BURHENN & GEST LLP
624 SOUTH GRAND AVENUE
SUITE 2200
LOS ANGELES, CALIFORNIA 90017-3321
(213) 688-7715
FACSIMILE (213) 624-1376
WWW.BURHENNGEST.COM

WRITER'S DIRECT NUMBER
(213) 629-8788

WRITER'S E-MAIL ADDRESS
dburhenn@burhenngest.com

March 15, 2019

VIA DROP BOX

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

Re: *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100,* 16-TC-05, Submittal of Rebuttal Comments

Dear Ms. Halsey:

On behalf of Joint Test Claimants Riverside County Flood Control and Water Conservation District, County of Riverside and the Cities of Murrieta, Temecula and Wildomar ("Joint Test Claimants") I am filing herewith the Rebuttal Comments of Joint Test Claimants to the comments of the State Water Resources Control Board, the San Diego Regional Water Quality Control Board and the Department of Finance to the above-referenced test claim. I am the designated Claimant Representative for all Joint Test Claimants.

The Rebuttal Comments consist of this cover letter, the Rebuttal Comments narrative and the Declaration of David W. Burhenn and Exhibits A-E thereto, as well as Rebuttal Documents submitted under separate cover.

Please have your staff contact me if there are any problems with regard to the receipt of these comments. Thank you for your consideration.

Very truly yours,

David W. Burhenn

DB:dwb

REBUTTAL COMMENTS OF RIVERSIDE COUNTY LOCAL AGENCY TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2015-0100, 16-TC-05

TABLE OF CONTENTS

PAGE

REBUTTAL COMMENTS OF RIVERSIDE COUNTY LOCAL AGENCY JOINT TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2015-0100, 16-TC-05

Test Claimants Riverside County Flood Control and Water Conservation District ("District"), County of Riverside ("County") and the Cities of Murrieta, Temecula and Wildomar (collectively, "Claimants") jointly file this Rebuttal to the comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, San Diego Region ("SDRWQCB") (collectively, "Water Boards") and the Department of Finance ("DOF") concerning *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a, B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)(a, E.5.c(3), E.5.e, E.6, F.1.a, F.1.b, F.2.a, F.2.b, F.2.c, F.3.B(3) and F.3.c,* 16-TC-05 ("Joint Test Claim").

This Rebuttal addresses each of the comments made by the Water Boards and the DOF concerning the validity of the Joint Test Claim. In summary, the Water Boards contend that Claimants are not entitled to a subvention of state funds for the mandates contained in Order No. R9-2015-0100 (the "2015 Permit") because (a) the mandates did not constitute a "program" or a "new program" or "higher level of service" subject to a subvention of funds under article XIII B, section 6 of the California Constitution (Water Boards Comments ("WB Comments") at 19-28); (b) that the mandates were federal, not state in nature (WB Comments at 28-33); and (c) that Claimants had fee authority to fund the mandates (WB Comments at 33-37). The DOF argues only that Claimants had fee authority to fund the mandates, and does not otherwise address the Joint Test Claim. DOF Comments at 1-2.

The Commission's consideration of this test claim is governed by these established principles:

1. The test as to whether a mandate is a "program" within the meaning of article XIII B, section 6, is whether its requirements are "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Each of the requirements at issue here provides services to the public. Moreover, they do not apply generally to all residents.

2. The test as to whether a mandate is "new" is whether the local government or agency was previously required to comply with the requirement at issue. This is determined by comparing the requirement with the pre-existing scheme. *San Diego Unified Dist. v. Commission on State Mandates* ("*San Diego Unified School Dist.*") (2004) 33 Cal.4th 859, 878. As set forth below, the mandates at issue were not previously required and are new.

3. The test as to whether a mandate is a higher level of service is whether there is "an increase in the actual level or quality of government services provided." *San Diego Unified School Dist.*, 33 Cal.4th at 877. Each of the mandates here increases the level or quality of government services provided.

4. The test as to whether a mandate is federal or state is "if federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. . . [I]f 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." *Department of Finance v. Commission on State Mandates* ("*Dept. of Finance*") (2016) 1 Cal. 5th 749, 765. Federal law does not impose or compel the mandates at issue here.

5. The test as to whether a federal regulation creates a federal mandate is whether the regulation "expressly" or "explicitly" requires the provision at issue. *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 683 *review denied,* (April 11, 2018) 2018 Cal. LEXIS 2647 (*"Dept. of Finance II"*). No federal regulation expressly or explicitly requires the provisions at issue here.

6. The State has the burden of showing a requirement is mandated by federal law or that it falls under any other exception to reimbursement. *Dept. of Finance*, 1 Cal. 5th at 769. A Water Board finding that a challenged requirement was federally mandated is not entitled to deference unless the Water Board finds, when imposing the disputed permit requirement, that it was the *only* means by which the maximum extent practicable ("MEP") standard could be implemented. *Id.* at 768. This finding must be case specific and supported by legal authority or the record. *Id.* and n.15. The Water Boards have not shown that the requirements at issue here are the only means by which the maximum extent practicable standard can be implemented.

7. A state mandate can also be created where the State usurps a local agency's discretion and directs the means to comply with federal law, *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, or if the State freely chooses to shift the cost of a federal program onto the local agency. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594.

8. The test as to whether local agency has fee authority is whether the local agency can impose a fee without voter or property owner approval. *In re Test Claim on: San Diego Regional Water Quality Control Order No. R9-2007-0001*, Case No. 07-TC-09 (2010), Statement of Decision ("SD County SOD") at 107. Claimants do not have fee authority here.

A number of these arguments raised by the Water Boards and the DOF have been made and addressed in other test claims decided before the Commission as well as by California appellate courts. Many of the arguments raised by the Water Boards ignore that precedent. Claimants respectfully submit that the Water Boards and DOF comments in opposition to the Joint Test Claim lack factual or legal support and that a subvention of funds for the mandates contained in the 2015 Permit is required by article XIII B, section 6 of the California Constitution.

REBUTTAL TO COMMENTS OF WATER BOARDS

I. RESPONSE TO GENERAL COMMENTS

This Section addresses the Water Boards' general comments on the Joint Test Claim, found at WB Comments at 1-33. Responses to the comments of the Water Boards on the specific elements in the Joint Test Claim (WB Comments at 37-70) are found in Section II. Claimants' response to the comments of the Water Boards and the DOF on Claimants' fee authority (WB Comments at 33-37; DOF Comments at 1-2) is found in Section III.

A. Introductory Comments

This Joint Test Claim concerns a regional municipal separate storm sewer system ("MS4") permit issued by the SDRWQCB under the authority of the federal Clean Water Act ("CWA") and state law authority[1] to entities in three counties, including to Claimants. The 2015 Permit (during its original adoption as Order No. R9-2013-0001) was described by the SDRWQCB as representing "an important paradigm shift." 2015 Permit Fact Sheet at F-15.[2] The permit seeks, through a new and extensive Water Quality Improvement Plan ("WQIP") program, to address the priority water quality conditions in the affected watersheds covered by the 2015 Permit, a process characterized by the SDRWQB as a "new permitting approach." *Id.* The major structural difference between the 2015 Permit and SDRWQCB Order No. R9-2010-0016, the previous MS4 National Pollution Discharge Elimination System ("NPDES") permit issued to Claimants (the "2010 Permit") is that the 2015 Permit applies to multiple local agencies in San Diego, southern Orange and southwestern Riverside Counties. The 2010 Permit applied only to Claimants.

In the introduction to their comments (WB Comments at 3-6), the Water Boards make several arguments, all of which will be addressed at length in Section I and II of these Rebuttal Comments and to the extent relevant, in Section III. A few introductory responses can be made, however.

First, regarding the Water Boards' contention (WB Comments at 3) that the 2015 Permit is not a "program" subject to a subvention of funds under article XIII B, section 6 of the California Constitution because compliance with "NPDES laws and regulations" is required of both private industry and local agencies, this specific argument has been twice rejected by the Commission in test claims involving MS4 permits issued to local agencies in Los Angeles and San Diego Counties. *See In re Los Angeles County Regional Water Quality Control Board Order No. 01-182, Permit CAS004001,* Test Claim No. 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21 ("LA County SOD") at 48; SD County SOD at 36.

---

[1] 2015 Permit, Finding I.2, at 1.

[2] The Permit Fact Sheet (Attachment F to the 2015 Permit) "sets forth the principal facts and the significant factual, legal, methodological and policy questions that the [SDRWQCB] considered in preparing [the Permit]." Fact Sheet at F-3. Fact Sheets are required by federal regulation to accompany various permits issued under federal law, including NPDES permits. 40 CFR § 124.8.

Second, regarding the Water Boards' argument that the requirements at issue in this Joint Test Claim are neither new programs nor require a higher level of service (WB Comments at 3), all of the requirements at issue were, under the standards previously set by the Commission in the LA County SOD and SD County SOD, new programs or required a higher level of service.

Third, concerning the Water Boards' contention that Claimants "have not shown (and cannot show) that the challenged provisions constitute state (versus federal) mandates" *id.* (emphasis in original), this comment itself reflects a misunderstanding of mandates law. It is the obligation of the Water Boards, not Claimants, to show that a challenge provision is a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 769. As will be shown in detail below and Section II, the provisions at issue are in fact mandates of the state.[3]

Fourth, the Water Boards' contention that *Dept. of Finance,* the seminal California Supreme Court case examining what constitutes a state, versus federal, mandate in the context of an MS4 permit test claim, is "largely, if not wholly, inapplicable to this case" (WB Comments at 5) is wrong. As will be demonstrated below, *Dept. of Finance* is directly applicable and directly relevant to key issues in this Joint Test Claim.

B. Department of Finance *Applies Directly to the Joint Test Claim*

In relevant part, the Water Boards argue that the 2015 Permit can be distinguished from the former Los Angeles County MS4 permit at issue in *Dept. of Finance* because in the 2015 Permit, the SDRWQCB made findings that the permit requirements were "*necessary* to comply with the CWA and its implementing regulations and, thus, the permit was based entirely on federal authority." WB Comments at 4 (emphasis in original).

As discussed in Section I.G.1 below, the SDRWQCB did not in fact make findings that would allow this Commission to defer to the Board's judgment as to what constituted a federal mandate.[4] Those findings fall far short of the standard established in *Dept. of Finance.*

Dept. of Finance directly applies to the Joint Test Claim, and most particularly these three holdings:[5]

---

[3] The Water Boards also contend that there are "one or more exceptions under mandates law" precluding a subvention of funds. WB Comments at 4. These "exceptions" are discussed below with respect to each provision at issue in the Joint Test Claim.

[4] The other alleged distinctions raised by the Water Boards relate to issues not decided by the Supreme Court in *Dept. of Finance* (WB Comments at 4-5) and are discussed in Sections II and III. These are that the requirements in the 2015 Permit are not new programs or higher levels of service, that *Dept. of Finance* allegedly did not address other federal mandates such as those under a Total Maximum Daily Load ("TMDL") program, that none of the requirements in the former permit were found in EPA-issued MS4 permits, that the question of fee authority is not addressed and that the Court did not consider whether the exception for generally applicable requirements.

[5] *See also* discussion in Section 5 Narrative Statement in Support of Joint Test Claim 16-TC-05 ("Narrative Statement") at 11-17.

- *How is a mandate in a stormwater permit determined to be "federal" or "state"?*

The Supreme Court set forth this test:

> 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," that requirement is not federally mandated.

1 Cal. 5th at 765. In particular, the Court noted the wide discretion afforded the State in determining what requirements would meet the MEP standard. *Id.* at 768.

- *Must the Commission defer to the Water Boards' determination of what constitutes a federal mandate?*

The Supreme Court refused to grant such deference. The Court found that in issuing the former Los Angeles County permit, "the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* at 768. The Court cited as authority its opinion in *City of Burbank v. State Water Resources Control Board* (2005) 5 Cal. 4th 613, 627-28 ("*City of Burbank*"), where it held that a federal NPDES permit issued by a regional water board (such as the 2015 Permit) may contain State-imposed conditions that are more stringent than federal law requirements.

The Court squarely addressed the Water Boards' argument (WB Comments at 28-31) that it should defer to the SDRWQCB's determination that the challenged requirements in the 2015 Permit were federal mandates. Finding that this determination "is largely a question of law," the Court distinguished situations where the question involved the regional board's authority to *impose* specific permit conditions from those involving the question of who would *pay* for them. In the former situation, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768. But, the Court held,

> 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.

Id. at 769.

- *Who Has the Burden of Establishing an Exception to Reimbursement of State-Mandated Costs?*

The Supreme Court placed on the State the burden of establishing that a mandate was in fact federal. In placing that burden, the Court held that because article XIII B, section 6 of the Constitution established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.* at 769.

The Supreme Court concluded that requiring the Commission to defer to a regional board would "leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." *Id.* Looking to the policies underlying article XIII B, section 6, the Court concluded that the Constitution "would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question." *Id.*

The Court held that the *only* circumstance under which deference to the Water Boards' expertise would be appropriate was if a regional board had "found, when imposing the disputed permit conditions, that those conditions were *the only means* by which the [MEP] standard could be implemented," which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15 (emphasis supplied). As discussed in Section I.G.1 below, the SDRWQCB made no such explicit findings in the 2015 Permit.

The Supreme Court further found that in assessing whether federal law or regulation required a particular provision, it was important to examine the scope of the regulatory language. In discussing inspection requirements in the federal stormwater regulations for example, the Court rejected the Water Boards' argument that all permit-required inspections were federally mandated "because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* at 771. The Court held instead that the mere fact that the federal regulations "contemplated some form of inspections, however, does not mean that federal law required *the scope and detail* of inspections required by the Permit conditions." *Id.* (emphasis supplied).

This last holding is important for the Commission to consider in assessing the federal versus state character of the requirements in this Joint Test Claim. Repeatedly, the Water Boards cite general federal regulatory language as mandating the SDRWQCB to impose the specific and prescriptive requirements in the 2015 Permit. However, as the Supreme Court held, the existence of general federal permit regulations does not mean that those regulations "required the scope and detail" of the 2015 Permit provisions at issue in this Joint Test Claim.

This issue was explored in greater depth in the next major appellate case addressing unfunded state mandates in stormwater permits, which is discussed next.

C. *The Court of Appeal's Opinion in* Dept. of Finance II *Reinforces Claimants' Position in This Joint Test Claim*

The issue of federal regulatory authority for provisions in a similarly complex MS4 permit was addressed in detail in *Dept. of Finance II.* While this case is mentioned only in passing by the Water Boards (which claim that it "did not address critical questions here," WB Comments at 5),

Dept. of Finance II provides an even clearer roadmap for the Commission to follow in assessing the federal mandate arguments raised by the Water Boards.

The test claim in *Dept. of Finance II* concerned a 2007 stormwater permit adopted by the SDRWQCB. 18 Cal.App.5th at 671. The board recited that the permit contained "new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." *Id.* Trying to distinguish this permit from the Los Angeles County MS4 permit at issue in *Dept. of Finance,* the State argued that "the San Diego Regional Board here made a finding its requirements were 'necessary' in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make." *Id.* at 682.

The Court of Appeal found this distinction to be of no importance:

> The use of the word "necessary" also does not distinguish this case from *Department of Finance.* By law, a regional board cannot issue an NPDES permit to MS4's without finding it has imposed conditions "necessary to carry out the provisions of [the Clean Water Act]. That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the condition it imposed had done so. . . .
>
> Third, the Supreme Court in *Department of Finance* rejected the State's argument that the permit application somehow limited a board's discretion or denied it a true choice. "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit." . . .
>
> The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the [MEP]. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

Id. at 683 (citations omitted).

Under *Dept. of Finance II,* the fact that a water board may have determined that its required permit conditions were "necessary" to meet the MEP standard or the requirements of federal law and regulations (as the Water Boards do here, WB Comments at 4) is irrelevant to the question of whether those conditions were federal mandates. The Court of Appeal made other holdings of relevance to these Joint Test Claims.

First, while the opinion extends *Dept. of Finance,* it is firmly rooted in the high court's opinion. The court cited *Dept. of Finance* in all of its holdings, and stated specifically that it was "[f]ollowing the analytical regime established by *Department of Finance.*" 18 Cal.App.5th at 667. The court stated that it upheld the Commission "on the same grounds the high court in *Department of Finance* reached its conclusion." *Id.* Indeed, much of the opinion consisted of either direct quotation of *Dept. of Finance* or a detailed description of the high court's analysis in that case. *Id.*

at 668-70; 676-80. These facts, and the fact that the Supreme Court denied review, establish that *Dept. of Finance II* represents controlling law.

Second, *Dept. of Finance II* affirmed the Supreme Court's holding that the language of general regulations describing what must be included in an NPDES permit application did not establish a federal mandate:

> To be a federal mandate for purposes of section 6 [of article XIII B of the California Constitution], however, the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit.

Id. at 683. In particular, the court found that the federal stormwater permit application requirements in 40 CFR § 122.26(d) did not render any of the permit conditions at issue in that case as federal mandates. *Id.* at 684-89. This holding is directly relevant to this Joint Test Claim, as the Water Boards have justified the bulk of the 2015 Permit provisions at issue by reference to those regulations. *See* WB Comments at 40, 43-44, 46, 48, 49, 51, 53, 57-58, 60, 62 and 68 (discussing provisions in 40 CFR § 122.26(d) as authority for 2015 Permit provisions).

Third, unlike in *Dept. of Finance,* where the Court considered only limited provisions of the former Los Angeles County permit, *Dept. of Finance II* considered several complex programmatic permit conditions, including the permittees' jurisdictional management programs, watershed management programs, urban runoff management programs and assessment programs. *Id.* at 671-72. *Dept. of Finance II* thus has direct application to a number of the specific provisions at issue in this Joint Test Claim.

D. *Comments Concerning Legal Basis for the 2015 Permit*

In discussing the federal regulatory background of the 2015 Permit (WB Comments at 6-13), the Water Boards fail to set forth a complete account of the statutory and regulatory basis for MS4 permits such as the 2015 Permit.

The Water Boards correctly note that while a state-issued NPDES permit must meet the minimum requirements of federal law (WB Comments at 6-7), in issuing that permit the SDRWQCB is acting "in lieu of U.S. EPA." *Id.* at 7. The CWA "allows the EPA director to 'suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems *that operate under those state's own laws in lieu of the federal framework." Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal. 4th 499, 522 (emphasis supplied).[6] Thus, a water board is not acting as a mere automaton of the federal government when it issues an MS4 permit.

And, while EPA maintains oversight over California's NPDES permitting programs, that oversight is limited to the permit's compliance with *federal* requirements. If a permitting authority, such as the SDRWQCB, elects to use its federal and state law authority to issue more stringent conditions in an NPDES permit than are required under federal law and regulations, EPA

[6] Attached in Rebuttal Documents, Tab 1. *See also* Narrative Statement at 7.

has no oversight authority over such conditions, which are purely a matter of state law. *See Dept. of Finance,* 1 Cal. 5th at 757 ("California's permitting system now regulates discharges under both state and federal law.")[7]

The Water Boards also fail to address how *Dept. of Finance* and *Dept. of Finance II* have clarified the meaning of the MEP standard as it may apply to test claims. The Boards contend that MEP is an "ever-evolving, flexible and advancing concept." WB Comments at 10. Employing this loose standard would free a regional board to exercise its discretion to impose ever more restrictive and proscriptive permit conditions and still argue that those conditions (imposed not by federal law or regulation but by its own discretion) constituted federal mandates.

The Supreme Court and Court of Appeal declined to follow that reasoning: "The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the [MEP]. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard." *Dept. of Finance,* 1 Cal. 5th at 767-68; "[T]he Supreme Court found the 'maximum extent practicable did not preclude the State from making a choice; rather, it gave the State discretion to make a choice." *Dept. of Finance II,* 18 Cal.App.5th at 681.

As discussed in further detail in Section I.G, the question of whether a permit condition is a federally mandated is one which requires an examination of the regulatory or statutory authorization for that provision and whether that authorization was express or explicit. If not, the provision is a state mandate. *See generally, Dept. of Finance II,* 18 Cal.App.5th at 683.

The Water Boards further contend that the final clause in 33 U.S.C. § 1342(p)(3)(B)(iii), providing that MS4 permits "shall require . . . such other provisions as the Administrator or the State determines appropriate for the control of such pollutants," means that if the SDRWQCB failed to include controls going beyond MEP, "it would violate the Clean Water Act's specific mandate to do so." WB Comments at 11. While a water board may, under the CWA, impose permit requirements exceeding the MEP standard, it does so at its *discretion,* not as a CWA *requirement. Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166. This is evident from the plain language of the statute: "as the . . . *State determines appropriate"* (emphasis supplied).

The Ninth Circuit in *Browner* explained that the final "such other provisions" clause authorizes EPA or a State to exercise its discretion: "Under that *discretionary provision,* the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards . . . ." 191 F.3d. 1166 (cited with approval in *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 886).

---

[7] The Water Boards also assert that MS4 permit application requirements are "extensive." WB Comments at 9. In fact, while there are a number of specific items to be included in the application, the federal regulations contain little specific direction as to how those items are to be set forth in the permit, as *Dept. of Finance II* found. 18 Cal.App.5th at 684-89.

