist relevant regional, State, and federal agencies to plan, design, and fund incorporation of Green Infrastructure measures into local infrastructure projects, including transportation projects. Issues to be addressed include coordinating the timing of funding from different sources, changes to standard designs and design criteria, ranking and prioritizing projects for funding, and implementation of cooperative in-lieu programs.[461]
   - In each Annual Report, report on the goals and outcomes during the reporting year of work undertaken to participate in processes to promote Green Infrastructure.[462]

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[458] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.i.5.).

[459] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.1.).

[460] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.2.).

[461] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.iii.1.).

[462] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iii.2.).

- In the 2019 Annual Report, submit a plan and schedule for new and ongoing efforts to participate in processes to promote Green Infrastructure.[463]

4. Tracking and Reporting Progress (Provision C.3.j.iv.):

- Either individually or collectively, develop and implement regionally-consistent methods to track and report implementation of Green Infrastructure measures including treated area and connected and disconnected impervious area on both public and private parcels within their jurisdictions. The methods shall also address tracking needed to provide reasonable assurance that wasteload allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[464]
- In each Annual Report, report progress on development and implementation of the tracking methods.[465]
- In the 2019 Annual Report, submit the tracking methods and report implementation of Green Infrastructure measures including treated area, and connected and disconnected impervious area on both public and private parcels within their jurisdictions.[466]

ii. Provisions C.11.c. and C.12.c. mandate a new program or higher level of service to prepare a reasonable assurance analysis of future mercury and PCBs load reductions and reporting. However, implementing Green Infrastructure Projects to reduce mercury and PCB loads is not new and does not mandate a new program or higher level of service.

As part of permittees' load reduction allocations under the mercury and PCBs TMDLs, Provisions C.11.c. and C.12.c. each require permittees to reduce their mercury and PCBs loads by minimum amounts by June 30, 2020 (during the term of the test claim permit), through implementing sufficient green infrastructure projects.[467] This deadline can be extended to December 31, 2020 if the permittees provide sufficient documentation that control measures that will attain the load reduction will be implemented by December 31, 2020.[468] Both public and private Green Infrastructure Projects count towards these requirements, as well as any projects that were implemented during the prior permit term if the load reduction was not realized or

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[463] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iii.3.).

[464] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iv.1.).

[465] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.2.).

[466] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.3.).

[467] Exhibit A, Test Claim, pages 488-490, 495-497 (test claim permit, Provisions C.11.c. and C.12.c.).

[468] Exhibit A, Test Claim, pages 488, 496 (test claim permit, Provisions C.11.c.ii.1. and C.12.c.ii.1.).

credited until this permit term.[469] The Fact Sheet explains that the interim load reduction requirement for mercury is intended to set a clear performance expectation during the permit term toward achieving the TMDL and is feasible since it is approximately equivalent to the load reductions achieved during the prior permit through Green Infrastructure:

> This green infrastructure load reduction requirement is feasible in that these load reductions are approximately equivalent to the scale of load reduction achieved during the Previous Permit term through green infrastructure and C.3- related treatment controls (Integrated Monitoring Report 2014). It is reasonable to expect that a similar or greater pace of redevelopment plus green infrastructure implementation on public property can be achieved during this Permit term. The green infrastructure load reduction requirement is warranted because it is important to provide a clear performance expectation for Permittees for green infrastructure implementation because widespread and effective green infrastructure implementation will be an important component of achieving the load reductions necessary to achieve the mercury TMDL wasteload allocation.[470]

Similarly, the Fact Sheet also found that the PCBs load reductions required this permit term are achievable based on the information learned and reported on from pilot projects in the prior term.[471]

Permittees are also required prepare a reasonable assurance analysis, showing that mercury load reductions of at least 10 kg/year and PCBs load reductions of at least 3 kg/year will be realized by 2040 through implementing Green Infrastructure Projects.[472] The Fact Sheet recognizes that the planning, financing, and implementation of Green Infrastructure could take 25 years or more; that load reduction benefits from the implementation of Green Infrastructure will be realized over an extended time frame; and, thus the reasonable assurance provisions require permittees to "rigorously and quantitatively demonstrate" the specified reductions "throughout the permit area will be achieved over the course of the next 25 years (i.e., by 2040) through implementation of green infrastructure throughout the permit area."[473]

Provisions C.11.c. and C.12.c. impose the following requirements:

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[469] Exhibit A, Test Claim, pages 488, 496 (test claim permit, Provisions C.11.c.i., C.11.c.ii.1., C.12.c.i., and C.12.c.ii.1.).

[470] Exhibit A, Test Claim, page 639 (test claim permit, Fact Sheet).

[471] Exhibit A, Test Claim, page642 (test claim permit, Fact Sheet).

[472] Exhibit A, Test Claim, pages 489-490 497 (test claim permit, Provisions C.11.c.ii.2. and C.12.c.ii.2.).

[473] Exhibit A, Test Claim, page 640 (test claim permit, Fact Sheet); see also page 652 (test claim permit, Fact Sheet).

1. Implementing Green Infrastructure Projects (C.11.c.ii.1. and C.12.c.ii.1.). Permittees shall implement sufficient Green Infrastructure Projects to collectively reduce mercury loads by 48 g/year by June 30, 2020, and PCBs loads by 120 g/year by June 30, 2020, respectively.[474] The share of these load reduction requirements within each county to collectively achieve the reduction requirements by June 30, 2020, are as follows:
   - Alameda Permittees: Mercury 15 g/year; PCBs 37 g/year
   - Contra Costa Permittees: Mercury 9 g/year; PCBs 23 g/year
   - San Mateo Permittees: Mercury 6 g/year; PCBs 15 g/year
   - Santa Clara Permittees: Mercury 16 g/year; PCBs 37 g/year
   - Solano Permittees: Mercury 2 g/year; PCBs 8 g/year[475]
2. Reasonable Assurance Analysis (C.11.c.ii.2. and C.12.c.ii.2.). Prepare a reasonable assurance analysis of future mercury and PCBs load reductions by doing the following:
   - Quantify the relationship between areal extent of Green Infrastructure implementation and mercury/PCBs load reductions, taking into consideration scale of contamination of the treated area as well as the pollutant removal effectiveness of likely Green Infrastructure strategies.[476]
   - Estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, by 2030, and by 2040.[477]
   - Estimate the amount of mercury/PCBs load reductions that will result from Green Infrastructure implementation by 2020, by 2030, and by 2040.[478]
   - Quantitatively demonstrate that mercury load reductions of at least 10 kg/year and PCBs load reductions of at least 3 kg/year will be realized by 2040 through implementing Green Infrastructure Projects.[479]

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[474] Exhibit A, Test Claim, pages 488 and 496 (test claim permit, Provisions C.11.c.ii. and C.12.c.ii.).

[475] Exhibit A, Test Claim, pages 489 and 496 (Table 11.1. and 12.2.).

[476] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.a., C.12.c.ii.2.a.).

[477] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.b., C.12.c.ii.2.b.).

[478] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.c., C.12.c.ii.2.c.).

[479] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.d., C.12.c.ii.2.d.). The Fact Sheet explains that the planning, financing, and implementation of green infrastructure will take a long time, as much as 25 years or

- Ensure that the calculation methods, models, model inputs, and model assumptions used in this analysis have been validated through a peer review process.[480]

3. Reporting (C.11.c.iii. and C.12.c.iii.)
   - Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions. This submittal shall include all data used and a full description of models and model inputs relied on to establish this relationship.[481]
   - Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of models and model inputs relied on to generate this estimate.[482]
   - Submit in the 2020 Annual Report a reasonable assurance analysis to quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/year will be realized by 2040 through implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[483]
   - Beginning with the 2019 Annual Report, submit as part of reporting for C.11.b.iii.2. and C.12.b.iii.4., an estimate of the amount of mercury and PCBs load reductions resulting from Green Infrastructure implementation during the

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more. To ensure permittees are working effectively and expeditiously towards implementing effective green infrastructure controls, the test claim permit requires permittees to prepare a reasonable assurance analysis to quantitatively demonstrate mercury load reductions of 10 kg/year and PCBs load reductions of 3 kg/year will be attained within 25 years (i.e., by 2040) by implementing green infrastructure throughout the permit area. See Exhibit A, Test Claim, pages 640, 652 (test claim permit, Fact Sheet.).

[480] Exhibit A, Test Claim, pages 489-490, 497 (test claim permit, Provisions C.11.c.ii.2.e. and C.12.c.ii.2.e.).

[481] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

[482] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[483] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

term of the Permit. This submittal shall include all data used and a full description of models and model inputs relied on to generate this estimate.[484]

a. Provisions C.11.c.ii.1. and C.12.c.ii.1., which require permittees to reduce mercury loads by 48 g/year and PCBs loads by 120 g/year, respectively, by June 30, 2020, through Green Infrastructure Projects, do not mandate a new program or higher level of service.

First, the Commission finds that the requirement to implement Green Infrastructure Projects to achieve the interim mercury and PCBs load reductions by June 30, 2020, is not new.

As indicated above, the prior permit implemented the WLAs set in the mercury and PCBs TMDLs.[485] Under the prior permit's receiving water limitations and discharge prohibitions, permittees were required to comply with the Basin Plan, which included the TMDL WLAs for mercury, and prohibited the permittees from violating water quality standards for these pollutants, including the standards for both mercury and PCBs.[486] To achieve these water quality standards, the prior permit required permittees to implement control measures *and* other actions required in Provisions C.2. through C.15. of the prior permit.[487] Provision C.3.c. of the prior permit required all Regulated Projects, including public and private regulated projects, to treat 100 percent of their stormwater runoff through onsite low impact development (LID), which is a type of Green Infrastructure.[488] Thus, under prior law, permittees were already required to impose Green Infrastructure requirements on any Regulated Projects within their jurisdictions, based on their regulatory authority and for their own public projects, to reduce their mercury and PCBs loads to meet water quality standards. The Fact Sheet

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[484] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.4. and C.12.c.iii.4.).

[485] Exhibit A, Test Claim, pages 295 and 299 (prior permit, Fact Sheet, Findings C.11-1. and C.12.).

[486] Exhibit A, Test Claim, page 91 (prior permit, Provision B.2); California Code of Regulations, title 23, section 3915 (Register 2007, No. 45) (codifying the San Francisco Bay mercury TMDL adopted by R2-2006-005); see also, Exhibit A, Test Claim, page 178 (prior permit, Provision C.11., which identified the same WLA for mercury of 82 kg/yr for urban runoff, "to be achieved by February 2028 and, as a way to measure progress an interim loading milestone of 120 kg/yr, halfway between the current load and the allocation, should be achieved by February 2018.") and pages 185, 220 (prior permit, Provision C.12., which states the purpose of the PCBs control provisions was to "achieve Waste Load Allocations adopted under Total Maximum Daily Loads" and "to implement the urban runoff requirements of the PCBs TMDL and reduce PCBs loads to make substantial progress toward achieving the urban runoff PCBs load allocation."); Exhibit I (2), Basin Plan 2007, page 57.

[487] Exhibit A, Test Claim, page 92 (prior permit, Provision C.1.).

[488] Exhibit A, Test Claim, page 108 (prior permit, Provisions C.3.c.).

notes that the amount of mercury load reductions required to be achieved through Green Infrastructure by Provisions C.11.c. and C.12.c. of the test claim permit were deemed feasible because they are equivalent to the scale of load reductions achieved through the Green Infrastructure and other C.3-related treatment controls implemented during the prior permit term; and the PCBs load reductions were similarly found to be achievable based on information learned from pilot projects in the prior term.[489] Thus, implementing Green Infrastructure requirements to satisfy the TMDL wasteload allocations for mercury and PCBs on public and private Regulated Projects (the definition of which has not changed since the prior permit), is not new, but continues the existing obligation to reduce mercury and PCBs loads to meet the wasteload allocations.

The claimant argues that the Commission cannot base its reasoning on the receiving water limitations found in the prior permit, because of the recent Supreme Court decision in *City and County of San Francisco*.[490] As explained earlier in this Decision, while the *City and County of San Francisco* decision may impact the interpretation of the receiving water limitations language in permits still open for review, the decision does not invalidate the prior permit in this case because the prior permit is final and no longer subject to review. The courts have been clear that "[w]hen the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review*."[491] The prior permit was adopted as a quasi-judicial order on October 14, 2009, was last revised on November 28, 2011,[492] and is no longer open on direct review.[493] Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.[494] Thus, the prior permit is binding, and the Commission has no authority to invalidate its provisions.

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[489] Exhibit A, Test Claim, pages 639, 642 (test claim permit, Fact Sheet).

[490] Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2.

[491] *Harper v. Virginia Dept of Taxation* (1993) 509 U.S. 86, 97; *Citicorp North America, Inc. v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1422-1423.

[492] See Exhibit A, Test Claim, page 82 (prior permit).

[493] Pursuant to Water Code section 13320, any aggrieved party may petition the State Water Board for review of the permit within 30 days of the action by the Regional Board. Water Code section 13330 then provides that "A party aggrieved by a final decision or order of a regional board subject to review under Section 13320 may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review." The petition for review is governed by Code of Civil Procedure section 1094.5. (Water Code section 13330(e).)

[494] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

In addition, the state has not mandated compliance with these provisions by requiring Green Infrastructure on a permittee's own public projects. Although the test claim permit says that permittees "shall implement green infrastructure projects" during the permit term, it also specifies that both private and public projects count towards achieving the required reductions.[495] Permittees have the option of satisfying this requirement entirely through approving private projects and requiring LID or other Green Infrastructure measures as permit conditions. No evidence has been presented to support a finding that requiring Green Infrastructure on private projects would not be able to meet the load reduction requirements of the test claim permit. Even if a permittee was required to install Green Infrastructure on their own public projects to meet the TMDL requirements, these costs would not be mandated by the state. As explained above, activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[496] In this case, the permittees have the authority to develop property,[497] but are not legally compelled to develop property. There is no evidence that local agencies are practically compelled, as the only reasonable means necessary to carry out core mandatory functions, to develop or redevelop property and comply with the Green Infrastructure requirements on their own

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[495] Exhibit A, Test Claim, pages 488, 496 (test claim permit, Provisions C.11.c.i., and C.12.c.i.).

[496] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

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

public property.[498] Nor is there evidence that a failure to develop property would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[499]

Moreover, implementing the Green Infrastructure requirements on a permittee's own public development is not unique to government and does not impose a new program or higher level of service since the test claim permit subjects both public and private projects to the requirements.

Accordingly, although the test claim permit may result in increased costs to implement Green Infrastructure requirements to achieve water quality standards for mercury and PCBs on more projects (which, alone, does not trigger the reimbursement requirement under article XIII B, section 6),[500] Provisions C.11.c.ii.1. and C.12.c.ii.1. do not mandate a new program or higher level of service.

b. Provisions C.11.c.ii.2., C.11.c.iii.1., C.11.c.iii.2., C.11.c.iii.3., C.12.c.ii.2., C.12.c.iii.1., C.12.c.iii.2., and C.12.c.iii.3. mandate a new program or higher level of service to prepare a reasonable assurance analysis of their future mercury and PCBs reductions that will be achieved through Green Infrastructure and to submit one-time reports on information based on the reasonable assurance analysis. However, the annual reporting requirements in Provisions C.11.c.iii.4. and C.12.c.iii.4. are not new and do not mandate a new program or higher level of service.

Provisions C.11.c.ii.2. and C.12.c.ii.2. require the permittees to prepare a reasonable assurance analysis of *future* mercury and PCBs load reductions that quantifies the relationship between the area of Green Infrastructure implementation and the loads reduced, taking into consideration the scale of contamination and the pollutant removal effectiveness of the Green Infrastructure strategies; estimates the amount of land area that will be treated through Green Infrastructure and the loads reduced by 2020, 2030, and 2040; quantitatively demonstrates permittees will achieve the specific load reductions for mercury and PCBs through Green Infrastructure by 2040; and ensures that the calculation methods, models, model inputs, and model assumptions used in the analysis are validated through a peer review process [501] The Fact Sheet explains that the permittees can use the reasonable assurance guidelines already underway in Southern California to comply with this requirement:

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[498] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (POBRA).

[499] *Department of Finance v. Commission on State Mandates* (*Kern)* (2003) 30 Cal.4th 727, 754 citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74.

[500] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1483.

[501] Exhibit A, Test Claim, pages 489-490, 497 (test claim permit, Provisions C.11.c.ii.2. and C.12.c.ii.2.).

> Fortunately, the permittees in the Bay Area can take advantage of related (reasonable assurance analysis) efforts already underway in Southern California. The Los Angeles Regional Water Board has produced a useful set of guidelines for conducting a Reasonable Assurance Analysis (RAA) for the watershed management programs that are required through their MS4 permits. [Fn. omitted.] These guidelines provide an excellent reference and starting point for the RAA required through C.11/12.c in terms of the mechanics of the analysis, BMP identification, critical condition selection, choice of models, model calibration criteria, modeling inputs, and model outputs. The crucial feature of the Southern California RAAs is that they must demonstrate with sufficient analytical rigor that the suite of foreseeable control measures to reduce loads will result in compliance with final WLAs. The RAA performed for PCBs and mercury for the San Francisco Bay Area will be similar in many respects to the type of analysis described in the Southern California guidance document, but they must also account for the local watershed characteristics as well as what has been learned about the distribution, fate, and transport characteristics of PCBs and mercury.[502]

The Fact Sheet further states that preparing the reasonable assurance analysis will be a step-wise process, requiring the permittees to "establish the relationship between areal extent of green infrastructure implementation and mercury load reductions, estimate the amount and characteristics of land area that will be treated through green infrastructure in future years, and estimate the amount of mercury load reductions that will result from green infrastructure implementation by specific future years. Ultimately, the reasonable assurance analysis will require the use of one or more models."[503]

In addition, Provisions C.11.c.iii. and C.12.c.iii. require permittees to include the reasonable assurance information in several stages in the Annual Reports. In the 2018 Annual Report, they provide the quantitative relationship between Green Infrastructure and mercury/ PCBs load reduction, including all data used and a full description of the models and model inputs relied on.[504] Beginning with the 2019 Annual Report, permittees provide an estimate of the mercury and PCBs loads reduced through Green Infrastructure during the permit term, including all data and a description of the models and model inputs used.[505] And in the 2020 Annual Report, they estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, 2030, and 2040, and give the reasonable assurance analysis which quantitatively demonstrates they will realize 10 kg/year mercury load reduction and 3 kg/year PCBs

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[502] Exhibit A, Test Claim, page 640 (test claim permit, Fact Sheet).

[503] Exhibit A, Test Claim, page 640 (test claim permit, Fact Sheet).

[504] Exhibit A, Test Claim, pages 490 and 497 (test claim permit, Provisions C.11.c.iii.1. and C.12.c.iii.1.).

[505] Exhibit A, Test Claim, pages 490 and 497 (test claim permit, Provisions C.11.c.iii.4. and C.12.c.iii.4.).

load reduction through Green Infrastructure by 2040, including all data used and a description of the models and model inputs relied on.[506]

Preparing a reasonable assurance analysis of future mercury and PCBs load reductions is new. Federal law requires annual assessments of the controls used by the permittees to ensure compliance with water quality standards during the permit term, including the WLAs established in TMDLs, and an annual report that includes the implementation status of all permit conditions.[507] Federal law does not require a reasonable assurance analysis of *future* reductions, however. In addition, the prior permit did not require a reasonable assurance analysis.[508] Thus, this requirement is new.

However, the requirement in Provisions C.11.c.iii.4. and C.12.c.iii.4. to provide an estimate beginning with the 2019 Annual Report of the mercury and PCBs loads reduced through Green Infrastructure during the permit term, including all data and a description of the models and model inputs used, is not new.[509] Federal law requires stormwater programs to be accompanied with an estimate of the expected reduction of pollutant loads, an annual assessment of the program, and annual reports that identify the status of implementing the stormwater management programs established as permit conditions, a summary of data including monitoring data accumulated during the year, and identification of water quality improvements.[510] The prior permit also required the permittees to file annual reports on the estimated loads of mercury and PCBs reduced as a result of the pilot projects.[511] Thus, the annual reporting required by C.11.c.iii.4. and C.12.c.iii.4. is not new.