A federal statute which authorizes a State to exercise its discretion in taking, or not taking, a permitting action is not mandating.[8]

E. *Comments Concerning Permit Background*

The Water Boards' discussion of the development of the 2015 Permit and predecessor MS4 permits (WB Comments 13-18) requires a response. The Water Boards apparently intend this discussion to support their argument that various mandates in the 2015 Permit did not impose "new programs" or require "higher levels of service" because the 2015 Permit allegedly contained provisions "that were very similar or equivalent to earlier permits." WB Comments at 14. As a factual matter, Claimants dispute this allegation, as discussed in Section II. The Commission has, however, already held that if a pre-existing MS4 requirement is expanded in a succeeding permit, that expansion represents a new program or higher level of service. SD County SOD at 49.

Also, the Water Boards ignore *Browner, supra,* in their discussion of the requirement for permittees to meet numeric receiving water quality standards (WB Comments at 15), stating that a precedential State Board order (Order WQ 99-05) "reflects" a U.S. EPA requirement. *Id.* In fact, that EPA requirement was in error, as it was issued prior to the Ninth Circuit's holding in *Browner* that MS4 permittees were *not* required to meet numeric water quality standards. 191 F.3d at 1164-65. As the Ninth Circuit also held, however, EPA or a state could, as a discretionary matter, impose such requirements. *Id.* at 1166.

Finally, while the Water Boards set forth in detail the rationale for the regulatory approaches followed in the 2015 Permit and earlier permits (WB Comments at 17-18), that rationale is not relevant to the issues in this Joint Test Claim. The Commission is not empowered to judge whether the SDRWQCB was justified in including the requirements in the 2015 Permit, including those at issue in these Joint Test Claims. As the Supreme Court held in *Dept. of Finance,* the Water Boards were authorized to do so. 1 Cal. 5th at 769. The "narrow question" before the Commission, as the Court put it, "is who will pay for them." *Id.*

F. *The Mandates Set Forth in the Joint Test Claim Are New Programs and/or Represent Requirements for Higher Levels of Service*

Article XIII B, section 6 of the California Constitution requires that the Legislature provide a subvention of funds to reimburse local agencies when the Legislature or a state agency "mandates a new program or higher level of service on any local government." The Water Boards assert that the 2015 Permit provisions at issue in the Joint Test Claim do not impose new programs or require higher levels of service by the Claimants (WB Comments at 19-28.) This assertion is supported neither by the facts nor the law.

---

[8] The Water Boards also make claims regarding the federal law basis for Total Maximum Daily Loads ("TMDL") requirements. WB Comments at 11-12. These assertions are addressed in Section II.A.2.c. below. The Water Boards also argue generally that federal law requires monitoring and reporting requirements in NPDES permits. WB Comments at 12-13. The discussion of why those requirements in the 2015 Permit still constitute an unfunded state mandate are found throughout Section II.

1. *The Requirements of the 2015 Permit at Issue in The Joint Test Claim Represent a "Program"*

The Water Boards first argue that the CWA requires all dischargers of stormwater, including municipalities, private industry, and state and federal government, to obtain NPDES permits. WB Comments at 21. Thus, claim the Water Boards, "local government is not singled out." *Id.*

This very argument has, however, already been addressed – and rejected – by the Commission. In the SD County SOD, the Water Boards argued "that the permit . . . is not unique to government because NPDES permits apply to private dischargers also." SD County SOD at 30. The Commission rejected that argument, noting that the focus on the inquiry of whether a reimbursable program exists must be on the *executive order itself, e.g.,* the permit:

> [W]hether the law regarding NPDES permits generally constitute a 'program' within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the *permit in this test claim* constitutes a program.

SD County SOD at 36 (emphasis supplied). *See also* LA County SOD at 48.

The Commission was applying *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919, where the court dismissed a similar argument: [T]he applicability of permits to public and private dischargers does not inform us about whether a *particular permit or an obligation thereunder* imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6." *Id.* (emphasis supplied). The court understood that it is the permit itself, or some obligation thereunder, which sets the frame of reference for determining whether there is a state-imposed mandate involving a governmental function of providing services to the public or a unique requirement placed on local government.

In the SD County SOD, the Commission, finding that the permit mandates before it constituted a "program," held that the San Diego County permit applied only to municipalities, that no private entities were regulated thereunder, and that the permit provided a service to the public through its requirement for the permittees "to reduce the discharge in urban runoff to the maximum extent practicable." SD County SOD at 36. Those same facts, and the Commission's analysis, apply to the 2015 Permit.

The Water Boards next argue (WB Comments at 21) that the 2015 Permit does not carry out a governmental function of providing services to the public. Reprising the "all dischargers must have NPDES permits" argument, the Water Boards contend that since Claimants were required to obtain NPDES permits for their MS4 discharges, they were obtaining an NPDES permit as just another point source discharger under the CWA, not as a governmental entity. WB Comments at 21.

This argument ignores any consideration of the specific permit provisions at issue in this test claim, contrary to the requirements of *County of Los Angeles v. Commission on State Mandates'* focus on "whether a particular permit or an obligation thereunder" constitutes a state

mandate. 150 Cal.App.4th at 919. Where some MS4 permit provisions might be analogous to those in permits issued to non-municipal permittees, others, including the ones at issue in this Joint Test Claim, are not. Claimants are providing a governmental service to citizens of Riverside County that private parties are not called upon to provide. This is discussed in more detail in Section II with respect to specific permit provisions.

This argument has already been addressed, and rejected, by the Commission. The Water Boards, not surprisingly, criticize these holdings, arguing that the Commission's approach "fails to appropriately focus on whether the permit mandates functions peculiar to government" and "obscures" the CWA's focus on the regulation of pollutant discharges. WB Comments at 21. The Water Boards then argue that they have, within the San Diego Region, "issued hundreds of NPDES permits to both public and private entities." *Id.* at 24.

But that criticism misses the point made by *County of Los Angeles, supra,* and the two previous MS4 test claim SODs issued by the Commission. The fact that NPDES permits may be issued to both public and private dischargers does not render the NPDES permit for MS4 discharges, a permit applicable *only* to municipalities and addressing specific municipal requirements, not a "program."

The "hundreds" of NPDES permits issued by the Water Boards did not, for example, require their permittees to:

- Develop a Water Quality Improvement Plan ("WQIP") requiring, among other things, that Claimants identify the water quality priorities within the watershed management area ("WMA") covered by the WQIP; consider various enumerated factors to develop a list of priority water quality conditions ("PWQCs"); identify and prioritize known and suspected sources of pollutants contributing to the PWQCs; identify strategies to improve water quality in MS4 discharges and/or receiving waters; identify and develop water quality improvement goals and schedules for achieving the numeric goals; identify and develop strategies to address the highest PWQCs; identify and incorporate numeric goals identifies strategies to be implemented in the WMA; develop and incorporate an integrated monitoring and assessment program to assess progress toward achieving numeric goals and schedules addressing the highest PWQC; implement and update the WQIP and undertake a detailed public participation scheme regarding development and updating of the WQIP.[9]

- Establish defensible standards for determining the location of critical sediment yield areas to be avoided with a watershed and implementing such standards with respect to public priority development projects.[10]

- Update a municipally developed Best Management Practices ("BMP") Design Manual in accordance with specified requirements.[11]

---

[9] 2015 Permit, Provisions B.2-6, F.1.a-b, F.2.c, F.3.b(3), F.3.c and A.4.

[10] 2015 Permit, Provision E.3.c.(2).

[11] 2015 Permit, Provisions E.3.d and F.2.b.

- Create and update an inventory of residential areas meeting certain requirements and inspect such areas.[12]

- Develop a program to retrofit and rehabilitate areas of existing development and in particular, streams, channels, and/or habitats in areas of existing development.[13]

- Develop and implement an Enforcement Response Plan to address how the permittee will use its legal authority to achieve compliance with the requirements of the 2015 Permit.[14]

- Update Jurisdictional Urban Runoff Management Plans required to be developed by each permittee, including establishing a public participation and stakeholder involvement process.[15]

- Carry out Transitional Dry Weather Field Screening requirements requiring inspections of MS4 outfalls and other observation activities.[16]

- Carry out two special studies regarding pollutants within the WMA and one other study regarding conditions generally in the San Diego Region.[17]

- Evaluate monitoring data and special studies and other information and assess the status and trends of receiving waters and conduct an assessment of non-stormwater discharges reduction and stormwater pollutant discharges reduction.[18]

- Develop, following an analysis of conditions in the WMA, candidate projects to allow PDPs to use alternative offsite BMPs for stormwater and hydromodification control and to review PDPs to ensure that alternative offsite BMPs meet enumerated requirements.[19]

- Conduct special dry weather monitoring at a receiving water monitoring station.[20]

The scope of these exclusively municipal and governmental requirements also refutes the second prong of the Water Boards' "program" argument, that the 2015 Permit does not impose

---

[12] 2015 Permit, Provision E.5.

[13] 2015 Permit Provision E.5.e.

[14] 2015 Permit Provision E.6.

[15] 2015 Permit Provision F.2.a.

[16] 2015 Permit Provision D.2.a.(2).

[17] 2015 Permit Provision D.3.

[18] 2015 Permit Provision D.4.

[19] 2015 Permit Provision B.3.B.(4) and E.3.c.(3).

[20] 2015 Permit Provision D.1.c.(6).

"unique requirements on local governments. WB Comments at 21. The activities described above are unique to Claimants' specific local agency governmental roles, and are not required of the "hundreds" of other NPDES permits issued in the San Diego Region.

The Commission previously has held that MS4 permits, such as the 2015 Permit, do impose unique requirements on local agencies. *See* SD County SOD at 36; LA County SOD at 49. As the Commission held in the latter, "the issue is not whether NPDES permits generally constitute a 'program' within the meaning of article XIII B, section 6. The only issue before the Commission is whether *the permit in this test claim* . . . constitutes a program because this permit is the only one over which the Commission has jurisdiction." *Id.* (emphasis supplied). These holdings govern the response of the Commission to this Joint Test Claim.

The Water Boards, again collapsing the requirements in an NPDES permit issued to a private discharger with the very different and more extensive requirements in permits issued to a municipality, next argue that the 2015 Permit does not impose unique requirements on local governments because Water Boards are implementing general CWA requirements which constitute "laws of general applicability" which "do not 'force' programs on localities." WB Comments at 22. The Water Boards contend that the "state policy" implemented by the 2015 Permit is that the CWA and Chapter 5.5 of the California Porter-Cologne Act require NPDES permits to "be consistent with the Clean Water Act," a policy which "applies generally to all residents and entities in the state and does not apply uniquely to local governments." *Id.*[21]

This argument ignores the fact that the requirements of the CWA and its implementing regulations *directed to MS4 owners and operators* are completely separate from the NPDES requirements applicable to non-municipal dischargers. In addition to the specific requirements in the statute applicable to MS4s, relating to programs designed specifically to address the operation of MS4s, the federal CWA implementing regulations for MS4 permits are contained in a completely separate section (40 CFR § 122.26).

Further, it cannot be disputed as a matter of fact that the 2015 Permit is "imposed uniquely upon local government." The permit's second page states that the "Riverside County Copermittees" (Claimants District, County and the Cities of Murrieta, Temecula and Wildomar) "are subject to waste discharge requirements set forth in this Order." 2015 Permit at 2. The remainder of the requirements in the permit, including those at issue in the Joint Test Claim, are exclusively directed to Claimants. The 2015 Permit is imposed uniquely on local agencies, and it serves a public purpose, *e.g.*, the regulation of pollutants in discharges. *See* 2015 Permit Findings, "Discharge Characteristics and Runoff Management," Section I.8-19, 2015 Permit at 3-6.

---

[21] The Water Boards allege that "[n]umerous provisions of the 2015 Permit are requirements of general applicability" which are "similar" to those in permits issued to private dischargers (WB Comments at 22), but nowhere specifically identify those alleged requirements or how they are the same as those for private dischargers. For example, while both private NPDES permittees and MS4 permittees are required to monitor discharges, the Water Boards nowhere show that those monitoring requirements are identical, and that there are not unique monitoring requirements imposed on local government. And, obviously, individual NPDES permittees are not required to develop WQIPs, do special studies, conduct assessments, inspect third-party facilities or develop plans for development, all of which, and more, are required in the 2015 Permit. *See* Narrative Statement at 18-63.

The 2015 Permit, moreover, regulates the performance by local governments of a core duty, the protection of the life and property of residents from flood waters. Unlike industrial or commercial NPDES permittees, whose only legal responsibility is the lawful discharge of water from their facilities, municipalities must ensure the safe conveyance and discharge of stormwater in order to protect public health and property. An industrial facility can choose not to discharge by changing or ceasing its operations. A local agency operating an MS4 has no such choice when storms arrive. It must safely handle stormwater or face inverse condemnation and tort liability for flooding resulting from a failure to do so. *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.[22] An MS4 operator is legally compelled to obtain an MS4 permit so that it can continue to carry out the uniquely governmental function of safely handling and discharging stormwater.

The Water Boards cite *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51 in support of their argument that the requirements of the 2012 Permit do not constitute a "program." WB Comments at 23. *City of Sacramento,* however, is inapposite. The Supreme Court there was considering whether a state statute which had the effect of requiring local governments to provide unemployment compensation to their own employees represented a "program." The Court concluded that simply requiring local governments to cover their employees' unemployment costs, a requirement "'indistinguishable in this respect from private employers,'" was not a requirement imposed uniquely on local government. *Id.* at 67 (quoting *County of Los Angeles v. State of California, supra,* 43 Cal. 3d at 58).

The Court also distinguished *City of Sacramento* from other mandates cases on the ground that it related to the imposition of costs "*unrelated* to the provision of public services . . . ." *Id.* (emphasis in original). The requirement to assume the costs of unemployment compensation were no different for a local government than for a private employer. The Court cautioned, however, that its holding was not intended to give the state free rein to "impose expensive unfunded obligations against local agencies' article XIII B spending limits. On the contrary, our standards require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." *Id.* at 70 (emphasis in original).

The requirements at issue in these Joint Test Claims are precisely those which "the state freely chooses to impose on local agencies," particularly governmental costs "which they were not previously required to absorb." Unlike the unemployment compensation statute in *City of Sacramento,* the 2015 Permit requires local governments to undertake various activities while undertaking the "peculiarly governmental" role of controlling flood waters to protect public health and safety. Again, as the Commission has held, it is the requirements of the 2015 Permit which constitutes the "program" under review, and the requirements of that permit are not generally applicable. SD County SOD at 36; LA County SOD at 49.

City of Richmond v. Commission on State Mandates (1998) 64 Cal.App.4th 1190, also cited by the Water Boards (WB Comments at 23-24), is equally inapposite. *City of Richmond* involved a statute which removed a restriction on the right of survivors of deceased public employees from

[22] Rebuttal Documents, Tab 1.

receiving both public retirement and workers compensation benefits. As a result, the city alleged that a state mandate had been created, since it was now responsible for the payment of increased survivor benefits. *Id.* at 1194. The court found that the resulting higher cost to the local government of compensating its employees was "not the same as a higher cost of providing services to the public." *Id.* at 1196. The court distinguished cases like *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, where "executive orders applied only to fire protection, a peculiarly governmental function." *Id.* That phrase precisely defines the 2015 Permit, which applies only to the operation and discharge of municipal storm drain systems, another "peculiarly governmental function."

City of Richmond, like *City of Sacramento,* involved an employment benefits statute which did not govern local governments. As the court found, by removing the limitation on the rights of survivors, "the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no 'unique requirements' on local governments." *Id.* at 1199. Also, as a statute, the mandate in *City of Richmond* differed from an executive order applying to a "peculiarly governmental function," as was the case in *Carmel Valley Fire Protection Dist.* and is the case with respect to the 2015 Permit. *City of Richmond* is simply a variation on *City of Sacramento,* and as irrelevant to this Joint Test Claim as the earlier case.

The Water Boards further ask the Commission to speculate as to whether the SDRWQCB had issued "identical NPDES permits to local governments and industrial dischargers," it still would find that this triggered a subvention of funds. WB Comments at 24. This is an absurd hypothetical, because such a permit would not be lawful. Permits issued to MS4 operators contain requirements that apply only to municipalities[23] and relate to the particular role that MS4 operators play in addressing stormwater pollution from diverse and uncontrollable sources. Moreover, the SDRWQCB has not chosen to issue such a permit, but instead to issue a 139-page permit (minus appendices) replete with specific mandates directed only at municipalities operating MS4s within the San Diego region. It is those mandates which are at issue before the Commission. And, under the Commission's prior decisions, it is those mandates which constitute a "program."[24]

Finally, the Water Boards' argument that NPDES requirements are "[l]aws of general applicability" ignores the fact that both the California Supreme Court and the Court of Appeal have decided mandates cases involving stormwater NPDES permits and in so doing have

---

[23] *See* 40 CFR § 122.26(d), discussed throughout. These municipality-specific requirements include, for example, requirements relating to new development and maintenance of public streets. 40 CFR § 122.26(d)(2)(iv)(2)-(3).

[24] The Water Boards note (WB Comments at 27) that in the *Dept. of Finance* case on remand from the Supreme Court, the trial court found that the mandated programs at issue in the 2001 Permit were not subject to a subvention of funds because, even though the requirements of an MS4 permit were in fact "unique" to local governments, such requirements were merely "incidental" to laws which allegedly applied to all residents. Claimants submit that the trial court ignored the structure of the CWA and its implementing regulations and the holdings of *County of Los Angeles v. Commission on State Mandates, supra,* and *Dept. of Finance II* in reaching this holding, which was not supported by extensive case or statutory analysis. Moreover, the trial court ignored the undisputed fact that the LARWQCB exercised its discretion to impose such requirements, hardly an "incidental" act and, under *Dept. of Finance II,* indicative of a state mandate. 18 Cal.App.5th at 683. Claimants have filed a Notice of Appeal with respect to that decision.

necessarily interpreted the California Constitution. Had the justices any sympathy for the "law of general applicability" argument (which, as a question of law, they were free to address *sua sponte*), it is doubtful that they would have gone through a constitutional analysis when a fairly simple statutory analysis would have sufficed to deny the viability of the test claims at issue and, indeed, any test claims involving NPDES municipal stormwater permits.

2. *The Mandated Programs Set Forth in the Joint Test Claim Represent "New Programs" as a Matter of Fact and Law*

Claimants respond in detail in Section II to the Water Boards' contention that the requirements at issue in the Joint Test Claim do not represent "new programs" (WB Comments at 25-26). But the following points can be made here. As the Water Boards concede, a "program is 'new' if the local government had not previously been required to institute it." WB Comments at 25, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189. All of the mandated programs identified in the Joint Test Claim are "new" in that they were not previously required to be performed by Claimants under the 2010 Permit or were new obligations imposed to expand on existing permit requirements.

The Water Boards simply contend that, without specific citation to either the 2015 Permit or previous MS4 permits issued to Claimants, "many of the requirements at issue in the Test Claims are not new." WB Comments at 25. The Water Boards cite no such allegedly non-new programs, relying instead on the argument that the "inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the Clean Water Act and these new and advanced measures do not constitute a 'new program.'" *Id.*

This argument has previously been rejected by the Commission. In the San Diego County test claim, the DOF similarly argued that since additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, they were not new requirements. SD County SOD at 49. In response, the Commission held that it "did not read the federal [CWA] so broadly" and that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service." *Id.* The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50.

The Commission has held that any new requirements not contained in a previous permit, even when those programs were only expanding on a program contained in the previous permit, constituted a new program or higher level of service. SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan ("SUSMP") and development of local SUSMPs, requirement in succeeding permit to submit a Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service). The same analysis applies to the requirements at issue in these Joint Test Claims.

3. *The Mandated Programs in the Joint Test Claim Impose Higher Levels of Service on Claimants*

Claimants have demonstrated here and in their Narrative Statement that the mandates at issue in this Joint Test Claim were new programs, eligible for a subvention of funds. Having established this, Claimants need go no further. To the extent that such mandates also represented a "higher level of service," Claimants have also established this element. In the Narrative Statement, Claimants set forth precisely how the requirements of the 2015 Permit were additional to those in the 2010 Permit. These new requirements imposed separate and additional increased costs on Claimants. As noted above, the Commission has found that even enhancement of requirements found in previous MS4 permits constitutes a "higher level of service" in the subsequent permit. SD County SOD at 53-54.

As they argued in contending that the 2015 Permit's requirements were not a "program," the Water Boards improperly collapse the Permit's multiple and complex requirements into a simple requirement for "better water quality," a goal which, they contend, has remained the same over the history of MS4 permitting. WB Comment at 26. Again, it is not the "overall goals" of the CWA and Porter-Cologne which are the "program" before the Commission.

The provisions of the 2015 Permit require specific and different and/or enhanced services to the public by the permittees, including requirements to prepare a complex and comprehensive WQIP, manage critical sediment yield areas, update the BMP design manual, develop and implement a residential inspection program, plan for retrofitting of existing development and stream rehabilitation, update the enforcement response plan, update JRMPs, conduct monitoring field screen activities, conduct special studies, conduct assessments, devise alternative compliance requirements for structural BMPs and conduct dry weather receiving water hydromodification monitoring. These requirements all involve provide an enhanced service to the public and result in increased costs to the permittees, as set forth in the Section 6 Declarations.[25]

The fact that these requirements are exclusively imposed on the permittees under the 2015 Permit will be discussed in detail in Section II. And, while the Water Boards characterize these requirements (where they expand on a requirement from the 2010 Permit) as "merely refinements of existing requirements" (WB Comments at 28), the Commission has held that such expansions on existing requirements in fact are higher levels of service, as noted above. SD County SOD at 53-54.

The Water Boards also contend that the 2015 Permit required only that "municipalities reallocate some of their resources in a particular way." WB Comments at 27. The Water Boards never explain how, with appropriate documentary or testimonial evidence, the mandates at issue in the Joint Test Claim could be paid for if Claimants "reallocate" local agency resources. *Id.* The requirements in the 2015 Permit imposed actual and distinct increased costs on Claimants, as reflected by the Declarations.

---

[25] *See* Section 6 Declarations in Support of Test Claim ("Declarations"), ¶ 8(a-1).

The Water Boards' citation of *County of Los Angeles v. Commission on State Mandates, supra,* (WB Comments at 26 nn.148-49) is inapposite. In that case, the court held that a state requirement that county law enforcement officers be trained in domestic violence did not impose a higher level of service because the mandate involved adding a single course to "an already existing framework of training." *Id.* at 1194. The mandate, concluded the court, "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training." *Id.*

This is not what the SDRWQCB did in mandating the 2015 Permit programs. The board required entirely new efforts or, in some cases, substantial upgrades to existing programs, both of which constitute new programs or requirements for a higher level of service under Commission precedent. The Water Boards contend that the "iterative process" for refining MS4 permits means that higher levels of permit specificity are do not represent a higher level of service. WB Comments at 27. The Commission, as discussed, has already rejected a similar argument made by the DOF in the San Diego County test claim. *See* SD County SOD at 49-50.

The Water Boards also argue that the "costs incurred must involve programs previously funded exclusively by the state." WB Comments at 27. This argument, and the cases cited, also do not apply to the Joint Test Claim. *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 involved a statute which authorized counties to charge cities and other local entities for the costs of booking persons into county jails. The court determined that the financial and administrative responsibility for the operation of county jails and detention of prisoners had been the sole responsibility of counties prior to adoption of the statute. The shifting of responsibility was thus from the *county* to the cities, not from the *State* to the cities, and because of that, the statute did not impose a state mandate. *Id.* at 1812. Here, the requirements in the Joint Test Claim involved imposition of a mandate by a state agency, *e.g.,* the SDRWQCB, on local government, *e.g.,* Claimants. As such, they fall well within the purpose of article XIII B, section 6.

County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264 also is inapposite. The court found there that the statute at issue merely reallocated property tax revenues for public education, which for years had been a shared state and local responsibility, and that there was no evidence of any increased costs imposed on local government by operation of the statute. *Id. at* 1283. By contrast, the Joint Test Claim involves the adoption of specific new provisions in an executive order which require the Claimants to incur new costs. *See* Narrative Statement, Sections V.A.3-L.3; V.A.5-L.5.

The Water Boards ignore the holdings of this Commission in prior test claims, mischaracterize the evidence set forth in the Joint Test Claim and misapply cases that are inapposite to the factual and legal issues presented here. The requirements of the 2015 Permit at issue represent the imposition of a higher level of service on the Claimants.

G. *The Water Boards Have Not Met the Burden of Establishing That Federal Law Mandated the Requirements in the 2015 Permit*

The Supreme Court has held that water boards have the burden of establishing that a requirement in a stormwater permit is federally mandated. *Dept. of Finance,* 1 Cal. 5th at 769. The Water Boards have not met that burden here.

Dept. of Finance sets forth this test to determine the potential existence of a federal, as opposed to state, mandate in an MS4 permit:

> 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.

Id. at 765. In that case, the Supreme Court rejected the State's argument that deference should be afforded the regional board's determination that requirements in an MS4 permit were federally mandated. Calling that determination "largely a question of law," the Court concluded:

> Had the Regional Board found, when imposing the disputed Permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the Board's expertise in reaching that finding would be appropriate.

Id. at 768. Such a finding, cautioned the Court, "would be case specific, based among other things on local factual circumstances." *Id.* at 768 n.15. Thus, blanket statements by a regional board that a permit, or a particular provision of that permit, is a federal mandate do not pass muster under *Dept. of Finance.*

Dept. of Finance II provides further guidance to the Commission, and the court there is no more deferential to the Water Boards. In explaining what it means for federal law to "compel" the state to impose a requirement, the Court of Appeal held that "the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit." 18 Cal.App.5th 683 (*citing Dept. of Finance,* 1 Cal. 5th at 770-71). Thus, held the court, citing to "regulations broadly describing what must be included in an NPDES permit application by an MS4" was not the same as "express mandates directing the San Diego Regional Board to impose the requirements it imposed." *Id.*

The court then examined each of the provisions raised in the test claim and found that none was expressly or explicitly required by the federal permit application regulations. The court concluded that the San Diego County MS4 permit requirements were state, not federal, mandates. 18 Cal.App.5th at 684-89. (The fact that the general MS4 permit application regulations do not expressly or explicitly require the measures at issue in this Joint Test Claim is discussed in Section II below.)

The Water Boards argue (WB Comments at 29) that the SDRWQCB "exercised its discretion under federal law" and that because it imposed "requirements that it determined were necessary to implement federal law and meet the CWA standards in the Permit supports the conclusion that the permit provisions are federal, not state mandates." This argument ignores both the facts and the law. Instead, it is the *very exercise of that discretion* that the Court of Appeal determined constituted a state mandate: "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the [MEP] standard establishes only that the San Diego Regional Board exercised its discretion. . . . . Its use of the word 'necessary' did not equate to finding the permit requirement was the *only* means of meeting the standard." 18 Cal.App.5th at 682 (emphasis in original).

1. *The Permit Findings Cited by the Water Boards Do Not Require the Commission To Defer to the Water Boards on the Question of Whether the Mandates are Federal or State*

The Water Boards argue that, unlike the 2001 Permit at issue in *Dept. of Finance,* "the San Diego Water Board here made specific findings that the Permit was based on federal law in very section of the Permit and the Fact Sheet under the factual circumstances presented." WB Comments at 29 (emphasis in original). The Water Boards then present four findings which, while they claim represent "examples," also "[c]ollectively . . . set forth the [SDRWQCB's] regulatory basis for issuing the Regional Permit and make it clear that the Board intended to and did rely solely on federal law in issuing the Permit." WB Comments at 29-30.

Two responses are in order. First, none of the findings meet the *Dept. of Finance* standard that the specific requirement at issue was, as a matter of fact, the *only* means by which the federal MEP standard could be achieved. Second, the findings cited by the Water Boards (WB Comments at 29-30) do not in fact support their contention.

The following are the findings cited by the Water Boards and Claimants' response:

- "This Order implements federally mandated requirements under CWA Section 402 (33 USC section 1342(p(3)(B))."

Response: This sentence (part of Finding 32, 2015 Permit at 12) does not meet the standard for a finding as to which the Commission must give deference, for it does not reference any particular requirement at issue in the Joint Test Claim, much less indicate that the requirement is the only means by which the MEP standard can be obtained. It is, instead, an unsupported general assertion by the SDRWQCB that the 2015 Permit is only federal in nature, the same sort of assertion that was afforded no deference by Supreme Court and the Court of Appeal in *Dept. of Finance* and *Dept. of Finance II.*

Tellingly, it is included in a finding entitled "Unfunded Mandates" which begins: "This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution." The only agency qualified to make that determination is the Commission, which has sole jurisdiction in such matters. *Kinlaw v. State of*

California (1991) 54 Cal. 3d 326, 333. This finding by the SDRWQCB is *ultra vires* and entitled to no weight.

- "The requirements of this Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the MEP and to protect water quality. . . . These findings are the expert conclusions of the principal state agency charged with implementing the NPDES program in California."

Response: This finding (Permit Fact Sheet at F-35, emphasis added by Water Boards)[26] specifically relies upon two superior court rulings overturning the Commission's LA County and SD County SODs:

> In recent months, the County of Los Angeles and County of Sacramento Superior Courts have granted writs setting aside decisions of the [Commission] that held certain requirements in Phase I permits constituted unfunded mandates. In both cases, the courts have found that the correct analysis in determining whether an MS4 permit constituted a state mandate was to evaluate whether the permit as a whole exceeds the MEP standard.

Id. In *Dept. of Finance* (the appeal of the Los Angeles County decision) and *Dept. of Finance II* (the appeal of the San Diego County decision), the Supreme Court and Court of Appeal specifically rejected the "as a whole" approach and required instead that for there to be deference to the water board's finding, that finding must relate to the specific requirement at issue and conclude that the requirement was the only means by which the MEP standard could be implemented, which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15. The quoted finding is wrong on the legal standard to be followed by the Commission.

- "This Order prescribes conditions to assure compliance with the CWA requirements for owners and operators of MS4s to effectively prohibit non-storm water discharges into the MS4s, and require controls to reduce the discharge of pollutants in storm water from the MS4s to the MEP."[27]

Response: Again, this finding does not meet the *Dept. of Finance* test for would constitute a finding that should be afforded deference by the Commission. Nor does the additional finding language quoted by the Water Boards in footnote 166 of their Comments. That other finding asserts that a "determination of whether the conditions contained in this Order exceed the requirements of federal law cannot be based on a point by point comparison of the permit conditions and the minimum control measures that are required 'at a minimum' to reduce pollutants to the maximum extent practicable and to protect water quality (40 CFR 122.34)."

Two additional responses are in order. First, comparing permit conditions and the permit application requirements of 40 CFR § 122.26(d) was exactly the test that the court in *Dept. of*

---

[26] The Water Boards cite to a different page of the Fact Sheet, F-30, for this finding. However, the version of the Fact Sheet applicable to the 2015 Permit contains this finding on Page F-35. That version of the Fact Sheet is cited in these Rebuttal Comments.

[27] 2015 Permit, Finding 3, at 1.

Finance II employed in determining whether conditions were "explicitly" or "expressly" required by the federal regulations. *See* Section I.C, above. Second, the regulation referenced in the finding, 40 CFR § 122.34, refers to smaller MS4 systems covered by so-called "Phase II" federal regulations. The 2015 Permit was adopted as a "Phase I" permit, which apply to stormwater sewers serving larger population areas.[28] Phase I permits are governed by regulations found at 40 CFR § 122.26(d). The regulations governing Phase II permits are found at 40 CFR § 122.34. *See also* 40 CFR § 122.26(b)(18)(ii) (small MS4s are MS4s "[n]ot defined as 'large' or 'medium' [MS4s].") The Phase II regulations do not apply to Phase I permittees and cannot serve as the source of a federal "mandate."

- "The authority exercised under this Order is not reserved state authority under the CWA's saving clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not 'less stringent' than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for [MS4s.]. To this extent, *it is entirely federal authority that forms the legal basis to establish the permit provisions. (*See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)"[29]

Response: Any finding that a permit condition stems entirely from federal authority must be "case specific," taking into account "local factual circumstances." *Dept. of Finance,* 1 Cal.5th at 768 and n.15. The finding quoted above is neither case specific nor does it take into account "local factual circumstances." It is boilerplate. It can be found in almost identical language in other MS4 permits and/or permit fact sheets adopted by regional boards across the state prior to adoption of the 2015 Permit by the SDRWQCB. *See* Declaration of David W. Burhenn, attached hereto ("Burhenn Decl.") and Exhibits A-C. This language can be found in permits issued by the Central Valley Water Board to the City of Modesto,[30] by the San Francisco Bay Water Board to permittees discharging to San Francisco Bay,[31] and by the Los Angeles Water Board to Ventura County[32] permittees.

The Water Boards suggest that to meet the *Dept. of Finance* test, "the regional water boards must make an express finding that the particular set of permit conditions finally embodied in a

---

[28] 2015 Permit, Finding 1, Permit at 1.

[29] Permit Fact Sheet at F-34, quoted in WB Comments at 30 (emphasis added by Water Boards).

[30] *Compare* Order No. R5-2008-0092, Finding 30 at 6-7 *with* 2015 Permit Fact Sheet at F-34. An excerpt of this permit is attached as Exhibit A to the Burhenn Decl. As with all such exhibits, the Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States) (Rebuttal Documents, Tab 2), Govt. Code § 11515 (Rebuttal Documents, Tab 2) and Cal. Code Regs., tit. 2, section 1187.5, subd. (c).

[31] *Compare* Fact Sheet, Order No. R2-2009-0074 (as revised November 28, 2011) at App I-12 to 13 *with* 2015 Permit Fact Sheet at F-34. An excerpt of this fact sheet is attached as Exhibit B to the Burhenn Decl.

[32] *Compare* Order No. R4-2009-0057, Finding E.7 at 12 *with* 2015 Permit Fact Sheet at F-34. An excerpt of this permit is attached as Exhibit C to Burhenn Decl.

given permit is required to meet that federal standard, and must support that finding with evidence." WB Comments at 30. This suggestion misstates the *Dept. of Finance* test and ignores the requirement set forth in *Dept. of Finance II* that to be a federal mandate, federal law or regulation must expressly or explicitly require the provision. None of the Water Boards' findings in fact make "the express finding" referenced.

The Water Boards also argue that since the SDRWQCB "determined that the requirements in the Regional Permit are practicable," and Claimants supposedly did not present evidence that they were impracticable, "the Commission cannot find these provisions exceed MEP and therefore are entitled to subvention." WB Comments at 31. This contention again ignores the controlling case law. The Water Boards, not Claimants, bear the burden of demonstrating that a federal mandate exists, either through an express finding that the permit requirement is the "only means" by which the MEP standard can be achieved or by demonstrating that federal law or regulation expressly or explicitly requires the inclusion of the requirement in the permit. Moreover, *Dept. of Finance II* teaches that a regional board finding the "permit requirements were 'necessary' to meet the [MEP] standard establishes only that the [regional board] exercised its discretion." 18 Cal.App.5th at 682.

Were the Water Boards correct, all a regional board would have to do is to proclaim, without reference to the evidence or the record, that permit requirements were practicable, then flip to claimants the burden of showing, with evidence, that they were not. While the Water Boards have attempted to do so here, that is not the law. 1 Cal. 5th at 769.

2. Dept. of Finance *and* Dept. of Finance II *Apply to All Requirements of the 2015 Permit*

The Water Boards contend (WB Comments at 31) that *Dept. of Finance* and *Dept. of Finance II* were limited to a consideration of the MEP standard as it applied to requirements in the former Los Angeles County MS4 permit and the San Diego County MS4 permit. Thus, they argue, the holdings in those cases do not extend to the separate CWA requirements requiring the effective prohibition of the discharge of non-stormwater to the MS4, provisions relating to TMDLs and provisions relating to monitoring and reporting.

This argument, however, ignores the analysis that the Supreme Court performed in *Dept. of Finance* to identify whether a mandate was federal or state. In formulating that test, the Court discussed three unfunded mandates cases, none of which involved stormwater permits: *City of Sacramento, supra*, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 and *Hayes, supra*. *See Dept. of Finance,* 1 Cal. 5th at 765 ("From *City of Sacramento, County of Los Angeles, and Hayes,* we distill the following principle").

The Supreme Court's statement of that principle, that if "federal law gives the state discretion whether to impose a particular implement requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated," does not refer to any stormwater permit requirements, much less the MEP standard. To illustrate the principle, the Court cited yet another non-CWA case, *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal.App.3d 794.

Further, the requirement that federal law or regulation "must 'expressly' or 'explicitly' require the condition imposed in the permit" established in *Dept. of Finance II*, 18 Cal.App.5th at 683, was without reference to the MEP standard. This separate and independent test applies as well to the non-stormwater, TMDL and monitoring and reporting provisions at issue in these Joint Test Claims. The holdings in *Dept. of Finance* and *Dept. of Finance II* apply to all requirements at issue in these Joint Test Claims.

3. *Similar Provisions in an EPA-Issued Permit Do Not Support The Argument that the Mandates in This Joint Test Claim Are Federally Mandated*

The Water Boards contend (WB Comments at 32) that U.S. EPA has "issued permits requiring either equivalent or substantially similar provisions to the contested provisions of this Permit," thus demonstrating that "[i]f the State had not issued the Permit, the U.S. EPA would have done so."[33] The Water Boards made a similar argument before the Supreme Court, and it was rejected:

> [T]he State contends the Permit itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so . . . .
>
> We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required.

Dept. of Finance, 1 Cal. 5th at 768 (emphasis in original). As discussed above, the 2015 Permit explicitly incorporates both federal and state authority as the basis for its provisions. Moreover, under *Dept. of Finance II,* the "federal requirements" referenced by the Water Boards must expressly or explicitly mandate the provision at issue.

The Water Boards further argue that the inclusion of alleged similar provisions in EPA-issued permits demonstrates that "the San Diego Water Board effectively administered federal requirements concerning permit requirements." *Id.* With respect to the EPA-issued MS4 permits cited by the Water Boards, as will be discussed in Section II below, none of the specific mandates at issue in the Joint Test Claim are in fact present in the permits cited by the Water Boards. The Supreme Court rightly cited the lack of such evidence as undermining "the argument that the requirement was federally mandated." 1 Cal. 5th at 772.

---

[33] The Water Boards also argue that had the SDRWQCB not issued a permit meeting federal standards, U.S. EPA could have objected to the permit. WB Comments at 35. This argument proves nothing, as U.S. EPA's only role is to ascertain whether the permit meets federal, not state, requirements. Since the permit can contain both, this argument is irrelevant to the Water Boards' contention. *City of Burbank, supra,* 35 Cal. 4th at 627-28. And, as the court held in *Dept. of Finance II*, the fact that a regional board is required to ensure that any NPDES permit it issues meets the requirements of the CWA does not render the permit conditions federal mandates. 18 Cal.App.5th at 683.

As also set forth in Section II, some provisions similar to (but not the same as) those in the 2015 Permit can be found in certain of the EPA-issued MS4 permits. The EPA Administrator has discretion under 33 U.S.C. § 1342(p)(3)(B)(iii) to impose "such other provisions as the Administrator or the States determines appropriate for the control of [MS4-discharged] pollutants." This does not mean that such "other provisions" are federally mandated. While the absence of such provisions in any U.S. EPA-issued MS4 permit, undermines the argument that a permit provision was federally mandated, it does not follow that the presence of similar, but less stringent provisions, confirms the argument. The Supreme Court did not so hold.

Finally, the discretionary nature of provisions in the EPA-issued MS4 permits is demonstrated by the fact that none of them contain the exact same provisions and programs. When the Water Boards cite such a permit as support for their argument that a particular provision is federally required, only one "Phase I" permit is cited. *See* WB Comments at 40 (District of Columbia ("D.C.") Permit), 44 (Boise Permit), 46, 50, 54 (D.C. Permit).[34] Had EPA required such provisions as a matter of federal mandate (rather than, as here, a matter of federal discretion), all permits would have had similar requirements.

H. *Claimants Do Not Have Fee Authority to Fund the Requirements at Issue in The 2015 Permit*

Claimants' response to the arguments set forth in WB Comments at 33-37 and the DOF comments at 1-2 is in Section III, below.

II. SPECIFIC RESPONSES

A. *Development, Implementation and Update of Water Quality Improvement Plan Provisions*

Provisions B and F of the 2015 Permit require Claimants to develop a WQIP for each of the Watershed Management Areas identified in Table B-1 of the Permit, including the Santa Margarita WMA at issue in this Joint Test Claim.[35] The permittees are required to develop, implement, update and provide annual reports for WQIPs for each WMA. Provision B sets forth the substantive requirements for the development and content of the WQIPs for each WMA, while Provision F sets forth requirements for public participation, submittal, review and modification of the WQIPs. Provision A.4 sets forth additional requirements for amendment of the WQIP upon continued exceedances of water quality standards. A detailed summary of each of the WQIP provisions at issue in the Joint Test Claim is found in the Narrative Statement at 18-24.

---

[34] As discussed in Section II.B.2, the Water Boards also cite so-called "Phase II" permits issued to smaller MS4 permittees, and not relevant to Phase I permits, such as the 2015 Permit.

[35] Permit Provision B.1.

1. *The WQIP Requirements Are a New Program and/or Require a Higher Level of Service*

Though admitting that "the term 'WQIP' does not appear in previous permits," the Water Boards contend (WB Comments at 37-39) that the WQIP requirements are not a new program or a requirement for a higher level of service. They argue that "the concept of a WQIP, its substance, and its accompanying provisions" are not new to the Regional Permit." WB Comments at 38. This argument ignores the more detailed, as well as new, water quality planning requirements in the 2015 Permit. Such additional requirements in an existing program constitute a new program or higher level service. *See* SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model SUSMP and development of local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

The Water Boards also wrongly assert that with respect to new requirements in the 2015 Permit, "there are none." WB Comments at 38. As are discussed here and below, the elements of the 2015 Permit at issue in the Join Test Claim are new to Claimants and/or represent requirements for a higher level of service as compared to the requirements in previous permits issued by the SDRWQCB.

To support their argument, the Water Boards cite five discrete provisions in the 2015 Permit and argue that there were "analogous" provisions in the 2010 Permit.[36] As discussed in Section I.F.2 above, "analogous" is not the Commission's standard for determining whether provisions in an executive order represent a new program. While there may be some similarities to the requirements cited by the Water Boards in the 2010 Permit,[37] the 2015 Permit provisions contain discrete new requirements.