The remaining reporting requirements all relate to the reasonable assurance analysis and are one-time in nature:

- Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions.

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[506] Exhibit A, Test Claim, pages 490 and 497 (test claim permit, Provisions C.11.c.iii.2., C.11.c.iii.3., C.12.c.iii.3., and C.12.c.iii.2.).

[507] Code of Federal Regulations, title 40, section 122.42(c).

[508] Exhibit A, Test Claim, pages 178-191 (prior permit, Provisions C.11. and C.12.).

[509] Exhibit A, Test Claim, pages 490 and 497 (test claim permit, Provisions C.11.c.iii.4. and C.12.c.iii.4.).

[510] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv); 122.42(c).

[511] Exhibit A, Test Claim pages 178-191, 206 (test claim permit, Provisions C.11., C.12., C.16.).

This submittal shall include all data used and a full description of models and model inputs relied on to establish this relationship.[512]

- Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of models and model inputs relied on to generate this estimate.[513]
- Submit in the 2020 Annual Report a reasonable assurance analysis to quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/year will be realized by 2040 through implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[514]

These reports are not required by federal law or the prior permit and, thus, they are new.

The Commission also finds that the requirements to prepare a reasonable assurance analysis of future mercury and PCBs load reductions and the new one-time reporting requirements are mandated by the state. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[515]

The courts have also explained "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be

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[512] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

[513] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[514] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

[515] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

met, the State exercises a true choice by determining what controls are necessary to meet the standard."[516]

Here, the Regional Board argues that all activities required by Provisions C.11. and C.12. are federally mandated, because the San Francisco Bay is impaired for mercury and PCB, and these provisions are needed to ensure compliance with the respective TMDLs for those pollutants.

> Both TMDLs require municipal stormwater agencies to take aggressive action to reduce mercury and PCBs in stormwater discharges and envision that these load reductions will be implemented in successive municipal stormwater permits. Both TMDLS recognized that identification of control measures that will effectively implement the load allocations will be a process of trial and error, and will not be possible within one permit term. U.S. EPA echoed this in its comments on the draft permit, stating, "EPA supports the Water Board's inclusion of specific numeric mercury and PCB milestones and deadlines within this permit cycle." EPA noted that these numeric milestones were consistent with federal guidance and recognized that the "pollutant-specific values are interim milestones to achieve step-wise progress in this permit as well as to measure progress towards attaining the final TMDL wasteload allocations (mercury in 2028 and PCBs in 2030)…." Accordingly, the TMDL provisions in the permit, described below, are (1) required pursuant to 303(d); (2) even if not a federal mandate, are not part of a new program and do not impose a higher level of service, and are not unique to local governments.[517]

Although the TMDLs require permittees to implement control measures to reduce mercury and PCBs loads, the reasonable assurance analysis of future mercury and PCBs load reductions and the new reporting one-time reporting requirements were imposed at the discretion of the Regional Board and there is no evidence in the record to support a finding that the requirements are the only means by which the federal MEP standard can be met.

In addition, these new state-mandated requirements are uniquely imposed on local government and provide a governmental service to the public and, thus, impose a new program or higher level of service.[518] Provisions C.11. and C.12. implement TMDLs restricting the discharge of pollutants into the San Francisco Bay. Although these TMDLs apply to all dischargers, both public and private entities, the specific requirements here are to prepare a reasonable assurance analysis, and include specific

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[516] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[517] Exhibit C, Regional Board's Late Comments on the Test Claim, page 13.

[518] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

information found in the reasonable assurance analysis in one-time annual reports. These are requirements uniquely imposed on permittees, utilizing knowledge possessed through their regulatory permitting authority for projects built within their jurisdiction. They also provide the governmental service of helping to achieve necessary mercury and PCBs load reductions.

Accordingly, the following requirements imposed by Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., C.12.c.iii.1.-3., mandate a new program or higher level of service:

- Prepare a reasonable assurance analysis of future mercury and PCBs load reductions by doing the following:
    - Quantify the relationship between areal extent of Green Infrastructure implementation and mercury and PCBs load reductions, taking into consideration the scale of contamination of the treated area as well as the pollutant removal effectiveness of likely green infrastructure strategies.[519]
    - Estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, 2030, and 2040.[520]
    - Estimate the amount of mercury/PCBs load reductions that will result from Green Infrastructure implementation by 2020, 2030, and 2040.[521]
    - Quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through the implementation of Green Infrastructure Projects.[522]
    - Ensure that the calculation methods, models, model inputs, and modeling assumptions used to fulfill provisions C.11.c.ii.2.a.-d. and C.12.c.ii.2.a.-d. above have been validated through a peer review process.[523]
- Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions. This

[519] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.a., C.12.c.ii.2.a.).

[520] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.b., C.12.c.ii.2.b.).

[521] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.c., C.12.c.ii.2.c.).

[522] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.d., C.12.c.ii.2.d.).

[523] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.e., C.12.c.ii.2.e.).

submittal shall include all data used and a full description of the models and model inputs relied on to establish this relationship.[524]

- Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of the models and model inputs relied on to generate this estimate.[525]
- Submit in the 2020 Annual Report a reasonable assurance analysis to demonstrate quantitatively that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through the implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[526]

e. Most of the requirements in Provisions C.11.a. and C.11.b., regarding control measures to achieve mercury load reductions in accordance with the mercury TMDL, are not new and do not mandate a new program or higher level of service. However, the requirement in Provision C.11.a.iii.1. to report on progress towards developing a list of the watersheds and management areas where control measures are currently being implemented or will be implemented during the permit term, is new and imposes a state-mandated new program or higher level of service.

For the reasons below, the Commission finds that except for the requirement to provide a progress report on preparing the list of watersheds and management areas where control measures are implemented or will be implemented during the permit term (C.11.a.iii.1.), the remaining requirements imposed by Provisions C.11.a. and b. are *not* new and do not constitute a new program or higher level of service.

i. Most of the requirements in Provisions C.11.a. and C.11.b. relating to the reduction of mercury are not new, except for the requirement to report on progress toward developing a list of the watersheds and management areas where mercury control measures are currently

[524] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

[525] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[526] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

being implemented or will be implemented during the permit term (C.11.a.iii.1.), which is new.

The plain language of Provision C.11.a. says that permittees shall "implement mercury source and treatment control measures and pollution prevention strategies to reduce mercury loads throughout the [permit area][527] by doing all of the following:

- Identify the watersheds or portions of watersheds (management areas) in which mercury control measures are currently being implemented and those in which new control measures will be implemented during the permit term, as well as identify the control measures that are currently being implemented and those that will be implemented in each watershed and management area.[528]
- Submit a schedule for control measure implementation.[529]
- Implement mercury source and treatment control measures and pollution prevention strategies and quantify mercury load reductions achieved by using the accounting methods established according to Provision C.11.b.[530]
- By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[531]
- In the 2016 Annual Report, report the list of watersheds and management areas where mercury controls are currently being implemented or will be implemented during the permit term, the specific control measures that are currently being implemented and those that will be implemented in these watersheds and management areas, and an implementation schedule for these control measures.[532] This report shall also include:
    - The number, type, and locations and/or frequency (if applicable) of control measures;
    - The description, scope, and start date of pollution prevention measures;
    - For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for

[527] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.i.).

[528] Exhibit A, Test Claim, page 486 (test claim permit, Provisions C.11.a.ii.1. and 2.).

[529] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.ii.3.).

[530] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.ii.4.).

[531] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

[532] Exhibit A, Test Claim, pages 486-487 (test claim permit, Provision C.11.a.iii.2.).

structural BMPs or other relevant milestones for non-structural BMPs), and a schedule for milestone achievement; and

  - Clear statements of the roles and responsibilities of each participating Permittee for implementation of pollution prevention or control measures identified in C.11.a.ii.2.[533]

- Beginning with the 2017 Annual Report and continuing in all Annual Reports, update all the information required by Provision C.11.a.iii.2. as necessary to account for new control measures implemented, but not described in the 2016 Annual Report.[534]

Provision C.11.b. requires permittees to develop and implement an assessment methodology and data collection program to quantify in a technically sound manner mercury loads reduced through implementation of pollution prevention, source control, and treatment control measures, including mercury source control, stormwater treatment, green infrastructure, and other measures. This assessment methodology shall be used to demonstrate progress towards achieving the load reductions required in this permit term and the program area wasteload allocations.[535] The Fact Sheet states that the reasonable and technically sound load reduction accounting system was based on information submitted by the permittees in their 2014 Integrated Monitoring Report.[536] The test claim permit therefore describes the activities required by this task as "documenting the method described in the Fact Sheet or any alternative methodology, updating and refining the accounting system to account for new information, justifying assumptions, analytical methods, sampling schemes and parameters used to quantify the load reduction for each type of control measure, and indicating what information will be collected and submitted to confirm the calculated load reduction for each control measure implemented."[537] Provision C.11.b. requires the following tasks:

- Adequately quantify the mercury load reductions achieved through implementing pollution prevention, source control, and treatment control efforts.[538]
- Submit the chosen assessment methodology and data collection program with the 2016 Annual Report for executive approval.[539]

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[533] Exhibit A, Test Claim, page 487 (test claim permit, Provision C.11.a.ii.2.a-d.).

[534] Exhibit A, Test Claim, page 487 (test claim permit, Provision C.11.a.iii.3.).

[535] Exhibit A, Test Claim, page 487 (test claim permit, Provision C.11.b.i.).

[536] Exhibit A, Test Claim, page 638 (test claim permit, Fact Sheet).

[537] Exhibit A, Test Claim, page 487 (test claim permit, Provision C.11.b.i.).

[538] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.ii.).

[539] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.1.).

- Beginning with the 2017 Annual Report, annually report the mercury loads reduced using either the default or an approved alternative assessment methodology, to demonstrate the cumulative mercury load reduced from each control measure implemented since the beginning of the permit term; and submit all supporting data and information necessary to substantiate the load reduction estimates, including appropriate reference to the control measure descriptions required under C.11.a.[540]
- Beginning with the 2018 Annual Report, submit any necessary refinements to the measurement and estimation methodologies to assess mercury load reductions in the subsequent permit term for Executive Officer approval.[541]

The Commission finds that most of these requirements are *not* new and, thus, do not constitute a new program or higher level of service, except for the requirement to provide a progress report on preparing the list of watersheds and management areas where control measures are implemented or will be implemented during the permit term (C.11.a.iii.1.), which is new.

The requirements to select and implement control measures and mercury source and treatment control measures in selected watersheds in accordance with Provisions C.11.a.i. and C.11.a.ii.1., 2., and 4., are not new and do not impose a new program or higher level of service. As indicated above, the mercury TMDL became effective in February 2008, before the December 1, 2009 effective date of the prior permit.[542] TMDLs calculate the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[543] The TMDL and the wasteload allocations allocated to dischargers are required by federal law to be established at levels necessary to meet water quality standards.[544] And existing federal law requires permittees to meet water quality standards by implementing controls to reduce pollutants in urban runoff from commercial, residential, industrial, and construction land

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[540] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.2.).

[541] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.3.).

[542] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 4; California Code of Regulations, title 23, section 3915; Exhibit A, Test Claim, page 207 (prior permit, Provision C.21.).

[543] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[544] Code of Federal Regulations, title 40, section 130.2(h), 130.7(c)(1) ("TMDLs hall be established for all pollutants preventing or expected to prevent attainment of water quality standards"); *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095-1096.

uses or activities, and to have the legal authority to control the discharges to their MS4.[545]

Moreover, meeting water quality standards for mercury is not new to the claimants; narrative criteria or objectives existed in the Basin Plan before the TMDLs were adopted.[546] The Basin Plan provided that surface waters shall not contain concentrations of chemical constituents in amounts that adversely affected any designated beneficial use.[547] The Basin Plan also had a water quality objective for mercury in surface waters not to exceed a 4-day average of 0.025 ug/l, and a one-hour average of 2.1 ug/l.[548]

In addition, compliance with the wasteload allocations adopted in the mercury TMDL was required under the prior permit by performing the same activities as required by the test claim permit. The prior permit's discharge prohibitions and receiving water limitations in Provisions A and B required and prohibited the following:

- Permittees shall, within their respective jurisdictions, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into, storm drain systems and watercourses.[549]
- It shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas.[550]
- The discharge shall not cause conditions of nuisance or adversely affect the beneficial uses of the waters, including from "[s]ubstances present in

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[545] United States Code, title 33, section 1342(p)(3)(B)(iii) (Permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods"); Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(A-D) and (iv)(A-D).

[546] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 6, 10 (Before the adoption of the TMDL for mercury, the Basin Plan provided that surface waters shall not contain concentrations of chemical constituents in amounts that adversely affected any designated beneficial use. In 1998, the Regional Board adopted a 303(d) impaired water body list classifying all of San Francisco Bay as impaired due to mercury.)

[547] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 6.

[548] Exhibit I (2) Basin Plan 2007, page 68.

[549] Exhibit A, Test Claim, page 91 (prior permit, Provision A.1.).

[550] Exhibit A, Test Claim, page 91 (prior permit, Provision A.2.).

concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, waterfowl, or that render of these unfit for human consumption."[551]

- The discharge shall not cause or contribute to a violation of any applicable water quality standard for receiving waters.[552]

The Basin Plan was amended to include the wasteload allocations adopted in the mercury TMDL.[553]

The prior permit, in Provision C.1. then required the permittees to "comply with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures *and* other actions specified in Provisions C.2 through C.15" of the prior permit.[554] The prior permit, in Provision C.8.e., also imposed monitoring requirements to ensure compliance with water quality standards, including pollutants of concern monitoring (including monitoring for mercury, a category 1 pollutant), to quantify annual loads or concentrations of pollutants of concern from tributaries to the Bay; quantify the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and quantify the projected impacts of management actions (including control measures) on tributaries and identifying where these management actions should be implemented to have the greatest beneficial impact.[555] Provision C.11. of the prior permit specifically required the permittees to develop and implement a monitoring program to quantify mercury loads and loads reduced through source control, treatment, and other management measures pursuant to Provision C.11.g.[556] These requirements are consistent with existing federal law, which requires the claimants to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the environment.[557]

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[551] Exhibit A, Test Claim, page 91 (prior permit, Provision B.1.).

[552] Exhibit A, Test Claim, page 91 (prior permit, Provision B.2.).

[553] California Code of Regulations, title 23, section 3915.

[554] Exhibit A, Test Claim, page 92 (Prior Permit, Provision C.1.), emphasis added.

[555] Exhibit A, Test Claim, pages 163-166 (prior permit, Provision C.8.e.).

[556] Exhibit A, Test Claim, page 182 (prior permit, Provision C.11.g.).

[557] United States Code, title 33, section 1342(p)(3)(B)(iii) requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants." Emphasis added. See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit

Thus, the permittees were required by prior state and federal laws to select and implement control measures of their choosing to meet the water quality standards for mercury. These prior requirements also implement a 1999 precedential order from the State Water Resources Control Board requiring permits to achieve water quality standards in protected waters through the implementation of control measures.[558] Therefore, the claimants had an existing duty to comply with the water quality standards for mercury when the prior permit was adopted through the selection and implementation of control measures in their water bodies and, therefore, these requirements are not new.

Moreover, the requirements to select and implement control measures to reduce the discharge of mercury to protected waters in selected watersheds in accordance with the TMDL is not unique to government and does not provide a governmental service to the public and, therefore, does not impose a new program or higher level of service.[559] The TMDL for mercury also imposed wasteload allocations on private industrial dischargers, including Chevron, Conoco, Martinez Refining Company, Valero, C&H Sugar, requiring these dischargers to reduce their discharges to meet water quality standards for mercury by implementing "effective programs to control mercury sources and loading."[560] Thus, compliance with the mercury TMDL by implementing control measures is not uniquely imposed on government and does not provide a *governmental* service to the public, but applies equally to public and private entities that discharge to the Bay. In this respect, the TMDL requirements are no different from the alleged mandated activities in *County of Los Angeles v. Department of Industrial Relations*.[561] In that case, the County sought reimbursement for complying with earthquake and fire

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limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[558] Exhibit A, Test Claim, page 234 (prior permit, Fact Sheet); Exhibit I (6), State Water Resources Control Board Order WQ 2015-0075, pages 11-12, which describes the Water Board's 1999 Order; see also *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880 (holding permit provisions requiring compliance with water quality standards are proper under federal law); *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1206-1207 (holding that if a permittee's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the permit, then, as a matter of permit construction, the monitoring data conclusively demonstrates that the County Defendants are not "in compliance" with the Permit conditions.).

[559] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[560] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 16-17, 24.

[561] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

safety regulations applicable to elevators in public buildings.[562] The "County acknowledges that the elevator safety regulations apply to all elevators, not just those which are publicly owned."[563] The court concluded that therefore the regulations "do not impose a 'unique requirement' on local government, [and] they do not meet the second definition of 'program' established by [County of Los Angeles I]."[564] Similarly, in *City of Richmond*, state law exempted public safety employees from the requirement to pay death benefits to a deceased employee's survivors under workers compensation statutes.[565] After the state repealed the exemption for public safety employees, the city sought reimbursement for the payment of workers compensation death benefits, which had to be made in addition to a PERS death benefit.[566] The court denied reimbursement, finding that the payment of death benefits under the workers compensation statutes was not unique to government. The court agreed with the Commission; "[t]hat [the test claim statute] affects only local government does not compel the conclusion that it imposes a unique requirement on local government."[567]

Therefore, the requirements to select and implement mercury source and treatment control measures in selected watersheds in accordance with Provisions C.11.a.i. and C.11.a.ii.1., 2., and 4., do not mandate a new program or higher level of service.

Provision C.11.a.ii.3. requires the permittees to submit a schedule of control measure implementation during the permit term. This requirement is not new. Federal law requires a proposed management program, which shall include a description of the structural and source control measure to control pollutants that are to be implemented during the life of the permit, an estimate of the expected resulting pollutant loads reduced, and a proposed schedule for implementing such controls.[568] Thus, it is not a new requirement to provide a schedule for control measures to be implemented during the permit term. Thus, Provisions C.11.a.ii.3. does not mandate a new program or higher level of service.

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[562] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[563] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[564] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[565] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1193-1194.

[566] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[567] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[568] Code of Federal Regulations title 40 section 122.26 (d)(2)(iv).

Provisions C.11.b.i. and ii. require permittees to develop and implement an assessment methodology and data collection program that will be used to quantify in a technically sound manner the mercury load reduced through the implementation of pollution prevention, source control, and treatment control measures, by either using the default methodology identified in the Fact Sheet (which is derived from 2014 Integrated Monitoring Report required by the prior permit), or modifying the program.[569] This is not a new requirement and does not mandate a new program or higher level of service. The prior permit required permittees to develop and implement a monitoring program to quantify their mercury loads and loads reduced through source control, treatment and other management measures.[570] Provision C.11.g.ii. of the prior permit specified this would be done by either: 1) quantifying through estimates the annual mercury load reduced through pollution prevention, source control, and treatment control efforts or other relevant efforts; 2) quantifying the mercury load as a rolling five-year annual average using data on flow and water column mercury concentrations; or 3) quantitatively demonstrating that the mercury concentration of suspended sediment that best represents sediment discharged with urban runoff is below the target of 0.2 mg mercury/kg dry weight. Permittees were required to report their chosen methods and a full description of the measurement and estimation methodology and rationale for the approach in their 2010 Annual Report; and report the results of their chosen monitoring/measurement approach concerning the loads assessment and estimate of loads reduced in the 2014 Integrated Monitoring Report.[571] The 2014 Integrated Monitoring Report was used as the basis for the default assessment methodology and data collection described in the Fact Sheet for Provision C.11.b. of the test claim permit.[572] Thus, using the existing methodology developed under the prior permit is not new and developing a new methodology is not required by the test claim permit, but a choice provided to the permittees. In addition, and as stated above, federal law requires a permittee's management program include an estimate of the expected resulting pollutant loads reduced.[573] Moreover, the mercury TMDL requires private dischargers to also monitor their discharges and document their mercury effluent concentrations, ongoing source control activities, and mercury loads avoided as a result, which is substantially the same as developing a data collection program, and thus the requirements are not unique to government or provide a governmental service to the public.[574] Therefore, requiring permittees to develop and implement an assessment methodology and data collection program in accordance with Provisions C.11.b.i. and ii. is not a new program or higher level of service, but was required for all

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[569] Exhibit A, Test Claim, pages 487-488 (test claim permit, Provision C.11.b.i. and ii.).

[570] Exhibit A, Test Claim, page182 (prior permit, Provision C.11.g.i.).

[571] Exhibit A, Test Claim, pages 182-183 (prior permit, Provision C.11.g.iii.).

[572] Exhibit A, Test Claim, pages 638-639 (test claim permit, Fact Sheet).

[573] Code of Federal Regulations title 40 section 122.26 (d)(2)(iv).

[574] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, page 24.

dischargers by federal law and the TMDL, and the prior permit adopted for the local agency permittees, which implemented the mercury TMDL.

Moreover, the following reporting requirements imposed by Provisions C.11.b.iii.1.-3. are not new.

- Submit the chosen assessment methodology and data collection program with the 2016 Annual Report for executive approval.[575]
- Beginning with the 2017 Annual Report, annually report the mercury loads reduced using either the default or an approved alternative assessment methodology, to demonstrate the cumulative mercury load reduced from each control measure implemented since the beginning of the permit term; and submit all supporting data and information necessary to substantiate the load reduction estimates, including appropriate reference to the control measure descriptions required under C.11.a.[576]
- Beginning with the 2018 Annual Report, submit any necessary refinements to the measurement and estimation methodologies to assess mercury load reductions in the subsequent permit term for Executive Officer approval.[577]

Under federal law, a permittee, when obtaining an NPDES permit, is required to identify a proposed management program that includes measures to control pollutants during the life of the permit, an estimate of the expected pollutant loads reduced as a result of those measures, and a proposed schedule for implementing such controls.[578] Federal law then requires that an annual report be filed by the permittees by the anniversary date of the issuance of the permit and include the following information:

- The status of implementing the components of the stormwater management program that are established as permit conditions.
- Proposed changes to the stormwater management programs that are established as permit conditions. Such proposed changes shall be consistent with Code of Federal Regulations, title 40, 122.26(d)(2)(iii) (which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application).
- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.
- A summary of data, including monitoring data, that is accumulated throughout the reporting year.

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[575] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.1.).

[576] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.2.).

[577] Exhibit A, Test Claim, page 488 (test claim permit, Provisions C.11.b.iii.3.).

[578] Code of Federal Regulations title 40 section 122.26 (d)(2)(iv).

- Annual expenditures and budget for the year following each annual report.
- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.[579]

As indicated above, the permittees were already required by the prior permit to use control measures to reduce the discharge of mercury and, thus, were required by federal law to report the status of that program, the mercury loads reduced, and any necessary refinements to the measurement and estimation methodologies chosen to assess mercury load reductions.[580] The prior permit also required the permittees, in Provision C.11.g.iii., to identify the monitoring and measurement approach the permittees chose to use in the 2010 annual report and to report the mercury loads assessment and loads reduced in the 2014 Integrated Monitoring Report.[581] Thus, none of the activities required by Provision C.11.b. are new.

In contrast, Provision C.11.a.iii.1. requires permittees to submit a report on their *progress towards developing* the list of where control measures will be implemented and the monitoring data and other information used to select them. This progress report answers a separate question than the information that is to be included in the 2016 Annual Report under Provision C.11.a.iii.2., namely verifying that the permittee is working to prepare the list and is using data and other information likely to result in a satisfactorily completed list. It also has a separate and additional deadline from any other previously required reports of April 1, 2016. Therefore, the following is a new requirement within Provision C.11.a.iii.1.:

- By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[582]

ii. The new requirement imposed by Provision C.11.a.iii.1. to file a progress report with the Regional Board by April 1, 2016, is mandated by the state and imposes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed

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[579] Code of Federal Regulations, title 40, section 122.42(c).

[580] Exhibit A, Test Claim, page 178 (prior permit, Provision C.11.).

[581] Exhibit A, Test Claim, pages 182-183 (prior permit, Provision C.11.g.iii.).

[582] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[583]

As indicated in the court's decision, this is the long-standing test identified in prior case law to determine if requirements imposed by state statute or executive order are mandated by the state or the federal government when the state is implementing federal law.[584]

The courts have also explained "except where a regional board finds the conditions are the only means by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[585] "That the . . . Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the . . . Regional Board exercised its discretion."[586]

Here, the mercury TMDL is required by federal law since the waterbodies were 303(d) listed as impaired because of mercury. Regional boards are then required by federal law to include effluent limits compliant with "all applicable water quality standards" and "consistent with the assumptions and requirements of any available wasteload

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[583] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[584] See *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 764-765, where the court explains the following prior decisions: *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, which addressed local governments' reimbursement claims for the costs of extending unemployment insurance protection to their employees pursuant to a federal statute that induced the state's compliance with a carrot and stick; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, addressing a state statute that required local governments to provide indigent criminal defendants with experts for the preparation of their defense in accordance with federal law; and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, which addressed state special education statutes implementing the federal Education of the Handicapped Act.

[585] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[586] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

allocation for the discharge" in NPDES permits.[587] The permits can also include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.[588]

However, the specific new activity found in Provision C.11.a.iii.1. was for permittees to submit a separate report by April 1, 2016 on their progress towards developing a list of the watersheds and management areas where mercury control measures are currently being implemented and those in which new control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas. This progress report is in addition to the Annual Report, as demonstrated by the fact that permittees are required to submit the finished version of the list of watersheds and management areas later that same year in their 2016 Annual Report.[589] Federal law does not require NPDES stormwater permittees to submit an additional report on their progress in preparing the required information about where control measures are being implemented. Thus, the Regional Board exercised discretion when it required permittees to report by April 1, 2016 on progress towards developing the list of watersheds and management areas where mercury control measures are being implemented and those where control measures will be implemented, as well as the monitoring data and other information used to identify the areas.

Moreover, the requirement of Provision C.11.a.iii.1. constitutes a new program or higher level of service. The requirement to submit a progress report is uniquely imposed on local agency permittees. The Regional Board has mandated that the permittees prepare this progress report and schedule as part of their BMPs to comply with the WLA assigned to MS4 permittees identified in the TMDL to achieve water quality standards for urban runoff and, thus, the requirement also provides a governmental service to the public.[590]

Accordingly, the Commission finds that Provision C.11.a.iii.1. mandates a new program or higher level of service by requiring permittees to perform the following activity:

- By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[591]

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[587] Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

[588] United States Code, title 33, section 1342(p)(3)(B)(iii).

[589] See Exhibit A, Test Claim, page 487 (test claim permit, Provision C.11.a.iii.2.).

[590] See *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537-538.

[591] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

f. Provisions C.12.a., C.12.d., and C.12.e., regarding control measures to achieve PCBs load reductions, impose some state-mandated new programs or higher levels of service to submit specific reports; prepare an implementation plan and schedule of future actions, and a reasonable assurance analysis showing control measures will be fully implemented in the future to achieve the PCBs TMDL wasteload allocations by 2030; and sample caulks and sealants in storm drains and roadway infrastructures. The remaining requirements are not new and do not mandate a new program or higher level of service.

Provision C.12. imposes requirements discussed below to achieve interim load reductions for PCBs during the term of the test claim permit, and to ultimately achieve the aggregate wasteload allocation of 1.6 kg/yr by March 2030, in accordance with the PCBs TMDL.[592]

i. Most of the requirements in Provision C.12.a. are not new and, thus, do not mandate a new program or higher level of service, except for some of the reporting requirements, which are new.

Provision C.12.a.i. requires permittees to "implement PCBs source and treatment control measures and pollution prevention strategies" to achieve the PCBs load reductions outlined in Table 12.1 throughout the permit area.[593] Table 12.1 identifies the following "PCBs Load Reductions Performance Criteria by County":

County	**PCBs Load Reduction (g/yr) by June 30, 2018**	**PCBs Load Reduction (g/yr) by June 30, 2020**
Alameda Permittees	160	940
Contra Costa Permittees	90	560
San Mateo Permittees	60	370
Santa Clara Permittees	160	940
Solano Permittees: Suisun City, Vallejo, Fairfield	30	190
Totals	**500**	**3000**[594]

Provision C.12.a.ii.4. explains that "For all Permittees combined, the county-specific average annual PCBs load reduction performance criteria shall total 0.5 kg/yr by

[592] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.).

[593] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.i.).

[594] Exhibit A, Test Claim, page 493 (test claim permit, Table 12.1.).

June 30, 2018, and 3.0 kg/yr by June 30, 2020. The June 30, 2020, deadline shall be extended to December 31, 2020, if the Permittees provide documentation that control measures that will attain the load reduction will be implemented by December 31, 2020."[595]

Provision C.12.a.iv. also states that the permittees may meet the load reductions as a group, rather than by county, and can use an alternative method of distributing the county load reductions if they choose, but all permittees within a county shall use the same method of distributing the county load reductions.[596]

To implement this, the plain language of Provision C.12.a. requires the following:

- Identify the watersheds or portions of watersheds (management areas) in which PCBs control measures are currently being implemented and those in which new control measures will be implemented during the permit term, as well as identify the control measures that are currently being implemented and those that will be implemented in each watershed and management area.[597]

  The Fact Sheet identifies potential control measures including the removal, capping, and paving of contaminated sediment in newly developed or redeveloped areas; retrofits or other treatment controls, such as green infrastructure; cleanup of contaminated private properties; control measures to prevent discharge to storm drains of PCBs in building materials during demolition; and enhanced operation and maintenance control measures to reduce loads of mercury and PCBs, including street sweeping, drain inlet cleaning, pump station maintenance, and PCBs captured by full trash capture devices.[598]

- Submit a schedule for control measure implementation.[599]

- Implement sufficient control measures to achieve the permit-area-wide PCBs load reduction of 0.5 kg/year by June 30, 2018 and 3.0 kg/yr by June 30, 2020, or the county-specific load reduction performance criteria outlined in table 12.1.[600]

- By April 1, 2016, report progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs control measures are currently being implemented and those in which PCBs control measures will be implemented during the permit term, including watersheds containing

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[595] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.ii.4.).

[596] Exhibit A, Test Claim, pages 492-493 (test claim permit, Provision C.12.a.ii.4.).

[597] Exhibit A, Test Claim, page 492 (test claim permit, Provisions C.12.a.ii.1 and 2.).

[598] Exhibit A, Test Claim, pages 647-649 (test claim permit, Fact Sheet).

[599] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.ii.3.).

[600] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.ii.4.).

contaminated sites that were referred to the Water Board, as well as the monitoring data and other information used to select these watersheds and management areas.[601]

- In the 2016 Annual Report, report the list of watersheds and management areas where control measures are currently being implemented or will be implemented during the permit term, along with the specific control measures that are currently being implemented, and those that will be implemented in those watersheds and management areas and an implementation schedule for those control measures.[602] Include the following:
    - The number, type, and locations and/or frequency (if applicable) of control measures;
    - A cumulative listing of all potentially PCBs-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information;
    - The description, scope, and start date of PCBs control measures;
    - For each structural control and non-structural BMP, interim implementation progress milestones (e.g. construction milestones for structural controls or other relevant implementation milestones for structural controls or non-structural BMPs) and a schedule for milestone achievement; and
    - Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or identified control measures.[603]
- Beginning with the 2017 Annual Report, update all information required in C.12.a.iii.2. as necessary to account for new control measures implemented but not described in the 2016 Annual Report.[604]

The Commission finds that the requirements to identify watersheds and implement PCBs source and treatment control measures and pollution prevention strategies to achieve PCBs load reductions in accordance with Provisions C.12.a.i., C.12.a.ii.1., C.12.a.ii.2., and C.12.a.ii.4. are not new and do not mandate a new program or higher level of service.

Before the adoption of the TMDL, the Basin Plan contained a narrative water quality objective stating that controllable water quality factors shall not cause a detrimental

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[601] Exhibit A, Test Claim, page 493 (test claim permit, Provision C.12.a.iii.1.).

[602] Exhibit A, Test Claim, pages 492-494 (test claim permit, Provision C.12.a.iii.2.).

[603] Exhibit A, Test Claim, page 494 (test claim permit, Provisions C.12.a.iii.2.a-e.).

[604] Exhibit A, Test Claim, page 494 (test claim permit, Provision C.12.a.iii.3.).

increase in toxic substances found in bottom sediments or aquatic life.[605] In addition, in May 2000, the CTR established numeric water quality criteria of 0.00017 ug/L total PCBs in water that apply to the San Francisco Bay.[606] The CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the CWA.'"[607] However, all segments of the San Francisco Bay were not meeting the narrative and CTR water quality standards, were listed as impaired for PCBs, and were 303(d) listed in 1998.[608] Thus, the permittees had actual knowledge that PCBs loads had to be reduced in 1998.

The Regional Board adopted the PCBs TMDL on February 13, 2008; it was approved by the State Board on October 20, 2009; was approved by the Office of Administrative Law on March 1, 2010; and was approved by the U.S. EPA on March 29, 2010.[609] This was happening concurrently to drafting the prior permit, which became effective on December 1, 2009.[610]

TMDLs calculate the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[611] The TMDL and the wasteload allocations allocated to dischargers are required by federal law to be established at levels necessary to meet water quality standards.[612] Meeting water quality standards for these pollutants is not new to the claimants. Existing federal law requires permittees to meet water quality standards by implementing controls to reduce pollutants in urban runoff from commercial, residential, industrial, and construction land uses or activities, and to have the legal authority to control the discharges to their MS4.[613] In addition,

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[605]Exhibit I (2) Basin Plan 2007, page 57 (section 3.3.2); Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 5.

[606] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 1, 5.

[607] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

[608] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 5.

[609] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 3; California Code of Regulations, title 23, section 3919.6.

[610] Exhibit A, Test Claim, page 207 (prior permit, Provision 21.).

[611] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[612] Code of Federal Regulations, title 40, section 130.2(h), 130.7(c)(1) ("TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards"); *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095-1096.

[613] United States Code, title 33, section 1342(p)(3)(B)(iii) (Permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques

and as explained above, narrative and numeric criteria or objectives existed in the Basin Plan and the CTR before the TMDLs were adopted. Moreover, the prior permit implemented the PCBs TMDL, stating that one of the goals was to "achieve Waste Load Allocations adopted under Total Maximum Daily Loads" and "to implement the urban runoff requirements of the PCBs TMDL and reduce PCBs loads to make substantial progress toward achieving the urban runoff PCBs load allocation."[614] Thus, compliance with the water quality standards and the wasteload allocations adopted in the PCBs TMDL was required under the prior permit and, as explained below, the prior permit imposed the same activities as required by the test claim permit.

In addition, the prior permit required the permittees to identify watersheds and implement PCBs source and treatment control measures and pollution prevention strategies to achieve PCBs load reductions in accordance with the wasteload allocations set by the TMDL. The prior permit's discharge prohibitions and receiving water limitations in Provisions A and B prohibited discharges that cause or contribute to a violation of any applicable water quality standard for receiving waters,[615] including those for PCBs, and also required the following:

- Permittees shall, within their respective jurisdictions, effectively prohibit the discharge of non-stormwater (materials other than stormwater) into, storm drain systems and watercourses.[616]
- It shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas.[617]
- The discharge shall not cause conditions of nuisance or adversely affect the beneficial uses of the waters, including from "[s]ubstances present in concentrations or quantities that would cause deleterious effects on aquatic biota, wildlife, waterfowl, or that render of these unfit for human consumption."[618]

The prior permit, in Provision C.1., then required the permittees to "comply with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 and B.2

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and system, design and engineering methods"); Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(A-D) and (iv)(A-D).

[614] Exhibit A, Test Claim, pages 185, 220 (prior permit, Provision C.12. and Fact Sheet); see also "The C.12 provisions are consistent with the regulatory approach and implementation plan of the San Francisco Bay PCBs TMDL adopted by the Water Board." (Exhibit A, Test Claim, page 299 (prior permit, Fact Sheet).)

[615] Exhibit A, Test Claim, page 91 (prior permit, Provision B.2.).

[616] Exhibit A, Test Claim, page 91 (prior permit, Provision A.1.).

[617] Exhibit A, Test Claim, page 91 (prior permit, Provision A.2.).

[618] Exhibit A, Test Claim, page 91 (prior permit, Provision B.1.).

through the timely implementation of control measures *and* other actions specified in Provisions C.2 through C.15" of the prior permit.[619] The Fact Sheet for the prior permit explains the "State Water Resources Control Board ("State Water Board") Order WQ 1999-05, is a precedential order requiring that municipal stormwater permits achieve water quality standards and water quality standard based discharge prohibitions through the implementation of control measures, by which Permittees' compliance with the permit can be determined" and that the "Water Board Order specifically requires that Provision C.1 include language that Permittees shall comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in the discharges."[620] Thus, pursuant to the plain language of Provision C.1., the permittees were required by the prior permit to implement control measures of their choosing *and* the specific control actions specified in Provision C.12. to meet the water quality standards for PCBs.

The prior permit also imposed monitoring requirements to ensure compliance with water quality standards, including pollutants of concern monitoring in Provision C.8.e. (including monitoring for PCBs, a category 1 pollutant), to quantify annual loads or concentrations of pollutants of concern from tributaries to the Bay; quantify the decadal-scale loading or concentration trends of pollutants of concern from small tributaries to the Bay; and quantify the projected impacts of management actions (including control measures) on tributaries and identifying where these management actions should be implemented to have the greatest beneficial impact.[621] Provision C.12.g. of the prior permit required the permittees to develop and implement a monitoring program to quantify PCBs loads and loads reduced through source control, treatment, and other management measures implemented with the pilot projects, and directs the reader to "see C.11.g for details," which addresses the same requirement under the prior permit for mercury.[622] Provision C.11.g. of the prior permit required compliance by either: 1) quantifying through estimates the annual loads reduced through pollution prevention, source control, and treatment control efforts or other relevant efforts; 2) quantifying the load as a rolling five-year annual average using data on flow and water column mercury concentrations; or 3) quantitatively demonstrating that the concentration of suspended sediment that best represents sediment discharged with urban runoff is below the target. Permittees were required to report their chosen methods and a full description of the measurement and estimation methodology and rationale for the approach in their 2010 Annual Report; and report the results of their chosen monitoring/measurement approach concerning the loads assessment and estimate of loads reduced in the 2014 Integrated Monitoring Report.[623] Since the prior permit treated Provisions C.11.g. and

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[619] Exhibit A, Test Claim, page 92 (prior permit, Provision C.1.), emphasis added.

[620] Exhibit A, Test Claim, page 234 (prior permit, Fact Sheet).

[621] Exhibit A, Test Claim, pages 163-166 (prior permit, Provision C.8.e.).

[622] Exhibit A, Test Claim, page 190 (prior permit, Provision C.12.g.).

[623] Exhibit A, Test Claim, pages 182-183 (prior permit, Provision C.11.g.iii.).