For example, in Provision B.2.a, which requires assessment of receiving water conditions, the SDRWQCB required permittees to consider the following relevant factors additional to those in the 2010 Permit: (1) receiving waters recognized as "sensitive or highly valued" by the permittees, including protected estuaries and marine protected areas, wetlands and waters with a Preservation of Biological Habitats of Special Significance beneficial use designation; (2) known historical versus current physical, chemical, and biological water quality conditions; (3) in reviewing monitoring data (required under the 2010 Permit), evaluation of data concerning chemical constituents, water quality parameters, Toxicity Identification Evaluations for both receiving water column and sediment, trash impacts, bioassessments and physical habitat; (4)

---

[36] The Water Boards claim further that these five provisions are a "sampling" of the WQIP provisions which are allegedly analogous, but cite no other provisions. Persons commenting before the Commission are required to support their factual assertions with documentary or testimonial evidence. Cal. Code Regs., tit. 2, section 1183.2, subd. 1(c). Having not done so here, the Water Boards have waived any other argument as to such alleged analogies.

[37] The Watershed Water Quality Work Plan requirements in the 2010 Permit cited by the Water Boards are at issue in a Joint Test Claim filed by Claimants with respect to the 2010 Permit. *See* Narrative Statement at 48-52, *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0015,* 11-TC-03.

available evidence of erosional impacts in receiving waters due to hydromodification; (5) available evidence of adverse impacts to the chemical, physical, and biological integrity of receiving waters; and (6) potential improvements in the overall condition of the WMA that can be achieved. *Compare* 2015 Permit, Provision B.2.a *with* 2010 Permit, Provisions G.1.a and G.1.b.

Concerning Provision B.2.b, requiring assessment of impacts from MS4 discharges, the Water Boards cite 2010 Permit Provision G.1.c, which required permittees to identify generally the "likely sources, pollutant discharge and/or other factors causing the highest water quality problem(s) within the watershed." Permittees were required to use source identification programs required by the permit, water quality monitoring and "additional focused water quality monitoring to identify specific sources within the watershed." By contrast, Provision B.2.b of the 2015 Permit focused on discharges from the permittees' MS4s, requiring, among other things, that permittees identify each location where permittees' MS4 outfalls discharged in receiving waters; identify those MS4 outfalls known to persistently discharge non-stormwater to receiving waters likely causing or contributing to impacts on receiving water beneficial uses; identify those MS4 outfalls known to discharge pollutants in stormwater causing or contributing to impacts on receiving water beneficial uses; and, identify potential improvements in the quality of discharges from the MS4 that can be achieved. *Compare* 2015 Permit, Provision B.2.b., *with* 2010 Permit, Provision G.1.c.

Concerning Provision B.2.c., the identification of Priority Water Quality Conditions ("PWQCs"), the Water Boards cite to 2010 Permit Provision G.1.d, which required the development of a "watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s) and locations," including a schedule for implementing BMPs to abate specific receiving water quality problems and a list of permittee-specified criteria to be used to evaluate BMP effectiveness. The implementation strategy was required to include a map of any implemented or proposed BMPs.

By contrast, 2015 Permit Provision B.2.c.(1) requires that, for each PWQC, the permittees must assess the beneficial use or uses associated with the condition; the geographic extent of the PWQC within the WMA, if known; the temporal extent of the PWQC; those permittees with MS4 discharges that may cause or contribute to the PWQC; and, assessment of the adequacy of and data gaps in monitoring data to characterize the conditions causing or contributing to the PWQC, including consideration of special and temporal variation. Provision B.2.c.(2) requires further that permittees identify the highest PWQC to be addressed by the WQIP and provide a rationale for selecting a subset of the conditions identified pursuant to Provision B.2.c.(1) as the highest priorities. None of these specific requirements was in the 2010 Permit. *Compare* 2015 Permit, Provision B.2.c., *with* 2010 Permit, Provision G.1.d.

Finally, concerning Provision F.1.a., regarding WQIP development and the role in that development of public participation, the Water Boards cite to 2010 Permit Provision G.4, a single paragraph requiring permittees to establish a "watershed-specific public participation mechanism" within each watershed. The only required component for permittees in the 2010 Permit provision was for a minimum 30-day public review and opportunity to comment on the Watershed Workplan prior to its submittal to the SDRWQCB. The Workplan was also required to include a description of the "public participation mechanisms to be used and identification of the persons or entities anticipated to be involved" during development and implementation of the Workplan.

By contrast, 2015 Provision F.1.a. sets forth a detailed process for public involvement in the development of the WQIP, including, in Provision F.1.a.(1), requirements for public participation that encompass: development of a public schedule of the opportunity for the public to participate and provide comments during development of the WQIP; formation of a Water Quality Improvement Consultation Panel to provide recommendations during development of the WQIP, with specified categories of members; and, coordination of schedules for the public participation process among WMAs to provide the public "time and opportunity to participate" during the development of the WQIP.

Provision F.1.a.(2) requires permittees to solicit data, information and recommendations from the public in the development identification of the PWQCs and potential water quality improvement strategies for the WMA; review with the Consultation Panel those PWQCs that permittees plan on including in the WQIP and obtain the Panel's recommendations or concurrence thereon; consider revisions to the PWQCs based on recommendations from the Panel; include potential water quality improvement strategies identified by the public and Panel in submissions of the PWQCs to the SDRWQCB; and, consider revisions to the PWQCs and potential water quality improvement strategies based on public comments. Finally, pursuant to Provision F.1.a.(3), the permittees must solicit recommendations from the public on potential numeric goals for the highest PWQCs and recommendations on strategies that should be implemented to achieve those goals; consult with the Consultation Panel and consider revisions recommended by the Panel concerning the numeric goals and schedules in the WQIP, the water quality improvement strategies and schedules proposed in the WQIP; and, to consider revisions to the water quality improvement goals, strategies and schedules based on public comments. None of these detailed requirements is contained in the 2010 Permit, and the Water Boards point to none. *Compare* 2015 Permit, Provision F.1.a. *with* 2010 Permit, Provision G.4.

While the Water Boards cite *City of Richmond,* WB Comments at 39 n.211, as discussed in Section I.F.1 above, this case does not provide support for their arguments. Moreover, where the court there found that modifications to the statue in question imposed no new substantive requirements on the city, such new substantive requirements are plentiful in the WQIP provisions in the 2015 Permit. Legally and factually, *City of Richmond* is inapposite. Finally, the Water Boards repeat the argument that "the new specificity in the Regional Permit is included as part of the iterative process – which is expressly contemplated under federal law." WB Comments at 39. As discussed above, this very argument was rejected by the Commission when raised by the DOF. *See* SD County SOD at 49-50 and discussion in Section I.F.2 above.

2. *The Provisions Are Not Necessary to Implement Federal Law*

The Water Boards argue on several grounds that the "WQIPs are based entirely on federal law and the San Diego Water Board determined they are necessary to meet the MEP standard." WB Comments at 39. The Water Boards' arguments, and that assertion, are incorrect both legally and factually.

In the Narrative Statement, Claimants set forth several grounds on which the WQIP requirements in the 2015 Permit were a state, not federal mandate. Narrative Statement at 24-28.

These were: that the federal regulations governing MS4 permitting did not specify the scope and detail of the requirements; that the WQIP requirements were intended to ensure that permittees achieved compliance with strict water quality standards ("WQS"), a discretionary choice by the SDRWQCB; and, that the WQIP requirements themselves involved a shifting of state responsibility to adopt and implement TMDLs to address waterbodies listed as impaired under Section 303(d) of the CWA to permittees. The Water Boards' responses to these arguments are addressed below.

a. *The WQIP Requirements in the 2015 Permit Are Not Mandated by Federal Law or Regulation*

California courts have found that federal MS4 permit regulations do not require the "scope and detail" found in MS4 permits issued by the Water Boards or that such regulations "explicitly" or "expressly" require provisions in those permits. *Dept. of Finance, supra,* 1 Cal. 5th at 771; *Dept. of Finance II, supra,* 18 Cal.App.5th at 683. The Water Boards continue to argue, however, that the WQIP provisions are required by those regulations. WB Comments at 40. As set forth in the Narrative Statement at 24-26, nothing in the federal regulations cited by the Water Boards (40 CFR § 122.26(d)(2)(iv)) requires the detailed and voluminous WQIP requirements in the 2015 Permit.

The Commission itself found that similar, but less complex and prescriptive programs in the 2007 San Diego County MS4 permit were not required by the federal stormwater permit regulations. SD County SOD at 74. This assessment was confirmed in *Dept. of Finance II:*

> The regulation relied upon by the State does not mandate any of these watershed and regional management requirements. It clearly leaves to the San Diego Regional Board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. The State exercised that discretion in imposing the controls it imposed. They thus are state mandates subject to section 6.

18 Cal.App.5th at 687.[38] The Water Boards cannot show that the WQIP requirements at issue in the Joint Test Claim are required by federal law or regulations. This alone demonstrates that the requirements are a state, not federal, mandate.

b. *The SDRWQCB Made No Findings That the WQIP Requirements Were Necessary to Meet the MEP Standard*

The Water Boards contend that the "factual findings here support the conclusions that WQIPs are necessary to meet the MEP standard under federal law and are entitled to deference under *Department of Finance.*" WB Comments at 40. As discussed in Section I.G.1 above, none of the findings in the 2015 Permit rise to the specific requirements of *Dept. of Finance,* that the

[38] The Water Boards attack Claimants' reliance on the SD County SOD on the ground that "numerous challenges to the [SOD] have not been resolved by the courts." WB Comments at 39 n.214. The issue of whether the requirements in that test claim represented state or federal mandates was, however, resolved in *Dept. of Finance II.*

specific provision at issue was the only means by which the MEP standard could be attained. 1 Cal. 5th at 765. The Water Boards cite to no language in the permit or the Fact Sheet that would meet the *Dept. of Finance* requirement for deference to the Water Boards.

The Water Boards also claim that "successful implementation of WQIPs is likewise crucial to permittee compliance with the independent federal prohibition on non-storm water discharges into MS4s" and also that the "monitoring, reporting and assessment components of the WQIP are based on the federal requirements of the Clean Water Act in section 308(a) and implementing regulations." WB Comments at 40. The test for assessing whether an MS4 permit requirement is a federal mandate is not only linked to the MEP requirements of the CWA, as discussed in Section I.G.2. The record also does not support the Water Boards' assertion. The Fact Sheet states that the monitoring and assessment requirements "are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order." Fact Sheet at F-49. There is no mention of compliance with federal requirements. Further, the SDRWQCB specifically noted that it "has the authority to establish monitoring, reporting, and recordkeeping requirements for NPDES permits under [California Water Code section] 13383." This reference to a California law shows again that the 2015 Permit's requirements, including monitoring, reflected both federal and state authorization.

The Water Boards also contend that a U.S. EPA-issued MS4 permit for the District of Columbia contains "requirements to implement similar programs" and that the elements of a "Stormwater Management Program" in the permit "are comparable and serve the same functions." WB Comments at 40-41. The Water Boards nowhere cite to the specific "elements" of the D.C. permit that support this argument, and this failure to cite to documentary evidence renders the comment without weight. Cal. Code Reg., tit. 2, section 1183.2, subd. 1(c). However, even a cursory review of the D.C. Permit provisions reveals no program in that permit comparable to the WQIP provisions in the 2015 Permit.

c. *The WQIP Requirements Shift to Permittees the Task of Attaining Water Quality Standards*

As a third and independent ground for determining that the WQIP provisions in the 2015 Permit are a state mandate, the WQIP requirements represent a shifting of responsibility under federal law to address impaired waterbodies in the San Diego Region listed under Section 303(d) of the CWA. As set forth in detail in the Narrative Statement at 27-28, such a shifting of a federal responsibility (to adopt a TMDL to address such impaired waterbodies) to local agencies is a state mandate under *Hayes, supra,* 11 Cal.App.4th at 1593-94.

The Water Boards respond (WB Comments at 41) that there was no shifting of state responsibility because, if "as a result of WQIP implementation, Claimants' monitoring demonstrates reductions in impairing pollutants have been achieved such that the receiving water body meets water quality standards, . . . it be unnecessary for the San Diego Water Board to expand [sic] resources to develop a TMDL to address the impairment."

That is precisely the point. The Water Boards treat this issue as one involving the requirement to monitor for impairments, which is a permittee responsibility with respect to

discharges from their MS4s. But the obligation for the SDRWQCB to develop a TMDL existed *before* the 2015 Permit was even adopted. This is demonstrated by Finding 30 of the Permit itself, which states that the Integrated Report required to be submitted to U.S. EPA in compliance with the CWA listed the attainment standards for water quality standards in the state. As the Permit stated, "Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required." 2015 Permit at 11. The 2010 Integrated Report lists several water bodies in the Santa Margarita WMA as being in such Category 5, including Murrieta Creek, the Upper Santa Margarita River and Warm Springs Creek.[39] This shift of responsibility implicates the entire WQIP program, not just monitoring.

By shifting its obligation to prepare and adopt a TMDL to address the non-attainment of water quality standards to the permittees, the SDRWQCB was, under *Hayes*, creating a state mandate.

3. *No Other Mandate Exceptions Apply*

The Water Boards assert that "Claimants have not demonstrated that they must use tax monies to pay for implementation of these provisions" and cite the 2009 California Watershed Improvement Act ("CWIA"). WB Comments at 42. In response to the first, Claimants have declared, under penalty of perjury, that the costs of implementing the challenged provisions of the 2015 Permit, including the WQIP provisions, requires tax monies. *See* Section 6 Declarations, ¶ 9. *See also* Section 5 Narrative Statement at 69. The non-applicability of the CWIA is discussed in Section III.

The Water Boards also claim that "any costs found to be beyond what federal requires are *de minimis.*" WB Comments at 42. The Water Boards provide no support for this assertion, which is mere speculation.

B. *Critical Sediment Yield and BMP Manual Update Provisions*

Provision E.3.c.(2)(b) of the 2015 Permit requires each Priority Development Project ("PDP") to avoid critical sediment yield areas known to permittees or to implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is "not net impact" to the receiving water. Provisions E.3.d. and F.2.b. require that permittees update the BMP Design Manual pursuant to specified criteria and also to update the Manual to incorporate comments received from the SDRWQCB, to submit updates to the Manual as part of the WQIP annual reports or Report of Waste Discharge, and to ensure that the updates are consistent with the requirements of Provisions E.3.a.-d. of the permit and also to make the updated Manual available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of completing the update.

---

[39] The Final 2010 Integrated Report including the listed of all impaired waterbodies in Category 5 can be accessed on the State Board website at: https://www.waterboards.ca.gov/water_issues/programs/tmdl/2010state_ir_reports/category5_report.shtml

1. *The Critical Sediment Yield Provisions Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend that the critical sediment yield provision is not a new program or a requirement for a higher level of service, stating that hydromodification provisions were in previous MS4 permits governing the Riverside County permittees. WB Comments at 42-43. Even the Water Boards, however, acknowledge that the "specific provisions concerning critical sediment yield areas are new to the Regional Permit." WB Comments at 43. The Water Boards argue that they are a mere "refinement" of hydromodification management plan requirements in the 2010 Permit. They also argue that the provisions apply only to Claimants when a PDP "is undertaken by the municipality itself," and that no mandate exists in that situation because the municipalities "voluntarily choose to undertake a [PDP]." *Id.*

These contentions are incorrect. First, the critical sediment yield provision adds a completely new requirement to the hydromodification management plan requirements, which involves mapping of such areas performed by the District, with funding from each Claimant. *See, e.g.,* Declaration of Edwin Quinonez, ¶ 8(b). This effort requires the establishment of defensible standards for determining the location of critical sediment yield areas to be avoided and as to how municipal PDPs must meet various criteria regarding the discharge of coarse sediment to receiving waters. *See* Narrative Statement at 32. They are more than a mere "refinement" of the existing hydromodification modification program and, under the Commission's decision in the SD County SOD, represent a new program and/or requirement for a higher level of service. SD County SOD at 53-54.

Second, the requirement to address coarse sediments in PDPs obviously is an unfunded mandate with respect to municipal PDPs but, as set forth in the Quinonez and other declarations, the identification and mapping of critical coarse sediment areas is a general activity not tied to any specific PDP. As such, those costs cannot be allocated to private PDPs. Moreover, the notion that municipal voluntarily choose to undertake a PDP and thus accept this requirement as "voluntary" is incorrect, and was addressed in detail in the Narrative Statement at 58-60.

2. *The Critical Sediment Yield Provisions Are Not Required to Implement Federal Law*

As Claimants set forth in their Narrative Statement[40], the SDRWQCB cited no specific regulatory requirement for the critical sediment yield provisions in the 2015 Permit Fact Sheet. In addition, hydromodification provisions (which include the critical sediment yield provisions) have already been found to constitute a state-mandated new program and/or higher level of service in the SD County SOD (SOD at 97), a finding upheld by the Court of Appeal in *Dept. of Finance II,* 18 Cal.App.5th at 684-85.

Nonetheless, the Water Boards still argue that "the incorporation of coarse sediment yield requirements was thus determined to be a necessary component of the hydromodification requirements to implement the MEP standard under the factual circumstances here." WB

[40] Narrative Statement at 31.

Comments at 44. This statement is a classic example of bootstrapping, in this case from an MEP finding entitled to no deference. As discussed in Section I.G.1, the finding that the "permit provisions are based entirely on federal law and are necessary to implement the MEP standard" was based on two overturned Superior Court decisions and does not meet the requirements for affording deference to an MEP determination set forth in *Dept. of Finance.* The Water Boards then assert that based on that original finding, all other provisions in the permit, including those concerning critical sediment yield, thus represent MEP too. This assertion is wrong on the law and the facts.

The Water Boards also claim that U.S. EPA "has also included similar developmental planning related requirements in MS4 permits that it has issued." WB Comments at 44. The Boards cite to a "Massachusetts General MS4 Permit" as authority. *Id.* This permit applies to smaller "Phase II" communities and installations, not to Phase I municipalities, such as the Claimants. As discussed in Section I.G above, Phase II MS4 permits are subject to an entirely different regulatory scheme in 40 CFR § 122.34. Thus, the provisions of the Massachusetts permit (even if it contained requirements relating to critical sediment yield areas, which it does not) is not relevant to this Joint Test Claim. Additionally, there are no such requirements in the Boise/Garden City Area MS4 permit footnoted by the Water Boards. WB Comments at 44 n.243.

3. *No Other Mandate Exceptions Apply*

The Water Boards assert, without citation to evidence in the record (WB Comments at 44) that costs of the critical sediment yield is "*de minimis* and therefore not subject to subvention." This assertion ignores the fact that Claimants incurred, in Fiscal Year ("FY") 2016-17 alone, over $6,700 to implement these requirements. Section 5 Narrative Statement at 32; Declarations at ¶ 8(b).

The Water Boards further argue that Claimants have fee authority to fund "the hydromodification requirements." While this was a finding made by the Commission in the SD County SOD, that finding is under court challenge, as the Water Boards observe. In addition, the critical sediment source yield provisions, which require municipal identification and mapping of areas containing such critical sediments, is an activity which cannot be translated into fee for service. Also, the argument of whether a municipality voluntarily subjects itself to the critical sediment source mandate by virtue of embarking on a PDP is also subject to court challenge.

4. *The BMP Design Manual Update Provisions Are a New Program and/or Represent a Higher Level of Service*

The Water Boards argue (WB Comments at 45) that the BMP Manual update provisions in the 2015 Permit, which require the specific mandates set forth on pages 32-33 of the Narrative Statement, are not a new program or a requirement for a higher level of service because "the objectives of the applicable federal requirements governing implementation of post-construction controls to limit pollutant discharges from areas of land development are the same." This argument ignores the previous decisions of the Commission, discussed in Section I.F.2 above, holding that revisions to an existing MS4 permit program (adopted under the same federal regulation as in the

previous permit) still represent a new program and/or higher level of service. SD County SOD at 53-54.

5. *The BMP Design Manual Update Provisions Are Not Necessary to Implement Federal Law*

To support their argument that the BMP Design Manual update provisions were required by federal law, the Water Boards cite a federal regulation (40 CFR § 122.26(d)(iv()(A)(2)) that allegedly required the update. In fact, nothing in that regulation expressly or explicitly requires update of a BMP manual. The Commission has already determined in the SD County SOD that a requirement to review and updated BMPS in local guidance materials was a state mandate. SD County SOD at 51-54. The Water Boards' argument that "these provisions satisfy the MEP standard and are entirely based on federal law" does not reflect governing case law, as previously discussed.

The Water Boards also claimed that "similar update requirements" are found in the D.C. Permit. WB Comments at 46 and n.251. The cited provision of that Permit, Section 4.1, provides only that

> The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic predevelopment site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs.

As can be seen, nothing in the D.C. Permit requires the specific BMP Manual updates mandated by the 2015 Permit.

6. *No Other Mandate Exceptions Apply*

The Water Boards again argue that to the extent the provisions "exceed federal requirements," the incremental costs are *de minimis*. WB Comments at 46. Since none of the BMP Design Manual update requirements are federal in nature, this argument is without force. The Water Boards also argue that Claimants have "fee authority" to implement the provisions or could impose development or other fees. This argument is at issue in the appeal of the SD County SOD.

C. *Residential Inventory and Inspection Provisions*

Provisions E.5.a, E.5.c.(1)(a), E.5.c.(2)(a) and E.5.c.(3) of the 2015 Permit contain detailed requirements for the inventorying, inspecting and tracking of areas of existing development. The Joint Test Claim focuses on those requirements as they apply to residential areas. Section 5 Narrative Statement at 35. Requirements applicable to non-residential areas in the 2010 Permit are the subject of the test claim on that permit, 11-TC-03. *Id.* These requirements are set forth in the Narrative Statement at 35-38. All were new to Claimants.