C.12.g. for mercury and PCBs consistently, the specific requirements for reporting under C.11.g. also apply to Provision C.12.g. of the prior permit. These requirements are consistent with existing federal law, which requires the claimants to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the environment.[624]

Thus, the claimants had an existing duty to comply with the water quality standards for PCBs under the prior permit by identifying watersheds and implementing control measures of their choosing to reduce the discharge of PCBs in accordance with the PCBs TMDL to meet water quality standards. Though Provision C.12.a.ii.4. of the test claim permit sets a specific requirement that these control measures attain aggregate, region-wide PCBs load reductions totaling 0.5 kg/yr by June 30, 2018 and 3 kg/year by June 30, 2020, these interim deadlines are consistent with the resolution adopting the PCBs TMDL, as stated in the opening paragraph of Provision C.12., which set an aggregate, region-wide wasteload allocation for permittees of 1.6 kg/year to be achieved by 2030.[625]

Moreover, the requirements to select and implement control measures to reduce the discharge of PCBs to protected waters in selected watersheds in accordance with the TMDL is not unique to government and does not provide a governmental service to the public and, therefore, does not impose a new program or higher level of service.[626] The TMDL for PCBs also imposed wasteload allocations on private industrial dischargers, including Chevron, Conoco, and C&H Sugar, requiring these dischargers to reduce their discharges to meet water quality standards for PCBs by implementing “best management practices to maintain optimum treatment performance for solids removal and the identification and management of controllable sources.[627] Thus, compliance with the PCBs TMDL by implementing control measures is not uniquely imposed on

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[624] United States Code, title 33, section 1342(p)(3)(B)(iii) requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants." Emphasis added. See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[625] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.).

[626] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[627] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, pages 9, 11.

government and does not provide a *governmental* service to the public, but applies equally to public and private entities that discharge to the Bay and are assigned a wasteload allocation. In this respect, the TMDL requirements are no different from the alleged mandated activities in *County of Los Angeles v. Department of Industrial Relations*.[628] In that case, the County sought reimbursement for complying with earthquake and fire safety regulations applicable to elevators in public buildings.[629] The "County acknowledges that the elevator safety regulations apply to all elevators, not just those which are publicly owned."[630] The court concluded that therefore the regulations "do not impose a 'unique requirement' on local government, [and] they do not meet the second definition of 'program' established by [County of Los Angeles I]."[631] Similarly, in *City of Richmond*, state law exempted public safety employees from the requirement to pay death benefits to a deceased employee's survivors under workers compensation statutes.[632] After the state repealed the exemption for public safety employees, the city sought reimbursement for the payment of workers compensation death benefits, which had to be made in addition to a PERS death benefit.[633] The court denied reimbursement, finding that the payment of death benefits under the workers compensation statutes was not unique to government. The court agreed with the Commission; "[t]hat [the test claim statute] affects only local government does not compel the conclusion that it imposes a unique requirement on local government."[634]

Therefore, the requirements in Provisions C.12.a.i., C.12.a.ii.1., C.12.a.ii.2., and C.12.a.ii.4., are not new and do not mandate a new program or higher level of service.

Provision C.12.a.ii.3. requires the permittees to submit a schedule of control measure implementation during the permit term.[635] This requirement is not new. Federal law requires a proposed management program, which shall include a description of the structural and source control measure to control pollutants that are to be implemented

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[628] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[629] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[630] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[631] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[632] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1193-1194.

[633] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[634] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[635] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.ii.3.).

during the life of the permit, an estimate of the expected resulting pollutant loads reduced, and a proposed schedule for implementing such controls.[636] Accordingly, it is not a new requirement to provide a schedule for control measures to be implemented during the permit term. Thus, Provision C.12.a.ii.3. does not mandate a new program or higher level of service.

In addition, some of the reporting requirements in Provision C.12.a.iii. are not new and do not mandate a new program or higher level of service. Provision C.12.a.iii. requires the permittees to include the following information in their 2016 Annual Report:

- A list of watersheds and management areas where control measures are currently being implemented or will be implemented during the term of the permit.
- A list of specific control measures currently being implemented and those that will be implemented, along with an implementation schedule.
- The number, type, and locations or frequency of control measures.
- A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
- The description, scope, and start date, of PCBs control measures.
- For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
- Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures.[637]

Provision C.12.a.iii.3. then requires, beginning with the 2017 Annual Report and continuing in all Annual Reports, the permittees to update the above information as necessary to account for new control measures implemented but not described in the 2016 Annual Report.[638]

Under federal law, in order to obtain an NPDES permit, a permittee is required to identify a proposed management program that includes measures to control pollutants during the life of the permit, an estimate of the expected pollutant loads reduced as a result of those measures, and a proposed schedule for implementing such controls.[639] Federal law then requires that an annual report be filed by the permittees by the anniversary date of the issuance of the permit and include the following information:

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[636] Code of Federal Regulations title 40 section 122.26 (d)(2)(iv).

[637] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[638] Exhibit A, Test Claim, page 494 (test claim permit, Provision C.12.a.iii.3.).

[639] Code of Federal Regulations title 40 section 122.26 (d)(2)(iv).

- The status of implementing the components of the stormwater management program that are established as permit conditions.
- Proposed changes to the stormwater management programs that are established as permit conditions. Such proposed changes shall be consistent with Code of Federal Regulations, title 40, 122.26(d)(2)(iii) [which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application].
- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.
- A summary of data, including monitoring data, that is accumulated throughout the reporting year.
- Annual expenditures and budget for the year following each annual report.
- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.[640]

In addition, and as stated above, the permittees had to report their measurement and estimation methodology for the reduction of PCBs and the rationale for their approach in the 2010 Annual Report; and report the results of their chosen monitoring/measurement approach concerning the loads assessment and estimate of loads reduced in the 2014 Integrated Monitoring Report. Thus, reporting the following information required by Provision C.12.a.ii.2. of the test claim permit is not new:

- A list of watersheds and management areas where control measures are currently being implemented or will be implemented during the term of the permit.
- A list of specific control measures currently being implemented and those that will be implemented, along with an implementation schedule.
- The number, type, and locations or frequency of control measures.
- The description, scope, and start date, of PCBs control measures.

Moreover, the requirement to update the above information beginning with the 2017 Annual Report to account for new control measures implemented but not described in the 2016 Annual Report, as required by Provision C.12.a.iii.3., is not new but is required by the existing federal requirement to annually report "revisions, if necessary, to the assessment of controls."[641]

However, prior law did not require the permittees to report the following new information in the 2016 Annual Report, in accordance with Provision C.12.a.iii.2.:

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[640] Code of Federal Regulations, title 40, section 122.42(c).

[641] Code of Federal Regulations, title 40, section 122.42(c).

- A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
- For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
- Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures.[642]

In addition, while reporting where control measures are being implemented or will be implemented during the permit term is not new and required by federal law, Provision C.12.a.iii.1. requires permittees to report on their progress towards developing the list of where control measures will be implemented and the monitoring data and other information used to identify them by April 1, 2016. This answers a separate question from the information to be included in the 2016 Annual Report, namely verifying that the permittee is working on preparing the list in compliance with the permit terms and is using data that will likely result in a satisfactorily completed list. This report also has a deadline of April 1, 2016, separate and in addition to the annual reports already required, further demonstrating it is a new requirement.

Therefore, the following are new requirements imposed by Provisions C.12.a.iii.1. and C.12.a.iii.2.:

- By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[643]
- In the 2016 Annual Report, include the following information:
    - A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
    - For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.

[642] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[643] Exhibit A, Test Claim, page 492 (test claim permit, Provisions C.12.a.ii.1. and C.12.a.iii.1.).

- Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures for PCBs.[644]

ii. The required activities for Provision C.12.d., which require an implementation plan and schedule of future actions, and a reasonable assurance analysis for attaining the PCBs TMDL wasteload allocation by 2030, are new requirements.

Provision C.12.d. says that "Permittees shall prepare a plan and schedule for PCBs control measure implementation and reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030," and submit the plan and schedule in the 2020 Annual Report.[645] To implement this, the plain language in section C.12.d. requires the following:

- Prepare a PCBs control measures implementation plan, which must identify all technically and economically feasible PCBs control measures to be implemented (including green infrastructure projects).[646]
- Include a schedule for PCBs control measure implementation according to which these technically and economically feasible PCBs control measures will be fully implemented by 2030.[647]
- Provide an evaluation and quantification of the PCBs load reduction of such measures as well as an evaluation of costs, control measure efficiency and significant environmental impacts resulting from their implementation.[648]
- Prepare a reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[649]
- Submit the plan and schedule required by Provision C.12.d. in the 2020 Annual Report.[650]

The Fact Sheet explains that achievement of the allocations for stormwater runoff in 20 years pursuant to the PCBs TMDL will be challenging and the long-term plan and schedule required by Provision C.12.d. will help lay the foundation for an implementation timeframe that is longer than stated in the TMDL:

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[644] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[645] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.).

[646] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.1.).

[647] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.2.).

[648] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.3.).

[649] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.i.).

[650] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.iii.).

> The PCBs TMDL anticipated the challenge of achieving the urban runoff load reductions required to meet the TMDL allocations within the twenty-year implementation time frame. The TMDL implementation plan states that
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> *"... achievement of the allocations for stormwater runoff, which is projected to take 20 years, will be challenging. Consequently, the Water Board will consider modifying the schedule for achievement of the load allocations for stormwater runoff provided that dischargers have complied with all applicable permit requirements and accomplished all of the following:*
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> *• A diligent effort has been made to quantify PCBs loads and the sources of PCBs in the discharge;*
>
> *• Documentation has been prepared that demonstrates that all technically and economically feasible and cost-effective control measures recognized by the Water Board have been fully implemented, and evaluates and quantifies the PCBs load reduction of such measures;*
>
> *• A demonstration has been made that achievement of the allocation will require more than the remaining 10 years originally envisioned; and*
>
> *• A plan has been prepared that includes a schedule for evaluating the effectiveness and feasibility of additional control measures and implementing additional controls as appropriate.*"
>
> Provision C.12.d provides the opportunity for Permittees to describe the full suite of actions that will be required to achieve the TMDL along with realistic timelines for this achievement. The load reductions for PCBs are difficult and time-consuming to achieve because of the distribution of sources in the landscape; challenges associated with finding and reducing these existing sources; and unpredictability related to demolition of PCBs containing structures. Further, some part of the expected PCB load reduction will come from long-term implementation of control strategies (like green infrastructure) that extend beyond the current implementation timeframe of the TMDL. The long-term plan and schedule required by this provision will help lay the foundation for an implementation timeframe that is longer than that stated in the TMDL.[651]

The Commission finds that the requirements imposed by Provision C.12.d. are new. Federal law requires a proposed management program for the permit term, which describes structural and source control measures to be implemented and a schedule for implementation, and further requires the assessment of the loads reduced and a fiscal analysis of the necessary capital and operational and maintenance expenditures and the source of funds to carry out the program.[652] However these federal requirements

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[651] Exhibit A, Test Claim, page 653 (test claim permit, Fact Sheet).

[652] Code of Federal Regulations, title 40, section122.26 (d)(2)(iv)-(vi).

are specifically looking at the controls to be implemented during the permit term, while the requirements in Provision C.12.d. are looking all the way out to 2030.

Although permittees were required by the prior permit to attain the wasteload allocation set out in the PCBs TMDL,[653] there was no requirement for the permittees to create a control measures implementation plan and a reasonable assurance analysis laying out which control measures they intend to implement in order to achieve the wasteload allocations of the TMDL by 2030 and a schedule of when these control measures will be fully implemented in the future to achieve compliance by 2030. Nor was there a prior requirement to provide evaluations and quantifications of the load reductions these control measures will achieve in the future to 2030, or to evaluate their costs, efficiency and significant environmental impacts. Thus, the requirements in Provision C.12.d. are new.

iii. The activities required for Provision C.12.e., which require collecting and analyzing samples of caulks and sealants used in storm drains and roadway infrastructure, are new.

Provision C.12.e. requires permittees to evaluate the presence of PCBs in caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[654] This section requires permittees to do the following:

- Collect at least 20 composite samples from throughout the permit-area of the caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[655]
- Analyze the samples taken for PCBs in such a way that is able to detect a minimum PCB concentration of 200 parts per billion.[656]
- Report on the results of this investigation, including all data gathered, no later than the 2018 Annual Report.[657]

Under section C.12.b. of the prior permit, the permittees were required to develop a sampling and analysis plan to evaluate PCBs at construction sites that involve demolition activities, including research on when, where, and which materials potentially contain PCBs. The permittees were required to implement the plan at a minimum of ten sites throughout the combined permittees' jurisdictional areas, and then develop and select BMPs to pilot test at five sites to reduce or prevent the discharge of PCBs during demolition and remodeling, and submit various reports including their results in the 2014

[653] Exhibit A, Test Claim, page 185 (prior permit, Provision C.12.).

[654] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.).

[655] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[656] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[657] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.iii.).

Integrated Monitoring Report.[658] The Fact Sheet to the prior permit indicates that Provision C.12.b. addressed PCBs that were used in a variety of building materials "like caulk and adhesives" and, thus, the "pilot tests and reporting results will help determine if control measures for PCBs from these sources should be implemented in a more widespread fashion in the next permit term" as follows:

> PCBs are used in a variety of building materials like caulks and adhesives. PCBs contained in such materials can be liberated and transported in runoff during and after demolition and renovation activities. At this point, it is not known how extensive this type of PCB contamination is in the region. Therefore, the expectation for this permit term is that Permittees conduct pilot studies (Provision C.12.b) that includes evaluation of the presence of PCBs in such materials, sampling and analysis, and BMP development to prevent PCBs in these materials from being released into the environment during demolition and renovation. Conducting these pilot tests and reporting results will help determine if control measures for PCBs from these sources should be implemented in a more widespread fashion in the next permit term.[659]

Provision C.12.c. of the prior permit also required the permittees to identify five drainage areas that contain high levels of PCBs and investigate and abate on-land locations with elevated PCB concentrations, including public rights-of-way and stormwater conveyances, with accumulated sediments. To comply, the permittees had to identify potential source areas, validate the existence of elevated PCB concentrations through "surface soil/sediment sampling and analysis," and determine whether runoff from such locations is likely to convey soils and sediments with PCBs to municipal stormwater conveyances and conduct abatement program in portions of drainages under their jurisdiction.[660]

Thus, the permittees were aware of the PCB issues with caulk and sealants under the prior permit and were required to investigate and abate five drainage areas with elevated PCB concentrations in sediment, including in public rights-of-way and storm drains.

The requirements in Provision C.12.e. of the test claim permit are new, however. There was no prior requirement to sample caulks and sealants used *in storm drains or roadway infrastructure in public rights-of-way*. The Fact Sheet notes this requirement was added because the Washington Department of Ecology discovered that caulks and sealants containing PCBs were used inside the City of Tacoma's storm drains during a repair back in the 1970's.[661] "There is reason to believe that such use was not isolated to one location," and given that limited sampling of Bay Area structures built between

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[658] Exhibit A, Test Claim, pages 185-186 (prior permit, Provision C.12.b.).

[659] Exhibit A, Test Claim, pages 300-301 (prior permit, Fact Sheet).

[660] Exhibit A, Test Claim, pages 186-187 (prior permit, Provision C.12.c.).

[661] Exhibit A. Test Claim, page 653 (test claim permit, Fact Sheet, Provision C.12.e.).

1950 and 1980 found PCBs contaminations at levels similar to those built in other parts of North America and Europe, it is plausible that a similar problem might be found in Permittee's storm drains.[662]

Accordingly, the requirements in Provision C.12.e. are new.

iv. The new requirements imposed in Provisions C.12.a.iii.1., C.12.a.iii.2., C.12.d., and C.12.e. to comply with the PCBs TMDL constitute state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6 of the California Constitution.

As discussed above, the following activities required by Provisions C.12.a.iii.1.-2., C.12.d., and C.12.e., with respect to the PCBs TMDL, are new:

1. PCBs Reporting (Provisions C.12.a.iii.1. and C.12.a.iii.2.):
   - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[663]
   - In the 2016 Annual Report, include the following information:
     - A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
     - For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
     - Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures for PCBs.[664]
2. Prepare PCBs control measures implementation plan, schedule, and reasonable assurance analysis to achieve the PCBs TMDL wasteload allocations by 2030 (Provision C.12.d.):

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[662] Exhibit A, Test Claim, pages 645, 653, (test claim permit, Fact Sheet, Finding C.12.-10, Provision C.12.e.).

[663] Exhibit A, Test Claim, page 492 (test claim permit, Provisions C.12.a.ii.1. and C.12.a.iii.1.).

[664] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

- Prepare a PCBs control measures implementation plan, which must identify all technically and economically feasible PCBs control measures to be implemented (including green infrastructure projects).[665]
- Include a schedule for PCBs control measure implementation according to which these technically and economically feasible PCBs control measures will be fully implemented by 2030.[666]
- Provide an evaluation and quantification of the PCBs load reduction of such measures as well as an evaluation of costs, control measure efficiency and significant environmental impacts resulting from their implementation.[667]
- Prepare a reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[668]
- Submit the plan and schedule required by Provision C.12.d. in the 2020 Annual Report.[669]

3. Evaluate the presence of PCBs in caulks/sealants in storm drain or roadway infrastructure in public rights-of-way (Provision C.12.e.):
   - Collect at least 20 samples from throughout the permit-area of the caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[670]
   - Analyze the samples taken for PCBs in such a way that is able to detect a minimum PCB concentration of 200 parts per billion.[671]
   - Report on the results of this investigation, including all data gathered, no later than the 2018 Annual Report.[672]

The Commission finds these new requirements are mandated by the state.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed

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[665] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.1.).

[666] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.2.).

[667] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.3.).

[668] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.i.).

[669] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.iii.).

[670] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[671] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[672] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.iii.).

by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[673]

As indicated in the court's decision, this is the long-standing test identified in prior case law to determine if requirements imposed by state statute or executive order are mandated by the state or the federal government when the state is implementing federal law.[674]

The courts have also explained "except where a regional board finds the conditions are the only means by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[675] "That the . . . Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the . . . Regional Board exercised its discretion."[676]

Here, the PCBs TMDL is required by federal law since the waterbodies were 303(d) listed as impaired because of PCBs.[677] Regional Boards are then required by federal law to include effluent limits "consistent with the assumptions and requirements of any

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[673] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[674] See *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 764-765, where the court explains the following prior decisions: *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, which addressed local governments' reimbursement claims for the costs of extending unemployment insurance protection to their employees pursuant to a federal statute that induced the state's compliance with a carrot and stick; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, addressing a state statute that required local governments to provide indigent criminal defendants with experts for the preparation of their defense in accordance with federal law; and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, which addressed state special education statutes implementing the federal Education of the Handicapped Act.

[675] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[676] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[677] Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 1 (Finding 3).

available wasteload allocation for the discharge" in NPDES permits.[678] The permits can also include such other provisions as the permitting agency determines to be appropriate for the control of pollutants.[679]

The Regional Board determined that these new requirements were appropriate for the control of PCBs and, as explained in the sections above, these activities are not required by federal law. Thus, the Regional Board exercised a true choice when imposing these requirements, making them mandated by the state.

Moreover, the new state-mandated requirements to implement the PCBs TMDL impose a new program or higher level of service since carry they out the governmental function of providing services to the public, or to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[680] Although the TMDL imposes requirements to reduce the discharge of PCB on both public and private dischargers, the new requirements imposed by Provisions C.12.a.iii.1.-2., C.12.d., and C.12.e. to submit specific reports, prepare an implementation plan and schedule of future actions and a reasonable assurance analysis showing control measures will be fully implemented in the future to achieve the PCBs TMDL wasteload allocations by 2030, and to sample caulks and sealants in storm drains and roadway infrastructures, are uniquely imposed on the local agency permittees and do not apply generally to all dischargers.

Moreover, the new requirements carry out the governmental function of providing services to the public.[681] The waters in the San Francisco Bay were impaired for PCBs, which threaten the health of humans, as described above. The purpose of these new requirements is to reduce the discharge of PCBs in urban runoff to the receiving waters, to lay the foundation for an implementation timeframe so that urban runoff dischargers will be able to comply with the final wasteload allocations by 2030, and to identify potential sources of PCBs in storm drains and roadways controlled by local government so that these potential sources of PCB discharges can be controlled.[682]

Accordingly, the Commission finds that the new requirements imposed by Provisions C.12.a.iii.1.-2., C.12.d., and C.12.e. mandate a new program or higher level of service.

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[678] Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

[679] United States Code, title 33, section 1342(p)(3)(B)(iii).

[680] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[681] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 629-630.

[682] Exhibit A, Test Claim, pages 647, 652-653, (test claim permit, Fact Sheet, Provisions C.12.a., C.12.d., and C.12.e.).

C. Pursuant to Government Code 17556(d), There Are No Costs Mandated by the State When the Claimants Have the Authority to Impose Fees Sufficient to Pay for the New State-Mandated Requirements.

As indicated above, the following activities constitute state-mandated new programs or higher levels of service:

1. Green Infrastructure Plan (Provision C.3.j.i.-iv.):
   a. Green Infrastructure Plan (Provision C.3.j.i.)
      - Prepare a framework or workplan describing specific tasks and timeframes for development for its Green Infrastructure Plan, to be approved by the Permittee's governing body, mayor, city manager, or county manager by June 30, 2017. This framework or workplan shall include a statement of purpose, tasks, and timeframe needed to complete all requirements in Provision C.3.j.i.2. (discussed below).[683]
      - Prepare a Green Infrastructure Plan, subject to Executive Officer approval, that contains all the following:
        - A mechanism (such as SFEI's Green PlanIT tool) to prioritize and map areas for potential and planned projects, both public and private, on a drainage-area specific basis, for implementation by 2020, by 2030, and by 2040, that includes criteria for prioritization and outputs that can be incorporated into the Permittees' long-term planning and capital improvement processes.
        - Outcomes from the above-described mechanism, including but not limited to, the prioritization criteria, maps, lists, and all other information, as appropriate. Individual project-specific reviews do not need to be submitted with the Plan, but shall be made available for review upon request.
        - Targets for the amount of impervious surface from public and private projects within the Permittee's jurisdiction to be retrofitted by 2020, by 2030, and by 2040.
        - A process for tracking and mapping completed projects, public and private, and making the information publicly available online (I.E., SFEI's Green PlanIT tool).
        - General guidelines for overall streetscape and project design and construction so that projects have a unified complete design that implements the range of functions associated with the project.
        - Standard specifications, and as appropriate, typical design details and related information necessary for the Permittee to implement Green Infrastructure Projects in its jurisdiction, which shall be sufficient to

[683] Exhibit A, Test Claim, page 423 (test claim permit, Provision C.3.j.i.1.).

address the different street and project types within a Permittee's jurisdiction, as defined by land use and transportation characteristics.

  - Requirements that projects be designed to meet the treatment and hydromodification sizing requirements outline in Provisions C.3.c. and C.3.d. For projects that are not subject to these requirements according to Provision C.3.b.ii. (non-regulated projects), Permittees may collectively propose a single approach for how to proceed when project constraints preclude fully meeting the sizing requirements, which can include options for addressing specific issues or scenarios.
  - A summary of planning documents the permittee has updated or otherwise modified to incorporate Green Infrastructure requirements (General Plans, Specific Plans, Complete Street Plans, Active Transportation Plans, Storm Drain Master Plans, Pavement Work Plans, Urban Forestry Plans, Flood Control/Management Plans, and any other plans that may impact the future alignment, configuration or design of impervious surfaces within the Permittee's jurisdiction). These modifications are to be completed by no later than the end of the permit term.
  - A workplan identifying how the Permittee will ensure that Green Infrastructure and low impact development are appropriately included in future plans.
  - A workplan to complete prioritized projects identified as part of an Alternative Compliance Program or Early Implementation as outlined in Provision C.3.e. or C.3.j.ii.
  - An evaluation of prioritized project funding options including, but not limited to: Alternative Compliance funds; grant monies, including transportation project grants from federal, State, and local agencies; existing Permittee resources; new tax or other levies; and other sources of funds.[684]

- Adopt policies, ordinances, and/or other appropriate legal mechanisms to ensure implementation of the Green Infrastructure Plan in accordance with the requirements of this provision.[685]
- Conduct outreach and education in accordance with the following:
  - Conduct public outreach on the requirements of this provision, including outreach coordinated with adoption or revision of standard specifications and planning documents, and with the initiation and planning of infrastructure projects. Such outreach shall include general outreach and

[684] Exhibit A, Test Claim, pages 423-425 (test claim permit, Provision C.3.j.i.2.).

[685] Exhibit A, Test Claim, page 425 (test claim permit, Provision C.3.j.i.3.).

targeted outreach to and training for professionals involved in infrastructure planning and design.

  - Train appropriate staff, including planning, engineering, public works maintenance, finance, fire/life safety, and management staff on the requirements of this provision and methods of implementation.
  - Educate appropriate Permittee elected officials (e.g., mayors, city council members, county supervisors, district board members) on the requirements of this provision and methods of implementation.[686]

- Each permittee shall report on its planning progress as follows:
  - Submit documentation in the 2017 Annual Report that its framework or workplan for development of its Green Infrastructure Plan was approved by its governing body, mayor, city manager, or county manager by June 30, 2017.
  - Submit its completed Green Infrastructure Plan with the 2019 Annual Report.
  - Submit documentation of its legal mechanisms to ensure implementation of its Green Infrastructure Plan with the 2019 Annual Report.
  - Submit a summary of its outreach and education efforts in each Annual Report.[687]

b. Early Implementation – List of Green Infrastructure Projects (Provision C.3.j.ii.):

- *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, prepare and maintain a list of Green Infrastructure Projects, public and private, that are already planned for implementation during the permit term and infrastructure projects planned for implementation during the permit term that have potential for Green Infrastructure measures.[688]
- *Except for a permittee's own public project (which does not mandate a new program or higher level of service)*, submit the list with each Annual Report and a summary of planning or implementation status for each public Green Infrastructure Project and each private Green Infrastructure Project that is not also a Regulated Project as defined in Provision C.3.b.ii. Include a summary of how each public infrastructure project with Green Infrastructure potential will include Green Infrastructure measures to the maximum extent practicable during the permit term. For any public infrastructure project where implementation of Green Infrastructure measures is not practicable, submit a

[686] Exhibit A, Test Claim, pages 425-426 (test claim permit, Provision C.3.j.i.4.).

[687] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.i.5.).

[688] Exhibit A, Test Claim, page 426 (test claim permit, Provision C.3.j.ii.1.).

brief description of the project and the reasons Green Infrastructure measures were impracticable to implement.[689]

c. Participation in Processes to Promote Green Infrastructure (Provision C.3.j.iii.):

- Either individually or collectively, track processes, assemble and submit information, and provide informational materials and presentations as needed to assist relevant regional, State, and federal agencies to plan, design, and fund incorporation of Green Infrastructure measures into local infrastructure projects, including transportation projects. Issues to be addressed include coordinating the timing of funding from different sources, changes to standard designs and design criteria, ranking and prioritizing projects for funding, and implementation of cooperative in-lieu programs.[690]
- In each Annual Report, report on the goals and outcomes during the reporting year of work undertaken to participate in processes to promote Green Infrastructure.[691]
- In the 2019 Annual Report, submit a plan and schedule for new and ongoing efforts to participate in processes to promote Green Infrastructure.[692]

d. Tracking and Reporting Progress (Provision C.3.j.iv.):

- Either individually or collectively, develop and implement regionally-consistent methods to track and report implementation of Green Infrastructure measures including treated area and connected and disconnected impervious area on both public and private parcels within their jurisdictions. The methods shall also address tracking needed to provide reasonable assurance that wasteload allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[693]
- In each Annual Report, report progress on development and implementation of the tracking methods.[694]
- In the 2019 Annual Report, submit the tracking methods and report implementation of Green Infrastructure measures including treated area, and connected and disconnected impervious area on both public and private parcels within their jurisdictions.[695]

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[689] Exhibit A, Test Claim, page 426 (test claim permit, section C.3.j.ii.2.).

[690] Exhibit A, Test Claim, page 426 (test claim permit, section C.3.j.iii.1.).

[691] Exhibit A, Test Claim, page 427 (test claim permit, section C.3.j.iii.2.).

[692] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iii.3.).

[693] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.3.j.iv.1.).

[694] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.2.).

[695] Exhibit A, Test Claim, page 427 (test claim permit, Provision C.2.j.iv.3.).

2. Reasonable Assurance Analysis (Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.):
    - Prepare a reasonable assurance analysis of future mercury and PCBs load reductions by doing the following:
        - Quantify the relationship between areal extent of Green Infrastructure implementation and mercury and PCBs load reductions, taking into consideration the scale of contamination of the treated area as well as the pollutant removal effectiveness of likely green infrastructure strategies.[696]
        - Estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, 2030, and 2040.[697]
        - Estimate the amount of mercury/PCBs load reductions that will result from Green Infrastructure implementation by 2020, 2030, and 2040.[698]
        - Quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through implementation of Green Infrastructure Projects.[699]
        - Ensure that the calculation methods, models, model inputs, and modeling assumptions used to fulfill provisions C.11.c.ii.2.a.-d. and C.12.c.ii.2.a.-d. above have been validated through a peer review process.[700]
    - Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions. This submittal shall include all data used and a full description of the models and model inputs relied on to establish this relationship.[701]

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[696] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.a., C.12.c.ii.2.a.).

[697] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.b., C.12.c.ii.2.b.).

[698] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.c., C.12.c.ii.2.c.).

[699] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.d., C.12.c.ii.2.d.).

[700] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.e., C.12.c.ii.2.e.).

[701] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

- Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of the models and model inputs relied on to generate this estimate.[702]
- Submit in the 2020 Annual Report a reasonable assurance analysis to demonstrate quantitatively that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through the implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[703]

3. Progress Report on List of Watersheds and Management Areas Where Mercury Control Measures are or will be Implemented (Provision C.11.a.iii.1.):
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[704]
4. PCBs Reporting (Provisions C.12.a.iii.1. and C.12.a.iii.2.):
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[705]
    - In the 2016 Annual Report, include the following information:
        - A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.

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[702] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[703] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

[704] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

[705] Exhibit A, Test Claim, page 492 (test claim permit, Provisions C.12.a.ii.1. and C.12.a.iii.1.).

- For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
- Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures for PCBs.[706]

5. Prepare PCBs control measures implementation plan, schedule, and reasonable assurance analysis to achieve the PCBs TMDL wasteload allocations by 2030 (Provision C.12.d.):
    - Prepare a PCBs control measures implementation plan, which must identify all technically and economically feasible PCBs control measures to be implemented (including green infrastructure projects).[707]
    - Include a schedule for PCBs control measure implementation according to which these technically and economically feasible PCBs control measures will be fully implemented by 2030.[708]
    - Provide an evaluation and quantification of the PCBs load reduction of such measures as well as an evaluation of costs, control measure efficiency and significant environmental impacts resulting from their implementation.[709]
    - Prepare a reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[710]
    - Submit the plan and schedule required by Provision C.12.d. in the 2020 Annual Report.[711]
6. Evaluate the presence of PCBs in caulks/sealants in storm drain or roadway infrastructure in public rights-of-way (Provision C.12.e.):

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[706] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[707] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.1.).

[708] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.2.).

[709] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.3.).

[710] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.i.).

[711] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.iii.).

- Collect at least 20 samples from throughout the permit-area of the caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[712]
- Analyze the samples taken for PCBs in such a way that is able to detect a minimum PCB concentration of 200 parts per billion.[713]
- Report on the results of this investigation, including all data gathered, no later than the 2018 Annual Report.[714]

The last issue in determining whether reimbursement is required under article XIII B, section 6 is whether these new mandated activities result in increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. Increased costs mandated by the state requires a showing of "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[715]

In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim. As relevant here, Government Code section 17556(d) states that the Commission shall not find costs mandated by the state when:

> The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

The claimant contends that the activities result in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514. The identified costs the claimant alleges it spent in fiscal years 2014-2015, 2015-2016, and 2016-2017 implementing mandated activities in the test claim permit total $9,454,799.39, of which $3,718,706.52 came from projects it began during the prior

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[712] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[713] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[714] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.iii.).

[715] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185.

permit term before this test claim permit's effective date.[716] It further asserts that future projects needed to complete all the requirements in the test claim permit are expected to cost $72,600,000 total, plus $145,000 per year for annual maintenance costs. The claimant made a statewide costs estimate for fiscal year 2016-2017 of costs totaling $18,135,921.[717]

The claimant acknowledged that it received some funding for installing full trash capture systems and green streets projects through grants from the EPA and the Proposition 84 State Water Grant Program, but insists that it is unlikely that it will be able to avail itself of any future grant opportunities because all other available grants are highly competitive and have steep fund matching requirements.[718] The claimant also acknowledged that it funds some of its activities through its Clean Water Fund, which is obtained through revenue on property tax assessments, and a solid waste franchise surcharge, as well as several other City revenue sources that are restricted to roadway projects, of which green street projects qualify.[719]

The Regional Board asserts that these funding sources, as well as others used by other municipalities under the test claim permit, demonstrate that claimants can fund these programs without using their tax revenue. Examples of how other municipalities have done this include: increased stormwater fees; "excess litter fees" on identified types of high trash-generating businesses; encouraging property owners to participate in a Business Improvement District or Community Benefits District where the property owners vote to pay assessments for maintenance and beautification projects within a district; partnerships with Caltrans; vehicle registration fees; federal, state and local grants; Measure A and J grants; gas tax; and development impact fees.[720]

The Water Boards and Finance further contend the claimants have the legal authority to charge property-related fees under Proposition 218, sufficient to cover the costs of this program during the entire period of reimbursement and that the court's holding in *Paradise Irrigation District* — that when fees are subject to majority protest provisions of Proposition 218, the claimants have fee authority sufficient to cover the costs of the state-mandated program pursuant to Government Code section 17556(d) — should be extended to find the same when fees are subject to the voter approval requirements.[721]

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[716] Exhibit A, Test Claim 16-TC-03, filed June 30, 2017, page 47 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[717] Exhibit A, Test Claim 16-TC-03, filed June 30, 2017, page 31 (Written Narrative).

[718] Exhibit A, Test Claim 16-TC-03, filed June 30, 2017, pages 23, 34 (Written Narrative).

[719] Exhibit A, Test Claim 16-TC-03, filed June 30, 2017, page 34 (Written Narrative).

[720] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 10-12.

[721] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 3; Exhibit H, Finance's Comments on the Draft Proposed Decision, pages 1-2.

As explained below, the Commission finds that the new state-mandated activities result in costs mandated by the state for some of the activities based on the following findings:

1. There is substantial evidence in the record that permittees incurred costs exceeding $1,000 and used proceeds of taxes to comply with the test claim permit.
2. Pursuant to Government Code section 17556(d), permittees have regulatory fee authority sufficient as a matter of law to fund the new state-mandated activities related to developing and implementing the Green Infrastructure Plan (Provision C.3.j.i.-iv.), and thus, there are no costs mandated by the state for these activities.
3. The Permittees have constitutional and statutory authority to charge property-related fees for the reasonable assurance analysis of future mercury and PCBs load reductions (C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.); required mercury progress report on list of watersheds and management areas where control measures are or will be implemented (C.11.a.iii.); PCBs reporting (C.12.a.iii.1. and 2.); PCBs control measures implementation plan (C.12.d.); and PCBs caulk and sealant testing (C.12.e.). However, from January 1, 2016 (the beginning date of the potential period of reimbursement) to December 31, 2017, these fees are subject to the voter approval requirement in article XIII D, section 6(c), and therefore fee authority is not sufficient as a matter of law.[722] Under these limited circumstances, Government Code section 17556(d) does not apply, and there are costs mandated by the state.[723] Any fee revenues received must be identified as offsetting revenue. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, other state funds, and other funds that are not a claimant's local proceeds of taxes shall be identified and deducted from this claim.

   On or after January 1, 2018, there are no costs mandated by the state to comply with these activities because the claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover

[722] See *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[723] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581; Government Code sections 53750 and 53751 (SB 231, eff. January 1, 2018, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

the costs of the mandated activities within the meaning of Government Code section 17556(d).[724]

Based on *Paradise Irrigation District* case and the Legislature's enactment of Government Code sections 53750 and 53751 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state on or after January 1, 2018, to comply with these activities, because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

1. There Is Substantial Evidence in the Record that Permittees Incurred Increased Costs and Used Proceeds of Taxes to Comply with the Test Claim Permit.

a. <u>The reimbursement requirement in article XIII B, section 6 was included because of the tax and spend limitations in articles XIII A and XIII B and is triggered only when the state forces the expenditure of local proceeds of taxes; section 6 was not intended to reach beyond taxation or to protect nontax sources.</u>

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A reduced the authority of local government to impose property taxes by providing "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[725] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by the voters.[726]

Article XIII B was adopted by the voters as Proposition 4, less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[727] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, article XIII B places limits on the authorization to expend

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[724] See *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, and Government Code sections 53750 and 53751 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351).

[725] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[726] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[727] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

the 'proceeds of taxes.'"[728] "Proceeds of taxes," in turn, includes "all tax revenues," as well as proceeds from "regulatory licenses, user charges, and user fees to the extent those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service," and proceeds from the investment of tax revenues.[729] And, with respect to local governments, the section reiterates that "proceeds of taxes" includes state subventions other than mandate reimbursement, and, with respect to the State's spending limit, excludes such state subventions.[730] Article XIII B does not restrict the growth in appropriations financed from nontax sources, such as "user fees based on reasonable costs."[731] And appropriations subject to limitation do not include "[a]ppropriations for debt service."[732]

Proposition 4 also added article XIII B, section 6, which was specifically "designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues."[733] The California Supreme Court, in *County of Fresno v. State of California*,[734] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid*.; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual

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[728] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[729] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990), emphasis added.

[730] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990), emphasis added.

[731] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; see also, *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451 (finding that revenues from a local special assessment for the construction of public improvements are not "proceeds of taxes" subject to the appropriations limit).

[732] California Constitution, article XIII B, section 9 (added Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[733] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[734] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

> and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[735]

The California Supreme Court concluded articles XIII A and XIII B work "in tandem," for the purpose of precluding "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities *because of the taxing and spending limitations that articles XIII A and XIII B impose.*"[736] Accordingly, reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[737]

b. <u>There is substantial evidence in the record that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.</u>

Consistent with these constitutional principles, reimbursement under article XIII B, section 6 is only required if the claimants show, with substantial evidence in the record,[738] they have incurred increased costs mandated by the state within the meaning of Government Code section 17514. When alleged mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.[739] Government Code section 17514 defines "costs mandated by the state" as any increased costs a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000.

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[735] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

[736] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

[737] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185.

[738] Government Code section 17559.

[739] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."). See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

The claimant filed declarations showing it has incurred shared costs and individual direct costs exceeding the $1,000 threshold to comply with the test claim permit.[740] For example, for its costs to implement the Green Infrastructure Plan and mercury and PCBs controls, the claimant filed a declaration by Union City's City Engineer, Thomas Ruark, stating that the city has budgeted $15,000 to retain a consultant that will assist in preparing "some of the tasks listed in the Framework for Green Infrastructure Plan Development."[741] Ruark also declared that the claimant paid $106,466 in fiscal years 2015-2016 and 2016-2017 to the Alameda County Clean Water Program (ACCWP) in support of compliance actions, of which he asserted $2,124 in fiscal year 2015-2016 went towards Green Infrastructure Plan development, and $5,377 in fiscal year 2016-2017 went towards Green Infrastructure Plan development and GIS development and support required by provisions C.3., C.11., and C.12.[742] These numbers were confirmed by James Scanlin of the ACCWP in his own declaration.[743] Ruark also identified some of the initial costs for staff time reviewing agendas and attending meetings for working groups that addressed requirements in C.3.j., C.11., and C.12., totaling $2,587.14.[744]

However, reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are not the claimants' proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.[745]

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[740] Exhibit A, Test Claim, page 47 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[741] Exhibit A, Test Claim, page 44 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[742] Exhibit A, Test Claim, page 46 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[743] Exhibit A, Test Claim, pages 77-78 (Declaration of James Scanlin, Associate Environmental Compliance Specialist, Alameda County).