1. *The Residential Inventory and Inspection Provisions Are a New Program and/or Represent a Higher Level of Service*

The Water Boards contend that the residential inventory and inspection requirements in Provision E.5 merely "build upon existing program elements being implemented by Claimants." While this statement itself represents an admission that the requirements are new, the Water Boards cite a provision in the 2010 Permit including "residential areas" among those areas where identification of pollutant sources is necessary. WB Comments at 47. This language, however, is found in a Finding D.3.b. of the 2010 Permit, not in a portion of the permit containing directives to permittees. The section of the 2010 Permit relating to residential areas, Provision F.3.c., contains *none* of the inspection and inventorying requirements set forth in Provision E.5 of the 2015 Permit. The Water Boards do not identify any of those specific requirements at issue in this Joint Test Claim as being in the previous permit.

Under the Commission's prior holdings in the SD County SOD, such added requirements represent a new program and/or a higher level of service. SD County SOD at 53-54.

2. *The Residential Inventory and Inspection Provisions Are Not Necessary to Implement Federal Law*

As discussed previously, the Court of Appeal has held that, to be a federally mandated provision in an MS4 permit, the federal law or regulation must "expressly" or "explicitly" require the provision in the permit. *Dept. of Finance II,* 18 Cal.App.5th at 683. There is no such requirement in the federal stormwater regulations for the residential inventory and inspection provisions.

The Water Boards contend (WB Comments at 47-48) that 40 CFR § 122.26(d)(2)(iv)(A) and (C) are authority for the residential inspection and inventory provisions. Nothing in those regulations, however, requires inspections or inventorying. Similarly, citation by the Water Boards of statements by the SDRWQCB in the Fact Sheet as to the utility of the inventory and inspection requirements (WB Comments at 48) does not render them federal mandates, but rather demonstrates that the board exercised its discretion to include them in the 2015 Permit. Finally, the SDRWQCB's determination that the permit as a whole constitutes compliance with the MEP standard, again cited by the Water Boards (WB Comments at 48), is entitled to no deference for the reasons set forth in Section I.G.1.

3. *No Other Mandate Exceptions Apply*

The Water Boards make two arguments that a subvention of funds is not required for the residential inventory and inspection requirements. WB Comments at 48. First, they argue that any "associated incremental costs" of completing this requirements would be "*de minimis.*" As with similar arguments, there is no citation to evidence in the record for this assertion and it should be disregarded. Second, the Water Boards contend that Claimants have "fee authority" to implement the requirements. As Claimants pointed out in the Narrative Statement at 40, unlike with inspections of businesses where (assuming that the inspection fee was not already paid to the

State) a fee might be chargeable in return for the inspection, for residential areas of existing development, there is no entity as to which a fee could be assessed.[41] There is thus no "authority to charge" such fees and, in light of these facts, only tax revenues could be used to fund the inventory and inspection requirements.

D. *Retrofitting and Rehabilitation of Existing Development and Streams Provisions*

Provision E.5.e. of the 2015 Permit requires Claimants to include in their Jurisdictional Runoff Management Program ("JRMP") provisions relating to the retrofitting of areas of existing development and also a program to rehabilitate streams, channels and/or habitats in areas of existing development. The detailed requirements are set forth in the Narrative Statement at 40-42.

1. *The Retrofitting and Rehabilitation Requirements Are a New Program and/or Require a Higher Level of Service*

The Water Boards argue that the requirements at issue are "not a new program as that term is understood in caselaw." WB Comments at 49. The Water Boards cite no such caselaw, but contends that the SDRWQCB determined that the provisions "'do not require the implementation of retrofitting and rehabilitation projects, but do require the Copermittee to develop a program of strategies to facilitate the implementation of these types of projects in areas of existing development.'" *Id.*, quoting Permit Fact Sheet at F-119. The Water Boards concede the point. The Boards do not dispute that the requirement to "develop a program of strategies" is new to the 2015 Permit. Claimants are alleging the costs of developing such programs, which are a necessary prerequisite to actual implementation of retrofitting and rehabilitation. *See* Narrative Statement at 43-44. There are costs involved in such programs, and these costs were identified in the Section 6 Declarations at ¶ 8(e) and in the Narrative Statement at 44.

2. *The Retrofitting and Rehabilitation Requirements Are Not Necessary to Implement Federal Law*

The Water Boards admit that "the storm water regulations do not explicitly require these provisions be included in the permit." WB Comments at 49. Under *Dept. of Finance II,* this fact alone is fatal to any argument that the retrofitting and rehabilitation requirements in the 2015 Permit were mandated by federal law. 18 Cal.App.5th at 683.

The Boards argue, however, that the provisions are "integral" to the iterative process embodied in the WQIP," and quote a Permit finding stating that retrofitting is "necessary" to address stormwater discharges from existing development. WB Comments at 49. Though there is no mention of the MEP standard in the quoted finding, the Water Boards argue that the general MEP finding regarding the permit "as a whole" means that the finding is "entitled to deference under *Department of Finance*." For the reasons previously discussed in Section I.B, this argument misrepresents the Supreme Court's test in that case.

---

[41] The Water Boards' citation of *Apartment Ass'n of Los Angeles County v. City of Los Angeles* (2001) 24 Cal. 4th 830 (WB Comments at 48 n.263) is inapposite, since in that case, the fee was imposed on landlord in their capacity as business owners, not property owners.

The Water Boards finally cite the U.S. EPA-issued D.C. Permit, which contains a retrofitting program for impervious surfaces and a tree-planting program. WB Comments at 49-50. These requirements are, however, fundamentally different from and far less prescriptive than from the ones at issue in the 2015 Permit. The EPA Administrator, moreover, has discretion under 33 U.S.C. § 1342(p)(3)(B)(iii) to impose "such other provisions as the Administrator or the States determines appropriate for the control of [MS4-discharged] pollutants." This does not mean that such "other provisions" are federally mandated, since they are imposed as the result of discretion. *See Defenders of Wildlife, supra,* 191 F.3d at 1166. While the absence of such provisions in any U.S. EPA-issued MS4 permit, as the Supreme Court stated, "undermines the argument" that a permit provision was federally mandated, it does not follow that the presence of very different retrofitting provisions in such a permit confirms the argument. The Supreme Court did not so hold.[42]

3. *No Other Mandate Exceptions Apply*

The Water Boards repeat their unsupported arguments that the costs of the retrofitting and rehabilitation program would be *de minimis* and that Claimants "have fee authority" to implement the requirements "and have not shown that they are required to raise taxes to fund them." WB Comments at 50. In fact, Claimants have established their lack of fee authority for these requirements and others in the Joint Test Claim. *See* Narrative Statement at 63-69.

E. *Enforcement Response Plan Requirements*

Provision E.6 of the 2015 Permit requires Claimants to develop and implement an "Enforcement Response Plan" as part of the JRMP document required under the permit. The full set of Enforcement Response Plan requirements is set forth in the Narrative Statement at 44-46. In brief, the Permit requires that each permittee develop and implement a Plan with identified components, required sanctions, timeliness of correction, escalated enforcement and reporting for non-compliant sites.

1. *The Enforcement Response Plan Requirements Are a New Program and/or a Requirement for a Higher Level of Service*

While the Water Boards argue (WB Comments at 51) that the 2010 Permit "directed implementation of enforcement authorities," the Enforcement Response Plan requirements go well beyond those discrete earlier enforcement requirements.[43] Importantly, there was no requirement for an Enforcement Response Plan in the 2010 permit. Also new to the 2015 Permit are requirements that Claimants "describe the applicable approaches and options to enforce its legal

---

[42] The Water Boards also cite, but do not discuss, a provision in an MS4 permit issued by U.S. EPA to Joint Base Lewis-McChord. WB Comments at 50 n.270. As a review of that permit discloses, the Joint Base Lewis-McChord permit is a Phase II MS4 permit which, as previously discussed in Section I.G.1, is subject to entirely different regulatory requirements than Phase I permits such as the 2015 Permit. That permit cannot be cited as support for the federal nature of provisions in the 2015 Permit.

[43] WB Comments at 51 n.272.

authority," and for Claimants to describe, in each component of the Plan, "the enforcement response approaches for implementing progressively stricter enforcement responses." Provision E.6 and E.6.b. The approaches are also required to include eight specified enforcement tools, with a 30-day deadline for correction of violations. Provisions E.6.b and E.6.c. If more than 30 days were required to achieve compliance, Claimants are required to set forth a rationale in the applicable electronic database or tabular system used to track violations. Claimants also are required to define "escalated enforcement" in the Plan and, where a Claimant determined that escalated enforcement was not required, to record a rationale in the electronic database or tabular system. Provision E.6.d. The Plan requirements also specified new deadlines for the reporting of non-compliant sites to the SDRWQCB. Provision E.6.e. All of these requirements were a new program and/or a requirement for a higher level of service by Claimants.

2. *The Enforcement Response Plan Requirements Are Not Necessary To Implement Federal Law*

The Water Boards concede that the federal stormwater regulations "do not explicitly require development of an 'enforcement response plan' . . . ." WB Comments at 51. This admission confirms that the Plan requirements are not federally mandated. The Water Boards argue, however, that the Plan requirements implement stormwater regulations "that require permittees to demonstrate they have adequate legal authorities to carry out their programs." *Id.* The regulations cited in the Fact Sheet quoted by the Water Boards contain, however, no explicit or express requirements for development of an Enforcement Response Plan. Under *Dept. of Finance II,* the Plan requirements are not federally required. 18 Cal.App.5th at 683. *See also* Narrative Statement at 46-47. Nothing in the Water Boards comments refutes that analysis.

The Water Boards also argue that to the extent the Enforcement Response Plan addresses non-stormwater discharges into the permittees' MS4s, this is "wholly based on federal law" and not considered in *Dept. of Finance* and *Dept. of Finance II.* As discussed in Section I.G.2, the analysis of what was considered a federal mandate in these cases did not focus solely on MEP but was broader, considering whether a regional board imposed a requirement by virtue of a "true choice" (*Dept. of Finance,* 1 Cal. 5th at 765) or whether federal law or regulation "expressly" or "explicitly" required the permit provision (*Dept. of Finance II,* 18 Cal.App.5th at 683). In particular, the Court of Appeal in *Dept. of Finance II* examined the requirements of the stormwater regulations (which implement both the MEP standard for discharges from the MS4 and the "effective prohibition" standard for non-stormwater discharges into the MS4) in determining the federal or state character of the requirement. 18 Cal.App.5th at 684-89.

Finally, the Water Boards' continued citation of the finding that the permit taken as a whole meets MEP argument is, for the reasons already set forth, not a justification with merit.

3. *No Other Mandate Exceptions Apply*

The Water Boards again make unsupported arguments that the requirements are *de minimis* and that Claimants have "fee authority" to implement them. WB Comments at 52. As previously discussed, these arguments are without merit. The Water Boards also claim that "[p]otentially, monies received from enforcement efforts could be applied to fund these requirements." *Id.*

Again, there is no support for this suggestion, which also ignores the fact that the majority of the sanctions required to be included in the Plan by the Water Board do not involve monetary penalties which could be assessed by a permittee. Such speculative arguments should be disregarded by the Commission as unsupported by testimonial or document evidence. Cal. Code Regs., tit.2, section 1183.2, subd. 1(c).

F. *Jurisdictional Runoff Management Plan Update Requirements*

Provision F.2.a. of the 2015 Permit requires Claimants to update each of their JRMP documents following grounds specified by the SDRWQCB.

1. *The JRMP Update Provisions Are a New Program and/or Requirement for a Higher Level of Service*

Contrary to arguments made by the Water Boards (WB Comments at 53), the JRMP update requirements of the 2015 Permit differ in several respects from the more general JRMP update requirements in the 2010 Permit. First, as conceded by the Water Boards, the 2015 Permit requires that the JRMP be updated to include all eight requirements of Provision E. Second, the JRMP is now required to be updated on a routine basis, not the single update required by the 2010 Permit. Third, permittees are required to respond to SDRWQCB comments on the JRMP and make appropriate revisions. Fourth, permittees are required to post updated JRMP documents on the newly required Regional Clearinghouse.

Such additional requirements constitute, under the Commission's holding in the SD County SOD, a new program and/or a higher level of service. SD County SOD at 53-54.

2. *The JRMP Update Provisions Are Not Necessary to Implement Federal Law*

As set forth in the Narrative Statement (at 48-49), the Commission already has determined that certain elements in a JRMP were state mandates and also the requirement to review and update BMP requirements listed in a SUSMP and to develop, submit, and implement an updated Model SUSMP constituted a state mandate. SD County SOD at 41-54. This finding was ignored by the Water Boards in their comments (WB Comments at 53-54), which instead focus on previous (and discredited) arguments that the SDRWQCB's finding that the 2015 Permit as a whole met the MEP standard is entitled to deference.[44]

Claimants also assert that because the D.C. Permit issued by U.S. EPA includes a requirement for a storm water management plan that must be, at times, updated, supports the federal mandate argument. This assertion is not correct. First, the D.C. Permit requirements are

[44] The Water Boards also repeat their argument that *Dept. of Finance* and *Dept. of Finance II* did not consider the "effective non-storm water prohibition." WB Comments at 54. As discussed in Section I.G.2 above, these cases cannot be read so narrowly. In fact, *Dept. of Finance* and *Dept. of Finance II* set forth a broader interpretation of what constitutes a federal mandate, with a focus on the actual language of the federal law or regulation, not a focus on what may, or may not, constitute the MEP standard.

not the same as the JRMP requirements in the 2015 Permit. The D.C. Permit generally requires the permittee to submit a "fully updated [stormwater management] Plan" for public notice and ultimate EPA review and approval. D.C. Permit, Section 3. The D.C. Permit contains no requirements for how the plan update should occur. By contrast, the 2015 Permit contains numerous such requirements, such as the requirement that the JRMP updates must conform to the eight requirements of 2015 Permit Provision E and specification as to how the updates must be submitted and posted.

Second, the inclusion of even vaguely related requirements in the D.C. Permit does not provide evidence of a federal mandate. The Water Boards cite no other such requirements in the other EPA-issued permits attached to their comments. In the case of the D.C. Permit, the EPA Administrator was using its discretion, set forth in the CWA, to adopt "such other requirements" as the Administrator chooses. *Defenders of Wildlife, supra,* 191 F.3d at 1166. The Water Boards cite no comparable provisions in the other EPA-issued permits they cite, confirming that this is a discretionary, not mandatory, provision.

3. *No Other Mandate Exceptions Apply*

The Water Boards here repeat the same arguments made as to other provisions at issue in the Joint Test Claim: That the costs are "*de minimis*," Claimants have fee authority to implement the requirements and have not shown that they are required to raise taxes to fund them. For the reasons previously stated, none of these arguments has merit.

G. *Transitional Dry Weather Field Screening Requirements*

Provision D.2.a.(2) of the 2015 Permit requires permittees to conduct "transitional dry weather field screening requirements" pending approval of the dry weather MS4 outfall monitoring program to be incorporated into the WQIP. Despite the claims of the Water Boards in their comments (WB Comments at 54-58), these requirements are not mandated by federal law, are new to the 2015 Permit and as to which no mandate exceptions apply.

1. *The Transitional Dry Weather Field Screening Requirements Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend that the transitional dry weather field screening requirements ("Screening Requirements") are not a new program or a requirement for a higher level of service based on several arguments. These contentions are addressed below.

First, the Water Boards contend that the Screening Requirements are not new because they implement "a federal law standard that has existed in the [CWA] and in Riverside County Copermittees' permits for decades," the requirement that MS4 permittees effectively prohibit non-stormwater discharges into the MS4. WB Comments at 56. This argument is similar to that raised by DOF with regard to the MEP standard in the SD County SOD. *See* discussion in Section I.F.2 and SD County SOD at 49-50. Simply because a standard (such as the MEP standard or here, the "effectively prohibit" standard) has been part of the CWA for decades, does not mean that new

and more extensive permit requirements that address such standard in succeeding permits are not state mandates. The Commission has held otherwise.

Second, the Water Boards cite provisions in the 2010 Permit, including the Non-Storm Water Dry Weather Action Levels ("NALs") and the monitoring program in Attachment E, to argue that prior permits "have contained comparable provisions." WB Comments at 56. This claim ignores the specific requirements of the 2015 Permit. The SDRWQCB adopted specific and prescriptive requirements for the Screening Requirements that were additional to dry weather monitoring required under previous permits. For example, the 2010 Permit contained no field screening requirements with respect to the monitoring of non-stormwater flow from MS4 outfalls. Under the 2015 Permit, permittees are required to field screen (visually inspect) a significant percentages of *all* major MS4 outfalls. For permittees with less than 125 such outfalls, at least 80 percent are to be inspected twice per year during dry weather conditions. For permittees with at least 125 such outfalls but less than 500, all such outfalls are to be visually inspected at least annually. For permittees with more than 500 major outfalls, at least 500 are to be inspected annually, and such permittees are required to conduct additional assessments set forth in Provision D.2.a.(2)(a)(iii)([a-e]). 2015 Permit Provision D.2.a.(2)(a)(i-iii). None of these requirements was in the 2010 Permit.

Moreover, during a field screening event, permittees are required to make visual observations consistent with the requirements of Table D-5, an additional requirement not found in previous MS4 permits. Permittees are additionally required to follow the requirements of Provisions E.2.d.(2)(c-e) based on the field observations (Provision D.2.a.(2)(b)(iii)) and "evaluate field observations together with existing information available from prior reports, inspections and monitoring results to determine whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow." Provision D.2.a.(2)(b)(iv). Finally, each permittee must update its MS4 outfall discharge monitoring station inventory with new information collected from the Screening Requirements on classifying MS4 outfalls having persistent flow, transient flow, or no dry weather flow. Provision D.2.a.(2)(c). Again, none of these requirements was contained in the 2010 Permit.

2. *The Dry Weather Transitional Monitoring Requirements Are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 57-58) contend that the Screening Requirements are necessary to implement federal law, citing general permit application regulations. Two of the cited regulations, 40 CFR § 122.26(d)(1)(v)(B) and (d)(2)(iv)(B), require no particular monitoring efforts but only that the permittee describe programs to identify illicit connections to the MS4 and to detect and remove (or require permitting) of illicit discharges and improper disposal into the MS4. Neither of these regulations requires field screening of outfalls. Under *Dept. of Finance II,* regulations which do not expressly or explicitly require the field screening do not constitute a federal mandate. 18 Cal.App.5th at 683.

The Water Boards cite a third regulation, 40 CFR § 122.26(d)(1)(iv)(D) which does require, *as part of the permittee's application,* a field screening of selected field screening points or major outfalls to detect illicit connections and illegal dumping. While the requirements of this

regulation are similar to those in 2015 Permit Provision D.2.a.2, they are not as prescriptive. But even were the regulation a mirror image of the 2015 Permit Screening Requirements, the latter would still represent a state mandate. That is because the field screening requirement in the federal stormwater regulations, unlike other requirements governing the content of permits following submittal of the application, was a one-time event expressly linked to the permit application process.

Here, the SDRWQCB elected to require more comprehensive field screening in an MS4 permit issued 25 years after the initial 1990 MS4 permit regulations, and which represented the fifth iteration of MS4 permits issued by the SDRWQCB to the permittees. That requirement was a discretionary act of the water board and not a federal mandate.

3. *No Other Mandate Exceptions Apply*

The Water Boards (WB Comments at 58) make several unsupported claims that there are exceptions to the requirement for a subvention of funds. First they argue that "any costs to implement the provision would be *de minimis*." This is contradicted by the evidence in the Narrative Statement, which sets forth that almost $75,000 in increased costs were incurred by the permittees during FYs 2015-16 and 2016-17 alone. Narrative Statement at 51. Second, they argue (without citation to any law or evidence) that "Claimants have not established that they must use tax monies to pay for the dry weather field screening activities." Again, this allegation is refuted by the Declarations submitted by Claimant representatives in support of this Joint Test Claim. *See* Declarations, ¶ 9. Third, the Water Boards assert that because the CWA and its regulations requiring monitoring and reporting in "all NPDES permits, not just MS4 permits," the Screening Requirements are "not unique to local government." This allegation is of no assistance to the Water Boards. The Screen Requirements in the 2015 Permit are a unique obligation of MS4 operators, not a general monitoring requirement applicable to all NPDES permits. As such, it does not provide an exception to the requirement for a subvention of funds for the costs of that provision.

H. *Special Studies Requirements*

Permit Provision D.3 requires Claimants to undertake various special studies to address pollutant and/or stressor data gaps and/or to develop information necessary "to more effectively address" pollutants and/or stressors that are causing or contributing to the highest priority water quality conditions identified in the WQIP or which are impacting receiving waters on a regional basis in the area under the SDRWQCB's jurisdiction (the "San Diego Region"). Provision D.3 requires at least two special studies in each WMA and one special study for the San Diego Region, with the option of replacing one WMA study with another San Diego Region study.

Such studies must meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the 2015 Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs.

1. *The Special Studies Requirement Is a New Program and/or a Requirement for a Higher Level of Service*

The Special Studies required by Provision D.3 of the 2015 Permit are entirely new requirements, not found in any previous MS4 permit issued to Claimants. No prior permit required the subject matter of such studies. The Water Boards argue, however, that since entirely different special studies requirements were contained in the 2004 and 2010 Permits issued to Claimants, the requirements of Provision D.3 does not constitute a new program or higher level of service. WB Comments at 59.

The Water Boards' argument, if followed to its logical conclusion, would exempt all requirements of an MS4 permit falling within a general category (e.g., new development requirements) from state mandate requirements on the ground that if a prior permit contained new development requirements, the existence of an *entirely different* new development requirements in a subsequent permit was not a new program.