[744] Exhibit A, Test Claim, page 47 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[745] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."). See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

The declarations state that although the claimant has partially funded its costs through grants and the claimant's Clean Water Fund, it is unlikely to be able to receive future grants, and the Clean Water Fund is already largely consumed by existing stormwater mandate costs and is funded through property tax assessments and a solid waste surcharge, neither of which the claimant has authority to increase under Proposition 218.[746]

The Regional Board's late comments argue that besides sewer fees, they can also levy regulatory fees for the mercury, PCBs, and green infrastructure provisions by collecting fees from developers.[747] Permittees are not required to use taxes to pay for the costs of the program, because they can levy fees, such as inspection fees, permitting fees, or for new storm drain connections on new development.[748] Besides the grants the claimant acknowledged in its declarations, other permittees have found other ways to fund program compliance, such as forming Business Improvement Districts or Community Benefit Districts, which vote to pay additional assessments to fund maintenance and beautification projects within the district, or by partnering with Caltrans on specific projects.[749]

There is also evidence in the administrative records for both this Test Claim and its predecessor that at least some permittees have adopted stormwater fees to cover costs to comply with their NPDES permits, such as Alameda County, the cities of Alameda and San Jose, and the Vallejo Sanitation and Flood Control District.[750]

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

Accordingly, there is substantial evidence in the record that the claimant incurred increased costs exceeding $1,000 and used its proceeds of taxes to comply with the test claim permit. The analysis must continue, however, to determine whether the exceptions in Government Code section 17556 apply.

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[746] Exhibit A, Test Claim, page 48 (Declaration of Thomas Ruark, City Engineer, City of Union City).

[747] Exhibit C, Regional Board's Late Comments on the Test Claim, page 7.

[748] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 9-10.

[749] Exhibit C, Regional Board's Late Comments on the Test Claim, page 11.

[750] Exhibit I (7), Alameda Clean Water Protection Fee, page 4; Exhibit I (8), City of Alameda Sewer and Stormwater Fees, page 2; Exhibit I (9), City of San Jose Stormwater Fees, pages 1-2; Exhibit I (10), Vallejo Sanitation and Flood Control District Stormwater Rate Equity Study 2013, page 10.

2. **Pursuant to Government Code Section 17556(d), Permittees Have Authority to Impose Regulatory Fees on Development Sufficient as a Matter of Law to Fund the New State-Mandated Activities Related to Developing and Implementing the Green Infrastructure Plan Requirements (Provision C.3.j.i.-iv.), and thus, There Are No Costs Mandated by the State for These Activities. Permittees also Have Authority to Impose Property-Related Stormwater Fees Sufficient as a Matter of Law to Fund the Remaining New State-Mandated Activities Imposed by Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., C.12.c.iii.1.-3., C.11.a.iii.1., C.12.a.iii.1.-2., C.12.d., and C.12.e., Beginning January 1, 2018, and, thus, There Are No Costs Mandated by the State for Those Activities Beginning January 1, 2018.**

Government Code section 17556(d) provides that the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds that "the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The claimant argues that although it has a Clean Water Fund that is funded by property tax assessments and a solid waste franchise surcharge, most of this fund is already consumed by existing stormwater compliance costs, and it has no authority to increase these sources without seeking voter approval.[751]

The Regional Board argues that permittees have the ability to craft regulatory development fees capable of covering the costs associated with implementing any mandated mercury, PCBs, and green infrastructure provisions.[752]

There is no question that local agencies have the authority to charge fees for stormwater programs. Cities and counties have authority under the California Constitution to make and enforce ordinances and resolutions to protect and ensure the general welfare within their jurisdiction, which is commonly referred to as the "police power."[753] That authority includes the power to impose fees or charges that are directed toward a particular activity or industrial or commercial sector, known as "regulatory fees;" fees or charges based on services or benefits received from government, known as "user fees;" fees or charges imposed as a condition of development of real property, known as "development fees;" and fees or charges (or assessments) levied on all property owners within the jurisdiction, which after Proposition 218 are commonly described as "property-related fees or assessments." In addition, a number of provisions of the Government Code provide express authority to

[751] Exhibit A, Test Claim, page 34 (Written Narrative).

[752] Exhibit C, Regional Board's Late Comments on the Test Claim, page 7.

[753] California Constitution, article XI, section 7. See also, *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

impose or increase regulatory fees,[754] fees for development of real property,[755] and property-based assessments, fees and charges.[756] Each of these fees or charges is subject to differing limitations pursuant to Propositions 218 and 26.[757]

The analysis below will address those limitations separately, because only property-related fees and assessments are subject to the notice, hearing, and majority approval or protest provisions of articles XIII D.

"Regulatory," "development," and "user" fees or charges are not subject to voter approval or majority protest. Broadly, these categories of fees are those that are targeted toward certain activities or sectors of industrial or commercial activity, or certain benefits received from the government or burdens created by the activity or the entity, rather than imposed on all property owners as an incident of property ownership.[758] Such fees may be adopted as an ordinance or resolution in the context of the legislative body's normal business,[759] subject only to the limitations of article XIII C, section 1(e), which, largely turn on establishing the relationship between the revenues raised and the uses to which they are put, and the amount charged and the benefits received or burdens created by the payor.[760]

As explained below, the courts have held that there are no costs mandated by the state pursuant to Government Code section 17556(d) when local government has the authority to charge regulatory fees pursuant to article XIII C or property-related fees that

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[754] See, for example, Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[755] Government Code section 66001 provides for development fees under the Mitigation Fee Act requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed.

[756] See, for example, Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[757] California Constitution, articles XIII C and XIII D.

[758] See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[759] See, for example, *City and County of San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 450 ("If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax").

[760] California Constitution, article XIII C, section 1(e).

are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution.

a. Case law establishes that the exception to the subvention requirement found in Government Code section 17556(d) is a legal inquiry, not a practical one.

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in County of Fresno.[761] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues.[762]

Following the logic of *County of Fresno*, the Third District Court of Appeal in *Connell v. Superior Court* held that the Santa Margarita Water District, and other similarly situated districts, had statutory authority to raise rates on water, notwithstanding argument and evidence that the amount by which the district would be forced to raise its rates would render the water unmarketable.[763] The district acknowledged the existence of fee authority, but argued it was not "sufficient," within the meaning of section 17556(d).[764] The court held that "[t]he Districts in effect ask us to construe 'authority,' as used in the statute, as a practical ability in light of surrounding economic circumstances. However, this construction cannot be reconciled with the plain language of [section 17556(d)] and would create a vague standard not capable of reasonable adjudication."[765] The court

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[761] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

[762] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[763] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

[764] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

[765] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

concluded: "Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry."[766]

More recently, the Third District Court of Appeal endorsed and followed *Connell* in *Paradise Irrigation District*: "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[767] Instead, the court held, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[768] Further, the 2021 decision of the Second District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "[e]ven if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so."[769] And, the 2022 decision of the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "The sole issue before us is whether permittees have 'the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program' . . . The inquiry is an issue of law, not a question of fact."[770]

Accordingly, the rule from these cases is that where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical, undesirable, or difficult.[771]

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[766] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[767] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[768] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[769] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[770] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[771] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401-402.

b. Permittees have authority to impose regulatory fees on development sufficient as a matter of law to fund the new state-mandated activities related to developing and implementing the Green Infrastructure Plan (Section C.3.j.i.-iv.), which are sufficient as a matter of law to cover the costs of the activities within the meaning of Government Code section 17556(d) and thus, there are no costs mandated by the state for these activities.

i. Permittees have constitutional and statutory authority to impose regulatory fees, which are exempt from the definition of "tax" under article XIII C of the California Constitution as long as the fees meet a threshold of reasonableness and proportionality.

Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[772] Interpreting this provision, and its predecessor, the courts have held that a local legislative body with police power "has a wide discretion" and its laws or ordinances "are invested with a strong presumption of validity."[773] The courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[774] Accordingly, ordinances or laws regulating legitimate businesses or other activities within a city or county, as well as regulating the development and use of real property, have generally been upheld.[775] In addition, "[t]he services for which a regulatory fee may be charged include those that are "'incident to the issuance of [a] license or permit, investigation, inspection, administration, maintenance of a system of supervision and

[772] California Constitution, article XI, section 7.

[773] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[774] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 (in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors).

[775] See *Ex parte Junqua* (1909) 10 Cal.App. 602 (police power "embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others…."); *Sullivan v. City of Los Angeles Dept. of Building & Safety* (1953) 116 Cal.App.2d 807 (recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

enforcement.'"[776] The courts also hold that water pollution prevention is a valid exercise of government police power.[777]

Moreover, as noted above, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[778] and fees for development of real property,[779] and property-based assessments, fees, and charges.[780]

Thus, there is no dispute that the claimants have authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[781] The issue in dispute is how far that authority goes and whether Propositions 218 and 26 impose procedural and substantive restrictions that so weaken that authority as to render it insufficient within the meaning of Government Code section 17556(d).

As discussed above, Proposition 13 of 1978 added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase taxes.[782] Proposition 13 generally limited the rate of any ad valorem tax on real property to one percent; limited increases in the assessed value of real property to two percent annually absent a change in ownership; and required that any changes in state taxes enacted to increase revenues and special taxes imposed by local government

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[776] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, quoting *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[777] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[778] See, for example, Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city").

[779] Government Code section 66001 provides for development fees under the Mitigation Fee Act requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed.

[780] See, for example, Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[781] See also, *Ayers v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31 (Upholding conditions imposed by the City on subdivision development, in the absence of any clear restriction or limitation on the City's police power); *Associated Home Builders etc. Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 (upholding state statute and local ordinance requiring dedication or in-lieu fees for parks and recreation as a condition of subdividing for residential building).

[782] See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

must be approved by a two-thirds vote of the electors.[783] Proposition 13, however, did not define "special taxes"; a series of judicial decisions tried to define the difference between fees and taxes, and in so doing, diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[784]

In 1996, Proposition 218 added article XIII C to ensure and reiterate voter approval requirements for general and special taxes, because it was not clear whether Proposition 62, which enacted statutory provisions to ensure that all new local taxes be approved by a vote of the local electorate, bound charter jurisdictions.[785] As added by Proposition 218, article XIII C defined all taxes as general or special, and provided that special districts have no power to impose general taxes; and for any other local government, general taxes require approval by a majority of local voters, and special taxes require a two-thirds majority voter approval.[786]

Interpreting the newly-reiterated limitation on local taxes, the California Supreme Court in *Sinclair Paint* held that a statute permitting the Department of Health Services to levy fees on manufacturers and other persons contributing to environmental lead contamination, in order to support a program of evaluation and screening of children, imposed bona fide regulatory fees, and not, as alleged by plaintiffs, a special tax that would require voter approval under articles XIII A and XIII C.[787] The Court noted with approval San Diego Gas & Electric, in which the air district was permitted to recover costs of its operations, which are not reasonably identifiable with specific industrial polluters, against all monitored polluters according to an emissions-based formula, and those fees were not held to constitute a special tax.[788] The Court cited with approval the court of appeal's finding that "[a] reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves…"[789] The Court thus held: "In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public

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[783] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

[784] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319.

[785] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

[786] See Exhibit I (11), Excerpts from Voter Information Guide, November 1996 General Election (Proposition 218, November 5, 1996).

[787] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

[788] *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

[789] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879 quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

to those persons deemed responsible for that poisoning is likewise a reasonable police power decision."[790]

In 2010, the voters approved Proposition 26, partly in response to *Sinclair Paint*.[791] Proposition 26 sought to broaden the definition of "tax," and accordingly narrow the courts' construction of permissible non-tax fees. However, Proposition 26 largely codifies the analysis of *Sinclair Paint*, in its articulation of the various types of fees and charges that are *not* deemed "taxes."[792] Thus, while Proposition 13 led a series of increasing restrictions on the imposition of new taxes, after *Sinclair Paint* and Propositions 218 and 26, local governments have the power, subject to varying limitations, to impose or increase (1) general taxes (with voter approval);[793] (2) special taxes (with two-thirds voter approval);[794] and (3) levies, charges, or exactions that are not "taxes," pursuant to the exceptions stated in article XIII C, section 1(e), which include:

> (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.
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> (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.
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> (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.

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[790] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

[791] See Exhibit I (12), Excerpts from Voter Information Guide, November 2010 General Election (Proposition 26, Nov. 2, 2010), page 3.

[792] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

[793] California Constitution, article XIII C, section 2.

[794] California Constitution, article XIII C, section 2.

> (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.
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> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[795]

The plain language of article XIII C, section 1(e) thus describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[796] and fees or charges for a government service or product provided to the payor and not others.[797] Both of these could be described as "user" fees, or otherwise described as fees for a government service or benefit. In addition, section 1(e) provides for regulatory fees (including those for inspections),[798] development fees,[799] and assessments or property-related fees or charges adopted in accordance with article XIII D.[800] In each case, the local government bears the burden to establish that the fee or charge is not a tax, including that "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[801]

However, while the limitations of article XIII C, section 1(e) may be newly expressed in the Constitution (i.e., added in 2010 by Proposition 26), the concepts that regulatory fees must be reasonably related to a legitimate public purpose, and in some way proportional to the activity being regulated, are not at all new. The California Supreme Court described the history of such fees in *United Water Conservation Dist*., saying, "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other."[802] The Court also noted: "*Sinclair*

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[795] California Constitution, article XIII C, section 1(e).

[796] California Constitution, article XIII C, section 1(e)(1).

[797] California Constitution, article XIII C, section 1(e)(2).

[798] California Constitution, article XIII C, section 1(e)(3).

[799] California Constitution, article XIII C, section 1(e)(6).

[800] California Constitution, article XIII C, section 1(e)(7).

[801] California Constitution, article XIII C, section 1(e).

[802] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

Paint, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis."[803] Accordingly, the Court upheld the court of appeal's finding that the conservation charges did not exceed the reasonable cost of the regulatory activity in the aggregate,[804] but presumed "each requirement to have independent effect,"[805] and remanded the matter for consideration of the latter issue.

Similarly, in *San Diego County Water Authority*, the First District Court of Appeal upheld non-property-related rates charged for conveying water from the Colorado River based on a two-part test.[806] The rates were held to satisfy both the express requirements of article XIII C, section 1(e)(2): "a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provided to those not charged and which does not exceed the reasonable costs…of providing the service"; and the more general test of *Sinclair Paint*: "[the volumetric rates] bear a fair and reasonable relationship to the benefits it receives from its use of the conveyance system."[807]

Notably, developer fees have been interpreted somewhat more loosely with respect to this proportionality test. Broad categories of fees have been found to be allowable development fees, such as fees to recover the local agency's costs of advance planning services (i.e., the cost to prepare general and specific plans that are applicable to the project being developed). The plain language of article XIII C, section 1(e)(6) conspicuously omits any language relating to the reasonable costs or burdens of development, although the general caveat at the end of section 1(e) presumably still applies: "that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[808] However, the court in *616 Croft Ave., LLC* suggests that as long as a development fee is "reasonably related to the broad general welfare purposes for which the ordinance was enacted,"[809] the courts will not inquire into the reasonableness of the fee as applied to a particular payor:

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[803] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

[804] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[805] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.

[806] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[807] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[808] California Constitution, article XIII C, section 1(e).

[809] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631.

> [A]lthough the fee must be reasonable, the inquiry is not about the reasonableness of the individual calculation of fees related to Croft's development's impact on affordable housing. The inquiry is whether the fee schedule itself is reasonably related to the overall availability of affordable housing in West Hollywood.[810]

The court relied in part on article XIII D, section 1, which states that "[n]othing in this article or Article XIII C shall be construed to…[a]ffect exiting laws relating to the imposition of fees as a condition of property development."[811] Other courts have also confirmed the constitutionality of development fees, finding that there must be a "logical nexus" between the impacts of development and the use of the fee exacted from the developer to mitigate those impacts, and that the fee must be roughly proportionate to the impacts from the development.[812]

Accordingly, there is no reason to believe that article XIII C imposes any greater limitation on local governments' authority under their police power to impose reasonable regulatory fees and other fees than existed under prior law. Article XIII C makes clear that the burden is on the local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[813] It is not the burden of the state to make this showing on behalf of local government.

Based on the foregoing, the Commission finds that article XIII C of the California Constitution does not render local government's authority to impose fees insufficient as a matter of law within the meaning of Government Code section 17556.

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[810] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631-632.

[811] *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 631 ("Because the City has shown the fees are not special taxes under Terminal Plaza [*Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892], articles XIII C and XIII D of the California Constitution do not require the City to demonstrate the reasonableness of Croft's individual fee").

[812] See *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.

[813] California Constitution, article XIII C, section 1(e).

ii. Permittees have regulatory fee authority for the new state-mandated requirements related to developing and implementing the Green Infrastructure Plan (Provision C.3.j.i.-iv.), and thus, there are no costs mandated by the state pursuant to Government Code section 17556(d) for this Provision. Permittees do not have regulatory fee authority for the other Provisions found to impose new state-mandated requirements.

The Regional Board contends that the claimants have regulatory fee authority within the meaning of Government Code section 17556(d) sufficient to cover the costs of all the new state-mandated activities by charging fees to developers and, thus, there are no costs mandated by the state.[814] The Regional Board argues that regulatory fees could be collected from developers for the costs associated with implementing mercury, PCBs, and green infrastructure provisions, stating:

> The permittees are capable of crafting fees to cover the trash, mercury, PCB and green infrastructure provisions. The Supreme Court has validated the adoption of regulatory fees, providing they are not levied for unrelated revenue purposes. It is reasonable to collect fees from developers for the costs associated with implementing the mercury, PCBs and green infrastructure provisions. Similarly, the costs of full trash capture can be allocated to businesses responsible for generating high trash areas. Asking these entities to bear the costs directly related to their activities "is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations." Permittees' police power is "broad enough to include mandatory remedial measures to mitigate the *past, present or future* adverse impact of the fee payer's operations" in situations, like those present here, where there is a causal connection or nexus between the adverse effects and the fee payer's activities.[815]

As explained below, the Commission agrees that the permittees have the authority to impose regulatory fees on developers sufficient as a matter of law to cover the costs to comply with Provision C.3.j.i.-iv. and, thus, there are no costs mandated by the state for the requirements in Provision C.3.j.i.-iv. However, regulatory fees imposed on developers for the remaining new state-mandated activities would not satisfy constitutional requirements because there is no evidence in the law or record that the remaining activities were intended to provide a specific benefit or privilege only to developers.

The sole issue for determining whether Government Code section 17556(d) applies is whether the claimants have the "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, notwithstanding other factors that may

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[814] Exhibit C, Regional Board's Late Comments on the Test Claim, page 7.

[815] Exhibit C, Regional Board's Late Comments on the Test Claim, page 7, citations omitted, emphasis in original.

make the exercise of that authority or the collection of those fees impractical or difficult.[816] And, as explained above, the claimants have the authority under their police powers to impose regulatory fees on development, which must meet the requirements of article XIII C, section 1(e) (Proposition 26).

The Green Infrastructure Plan requirements imposed by Provision C.3.j.i.-iv. provide general guidelines for overall streetscape and project design and construction; standard specifications and typical design details and related information necessary to incorporate Green Infrastructure into development projects; require any Green Infrastructure projects not subject to the treatment and hydromodification sizing requirements already imposed on Regulated Projects to meet those standards; and summarize planning documents that have been updated or modified to include green infrastructure elements.[817] It also requires permittees to conduct public outreach to educate professionals involved in the planning and design of Green Infrastructure Projects on these standards and specifications, to develop and implement methods for tracking and reporting implementation of green infrastructure measures, and to report on the implementation of green infrastructure measures.[818] In other words, the Green Infrastructure Plan provides guidance to project developers on how to effectively incorporate Green Infrastructure into a project's design for Regulated Projects and any other projects intended to incorporate Green Infrastructure elements that do not qualify as a Regulated Project. Although the Green Infrastructure Plan as a whole provides a public good by encouraging the use of Green Infrastructure to reduce pollutant loads, project developers receive a direct benefit from the information it provides on how to incorporate those elements into their projects.