The Water Boards cite to the 2004 Permit, but that permit required only a single special study to determine numeric criteria for controlling the volume, velocity, duration, and peak discharge rate of runoff from new developments. Order No. R9-2004-0001, MRP, at 8 (Attachment H-2 to Water Boards' Comments.) The Boards also cite the 2010 Permit, but that permit required completely separate special studies on sediment toxicity, trash and litter, agricultural federal and tribal inputs, an MS4 and receiving water maintenance study and a study on the implementation of LID protections on downstream flows to Marine Corps Base Camp Pendleton and potential impacts on downstream waters. *See* Narrative Statement in Support of Joint Test Claims of Riverside County Local Agencies Concerning San Diego RWQCB Order No. R9-2010-0016 (NPDES No. CAS 0108766), San Diego Region Stormwater Permit – County of Riverside, 11-TC-03 at 55-61. As this reference to the Narrative Statement in Test Claim 11-TC-03 indicates, the special studies requirements in the 2010 Permit are the subject of a test claim on that permit. In any event, the subject matters of the special studies required by that earlier permit are different than the requirements set forth in the 2015 Permit.

Because these special studies are distinct and unique to each succeeding MS4 permit, they are a new program and/or a requirement for a higher level of service. The Water Boards do not contend, and cannot contend, that Claimants were required to perform the same special studies in the preceding two permits. Because these studies were previously not required to be performed by Claimants, their inclusion in the 2015 Permit represented a new program. *County of Los Angeles v. Commission on State Mandates, supra,* 110 Cal.App.4th at 1189.

2. *The Special Studies Requirement Is Not Necessary to Implement Federal Law*

In the 2015 Permit Fact Sheet, which must contain, among other items, the legal authority for permit requirements,[45] the SDRWQCB cited no CWA or regulatory provisions as federal

[45] *See* 40 CFR § 124.8(b)(4) (A fact sheet shall include, when applicable "A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions . . . .")

authority for the special studies. 2015 Permit Fact Sheet at F-82 to F-83. In their comments, however, the Water Boards now cite 40 CFR § 122.26(d)(2)(iii) and (iv) to support their argument that the special studies are necessary to implement federal law. WB Comments at 60. Nothing in those federal regulations, however, expressly or explicitly requires the conduct by MS4 permittees of special studies. Absent such express authorization, the special studies requirement does not constitute a federal mandate. *Dept. of Finance II,* 18 Cal.App.5th at 683.[46]

The Water Boards contend that the special studies "are intended to be integral components of the Copermittees' broader, federally required, monitoring program efforts." In fact, the inclusion of the special studies was a discretionary act by the SDRWQCB. This is reflected by the Fact Sheet, which stated that such studies "are often necessary to fill data gaps or provide more refined information" and that as in the 2010 Permit, similar special studies were required "as directed by the San Diego Water Board." Fact Sheet at F-83, quoted in WB Comments at 60. Again, nothing in the Fact Sheet reflects any determination by the SDRWQCB that special studies were a requirement of federal law or regulation.

Under both *Dept. of Finance* and *Dept. of Finance II,* to find that a mandate was federal, and not state, requires a finding by the Commission that the "scope and detail" of the Permit mandate were specified by federal law or regulation or that the mandate was "explicitly" or "expressly" required by federal law. The general arguments made by the Water Boards that such studies may aid in determining the effectiveness of watershed management programs in achieving the MEP standard and the effective prohibition of non-stormwater discharges into the MS4 (WB Comments at 60) do not meet these tests.

Moreover, as discussed in the Narrative Statement, because the SDRWQCB's required special studies were not limited in scope to a study of discharges into or from the Claimants' MS4, the studies go beyond the scope of a federal NPDES permit, which, as noted above, addresses discharges from a point source (here, the MS4 operated by Claimants) into a water of the United States. *See* Narrative Statement at 52.

3. *No Mandate Exceptions Apply*

The Water Boards (WB Comments at 61) repeat the same contentions made earlier, that the costs of the special studies "would be *de minimis*" and that Claimants "have not established they must use tax monies to pay for the special studies." The first contention is unsupported by any citation to facts in the record and the second by the Section 6 Declarations filed by Claimants. *See* Declarations at ¶ 9.

The Water Boards also cite the "2009 Watershed Improvement Act" and speculate whether the WQIP is "comparable" to the plans discussed in that Act. The inapplicability of this Act to the mandates in this Joint Test Claim is discussed in Section III below. Finally, the Water Boards

[46] While the Water Boards contend that this case is not applicable to "the Clean Water Act's effective prohibition on non-storm water discharges and/or monitoring and reporting requirements," the analysis of whether the CWA regulations require a specific provision, including relating to monitoring and reporting, is directly addressed by *Dept. of Finance II. See* discussion in Section I.G.2, *supra.*

contend that because a special bacteriological standards study was required of a sewage treatment plant in a non-MS4 NPDES permit, this indicates that special studies requirements were "not unique to local government." WB Comments at 61. As previously discussed, the provisions of the 2015 Permit, including those relating to special studies, are unique to local government and require the exercise of core local governmental functions.

I. *Assessment Requirements*

Provision D.4 of the 2015 Permit requires Claimants to evaluate data collected pursuant to the receiving waters and MS4 outfall monitoring and special studies requirements in Permit Provisions D.1, D.2 and D.3, as well as information collected during implementation of the JRMP requirements set forth in Provision E, "to assess the progress of the water quality improvement strategies in the [WQIP] toward achieving compliance with Provisions A.1.a, A1.c and A.2a." Provision D.4 requires assessments of: receiving waters, MS4 outfall discharges of non-stormwater and stormwater, the special studies required under Provision D.3 and an integrated assessment of the WQIP. Collectively, these requirements are referred to herein in the "Assessment Requirements."

1. *The Assessment Requirements Represent a New Program and/or Higher Level of Service*

The Water Boards (WB Comments at 61-62) do not dispute that the Assessment Requirements were new to the 2015 Permit and not found in prior MS4 permits issued to Claimants. Instead they argue that because the provisions "are designed to help Copermittees achieve compliance with the receiving water limitations and discharge prohibition provisions," and that these requirements have been in previous permits, provisions "designed to assist the Copermittees to meet these longstanding federal requirements are not new nor do they require a higher level of service." WB Comments at 62.

This argument is a variation of one already made to, and rejected by, the Commission. As discussed in Section I.F.2, the DOF had similarly argued in the San Diego County test claim that since additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, they were not new requirements. SD County SOD at 49. The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50. Here, the Water Boards are similarly arguing that new requirements, not found in previous permits, are not new because they serve an existing purpose. Under the Commission's reasoning in the SD County SOD, this argument is without merit.

The Commission has also held that any new requirements not contained in a previous permit, even when those programs were only expanding on a program contained in the previous permit, constituted a new program or higher level of service. *See* SD County SOD at 53-54. The same analysis applies to the Assessment Requirements.

2. *The Assessment Requirements Are Not Necessary to Implement Federal Law*

As Claimants have set forth, the CWA regulations cited in the Fact Sheet to justify the assessment requirements contain no provisions specifically requiring the Assessment Requirements. *See* Narrative Statement at 54-56. In their comments, the Water Boards cite to no such provision, but merely claim that the SDRWQB determined that provisions were "consistent with the monitoring and reporting authorities in the NPDES regulations as cited in the Fact Sheet." WB Comments at 62. "Consistent with" is not, however, the standard by which the Commission must judge whether a mandate is necessary to implement federal law. As discussed above, the standard, as established by *Dept. of Finance II*, is whether the regulation expressly or explicitly required the permit provision. 18 Cal.App.5th at 683.

The Water Boards also repeat the allegation that the assessments were designed to help Copermittees "achieve compliance with the requirements to implement the federal standards of reducing pollutants in discharges from the MS4 to the MEP and the separate requirement to effectively prohibit non-storm water discharges to the MS4." WB Comments at 62. Absent evidence that the scope and detail of a permit mandate (here, the specific assessment requirements in Provision D.4) is required by federal law or regulation, or that the law or regulation expressly or explicitly requires the mandate, it is not a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.[47]

3. *No Mandate Exceptions Apply*

The Water Boards again repeat contentions that the costs of the special studies "would be *de minimis*" and that Claimants "have not established they must use tax monies to pay for the special studies." WB Comments at 63. The first contention is unsupported by any citation to facts in the record and the second is contradicted by the Declarations filed by Claimants. *See* Declarations at ¶ 9.

The Water Boards also cite the "2009 Watershed Improvement Act" and speculate whether the WQIP is "comparable" to the plans discussed in that Act. The inapplicability of this statute is discussed in Section III below. Finally, the Water Boards contend that because all NPDES permits require monitoring and reporting, the Assessment Requirements are "not unique to local government." WB Comments at 63. As previously discussed, the provisions of the 2015 Permit, including those relating to the Assessment Requirements, are unique to local government and require the exercise of core local governmental functions. In particular, the Assessment Requirements are aimed only at local government and require them to, in the course of performing core local government functions (i.e., complying with the 2015 Permit), conduct assessments of those functions.

---

[47] The Water Boards (WB Comments at 62-63) cite SDRWQCB findings that the Assessment Requirements will be useful in evaluating compliance with permit requirements and the CWA. These findings reflect not a federal requirement for the assessments but rather a discretionary choice by the SDRWQCB to mandate those assessments in the 2015 Permit. Under *Dept. of Finance* and *Dept. of Finance II,* that choice represents a state, not federal mandate.

J. *Alternative Compliance Program Requirements for Onsite Structural BMP Implementation*

Provision E.3.c.(3) of the 2015 Permit contains provisions that allow a PDP, including a municipal PDP, to be constructed with offsite BMP implementation for stormwater and hydromodification control. To qualify for this alternative Claimants must undertake a Watershed Management Area Analysis ("WMAA") set forth in Provision B.3.b.(4).

Provision B.3.b.(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. Claimants must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from hydromodification BMP performance requirements. Additionally, pursuant to Provision E.3.c.(3)(a), Claimants must submit Water Quality Equivalency calculations for acceptance by the SDRWQCB executive officer. PDPs, including PDPs for municipal projects, wishing to enter an alternative compliance program, must fund, contribute funds to or implement a candidate project, provided that Claimants have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) ("onsite BMP requirements").

Additionally, if the PDP sponsor chooses to fund a candidate project, Claimants are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite structural BMPs; if the PDP chooses to implement a candidate project, Claimants are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that the design is conducted by professionals who are competent and proficient in the fields pertinent to the project design; and, that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer. Additionally, Claimants must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP sponsor wishes to construct or fund an alternative compliance project not identified by the WMAA, it may do so provided that Claimants determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, Claimants must develop and implement an in-lieu fee structure.

These requirements are referred to as the "Alternative Compliance Program" requirements.

1. *The Alternative Compliance Program Requirements Are a Mandate*

The Water Boards do not directly claim that the Alternative Compliance Program requirements are a federal mandate or address the fact that their status as a state mandate was decided in the SD County SOD, points addressed by Claimants in the Narrative Statement. WB Comments at 65. Instead, they contend that these points made by Claimants are "misplaced" because the requirements are discretionary for permittees and thus not a mandate. *Id.*[48]

As set forth in the Narrative Statement, the Alternative Compliance Program requirements are not in fact discretionary as applied to the Claimants. Claimants must put the Program into place because, as the Narrative Statement indicated, due to the hydrologic conditions and state of the built environment, there simply is no place to put an on-site BMP. Narrative Statement at 61.

The Water Boards argue that even if these conditions were in place, "permittees are not forced to pursue the alternative outline in Provisions E.3.c.(3)." WB Comments at 65. This argument ignores the reality of development. Due to watershed conditions, Claimants have no choice but to proceed with conducting the WMAA and coming up with a list of alternatives to on-site BMP requirements. Otherwise, development projects in areas where on-site BMPs cannot be built would not go forward. To do so is prudent community development, not a whim by local government, as the Water Boards suggest.

The Water Boards also repeat their argument that "Claimants have not shown that they would be required to use tax monies to pay for the option." WB Comments at 65. The costs set forth in the Joint Test Claim, however, relate to generalized costs to establish the availability of alternative sites, not costs associated with specific private PDPs. And, where it is a municipal PDP that is being developed, local government may have no choice as to the construction or location of that project. For the reasons set forth in the Narrative Statement, local governments such as Claimants do not have a real choice in whether to build vital projects for the public safety, health or other needs. *See* Narrative Statement at 58-60.

Claimants are entitled to a subvention of funds for costs associated with the development of the Alternative Compliance Program and for its implementation with respect to municipal PDPs.

K. *Dry Weather Receiving Water Hydromodification Monitoring Requirements*

Provision D.1.c.(6) of the 2015 Permit sets forth specific requirements for the permittees to monitor each long-term receiving water monitoring station for observations and measurements concerning the effects of hydromodification. In particular, permittees are required to monitor channel conditions, including dimensions, hydrologic and geomorphic conditions and the presence and condition of vegetation and habitat; the location of discharge points; habitat integrity; conduct

[48] The Water Boards also contend that in this Joint Test Claim, "Claimants do not directly challenge the LID and Hydromodification Management BMP requirements as state mandates." WB Comments at 64. Because those requirements were not new to the 2015 Permit, they are not included in the body of the Narrative Statement for this Joint Test Claim. However, to the extent that they are carried on from the 2010 Permit, where LID and HMP requirements are at issue in Test Claim 11-TC-03, those requirements are specifically incorporated into the Joint Test Claim. *See* Narrative Statement at 4, Section I.F.

photo documentation of existing erosion and habitat impacts, with the location of the photos located by latitude and longitude coordinates; measure or estimate existing channel bed or bank eroded areas; and identify known or suspected causes of existing downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development.

In addressing these requirements, the Water Boards (WB Comments at 66-67) emphasize that the SDRWQCB "determined" that the dry weather hydromodification requirements were "necessary for permittees to assess the impacts of their discharges on receiving waters." This statement demonstrates that the SDRWQCB added these requirements to the 2015 Permit in an exercise of its discretion.

1. *The Dry Weather Hydromodification Monitoring Requirements Represent a New Program and/or Higher Level of Service*

In arguing that the dry weather hydromodification monitoring requirements are not a new program or a higher level of service, the Water Boards again contend that because the SDRWQCB determined that the requirements were necessary to meet the same discharge prohibitions and receiving water limitations found in previous MS4 permits issued to Claimants, the monitoring did "not amount to imposition of a new program nor do they require a higher level of service." WB Comments at 67. As previously shown, the Commission rejected a similar argument that because new permit requirements were necessary for permittees to meet the MEP standard, those requirements were not a new program or higher level of service. SD County SOD at 53-54.

Here, even though the "standard" referenced was Permit Provision A rather than the CWA's MEP standard, the analysis is the same. In requiring new monitoring requirements to determine if the discharge prohibitions and receiving water limitations were being met, the SDRWQCB was imposing a new program and/or a requirement for a higher level of service on permittees.

The Water Boards argue further that the 2004 and 2010 Permits also required monitoring to assess the impacts of hydromodification, while acknowledging that the provisions in the prior permits were "different in precise form." WB Comments at 68. That argument ignores the significant differences in the hydromodification requirements found in the 2015 Permit, including the requirement for monitoring at the long-term receiving water monitoring station, the need to measure areas of erosion, photo-documentation of erosion and habitat impacts, the location of discharge points, the presence and condition of vegetation and habitat, and the known or suspected causes of downstream erosion or habitat impacts, including flow, soil, slope and vegetation conditions, as well as upstream land uses and the identity of any contributing new and existing development.

The requirements of 2015 Permit Provision D.1.c.(6) represent a new program and/or higher level of service.

2. *The Dry Weather Hydromodification Monitoring Requirements Are Not Necessary to Implement Federal Law*

As Claimants set forth in their Narrative Statement (at 62), there is no CWA or federal regulatory requirement for the dry weather hydromodification monitoring required by the 2015 Permit. Nor, as the Commission found in the SD County SOD, was there any federal requirement for hydromodification programs in the first place, a determination confirmed in *Dept. of Finance II.* 18 Cal.App.5th at 684-85.

The Water Boards do not dispute these facts, but argue that the monitoring is "wholly consistent with" a regulatory requirement requiring that MS4 monitoring for representative data collection may include instream locations. WB Comments at 68. The Water Boards also contend that since the "overarching" federal basis for the Monitoring and Assessment Program in the 2015 Permit (which includes hydromodification monitoring) is necessary to implement the federal MEP standard and the effective prohibition of non-stormwater discharges into the MS4 contained in the CWA, and argue that the dry weather hydromodification monitoring is necessary to implement those requirement. *Id.*.

As set forth above, both the Commission in the SD County SOD and the Supreme Court and Court of Appeal in *Dept. of Finance* and *Dept. of Finance II* have rejected this analysis. In the SOD, the Commission found that a similar argument made by the DOF concerning provisions necessary to meet the MEP standard did not constitute those provisions federally mandated. In *Dept. of Finance,* the Supreme Court stated that to be a federal mandate, the federal law must require the "scope or detail" of the permit provision. 1 Cal. 5th at 771. And, the Court of Appeal's requirement (*Dept. of Finance II,* 18 Cal.App.5th 683) that the federal regulation expressly or explicitly require the permit terms at issue is not met here, since the Water Boards cannot cite to any such regulations.[49]

The Water Boards last argue that the findings made by the SCRWQCB are entitled to deference under *Dept. of Finance.* For the reasons set forth in Section I.G above, the SDRWQCB is not entitled to such deference. And, as also discussed above, both *Dept. of Finance* and *Dept. of Finance II* are directly relevant as to whether the dry weather hydromodification monitoring is a federal or state mandate.

3. *No Other Mandate Exceptions Apply*

The Water Boards repeat their unsupported arguments relating to the alleged "*de minimis*" costs of the dry weather hydromodification monitoring requirements and that Claimants have not

[49] Similarly, the Water Boards contend that monitoring provisions "such as that challenged here" are a necessary part of federal requirements that permittees monitor their discharges to assess permit compliance and cite a general requirement for MS4 permittees to report on the identification of water quality improvements or degradation. WB Comments at 68. These contentions do not survive *Dept. of Finance* and *Dept. of Finance II.* Under the Water Boards' argument, any monitoring requirement, no matter how unmoored from the monitoring required by federal regulations, would satisfy the federal mandate requirement. Under those cases, and under the SD County SOD, that is not the governing law.

shown that they must use tax monies to pay for it. WB Comments at 69. They provide no evidence to support the first argument, and as to the second, *see* Declarations, ¶ 9.

The Water Boards then contend that since "hydromodification monitoring is focused on assessing water quality impacts from development," it is "also likely that copermittees can fund the required monitoring through fees from developers." WB Comments at 69. This contention ignores the nature of the monitoring requirement. It is a requirement independent of any development per se, but rather the impact on receiving waters of all development in the watershed being assessed. Thus, the impacts being monitored may be from development which occurred years before, not contemporaneous development which might be subject to development fees. Because there is no link between the impacts of such development and the monitoring required in Provision D.1.c.(6), developer fees cannot be used to fund it. The Water Boards' reference to municipal PDPs (WB Comments at 69) is inapposite, for the same reason.

Finally, the fact that monitoring and reporting is required in all NPDES permits does not mean that the specific hydromodification monitoring requirements in the 2015 Permit are not a provision unique to local government. The monitoring is required only of local government, and is intended to address impacts caused by upstream development within local government boundaries. The monitoring is required as part of an MS4 permit, issued only to municipal governments, regarding the operation of their storm sewer systems, a core function of local government. *See generally* discussion in Section I.F, above.

REBUTTAL TO COMMENTS OF WATER BOARDS AND DEPARTMENT OF FINANCE

III. CLAIMANTS LACK FEE AUTHORITY TO FUND THE MANDATES IMPOSED BY THE 2015 PERMIT

Claimants are entitled to reimbursement for a mandated program or increased level of service unless they have the authority to levy service charges, fees or assessments sufficient to pay for the program or service. Govt. Code § 17556(d). Because the fee authority is an exception to payment, like the exception for federal mandates set forth in Govt. Code § 17556(c), the state bears the burden of proving that the Joint Test Claimants have this authority, and not otherwise.[50] As the Supreme Court stated with respect to the federal mandate exception, "the State must explain why" the Joint Test Claimants can assess service charges, fees or assessments to pay for the mandates set forth above. *Dept. of Finance,* 1 Cal. 5th at 769.

The Water Boards and the DOF have not met this burden. The Water Boards' chief contention is that Claimants can levy fees to pay for the programs at issue in the Joint Test Claim. WB Comments at 33-37. DOF's chief contention, also raised by the Water Boards, is that the fact that Claimants must seek voter approval pursuant to Proposition 218, articles XIII C and D of the

[50] The Water Boards argue that "Claimants must establish that they are required to use tax monies to pay for implementation of the contested provisions." WB Comments at 33. This was done in the Declarations submitted in support of the Joint Test Claims. *See* Declarations at ¶ 9.

California Constitution,[51] to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Govt. Code § 17556(d). DOF Comments at 1-2; WB Comments at 35-36.

Neither of these contentions meets the State's burden of explaining why Claimants can assess charges, fees or assessments to fund the mandates in this Joint Test Claim. First, under article XIII C of the California Constitution, when providing services or conferring benefits, Claimants cannot assess a fee that covers more than the reasonable cost of providing the benefit, privilege, service or product. Additionally, the manner in which those costs are allocated to a payor must bear a fair and reasonable relationship to the payor's burdens or benefits received from the governmental activity. In this regard, when assessing a fee, Claimants bear the burden of proving by a preponderance of the evidence 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. Cal. Const., article XIII C, section 1(e). Otherwise the fee would be considered a tax subject to the requirements of article XIII C of the California Constitution. Cal. Const., article XIII C, section 1(e). *Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, 261.

The mandates at issue in this Joint Test Claim are not the types of programs for which the Claimants can assess a fee. WQIP development and implementation, establishing and implementing standards to locate critical sediment yield areas, updating of a BMP design manual, creating and updating residential area inventories and inspecting residential areas, developing a program to retrofit and rehabilitate areas of existing development and streams and channels, developing and implementing an enforcement response plan, updating the JRMP, carrying out transitional dry weather field screen monitoring, carrying out special studies, evaluating monitoring data and special studies and other data, developing candidate projects for offsite BMPs for stormwater and hydromodification control and conducting dry weather monitoring at receiving water monitoring stations, are all programs intended to improve the overall water quality in the Santa Margarita region, which benefits all persons within the jurisdiction. It is not possible to identify benefits that any individual resident, business or property owner within the jurisdiction would be receiving that is distinct from benefits that all other persons within the jurisdiction are receiving. Similarly, it is not possible to identify the particular burden posed by any individual person so as to accurately allocate the costs of that burden to the individual.

Likewise, 2015 Permit requirements that apply to Claimants' own activities as municipal governments address requirements imposed on Claimants themselves. Again, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements.

Second, any assessment would be considered to be a "special tax," and, as such, could not be imposed without a vote of the electorate. Under the Constitution, a tax is defined to be "any levy, charge, or exaction of any kind imposed by a local government . . . ." Cal. Const., article XIII C, section 1(e). A "special tax" is defined to be "any tax imposed for specific purposes,

[51] Rebuttal Documents, Tab 2.

including a tax imposed for specific purposes, which is placed into a general fund." *Id.*, article XIII C, section 1(d). Under the Constitution, "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Cal. Const., article XIII C, section 2(d).

Article XIII C, section 1(e), sets forth certain charges that are excepted from the definition of a tax. Those exceptions are:

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

Cal. Const., article XIII C, section 1(e).

None of these exceptions applies here. As discussed above, any fee or assessment to pay for implementation of the 2015 Permit requirements at issue in this Joint Test Claim would be a fee or assessment to pay for the costs of a general program, not one directed towards a specific benefit, privilege, service or product.

Article XIII D of the California Constitution also restricts the Claimants' ability to assess property-related fees. Under article XIII D, section 3(a), no tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership, unless it is for "property-related services"[52] or certain other exceptions, except upon a two-thirds vote of the electorate. Under article XIII D, section 6(c), except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed unless approved by a majority vote of property owners of the property subject to the fee or charge or by two-thirds vote of the electorate residing within the affected area. In *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354, the Court of Appeal held that a general stormwater fee was not excepted as a charge for water or sewer services, but

[52] "Property-related services" means "a public service having a direct relationship to property ownership." Article XIII D, section 2(h).

instead was a property-related fee subject to the two-thirds electoral vote requirement. *Id.* at 1354-55, 1357-59.

The Water Boards cite a newly adopted statute, Senate Bill 231, which took effect on January 1, 2018 and which amended the definition of "sewer" in Govt. Code § 53750 as support for their argument that Claimants have authority under article XIII D to impose a property-related fee. WB Comments at 34. This statute seeks to legislatively clarify the meaning the article XIII D of the Constitution and overrule *Howard Jarvis Taxpayers Assn.* Its constitutionality has not yet been tested. Even if upheld by the courts, it would not affect any amounts spent by Claimants under the 2015 Permit during the period up to January 1, 2018.[53]

Accordingly, the Claimants do not have the authority to levy fees or assessments to pay for the mandates that are the subject of this Joint Test Claim. Such fees or assessments can be levied only upon the vote of the electorate.

The DOF and the Water Boards contend that even though Cal. Const. articles XIII C and D require Claimants to submit a fee to the electorate for approval, this does not mean that Claimants lack authority to assess a fee. This contention also lacks merit. Indeed, the Commission has already considered and rejected this contention. In the San Diego County test claim, DOF and the Water Boards made the same argument that they make here, that municipalities have authority to levy service charges, fees or assessments within the meaning of Govt. Code § 17556(d), even though they lack such authority unless the charges, fees or assessments are submitted to the electorate and approved by a two-thirds vote. The Commission held:

> The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes 'costs mandated by the state' if 'The local agency . . . has the *authority* to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.' . . . Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.
>
> Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which 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 taxing and spending limitations that articles XIII A and XIII B impose."

---

[53] The Water Boards also cite Assembly Bill 2043 (WB Comments at 34), which did not directly confront the controlling *Howard Jarvis Taxpayers Assn.* case, but which purports to address the issue by defining water as meaning "water from any source." AB 2043 is even less clear in its purpose than SB 231, but suffers from the same limitation: Absent constitutional testing by an appellate court, the statute still is only a legislative attempt to amend the Constitution.

SD County SOD at 106 (emphasis in original; citation omitted).

In reaching this result, the Commission rejected the Water Boards' contention, also made here (WB Comments at 36 and n.196), that *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, in which the court held that economic impracticability is not a bar to levying charges or fees within the meaning of section 17556, was applicable. The Commission held:

> The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d).* The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell,* but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority," i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.

SD County SOD at 107 (emphasis added).[54]

The Commission reached the same conclusion in that test claim with respect to property-related fees under article XIII D of the Constitution. To the extent that any fees imposed for the programs at issue here would be considered property-related fees, rather than a special tax, the fee would still be subject to voter approval or approval by a majority of property owners under article XIII D, section 6(c). *See Howard Jarvis Taxpayers Assn., supra,* 98 Cal.App.4th at 1354. As the Commission found in the San Diego County Test Claim, this requirement also means that Claimants lack authority to impose fees for property-related services. SD County SOD at 106-07.

The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5 [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4,* Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014).[55] In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, "absent compliance with the Proposition 218 election and other procedures, there is no legal

---

[54] As a result, the Commission found the following state mandates in the San Diego County stormwater permit to be reimbursable: (1) street sweeping; (2) street sweeping reporting; (3) conveyance system cleaning; (4) conveyance system cleaning reporting; (5) educational programs; (6) watershed activities and collaboration in the Watershed Urban Runoff Management Program; (7) the Regional Urban Runoff Management Program; (8) program effectiveness assessment; (9) long-term effectiveness assessment; and (10) permittee collaboration requirements. *Id.* at 1-2.

[55] Rebuttal Documents, Tab 3.

authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)." Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

The Water Boards also cite to Health and Safety Code § 5471 and Public Resources Code § 40059(a). Neither of these statutes provide authority to Claimants. Health and Safety Code § 5471 applies to sanitation and sewer districts. It does not apply to Claimants. Public Resources Code § 40059(a) was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board ("IWMB") to ensure that local trash collection agreements would not be affected by the IWMB legislation. In *Waste Resource Technologies v. Department of Public Health* (1994) 23 Cal.App.4th 299,[56] the court held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. *Id.* at 308-09 (validating city's exclusive refuse contract). Neither statute gives local agencies authority to impose fees for stormwater control.

The Water Boards and DOF nevertheless contend that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Govt. Code § 17556(d). (WB comments at 36, n.197; DOF comments at 1). *Clovis* is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so. 188 Cal.App.4th at 810. In those circumstances, the Court of Appeal held that the Controller's office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id.* at 812.

Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted this argument, article XIII B, section 6 would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds. Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.[57]

---

[56] Rebuttal Documents, Tab 1.

[57] The Water Boards reference the decision made by some jurisdictions to impose local stormwater fees and attach information regarding (but not excerpts of the actual ordinances) stormwater fee ordinances adopted by the Cities of Alameda, Culver City, Palo Alto, San Clemente, San Jose and Santa Cruz and by the County of Los Angeles. WB Comments at 36 and Attachments I-2 to I-8. None of these excerpts supports the Water Boards' argument. First, the documents provided by the Water Boards on Culver City Measure CW and Los Angeles County Measure W plainly indicate that they were adopted by a vote of the people. Indeed, the Water Boards concede this fact with respect to Measure W. WB Comments at 36. Second, the Palo Alto stormwater fee ordinance was passed by the voters in 2005. *See* Exhibit D to Burhenn Declaration, an excerpt from a Question and Answer document prepared by the City describing the background of its stormwater fee ordinance. Claimants request that the Commission take administrative notice of this document pursuant to Evidence Code § 452(b) as a legislative enactment issued by a public entity in the United States. Third, the Water Boards' documentation on the San Clemente ordinance indicates that it was passed by a vote, as was the Santa Cruz ordinance, Measure E, which was passed by the voters in 2008.

Finally, the Water Boards (but not DOF) cite the California Watershed Improvement Act of 2009 ("CWIA")[58] as a potential source of funding, citing a passing statement by the State Water Board in a footnote in Order No. WQ 2015-0075 concerning the 2012 Los Angeles County MS4 permit. WB Comments at 36. This citation is noteworthy because neither the Water Boards nor DOF cited the CWIA in their comments on the Los Angeles County MS4 permit test claim itself. *See* Comments of the State Water Resources Control Board and the Los Angeles Regional Water Board and the Department of Finance on *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0075,* Nos. 13-TC-01 and 13-TC-02. And, neither the Water Boards nor DOF cited the CWIA in their comments on the test claim filed by Orange County permittees or San Diego County permittees on the very same regional MS4 permit at issue in this Joint Test Claim. *See* comments of the State Water Resources Control Board and the San Diego Regional Water Board and the Department of Finance on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0001, Provisions A.2, A.3.b, A.4, B, E.3.c(2), E.3.d, E.5, E.5.e, E.6, F, and Attachment E; and Order No. R9-2015-0100, Provision B.3.c,* 15-TC-02; *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001,* 14 TC-03.

The Water Boards claim, without evidence, that the WQIPs in the 2015 Permit are "largely consistent" with watershed improvement plans authorized by the CWIA. This is not correct. The 2015 Permit's WQIP requirements contain mandates that go further than those required for a watershed improvement plan under the CWIA, including among other things the identification of PWQCs (Provision B.2), the identification of MS4s that are sources of pollutants and stressors (Provision B.2.d.), a water quality improvement monitoring and assessment program (Provision B.4) and the requirement for an iterative approach and adaptive management process to re-evaluate PWQCs, adapt goals, strategies and schedules and adapt the monitoring and assessment program (Provision B.5). These provisions are not in the watershed improvement plan requirements set forth in Water Code § 16101. Also, the process required by the SDRWQCB for the development of the WQIP differs greatly from, and is far more detailed than, that required for development of watershed improvement plans under the CWIA. *Compare* 2015 Permit Provision F.1 *with* Water Code § 16101(b). Significantly, neither the 2015 Permit nor the Permit Fact Sheet even mentions the CWIA.

And while, the CWIA provides that an entity undertaking a watershed improvement plan "may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution" to pay the costs of preparing and implementing the plan, the sponsoring entity must "make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities *of the feepayer.*" Water Code § 16103(a)(2) (emphasis supplied).

For the reasons previously discussed, there is no way that a permittee here could make the finding required by the CWIA. The benefits provided, and the burdens responsible for, the 2015

See Exhibit E to Burhenn Declaration. Finally, the information on the Alameda and San Jose programs do not indicate how they were originally adopted.

[58] Rebuttal Documents, Tab 2.

Permit mandates at issue in the Joint Test Claim cannot be so allocated among fee payers. Thus, any attempt to raise fees to pay for those requirements would fall into the same category of "special tax" that requires a vote of the people pursuant to Cal. Const. art. XIII C. And, the CWIA itself limits itself by stating that any watershed improvement plan fees can be "imposed solely as an incident of property ownership." Water Code § 16103(a)(3).

For all of the reasons, the CWIA does not provide a method for Claimants to raise fees to pay for the requirements of the 2015 Permit.

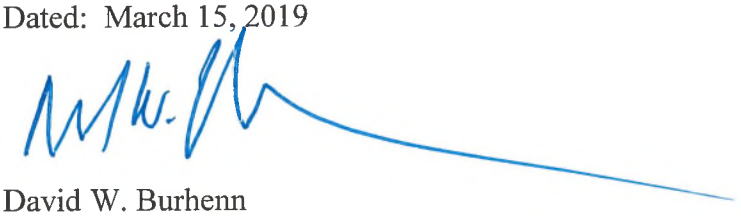
The Water Boards and DOF have not met their burden of showing that Claimants have the authority to levy service charges, fees or assessments sufficient to pay for the mandated programs at issue here. Govt. Code § 17556(d) does not apply.

IV. CONCLUSION

For the foregoing reasons, each of the mandates at issue in this Joint Test Claim is a state mandate for which Claimants are entitled to reimbursement. Claimants respectfully request that the Commission find that Claimants are entitled to a subvention of funds for each mandate in accordance with article XIII B, section 6, of the California Constitution.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge and belief.

Dated: March 15, 2019



David W. Burhenn
BURHENN & GEST LLP
HOWARD GEST
DAVID W. BURHENN
624 S. Grand Avenue, Suite 2200
Los Angeles, CA 90017

Phone: (213) 629-8788
Email: dburhenn@burhenngest.com

Attorneys for Joint Test Claimants Riverside County Flood Control and Water Conservation District, County of Riverside and Cities of Murrieta, Temecula and Wildomar.

DECLARATION OF DAVID W. BURHENN AND EXHIBITS A-E IN SUPPORT OF REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2015-0100, 16-TC-05

DECLARATION OF DAVID W. BURHENN ON BEHALF OF JOINT TEST CLAIMANTS IN SUPPORT OF REBUTTAL COMMENTS

I, DAVID W. BURHENN, hereby declare and state as follows:

1. I am a partner in the firm of Burhenn & Gest LLP and am the representative for the Joint Test Claimants in *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a, B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)(a, E.5.c(3), E.5.e, E.6, F.1.a, F.1.b, F.2.a, F.2.b, F.2.c, F.3.B(3) and F.3.c,* 16-TC-05. As such, I have personal knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Central Valley Region ("CVRWQCB") to the City of Modesto on or about June 12, 2008. On December 8, 2017, I downloaded that excerpt from the website of the CVRWQCB at the following address: https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/stanislaus/r5-2008-0092.pdf

3. Exhibit B to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, San Francisco Bay Region ("SFBRWQCB") to permittees in the San Francisco Bay area on or about October 14, 2009. On December 8, 2017, I downloaded that excerpt from the website of the SFBRWQCB at the following address: https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/R2-2009-0074_Revised.pdf

4. Exhibit C to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB") to permittees in the County of Ventura on or about May 7, 2009. On December 8, 2017, I downloaded that excerpt from the website of the LARWQCB at the following address: https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.

5. I have reviewed the permit issued by the SFBRWQCB to the San Francisco Bay permittees and determined that revisions to the permit dated November 28, 2011 did not include revisions to those provisions in the Fact Sheet included in Exhibit B.

6. I reviewed the permit issued by the LARWQCB to the Ventura County permittees and determined that corrections to the permit dated January 13, 2010 did not include revisions to Finding E.7, which is included in Exhibit C.

7. Exhibit D to this Declaration is a true and correct copy of an excerpt from a document from the City of Palo Alto Storm Water Management Program and dated December 16, 2016 entitled "City of Palo Alto Storm Water Management Fee Background and Frequently Asked Questions." On March 15, 2019, I downloaded this document from the City of Palo Alto website at the address: www.cityofpaloalto.org/civicax/filebank/documents/56164

8. Exhibit E to this Declaration is a true and correct copy of an excerpt of a document from the Smart Voter website concerning the ballot results to adopt Measure E, the Santa Cruz City Clean Beach tax. On March 15, 2019, I downloaded this document from the Smart Voter website at the address: www.smartvoter.org/2008/11/04/ca/scz/meas/E/

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

Executed March 15, 2019 at Los Angeles, California.

David W. Burhenn

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER NO. R5-2008-0092

NPDES NO. CAS083526

WASTE DISCHARGE REQUIREMENTS FOR CITY OF MODESTO STORM WATER DISCHARGE FROM MUNICIPAL SEPARATE STORM SEWER SYSTEM STANISLAUS COUNTY

The California Regional Water Quality Control Board, Central Valley Region (hereafter Regional Water Board) finds that:

1. The City of Modesto submitted a Report of Waste Discharge (ROWD) on 2 April 2007 and requested reissuance of Waste Discharge Requirements (WDR) under the National Pollutant Discharge Elimination System (NPDES) area-wide municipal separate storm sewer system (MS4) permit to discharge storm water runoff from storm drains and watercourses within the jurisdiction of the Discharger and to implement a Storm Water Management Plan (hereafter SWMP) for the City of Modesto.

2. Prior to issuance of this Order, the City of Modesto was covered under the NPDES area-wide MS4 permit, Order No. R5-2002-0182 (NPDES No. CA0083526) adopted on 1 October 2002.

3. The City of Modesto is located in Stanislaus County at the confluence of Dry Creek and the Tuolumne River (tributaries of the San Joaquin River). The City encompasses 36 square miles[1] with an average elevation of 91 feet above sea level. The average annual precipitation is approximately 12.2 inches.[2] The storm drain system has approximately 77 miles of storm drain lines and 20 pump stations within the City. Storm water discharges from the City drain to detention/retention basins (13 detention and 11 retention basins in the City), approximately 18 major outfalls to receiving waters (Tuolumne River or Dry Creek), Modesto Irrigation District (MID) laterals/drains, or rock wells (approximately 11,000). **Attachment A** shows a map of the City of Modesto and the service area covered under this permit.

4. Surface water discharges occur generally in the older areas of the City or those areas immediately adjacent to the Tuolumne River, Dry Creek or irrigation canals. Forty percent of storm water discharges to detention/retention basins, twenty percent to

[1] U.S. Census Bureau, 2000.
[2] Modesto Irrigation District, Water Years 2002-2007.

~~*Council, Inc. v. U.S. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)~~ The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (*cf. Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

~~Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs)~~ are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. § 122.44(d)(1)(vii)(B).)]

Second, the local agency Discharger's obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges or waste discharge requirements for discharges to underground injection wells. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, §§ 13260, 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].). As noted above, private dischargers to underground injection wells who cause similar threats to groundwater would be subject to similar regulation.

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

EXHIBIT B

California Regional Water Quality Control Board
San Francisco Bay Region
Municipal Regional Stormwater NPDES Permit

Order R2-2009-0074
NPDES Permit No. CAS612008
October 14, 2009

inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) requires "a comprehensive planning process which involves public participation and where necessary 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. The program shall also include a description of staff and equipment available to implement the program. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls."

40 CFR 122.26(d)(2)(iv)(A -D) – Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial, and municipal land uses or activities. Control of illicit discharges is also required.

CWC 13377 – CWC section 13377 requires that "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the CWA, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with anymore stringent effluent standards or limitation necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

Order No. R2-2009-0074 is an essential mechanism for achieving the water quality objectives that have been established for protecting the beneficial uses of the water resources in the San Francisco Bay Region. Federal NPDES regulation 40 CFR 122.44(d)(1) requires MS4 permits to include any requirements necessary to "achieve water quality standards established under CWA section 303, including State narrative criteria for water quality." The term "water quality standards" in this context refers to a water body's beneficial uses and the water quality objectives necessary to protect those beneficial uses, as established in the Basin Plan.

State Mandates

This Permit does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Permit implements federally mandated requirements under CWA section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-stormwater discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held that these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. USEPA

(9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Permit is not reserved state authority under the CWA's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements that are not less stringent than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for MS4. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Association of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Permit to implement total maximum daily loads (TMDLs) are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once USEPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable WLA. (40 CFR 122.44(d)(1)(vii)(B).)

Second, the local agencies' (Permittees') obligations under this Permit are similar to, and in many respects less stringent than, the obligations of nongovernmental dischargers who are issued NPDES permits for stormwater discharges. With a few inapplicable exceptions, the CWA regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Water Code, section 13263), both without regard to the source of the pollutant or waste. As a result, the costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The CWA and the Porter-Cologne Water Quality Control Act largely regulate stormwater with an even hand, but to the extent that there is any relaxation of this evenhanded regulation, it is in favor of the local agencies. Except for MS4s, the CWA requires point source dischargers, including discharges of stormwater associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1164-1165 [noting that industrial stormwater discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal stormwater more leniently than the discharge of waste from nongovernmental sources.