The activities required to develop and implement a Green Infrastructure Plan pursuant to Provision C.3.j.i.-iv., which would then be applicable to development projects seeking permittees' approval, would fall within the category of a constitutionally-allowable regulatory development fee. In 2022, the Third District Court of Appeal issued its decision in *Department of Finance (Discharge of Stormwater Runoff)* and found that the permittees had regulatory fee authority under their police powers to pay for the requirements imposed by the San Diego Regional Water Quality Control Board to develop and implement a hydromodification management plan and LID requirements for use on priority development projects, as incidental expenses of regulating development.[819] Similar to the test claim permit here, the court explained that the priority development projects addressed in the permit are certain new developments

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[816] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401-402; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[817] Exhibit A, Test Claim, page 424 (test claim permit, Provisions C.3.j.i.2.e.-h.).

[818] Exhibit A, Test Claim, pages 425 (test claim permit, Provision C.3.j.i.4.a.), and 427 (test claim permit, Provision C.3.j.iv.).

[819] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586-593.

that increase pollutants in stormwater and in discharges from MS4s, including certain residential, commercial, and industrial uses along with parking lots and roads that add impervious surfaces or are built on hillsides or in environmentally sensitive areas.[820] The permit required the claimants to develop and implement a hydromodification management plan to mitigate increases in runoff discharge rates and durations from priority development projects, and add LID requirements to their local Standard Urban Storm Water Mitigation Plans.[821] The County and cities argued that the costs of creating the plans could not be recovered through regulatory fees, and thus voter approval would be required, since the amount of the fee would exceed the reasonable costs of providing the services for which it is charged, and the amount of the fee would not bear a reasonable relationship to the burdens created by the feepayers' activities or operations, primarily because the costs were incurred before any priority development project was proposed.[822] The County and cities further argued that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large and, thus, would constitute a tax.[823] The court disagreed and found that local government has fee authority sufficient as a matter of law to cover the costs of the hydromodification management plan and LID requirements within the meaning of Government Code section 17556(d) and, thus, there were no costs mandated by the state for these activities based on the following findings:

- Creating the hydromodification management plans and the LID requirements "constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program. Setting the fee will not require mathematical precision. Permittees' legislative bodies need only consider probabilities according to the best honest viewpoint of [their] informed officials to set the amount of the fee."[824]
- There was no evidence that the permittees could not levy a fee that would bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors . . . The question of proportionality is not measured on an individual basis. Rather, it is measured

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[820] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586.

[821] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 586.

[822] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

[823] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[824] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590, internal quotations omitted.

collectively, considering all rate payors." The fee just has to be related to the overall cost of the governmental regulation.[825]

- The court rejected the claimants' argument that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large, relying on *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service provided directly to the payor that is not provided to those not charged ...."[826] However, the court found that the service provided directly to developers of priority development projects was the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service was not provided to anyone else, and only affected priority project developers charged for the service. The service would not be provided to those not charged.[827]

In addition, the Mitigation Fee Act, Government Code section 66000 et seq., also authorizes local agencies to impose development fees if certain requirements are met. As defined by the Act, a development fee is:

> . . . a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include . . . fees for processing applications for governmental regulatory actions or approvals[.][828]

"[A] fee does not become a 'development fee' simply because it is made in connection with a development project. Rather, approval of the development project must be conditioned on payment of the fee."[829] A development fee under the Act is one that is

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[825] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[826] See, for example, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 569, where the court held that article XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large.

[827] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[828] Government Code section 66000(b).

[829] *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 130.

imposed to "defray[] all or a portion of the cost of public facilities related to the development project."[830] "'Public facilities' [broadly] includes public improvements, public services, and community amenities," and, thus, is not limited to capital outlay costs.[831] The local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.[832] Pollution prevention or abatement provides a public service,[833] which falls within the Act's definition of a public facility.

The courts have also explained that the scope of a regulatory fee is somewhat flexible: a regulatory fee is valid as long as it relates to the overall purpose of the regulatory governmental action.[834] The Third District Court of Appeal in *California Assn. of Prof. Scientists v. Department of Fish & Game (Professional Scientists)* has identified the following general rules:

> General principles have emerged. Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A, section 4 analysis if the " ' "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." ' " (Citation omitted.) "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." (Citation omitted.) "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." (Citation omitted.) Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. (Citation omitted.) Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[835]

As indicated by the court in *Professional Scientists*, regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection,

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[830] Government Code section 66000(b).

[831] Government Code section 66000(d).

[832] Government Code 66001.

[833] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[834] *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438, citing *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[835] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

administration, maintenance of a system of supervision and enforcement."[836] In *United Business Commission v. City of San Diego*, the court explained that regulatory fees include "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed" and that the following incidental costs are properly included in a regulatory fee: "inspection of hazards, travel time, office supplies, telephone expenses, overhead, and clerk's time"[837]

Here, Green Infrastructure Program Plan development, early implementation of Green Infrastructure Projects, participating in processes to promote Green Infrastructure, and tracking and reporting progress pursuant to Provision C.3.j.i.-iv. are "incident to the development permit[s] which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[838] The required activities all relate to the development and implementation of a plan which facilitates incorporating Green Infrastructure elements into development projects, which project developers benefit from directly. The proposed fee would be imposed as a condition for approving new real property development and redevelopment and based on the developer's application for government approval to proceed with the development. The fees would not be levied for an unrelated revenue purpose, can be fairly allocated among the fee payers, and the service is not provided to those not charged.[839] Such fees are not taxes under Proposition 26 when they are charges imposed as a condition of property development.[840]

In addition, there is no evidence in the record indicating that the claimants cannot levy a fee that will bear a reasonable relationship to the burdens created by future Green Infrastructure development. A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors.[841] The question of proportionality is not measured on an individual basis. Rather, it is

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[836] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[837] *United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, footnote 2.

[838] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[839] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

[840] California Constitution, article XIII C, section 1(e)(6).

[841] *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194.

measured collectively, considering all rate payors.[842] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive, or the precise burden each payer may create. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. "An excessive fee that is used to generate general revenue becomes a tax."[843] And "No one is suggesting [that the claimants] levy fees that exceed their costs."[844]

Based on this authority, the claimants in this case have regulatory and developer fee authority under their police powers and the Mitigation Fee Act sufficient as a matter of law to cover the costs of the new state-mandated requirements related to the Green Infrastructure Plan (Section C.3.j.i.-iv.), pursuant to Government Code section 17556(d), and thus, there are no costs mandated by the state for these requirements.

In contrast, the Regional Board has not explained how the permittees have authority to impose fees on developers for the remaining mandated activities. The remaining provisions: 1) required permittees to prepare a reasonable assurance analysis of future mercury and PCBs load reductions (C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.); 2) required a mercury progress report on the list of watersheds where mercury control measures are or will be implemented (C.11.a.iii.); 3) required PCBs reporting (C.12.a.iii.1. and 2.); 4) required a PCBs control measures implementation plan (C.12.d.); and 5) required permittees to perform PCBs caulk and sealant testing (C.12.e.). These activities relate to identifying where mercury and PCBs are currently present in the environment, a plan identifying control measures that are or will be implemented during the permit term, and creating plans and analysis for how those loads will be reduced in the future.[845] Unlike developing and implementing the Green Infrastructure Plan, which provides a direct benefit to developers by providing guidance on how to incorporate green infrastructure into their projects and requires compliance with the Green Infrastructure Plan requirements to obtain a building permit, the remaining new mandated activities primarily benefit the public at large by providing information that shows compliance with the TMDLs and how best to comply with the water quality standards for these pollutants in the future. The TMDLs showed that mercury and PCBs needed to be controlled and reduced because of the threat to the health of humans who consume fish, the impairment to sport fishing, and the preservation of endangered species, and the sources of these pollutants extend beyond

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[842] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948.

[843] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438.

[844] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

[845] Exhibit A, Test Claim, pages 486-487 (test claim permit, Provision C.11.a.iii.), 489-490 (test claim permit, Provisions C.11.c.ii.2. and C.11.c.iii.1.-3.), 493-494 (test claim permit, Provisions C.12.a.iii.1. and 2.), 497 (test claim permit, Provisions C.12.c.ii.2. and C.12.c.iii.1.-3.), and 498 (test claim permit, Provisions C.12.d. and C.12.e.).

development.[846] As mentioned, for a regulatory fee to be constitutional, there must be a "logical nexus" between the impacts of development and the use of the fee exacted from the developer to mitigate those impacts, and that the fee must be roughly proportionate to the impacts from the development.[847] As indicated in Proposition 26, a charge must be imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged.[848] There is no evidence in the law or record that the Regional Board intended that providing a reasonable assurance analysis of future mercury and PCBs load reductions by 2040; reporting on preparing a list of watersheds where mercury control measures are or will be implemented; preparing a PCBs report; preparing a PCBs control measure implementation plan; and testing caulk and sealants in existing storm drain infrastructure and public rights-of-way for PCBs, would provide any specific benefit to a developer.

Accordingly, while the claimants in this case have regulatory fee authority under their police powers and the Mitigation Fee Act sufficient as a matter of law to cover the costs of the new state-mandated requirements related to the Green Infrastructure Plan (Section C.3.j.i.-iv.), pursuant to Government Code section 17556(d), they do not have regulatory fee authority for any of the other new activities found to be mandated by the state.

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[846] Exhibit I (4), Order R2-2006-0052, Mercury TMDL, pages 10, 12 (mercury discharges from mining, bed erosion, stormwater runoff); Exhibit I (5), Order R2-2008-0012, PCBs TMDL, page 6 (discharges of PCBs from atmospheric deposition, stormwater runoff, sediment and erosion in the Bay).

[847] See *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.

[848] California Constitution, article XIII C, section 1(e).

c. The permittees have constitutional and statutory authority to impose property-related stormwater fees for the reasonable assurance analysis of future mercury and PCBs load reductions (C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2, and C.12.c.iii.1.-3.); required progress report on list of watersheds where mercury control measures are or will be implemented (C.11.a.iii.); PCBs reporting (C.12.a.iii.1. and 2.); PCBs control measures implementation plan (C.12.d.); and PCBs caulk and sealant testing (C.12.e.). However, from January 1, 2016, through December 31, 2017, voter approval of these fees is required and the courts have found that when voter approval is required, Government Code section 17556(d) does not apply and there are costs mandated by the state. Beginning January 1, 2018, when property-related stormwater fees are subject only to the voter protest provisions of article XIII D, Section 6 of the California Constitution, Government Code section 17556(d) applies, there are no costs mandated by the State, and reimbursement is denied.

The claimants also have authority pursuant to their constitutional police powers[849] and other statutory authority[850] to impose property-related fees for the new state mandated activities.[851] "[P]revention of water pollution is a legitimate governmental objective, in furtherance of which the police power may be exercised."[852]

As discussed above, some permittees have adopted and imposed property-related fees to cover their costs to comply with the stormwater permits.[853]

As described below, however, stormwater property-related fees are subject to certain substantive and procedural requirements of Proposition 218, or article XIII D of the California Constitution. The claimant contends that it has no authority to increase its existing Clean Water Fund without seeking voter approval under proposition 218.[854]

It is true that property-related fees are subject to the procedural requirements of article XIII D, which until January 1, 2018, required voter approval before new or increased

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[849] California Constitution, article XI, section 7.

[850] See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[851] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

[852] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561, citing to *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[853] Exhibit C, Regional Board's Late Comments on the Test Claim, pages 9-12.

[854] Exhibit A, Test Claim, page 34 (Written Narrative).

fees could be charged. The courts have held when voter approval of a fee is required by article XIII D, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements.[855]

Effective January 1, 2018, SB 231 defined "sewer" to include stormwater as an exception to the voter approval requirement in article XIII D, which makes only the voter protest provisions of article XIII D apply to property-related stormwater fees. The courts have held Government Code section 17556(d) applies to deny a claim for state mandate reimbursement when the fee authority is subject to voter protests under article XIII D, section 6(a).[856]

These issues are analyzed below.

i. The substantive and procedural requirements of articles XIII C and XIII D for property-related fees and SB 231.

Proposition 218, approved by voters in 1996, added articles XIII C and XIII D to the California Constitution and "is one of a series of voter initiatives restricting the ability of state and local governments to impose taxes and fees."[857] Article XIII C concerns voter approval for many types of local taxes other than property taxes. Article XIII D addresses property-based taxes and fees.[858] Specifically, article XIII D of the California Constitution "imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.'"[859] For example, assessments and property-related fees are subject to notice and hearing requirements, and must meet a threshold of proportionality with respect to the amount of the exaction and the purposes to which it is put. Section 4, addressing assessments, provides:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an

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[855] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

[856] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[857] *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.

[858] *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 381.

[859] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 citing California Constitution, article XIII D, section 3.

> agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.[860]

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency "shall consider all protests…and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.

Similarly, section 6 provides for a proportionality requirement with respect to property-related fees and charges and imposes the following substantive requirements:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the

[860] California Constitution, article XIII D, section 4(a).

burden shall be on the agency to demonstrate compliance with this article.[861]

And section 6 provides for notice and a public hearing similarly to section 4; but, unlike section 4, section 6 does not expressly require the notice to inform parcel owners of their right to protest the proposed fee, nor is the notice required to be in the form of a ballot to be returned.[862]

Section 6(c) also provides that *voter approval* is required for property-related fees and charges *other than* for water, sewer, and refuse collection services.[863] This section is discussed further below, but for charges for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, and are subject only to the voter protest provisions of article XIII D.

In 2010, the voters approved Proposition 26 to amend article XIII C, section 1 of the California Constitution to define a "tax" subject to the voters' approval as "any levy, charge, or exaction of any kind imposed by a local government, *except*" as stated.[864] An exception to the definition of a tax includes "Assessments and property-related fees imposed in accordance with the provisions of Article XIII D."[865] Thus, as long as local government complies with the substantive and procedural requirements of article XIII D (added by Proposition 218), then the revenues received are not considered proceeds of taxes, but revenue from "nontax" property-related fees and assessments. Article XIII C also makes clear that the burden is on local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[866]

Many of the limitations stated in Proposition 218 and article XIII D are not new, as most special assessment acts under prior law required notice and a public hearing, and many such acts also provided for majority protest of affected parcel owners to defeat a proposed assessment.[867] Despite the existence of such limitations before Proposition

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[861] California Constitution, article XIII D, section 6(b).

[862] Compare California Constitution, article XIII D, section 6(a)(1)-(2) with article XIII D, section 4(a).

[863] California Constitution, article XIII D, section 6(c).

[864] California Constitution, article XIII C, section 1 (amended by the voters on Nov. 2, 2010, by Prop. 26).

[865] California Constitution, article XIII C, section 1(e)(7).

[866] California Constitution, article XIII C, section 1(e).

[867] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

218, the court in *County of Placer v. Corin* held assessments were sufficiently distinct from taxes as to be outside the scope of articles XIII A and XIII B.[868]

After Proposition 218 came the cases of *Apartment Ass'n of Los Angeles County*, *Richmond*, and *Bighorn-Desert View*.[869] In each of these cases, the Court narrowly construed the procedural and substantive limitations of article XIII D. In *Apartment Ass'n*, the Court rejected a challenge under article XIII D, section 6 to the city's ordinance imposing fees on residential rental properties, finding the fees were not "imposed by an agency upon a parcel or upon a person as an incident of *property ownership*…"[870] The Court held Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only "when they burden landowners as *landowners*."[871] The residential rental fee ordinance at issue "imposes a fee on its subjects by virtue of their ownership of a business - i.e., because they are landlords," and, thus, the fee was not subject to the requirements of article XIII D.[872]

In *Richmond*, the District imposed a "capacity charge" on applicants for new water service connections, and thus could not prospectively identify the parcels to which the charge would apply; i.e., it could not have complied with the procedural requirements of notice and hearing under article XIII D, section 4. The Court held the impossibility of compliance with section 4 was one reason to find that the capacity charge was not an assessment, within the meaning of article XIII D.[873] The Court also found the charge was to be imposed on applicants for new service, rather than users receiving service through existing connections, and that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.[874] Accordingly, the Court concluded: "Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude

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[868] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

[869] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, and *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205.

[870] California Constitution, article XIII D, sections 2(e); 3, emphasis added; *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-842.

[871] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, emphasis in original.

[872] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[873] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

[874] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees."[875]

In *Bighorn-Desert View*, the Court rejected a local initiative designed to impose a voter approval requirement on all future rate increases for water service,[876] finding article XIII D, section 6's express exemption from voter approval for sewer, water, and refuse collection "would appear to embody the electorate's intent as to when voter-approval should be required, or not required."[877] The Court concluded:

> [U]nder section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but…[article XIII C, section 3] does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 ["We should not presume ... that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected (see Stats.1969, ch. 1175, § 5, p. 2274, 72B West's Ann. Wat.-Appen., supra, ch. 112, p. 190), will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.[878]

The Sixth District Court of Appeal in *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351(*City of Salinas*) held "sewer," for purposes of the voter

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[875] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

[876] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

[877] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

[878] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

approval exemption in article XIII D, does not include storm sewers or storm drains.[879] *City of Salinas* involved a challenge to a "storm drainage fee" imposed by the City of Salinas to fund its efforts "to reduce or eliminate pollutants contained in storm water, which was channeled into a drainage system separate from the sanitary and industrial waste systems," as required by the CWA.[880] The fee was imposed on owners of developed parcels of property, and the amount "was to be calculated according to the degree to which the property contributed to runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of the 'impervious area' on that parcel."[881] Taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the fee was exempt from the voter approval requirements because it was for "sewer" or "water" services under article XIII D, section 6(c). The court disagreed, and construed the term "sewer" narrowly, holding "sewer" referred solely to "sanitary sewerage" (i.e., the system that carries "putrescible waste" from residences and businesses), and did not encompass a sewer system designed to carry only stormwater.[882] It also held the term "water services" meant "the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean."[883]

Thus, under the *City of Salinas* case, a local agency's charges on developed parcels to fund stormwater management were property-related fees not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two-thirds of the electorate in the area was first required to affirmatively approve those fees.

That holding has since been the subject of legislation. In 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to expressly overrule the 2002 *City of Salinas* case.[884] Government Code section 53750(k) defines the term "sewer" for purposes of article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters."

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[879] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[880] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[881] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[882] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[883] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

[884] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

Government Code section 53751 explains why the Legislature thinks the *City of Salinas* case is wrong:

> The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.[885]

ii. Local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6(b).

The claimant contends that it has no legal authority to impose fees against residents for the new requirements.[886] Its rebuttal comments also claim that SB 231 has no effect on this test claim because it became effective in 2018, and thus has no effect on the availability of fee authority during the years the test claim permit went into effect that are the basis for the Commission's approval of the test claim.[887]

The Commission disagrees with these contentions.

In the 2021 *Department of Finance* case, the Second District Court of Appeal determined that an NPDES permit condition requiring the local governments to install and maintain trash receptacles at public transit stops owned by other public entities required subvention under article XIII B, section 6 because the local agencies did not

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[885] Government Code section 53751(f).

[886] Exhibit A, Test Claim, page 34 (Written Narrative).

[887] Exhibit D, Claimant's Rebuttal Comments, page 3; see also, Exhibit F, Claimant's Comments on the Draft Proposed Decision, page 2 ["[E]ven if SB 231 were applicable, which it is not, the appropriate approach for the Commission to take regarding SB 231 would be to wait until a court of competent jurisdiction resolves the constitutionality of SB 231 in the context of an actual fee enabled under its provisions."].

have sufficient authority to levy fees for the requirement.[888] The court held the local governments did not have authority to install equipment on another public entity's property and then charge that entity for installation and ongoing maintenance.[889] The State then contended the local governments could impose a fee on private property owners. However, the court determined not only that the State had not shown the fee would meet article XIII D's substantive requirements for property-related fees, but common sense dictated the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public, as follows.

> The state agencies have not satisfied their burden. Not only have the state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy the substantive constitutional requirements, but common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)-(4)), the placement of the receptacles at public transit stops makes the "service available to the public at large in substantially the same manner as it is to property owners" (id., art. XIII D, § 6, subd. (b)(3)). The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements.[890]

In 2022, the Third District Court of Appeal revisited the 2021 case and the substantive requirements in article XIII D, section 6(b) regarding property-related fees to cover the costs of street sweeping required by the NPDES permit as part of the receiving water limitations and discharge prohibitions to keep pollutants out of local waters.[891] The State acknowledged the general rule that the party claiming the applicability of an exception bears the burden of demonstrating that it applies. However, the State argued that this typical approach should not apply to the burden of showing fee authority under Government Code section 17556(d). The State argued "the inherent flexibility in

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[888] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 561.

[889] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 565-567.

[890] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

[891] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

permittees' police power means permittees may develop fees in any number of ways. Also, local governments like permittees have significantly more expertise and experience than the State agencies before us in designing, implementing, and defending local government fees. The State asserts that permittees' expertise means they should bear the burden on this point."[892] The court agreed, and held as follows:

> We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)[893]

The court further held that requiring the State to show affirmatively how permittees can create a fee that meets the substantive requirements where no fee yet exists requires the State to effectively engage in the rulemaking process itself and asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue under Government Code section 17556(d).[894] The court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact (as was the case in the 2021 *Department of Finance* case), then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee. The court stated the following:

> Although the court of appeal in *Los Angeles Mandates II* [i.e., the 2021 *Department of Finance* case] stated the state bore the burden to show that a fee for public trash receptacles could satisfy the substantive

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[892] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584.

[893] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

[894] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585. This finding is consistent with provisions in articles XIII C and XIII D, which state the burden is on the local agency to demonstrate compliance with the substantive rules when a fee exists and is legally challenged. Article XIII D, section 6(b), states that "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article;" and article XIII C, section 1(e), states, "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

> requirements, and that the state did not satisfy its burden, the court actually ruled that the local governments could not establish a fee that could meet the substantive requirements as a matter of law or undisputed fact. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568-569, 273 Cal.Rptr.3d 619 ["common sense dictates" that fee would not meet requirements].) To require the State to show affirmatively how permittees can create a fee that meets the substantive requirements where no fee yet exists requires the State effectively to engage in the rulemaking process itself. That asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue. To the extent *Los Angeles Mandates II* requires the State to prove more, we respectively disagree with its interpretation.[895]

Similarly here, there is no showing as a matter of law or fact that a fee cannot meet the substantive requirements of article XIII D, section 6(b). Although the claimant is correct that SB 231 became effective after the test claim went into effect, that only affects whether the permittees have fee authority for the entire permit term, not whether they have fee authority at all. The remaining mandate issues here regarding mercury and PCBs control measures address waters within the regulatory control of the permittees. Like street sweeping in the 2022 *Department of Finance* case, all of the new requirements are required by the permit to protect the beneficial uses of the local waters enjoyed by property owners in the San Francisco region and to prevent pollutants from causing or contributing to a violation of water quality standards.[896]

As indicated above, the courts have found that local government has the authority (i.e., the right and the power) to levy property-related fees for stormwater services under their police powers.[897] And the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they can properly develop property-related stormwater fees under section XIII D of the California Constitution, including elements incorporated into a stormwater fee for various types of parcels to cover the cost of reducing stormwater pollutant loading and public education.[898] CASQA describes the typical apportionment of costs for stormwater services as follows:

> Proposition 218 requires that property-related fees "shall not exceed the proportional cost of the service attributable to the parcel."

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[895] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[896] Exhibit A, Test Claim, page 385 (test claim permit, Provision C.1.).

[897] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

[898] Exhibit I (13), CASQA, *Fee Study and Ordinance,* https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance (accessed on November 23, 2022).

> Therefore, it is essential to develop an apportionment of costs that best reflects the stormwater services provided by the municipality.
>
> Across the U.S., most stormwater fee structures are based on the amount of impervious surface on a parcel, which is proportional to the amount of rainwater that runs off a parcel. This is a straight forward method, although impervious surface data may be difficult or expensive to obtain. Rate-setting consultants have experience working around this issue with sampling and statistical approaches, which can satisfy the Proposition 218 "proportionality" test.
>
> The majority of stormwater rate structures utilize an equivalent residential unit (ERU) as a basis for fees. ERUs estimate the average or median characteristics for a residential property. For stormwater, land use, impervious surface cover, or total size are possible metrics. Once established based on a sample of properties, each parcel in a municipality can be assigned an individual number of ERUs, which is multiplied by the base residential rate to establish the individual fee. With the ERUs assigned and totaled, the revenue requirement is divided by the total number or ERUs to establish the base residential rate.
>
> Most municipalities are bound to an NPDES permit requiring them to reduce stormwater pollutant loading as well as other objectives such as green infrastructure development and public education. These elements could be incorporated into the stormwater fees for various types of parcels.
>
> It is worth noting that Proposition 218's strict requirements on a fair apportionment method means that a municipality should create a thorough administrative record of how the rate and studies upon which it relies would need to be clearly referenced.[899]

Moreover, as noted in the Decision on the prior Test Claim in this series, several permittees have already adopted property-related fees to pay for similar requirements imposed by the NPDES permit, including fees for stormwater pollution and control.[900]

Accordingly, the Commission finds that local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6(b).

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[899] Exhibit I (13), CASQA, *Fee Study and Ordinance,* pages 2-3, https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance (accessed on November 23, 2022).

[900] Commission on State Mandates, Test Claim Decision on *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*, 10-TC-02, 10-TC-03, 10-TC-05, adopted January 24, 2025, pages 361-362.

iii. The courts have held Government Code section 17556(d) does not apply to deny a claim when voter approval of the property-related stormwater fee is required under article XIII D (Proposition 218). However, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

The court in *Paradise Irrigation District* (a challenge to the Commission's Decision in *Water Conservation*, 10-TC-12/12-TC-01) held, in the context of water services, the voter protest requirements of Proposition 218 do not divest local agencies of their authority to impose fees sufficient as a matter of law pursuant to Government Code section 17556(d) and, thus, when even when the voter protest provisions apply, there are no costs mandated by the state.[901] In *Paradise Irrigation District,* the Third District Court of Appeal observed:

> This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and irrigation districts' authority to levy fees so that they are entitled to subvention for state-mandated regulations requiring water infrastructure upgrades. The Water and Irrigation Districts do not argue this court wrongly decided *Connell, supra*, 59 Cal.App.4th 382, 69 Cal.Rptr.2d, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell*.[902]

Ultimately the court preserved and followed the rule of *Connell*, finding, based in large part on a discussion of *Bighorn-Desert View*, "Proposition 218 implemented a power sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts' fee authority."[903] The court held, "[c]onsistent with the California Supreme Court's reasoning in *Bighorn*, we presume local voters will give appropriate consideration and deference to state mandated requirements relating to water conservation measures required by statute."[904] In addition, the court held "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to

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[901] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[902] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[903] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[904] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

levy fees."[905] However, the court said, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[906] The court found water service fees, being expressly exempt from the voter approval provisions of article XIII D, section 6(c), therefore do not require voter preapproval, as would new taxes.[907] In addition, the court followed and relied upon *Bighorn-Desert View*'s analysis of a power-sharing relationship between local agencies and their constituents, including the presumption "local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency…" and the notice and hearing requirements of article XIII D, section 6(a) "will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive."[908] Accordingly, the court found that power-sharing arrangement "does not undermine the fee authority that the districts have," and the majority protest procedure of article XIII D, section 6(a) "does not divest the Water and Irrigation Districts of their authority to levy fees."[909] The court noted statutory protest procedures already existed, and "the possibility of a protest under article XIII D, section 6 does not eviscerate the Water and Irrigation Districts' ability to raise fees to comply with the Water Conservation Act."[910] Thus, the court found Government Code section 17556(d) still applies to deny a claim when the fee authority is subject to voter protest under article XIII D, section 6(a).

The Water Boards argue that *Paradise Irrigation District's* findings should apply equally when the fees or assessments are subject to the voter approval requirements of Proposition 218.[911] However, this has already been addressed by the courts. The Third District Court of Appeal addressed the voter approval issue in *Department of Finance v. Commission on State Mandates* (*Discharge of Stormwater Runoff*) and found that Government Code section 17556(d) does not apply when voter approval is required and, thus, there are costs mandated by the state for new requirements mandated by a

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[905] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[906] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[907] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

[908] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[909] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[910] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[911] Exhibit G, Water Boards' Comments on the Draft Proposed Decision, page 3.

stormwater permit issued by the San Diego Regional Water Quality Control Board.[912] The court's reasoning is as follows:

> The State contends the reasoning in *Paradise Irrigation Dist.* applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees' governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The "fact that San Diego property owners could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not 'eviscerate' San Diego's police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee."
>
> The State's argument does not recognize a key distinction we made in *Paradise Irrigation Dist.:* water service fees were not subject to voter approval. We contrasted article XIII D's protest procedure with the voter approval requirement imposed by Proposition 218 on new taxes. Under article XIII C, no local government may impose or increase any general or special tax "unless and until that tax is submitted to the electorate and approved" by a majority of the voters for a general tax and by a two-thirds vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Cal. Const., art. XIII D, § 6, subd. (c).) (*Paradise Irrigation Dist., supra,* 33 Cal.App.5th at p. 192, 244 Cal.Rptr.3d 769.) The implication is the voter approval requirement would deprive the districts of fee authority.
>
> Since the fees in *Paradise Irrigation Dist.* were not subject to voter approval, the protest procedure created a power sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist.* correctly described as a "speculative and uncertain threat." (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 184, 244 Cal.Rptr.3d 769.)

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[912] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

Here, a fee for stormwater drainage services is not valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees' police power to proposing the fee. Like article XIII C's limitation on local governments' taxing authority, article XIII D provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Cal. Const., art. XIII D, § 6, subd. (c).) The State's argument ignores the actual limitation article XIII D imposes on permittees' police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason Section 6 exists and requires subvention. As stated earlier, the purpose of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the "next logical step" to article XIII A, limits the growth of appropriations made from the proceeds of taxes. (Cal. Const., art. XIII B, §§ 1, 2, 8; *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334, 194 Cal.Rptr. 110.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under Section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Section 6 provides them with those resources.

> Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in Paradise Irrigation Dist., the voter approval requirement does not create a power sharing arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Section 6 thus requires subvention because of Article XIII D's voter approval requirement. Contrary to the State's argument, *Paradise Irrigation Dist*. does not compel a different result.[913]

Although the Water Boards disagree with the Third District Court of Appeal's findings and believe that another district court or the California Supreme Court could still decide the issue differently,[914] the Commission is required by law to follow the 2022 *Department of Finance* case and find that Government Code section 17556(d) does not apply to deny a claim when voter approval of the fee is required under article XIII D (Proposition 218).[915] However, pursuant to the decisions in the 2022 *Department of Finance case* and *Paradise Irrigation District*, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

iv. From January 1, 2016, through December 31, 2017, voter approval of stormwater fees is required pursuant to the decision in the City of Salinas and, thus, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements. Beginning January 1, 2018, when property-related fees are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution, then Government Code section 17667(d) applies, and there are no costs mandated by the state.

As indicated above, the court in *City of Salinas* held a local agency's charges on developed parcels to fund stormwater management were property-related fees that were not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two thirds of the electorate in the area was first required to affirmatively approve those fees.[916]

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[913] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[914] Exhibit G, Water Board's Comments on the Draft Proposed Decision, page 3.

[915] *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 ("Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.").

[916] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

When voter approval of fees are required, then Government Code section 17556(d) does not apply and there are costs mandated by the state.[917]

However, Government Code sections 53750 and 53751 (SB 231) superseded the holding in *City of Salinas* and defined "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D.[918] These provisions became effective January 1, 2018.

The claimant argues that SB 231 is not applicable to this test claim, and even if it were applicable, the appropriate approach would be to wait until a court of competent jurisdiction resolves the constitutionality of SB 231 in the context of an actual fee enacted under its provisions.[919] However, the Commission is required to presume statutes are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional. Article III, section 3.5 states, in relevant part, the following:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;

The Commission also finds, pursuant to the decision of the Third District Court of Appeal, Government Code sections 53750 and 53751, absent a clear and unequivocal statement to the contrary, operate prospectively beginning January 1, 2018.[920]

Accordingly, the claimants do not have fee authority sufficient as a matter of law to cover the costs of the new state-mandated activities from December 1, 2009, through December 31, 2017, when voter approval of stormwater fees is required, and there are costs mandated by the state during that time. However, reimbursement is not required to the extent the claimants received fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes.[921]

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[917] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[918] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

[919] Exhibit F, Claimants' Comments on the Draft Proposed Decision, page 2.

[920] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

[921] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues.").

Pursuant to Government Code sections 53750 and 53751 and the decision in *Paradise Irrigation District*, there are no costs mandated by the state beginning January 1, 2018.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that the test claim permit imposes a reimbursable state-mandated program from January 1, 2016 through December 31, 2017, only, for the following activities:

1. Reasonable Assurance Analysis (Provisions C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., and C.12.c.iii.1.-3.):
    - Prepare a reasonable assurance analysis of future mercury and PCBs load reductions by doing the following:
        - Quantify the relationship between areal extent of Green Infrastructure implementation and mercury and PCBs load reductions, taking into consideration the scale of contamination of the treated area as well as the pollutant removal effectiveness of likely green infrastructure strategies.[922]
        - Estimate the amount and characteristics of land area that will be treated through Green Infrastructure by 2020, 2030, and 2040.[923]
        - Estimate the amount of mercury/PCBs load reductions that will result from Green Infrastructure implementation by 2020, 2030, and 2040.[924]
        - Quantitatively demonstrate that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through implementation of Green Infrastructure Projects.[925]
        - Ensure that the calculation methods, models, model inputs, and modeling assumptions used to fulfill provisions C.11.c.ii.2.a.-d. and

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See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

[922] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.a., C.12.c.ii.2.a.).

[923] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.b., C.12.c.ii.2.b.).

[924] Exhibit A, Test Claim, pages 489, 497 (test claim permit, Provisions C.11.c.ii.2.c., C.12.c.ii.2.c.).

[925] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.d., C.12.c.ii.2.d.).

C.12.c.ii.2.a.-d. above have been validated through a peer review process.[926]

- Submit in the 2018 Annual Report as part of the reporting required for Provisions C.11.b.iii.2. and C.12.b.iii.3., the quantitative relationship between Green Infrastructure implementation and mercury and PCBs load reductions. This submittal shall include all data used and a full description of the models and model inputs relied on to establish this relationship.[927]
- Submit in the 2020 Annual Report an estimate of the amount and characteristics of land area that will be treated through Green Infrastructure implementation by 2020, 2030, and 2040. This submittal shall include all data used and a full description of the models and model inputs relied on to generate this estimate.[928]
- Submit in the 2020 Annual Report a reasonable assurance analysis to demonstrate quantitatively that mercury load reductions of at least 10 kg/yr and PCBs load reductions of at least 3 kg/yr will be realized by 2040 through the implementation of Green Infrastructure Projects. This submittal shall include all data used and a full description of models and model inputs relied on to make the demonstration and documentation of peer review of the reasonable assurance analysis.[929]

2. Progress Report on List of Watersheds and Management Areas Where Mercury Control Measures are or will be Implemented (Provision C.11.a.iii.1.).
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where mercury control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[930]
3. PCBs Reporting (Provisions C.12.a.iii.1. and C.12.a.iii.2.):
    - By April 1, 2016, report on progress towards developing a list of the watersheds and portions of watersheds (management areas) where PCBs

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[926] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.ii.2.e., C.12.c.ii.2.e.).

[927] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.1., C.12.c.iii.1.).

[928] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.2., C.12.c.iii.2.).

[929] Exhibit A, Test Claim, pages 490, 497 (test claim permit, Provisions C.11.c.iii.3., C.12.c.iii.3.).

[930] Exhibit A, Test Claim, page 486 (test claim permit, Provision C.11.a.iii.1.).

control measures are currently being implemented, and those in which control measures will be implemented during the permit term, as well as the monitoring data and other information used to select these watersheds and management areas.[931]

- In the 2016 Annual Report, include the following information:
  - A cumulative listing of all potentially PCB-contaminated sites permittees have discovered and referred to the Water Board to date, with a brief summary description of each site and where to obtain further information.
  - For each structural control and non-structural BMP, interim implementation progress milestones (e.g., construction milestones for structural controls or other relevant implementation milestones for structural controls and non-structural BMPs) and a schedule for milestone achievement.
  - Clear statements of the roles and responsibilities of each participating permittee for implementation of pollution prevention or control measures for PCBs.[932]

4. Prepare PCBs control measures implementation plan, schedule, and reasonable assurance analysis to achieve the PCBs TMDL wasteload allocations by 2030 (Provision C.12.d.):
   - Prepare a PCBs control measures implementation plan, which must identify all technically and economically feasible PCBs control measures to be implemented (including green infrastructure projects).[933]
   - Include a schedule for PCBs control measure implementation according to which these technically and economically feasible PCBs control measures will be fully implemented by 2030.[934]
   - Provide an evaluation and quantification of the PCBs load reduction of such measures as well as an evaluation of costs, control measure efficiency and significant environmental impacts resulting from their implementation.[935]
   - Prepare a reasonable assurance analysis demonstrating that sufficient control measures will be implemented to attain the PCBs TMDL wasteload allocations by 2030.[936]

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[931] Exhibit A, Test Claim, page 492 (test claim permit, Provision C.12.a.iii.1.).

[932] Exhibit A, Test Claim, pages 493-494 (test claim permit, Provision C.12.a.iii.2.).

[933] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.1.).

[934] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.2.).

[935] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.ii.3.).

[936] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.i.).

- Submit the plan and schedule required by Provision C.12.d. in the 2020 Annual Report.[937]

5. Evaluate the presence of PCBs in caulks/sealants in storm drain or roadway infrastructure in public rights-of-way (Provision C.12.e.):
    - Collect at least 20 samples from throughout the permit-area of the caulks and sealants used in storm drains or roadway infrastructure in public rights-of-way.[938]
    - Analyze the samples taken for PCBs in such a way that is able to detect a minimum PCB concentration of 200 parts per billion.[939]
    - Report on the results of this investigation, including all data gathered, no later than the 2018 Annual Report.[940]

Reimbursement for these activities is denied beginning January 1, 2018, because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state.

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

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

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[937] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.d.iii.).

[938] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[939] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.ii.).

[940] Exhibit A, Test Claim, page 498 (test claim permit, Provision C.12.e.iii.).

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On October 12, 2026, I served the:

- **Current Mailing List dated September 29, 2026**
- **Draft Proposed Expedited Parameters and Guidelines, Schedule for Comments and Notice of Hearing issued October 12, 2026**
- **Decision adopted October 9, 2026**

  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, 16-TC-03
  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, Provisions C.11.a.iii.1., C.11.c.ii.2., C.11.c.iii.1.-3., C.12.c.ii.2., C.12.c.iii.1.-3., C.12.a.iii.1.-2., C.12.d., and C.12.e., Adopted November 19, 2015, and Effective on January 1, 2016
  City of Union City, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 12, 2026 at Sacramento, California.

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Mailing List

Last Updated: 9/29/26

Claim Number: 16-TC-03

Matter: California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049

Claimant: City of Union City

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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