Third, the Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Permit. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Permittees can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising

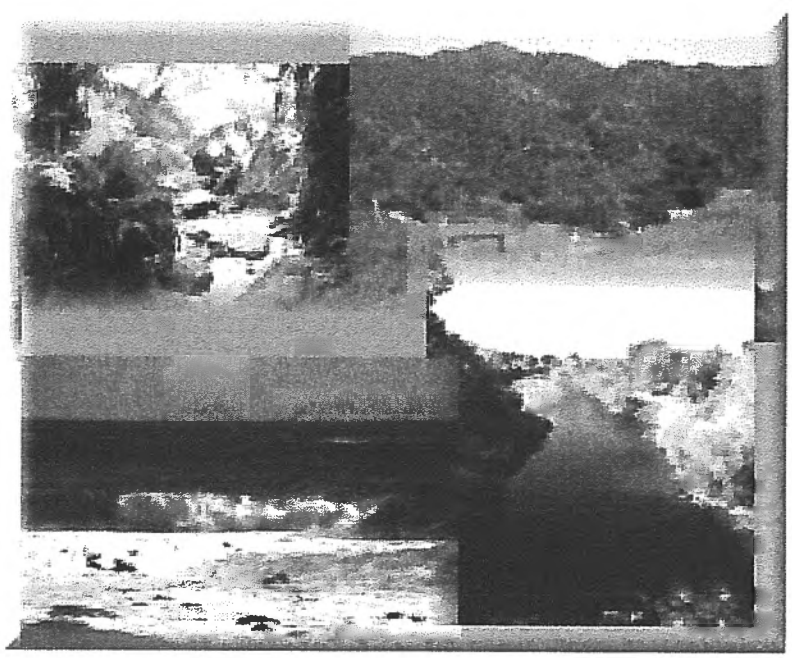
EXHIBIT C

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER 09-0057
NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS
FOR
STORM WATER (WET WEATHER) AND NON-STORM WATER (DRY WEATHER) DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN.

May 7, 2009



May 7, 2009
Final – Corrected January 13, 2010

~~determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)~~ The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Ass'n of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

~~Likewise, the provisions of this Order to implement TMDLs are federal mandates.~~ The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards (33 U.S.C. § 1313(d)). Once the U.S. EPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 CFR 122.44(d)(1)(vii)(B)).

Second, the local agency Permittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, in many respects this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the

EXHIBIT D

City of Palo Alto Storm Water Management Fee

Background and Frequently Asked Questions

Palo Alto's Storm Water Management Fee funds projects and services that reduce street flooding and protect creeks. Property owners will be voting on whether to continue the monthly fee that fund these critical construction projects and services. **Ballots will be mailed to Palo Alto property owners on February 24, 2017.**

Voting "yes" on the ballot to renew the Storm Water Management Fee would increase the existing monthly Fee by an average of 62 cents. The monthly Fee would be approximately $13.65 for a typical home. The Fee would fund new projects and rebates that reduce flooding, water pollution, and the maintenance of existing storm drain infrastructure and programs. This Fee amounts to a 2.3% increase above the pattern of annual rate increases that has occurred since 2005.

Quick Information

Background

In 1989, the City of Palo Alto established the "Storm Drainage Fee" to pay for storm drain system construction, maintenance, and water quality protection. Voters approved the continuation of this "enterprise fund" fee in 2005 which is similar to fees for other utilities such as the sanitary sewer, gas, electricity, water, and refuse.

Palo Alto's current monthly "Storm Drainage Fee" for a typical single family residence is $13.03 and is included in the monthly utility bill. The Fee funds the maintenance and improvements to Palo Alto's storm water system, in addition to urban pollution prevention services and rebate programs. Several of these services are mandated by the State of California. This Fee sunsets on June 1, 2017. If continued funding is not approved by a majority of property owners, it will revert to its pre-2005 level of $4.25 per month. Without a continuation of the current Fee, funding to make all of the necessary storm water system repairs and improvements would not be available.

To address this funding concern, Palo Alto City Manager Jim Keene appointed a Storm Drain Blue Ribbon Committee comprised of Palo Alto residents in January 2016. The Committee recommended a Storm Water Management Fee of approximately $13.65 per month for a typical home (62 cents more than the current Fee). This proposed Fee amounts to a 2.3% increase above the pattern of annual rate increases that have occurred since 2005. The Fee would fund new projects and rebates that reduce flooding, water pollution, and allow for the maintenance of existing storm water system infrastructure and continuation of programs. Palo Alto City Council approved the recommendations in August 2016.

Frequently Asked Questions

1. How would the proposed Storm Water Management Fee be approved?

EXHIBIT E

This is an archive of a past election.
See http://www.smartvoter.org/ca/scz/ for current information.

League of Women Voters of California Education Fund

SHARE

Santa Cruz County, CA

November 4, 2008 Election

Measure E

Santa Cruz City Clean Beach tax

City of Santa Cruz

2/3 Approval Required

Pass: 23,112 / **76.25%** **Yes** votes ..... 7,200 / **23.75%** **No** votes

See Also: Index of all Measures

Results as of December 2 4:43pm, 100.00%% of Precincts Reporting (38/38)

Information shown below: Fiscal Impact | Official Information | Impartial Analysis | Arguments |

To protect public health and the environment by reducing pollution, trash, toxics and dangerous bacteria in our river, bay and ocean; helping to keep beaches clean; protecting fish and wildlife habitat; shall the City of Santa Cruz adopt a Clean River, Beaches and Ocean Tax, with revenues spent locally under independent citizen oversight? The annual rates will be $28 for single-family parcels, $94 for other developed parcels, and $10 for undeveloped parcels.

Fiscal Impact from City Finance Director:

The proposed Clean River, Beaches and Ocean Tax, if approved by voters, will be first levied on January 1, 2009, and will be first collected in connection with the annual County tax bills issued in November 2009. It will subsequently be assessed and collected on the same dates during all subsequent years that the tax ordinance is in effect. If adopted by the voters during the City's 2008-2009 fiscal year, the tax ordinance will have no retroactive effect and will be applied prospectively commencing on January 1, 2009. The tax will produce approximately $626,000 for the 2009-2010 fiscal year and approximately the same amount for each year thereafter. Revenues generated would be used exclusively for the purpose of reducing and preventing water pollution and managing stormwater runoff, as well as complying with local, state and federal regulations relating to the aforementioned purpose.

s/ Sandra Benoit
Finance Director
City of Santa Cruz

Official Sources of Information

- Official WWW Site

Impartial Analysis from City Attorney

News and Analysis

Santa Cruz Sentinel

- Santa Cruz's Measure E widely eyed as possible water-pollution funding strategy - 10/21/08
- Details of Measure E revealed - 10/16/08
- Santa Cruz's Measure E would raise money to clean waterways - 9/28/08

This election is archived. Any links to sources outside of Smart Voter may no longer be active. No further links will be added to this page.

Links to sources outside of Smart Voter are provided for information only and do not imply endorsement.

REBUTTAL DOCUMENTS IN SUPPORT OF REBUTTAL COMMENTS OF RIVERSIDE COUNTY LOCAL AGENCY TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2015-0100, 16-TC-05

INDEX

TAB 1

Voices of the Wetlands v. State Water Resources Control Bd.

Supreme Court of California

August 15, 2011, Filed

S160211

Reporter

52 Cal. 4th 499 *; 257 P.3d 81 **; 128 Cal. Rptr. 3d 658 ***; 2011 Cal. LEXIS 8117 ****; 41 ELR 20268

VOICES OF THE WETLANDS, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; DUKE ENERGY MOSS LANDING, LLC, et al., Real Parties in Interest and Appellants.

Subsequent History: Reported at Voices of the Wetlands v. State Water Resources Control Board (Duke Energy Moss Landing, LLC), 2011 Cal. LEXIS 8766 (Cal., Aug. 15, 2011)

Time for Granting or Denying Rehearing Extended Voices of the Wetlands v. California State Water Resources Control Board (Dule Energy Moss Landing, LLC), 2011 Cal. LEXIS 9394 (Cal., Sept. 12, 2011)

Request denied by Voices of the Wetlands v. Cal. State Water Res. Control Bd., 2011 Cal. LEXIS 10654 (Cal., Oct. 12, 2011)

Prior History: **[****1]** Superior Court of Monterey County, No. M54889, Robert A. O'Farrell, Judge. Court of Appeal, Sixth Appellate District, No. H028021.

Voices of the Wetlands v. California State Water Resources Control Bd., 157 Cal. App. 4th 1268, 69 Cal. Rptr. 3d 487, 2007 Cal. App. LEXIS 2024 (Cal. App. 6th Dist., 2007)

Core Terms

Regional, Energy, water board, subdivision, certification, powerplant, plant, Resources, mandamus, renewal, superior court, court of appeals, regulations, decisions, intake, administrative record, cooling water, trial court, reconsideration, cooling system, technology, agency's, state water, issues, cooling, Commission's, proceedings, compliance, issuance, generating

Case Summary

Procedural Posture

Plaintiff, an environmental organization, filed an administrative mandamus action challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by defendant regional water board. The trial court denied the mandamus petition. The California Court of Appeal, Sixth Appellate District, affirmed the trial court's judgment. Plaintiff sought review.

Overview

The NPDES permit authorized a powerplant to draw cooling water from a harbor and slough. The court concluded that the trial court did not err in using an interlocutory remand to resolve perceived deficiencies in the regional water board's best technology available (BTA) finding. In compliance with the trial court's directive, the board engaged in a full reconsideration of the BTA issue, and gave all interested parties, including plaintiff, a noticed opportunity to appear and to present evidence, briefing, and argument pertinent to the BTA determination. The court rejected plaintiff's argument that Code Civ. Proc., § 1094.5, subd. (e), precluded the board from accepting and considering new evidence on remand absent a showing that such evidence could not have been produced at the original administrative proceeding, or was

improperly excluded therefrom. The court further concluded that the board did not err by basing its BTA determination on a finding that the costs of alternative cooling technologies for the powerplant were wholly disproportionate to the anticipated environmental benefits. The board's use of this standard was proper.

Outcome

The judgment of the appellate court was affirmed.

LexisNexis® Headnotes

Environmental
Law > ... > Enforcement > Discharge
Permits > State Water Quality Certifications

HN1[↓] Discharge Permits, State Water Quality Certifications

The discharge of a "pollutant" from a "point source" into navigable waters may only occur under the terms and conditions of National Pollutant Discharge Elimination System (NPDES) permit, which must be renewed at least every five years. 33 U.S.C. §§ 1311, 1342(a), (b).) In California, NPDES permits, which must comply with all minimum federal clean water requirements, are issued under an EPA-approved state water quality control program administered, pursuant to the Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., by the State Water Board and the nine regional water boards. Wat. Code, §§ 13372, 13377; 33 U.S.C., § 1342(b); 40 C.F.R. §§ 123.21-123.25 (2011); 39 Fed.Reg. 26061 (Jul. 16, 1974); 54 Fed.Reg. 40664-40665 (Oct. 31, 1989).

Administrative Law > Judicial
Review > Standards of Review > De Novo
Standard of Review

Environmental
Law > ... > Enforcement > Discharge
Permits > State Water Quality Certifications

Administrative Law > Agency
Adjudication > Review of Initial Decisions

Administrative Law > Judicial
Review > Remedies > Mandamus

HN2[↓] Standards of Review, De Novo Standard of Review

Pursuant to the Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., decisions and orders of a regional water board, including the issuance and renewal of National Pollutant Discharge Elimination System permits, are reviewable by administrative appeal to the State Water Board, and then by petition for administrative mandamus in the superior court. Code Civ. Proc., § 1094.5; Wat. Code, §§ 13320, 13330. In the mandamus proceeding, the superior court is obliged to exercise its independent judgment on the evidence before the administrative agency, i.e., to determine whether the agency's findings are supported by the weight of the evidence. § 1094.5, subd. (c); Wat. Code, § 13330, subd. (d).

Energy & Utilities Law > Electric Power
Industry > Siting of Facilities

HN3[↓] Electric Power Industry, Siting of Facilities

The Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 et seq., mandates simplified and expedited processing and review of applications to certify the siting, construction, and modification of thermal powerplants. The Act accords the California Energy Commission the exclusive power to certify all sites and related facilities for thermal powerplants with generating capacities of 50 or more megawatts, whether a new site and related facility or a change or addition to an

existing facility. Pub. Resources Code, § 25500.

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

HN4[↓] Electric Power Industry, Siting of Facilities

When a certification application for the siting, construction, and modification of a thermal powerplant is filed, the California Energy Commission undertakes a lengthy review process that involves multiple staff assessments, communication with other state and federal regulatory agencies, environmental impact analysis, and a series of public hearings. Pub. Resources Code, §§ 25519-25521. With one exception, the Commission may not certify a proposed facility that does not meet all applicable federal, state, regional, and local laws. Wat. Code, § 25525. Accordingly, the issuance of a certificate by the Commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. Wat. Code, § 25500.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

HN5[↓] Reviewability, Jurisdiction & Venue

The Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 et seq., constrains judicial review of a California Energy Commission powerplant certification decision. Pub. Resources Code, § 25531, subd. (a), establishes that the California Supreme Court alone has jurisdiction to review powerplant certification decisions by the Commission.

Administrative Law > Judicial Review > Reviewability > General Overview

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

HN6[↓] Judicial Review, Reviewability

See Pub. Resources Code, § 25531, subd. (c).

Governments > Legislation > Interpretation

HN7[↓] Legislation, Interpretation

When interpreting statutes, a court begins with the plain, commonsense meaning of the language used by the legislature. If the language is unambiguous, the plain meaning controls. Potentially conflicting statutes must be read in the context of the entire statutory scheme, so that all provisions can be harmonized and given effect.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Administrative Law > Judicial Review > Remedies > Mandamus

Energy & Utilities Law > Electric Power

Industry > Siting of Facilities

HN8[↓] Reviewability, Jurisdiction & Venue

Pub. Resources Code, § 25531, subd. (a), of the Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 et seq., specifies the extent of the California Supreme Court's exclusive direct review jurisdiction as mandated by the Act. Under § 25531, subd. (a), the decisions of the California Energy Commission on any application for certification of a site and related facility are subject to review by the Supreme Court. Read together with § 25531, subd. (a), § 25531, subd. (c), simply confirms that no other court may review directly a certification decision of the Commission, or may otherwise entertain a case or controversy that attacks such a decision indirectly by raising a matter the Commission determined, or could have determined, for purposes of the certification proceeding. Section 25531 neither states nor implies a legislative intent to interfere with normal mandamus review of the actions of another agency, simply because that agency, exercising functions within its exclusive authority, has independently decided an issue the Commission also must or might have addressed for its own purposes.

Administrative Law > Judicial Review > Reviewability > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Administrative Law > Judicial Review > Remedies > Mandamus

HN9[↓] Judicial Review, Reviewability

Under the federal Clean Water Act, any facility that discharges wastewater into a navigable water source must have an unexpired permit, conforming to federal water quality standards, in order to do so. Only the State Water Board or a regional water board may issue a federally compliant discharge permit; such a decision is entirely outside, and independent of, the California Energy Commission's authority. Under the Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., judicial review of the decisions of these agencies, including those to grant or renew National Pollutant Discharge Elimination System permits, is by mandamus in the superior court.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

HN10[↓] Reviewability, Jurisdiction & Venue

Under the Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 et seq., only the decisions of the California Energy Commission on any application for certification of a site and related facility are subject to exclusive review in the California Supreme Court, Pub. Resources Code, § 25531, subd. (a), and other courts are deprived of jurisdiction only of a case or controversy concerning a matter which was, or could have been, determined in a proceeding before the Commission. § 25531, subd. (c). A National Pollutant Discharge Elimination System (NPDES) permit decision by a regional water board is not a certification decision. Conversely, under the NPDES permit program, neither certification proceedings, nor findings the Commission may make in connection with such proceedings, can result in the issuance or renewal of an NPDES permit; only the State Water Board and the regional water boards may issue or renew such permits. Hence, a challenge to the issuance or renewal of an NPDES permit is not a case or

controversy concerning a matter which was, or could have been, determined by the Commission.

Administrative Law > Judicial Review > Reviewability > General Overview

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

HN11[↓] Judicial Review, Reviewability

Nothing in the Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 et seq., states or implies that where a thermal powerplant has concurrently sought both a renewal from the Regional Water Board of its National Pollutant Discharge Elimination System permit, and a California Energy Commission certification to install additional generating capacity, the regional water board's decision, normally reviewable in the superior court pursuant to the Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq., is suddenly subject to the exclusive-review provisions of the Warren-Alquist Act. There is no basis for reading such a requirement into the latter statute.

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Remand & Remittitur

HN12[↓] Remedies, Mandamus

See Code Civ. Proc., § 1094.5, subd. (e).

Administrative Law > Judicial Review > Remedies > Mandamus

HN13[↓] Remedies, Mandamus

See Code Civ. Proc., § 1094.5, subd. (f).

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Remand & Remittitur

HN14[↓] Remedies, Mandamus

Properly understood and interpreted, Code Civ. Proc., § 1094.5, subds. (e) & (f), impose no absolute bar on the use of prejudgment limited remand procedures. Moreover, when a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, the statute does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified.

Administrative Law > Judicial Review > Remedies > Mandamus

Governments > Legislation > Expiration, Repeal & Suspension

HN15[↓] Remedies, Mandamus

On its face, Code Civ. Proc., § 1094.5, subd. (f), indicates the form of final judgment the court may issue in an administrative mandamus action. Section 1094.5, subd. (f), states that the last step the trial court must take in the proceeding is either to command the agency to set aside its decision, or to deny the writ. Nothing in § 1094.5, subd. (f), purports to limit procedures the court may appropriately employ before it renders a final judgment. Code Civ. Proc., § 187, broadly provides that whenever the California Constitution or a statute confers jurisdiction on a court, all the means necessary to carry that jurisdiction into effect are

also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by the California Code of Civil Procedure or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code. Section 1094.5, subd. (f), does not specifically point out the prejudgment procedures to be followed in an administrative mandamus action, nor do its terms prohibit the court from adopting a suitable process or mode of proceeding when addressing the issues presented. § 187. Hence, nothing in § 1094.5, subd. (f)'s language suggests an intent to limit or repeal § 187 for purposes of administrative mandamus actions.

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Remand & Remittitur

HN16[↓] Remedies, Mandamus

Code Civ. Proc., § 1094.5, subd. (f), provides that, when granting mandamus relief, the court may order the reconsideration of the case in the light of the court's opinion and judgment. This clearly implies that, in the final judgment itself, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action. That being so, no reason appears why, in appropriate circumstances, the same objective cannot be accomplished by a remand prior to judgment. Indeed, such a device, properly employed, promotes efficiency and expedition by allowing the court to retain jurisdiction in the already pending mandamus proceeding, thereby eliminating the potential need for a new mandamus action to review the agency's decision on reconsideration.

Administrative Law > Judicial Review > Remand & Remittitur

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN17[↓] Judicial Review, Remand & Remittitur

Any agency reconsideration must fully comport with due process, and may not simply allow the agency to rubber-stamp its prior unsupported decision.

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Remand & Remittitur

HN18[↓] Remedies, Mandamus

Code Civ. Proc., § 1094.5, subd. (f), imposes no blanket prohibition on the appropriate use, in an administrative mandamus action, of a prejudgment remand for agency reconsideration of one or more issues pertinent to the agency's decision. To the extent Resource Defense Fund v. Local Agency Formation Com., 191 Cal. App. 3d 886, 236 Cal. Rptr. 794 (1987), and Sierra Club v. Contra Costa County, 10 Cal. App. 4th 1212, 13 Cal. Rptr. 2d 182 (1992), have concluded otherwise, those decisions are disapproved.

Administrative Law > Judicial Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Remand & Remittitur

Administrative Law > Judicial Review > Remedies > Mandamus

HN19[↓] Judicial Review, Administrative Record

Code Civ. Proc., § 1094.5, subd. (e), is not intended to prevent the court, upon finding that the administrative record itself lacks evidence sufficient to support the agency's decision, from remanding for consideration of additional evidence. A more reasonable interpretation, which fully honors the statutory language, is that § 1094.5, subd. (e), simply prevents a mandamus petitioner from challenging an agency decision that is supported by the administrative record on the basis of evidence, presented to the court, which could have been, but was not, presented to the administrative body.

Administrative Law > Judicial Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Remand & Remittitur

Administrative Law > Judicial Review > Remedies > Mandamus

HN20[↓] Judicial Review, Administrative Record

Code Civ. Proc., § 1094.5, subd. (e), merely confirms that while, in most cases, the court is limited to the face of the administrative record in deciding whether the agency's decision is valid as it stands, in fairness, the court may consider, or may permit the agency to consider, extra-record evidence for a contrary outcome, if persuaded that such evidence was not available, or was improperly excluded, at the original agency proceeding.

Administrative Law > Judicial Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Remand & Remittitur

Administrative Law > Judicial Review > Remedies > Mandamus

HN21[↓] Judicial Review, Administrative Record

Code Civ. Proc., § 1094.5, subd. (e), promotes orderly procedure, and the proper distinction between agency and judicial roles, by ensuring that, with rare exceptions, the court will review a quasi-judicial administrative decision on the record actually before the agency, not on the basis of evidence withheld from the agency and first presented to the reviewing court. But once the court has reviewed the administrative record, and has found it wanting, § 1094.5 does not preclude the court from remanding for the agency's reconsideration in appropriate proceedings that allow the agency to fill the evidentiary gap. To the extent the analyses in Ashford v. Culver City Unified School Dist., 130 Cal. App. 4th 344, 29 Cal. Rptr. 3d 728 (2005), and Newman v. State Personnel Bd., 10 Cal. App. 4th 41, 12 Cal. Rptr. 2d 601 (1992), are inconsistent with these conclusions, those decisions are disapproved.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff, an environmental organization, filed an administrative mandamus action challenging a regional water board's issuance of a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit authorized a powerplant to draw cooling water from a harbor and slough. The trial court denied the mandamus petition. (Superior Court of Monterey County, No. M54889, Robert A. O'Farrell, Judge.) The Court of Appeal, Sixth Dist., No. H028021, affirmed the

trial court's judgment.

The Supreme Court affirmed the judgment of the Court of Appeal. The court concluded that the trial court did not err in using an interlocutory remand to resolve perceived deficiencies in the regional water board's best technology available (BTA) finding. In compliance with the trial court's directive, the board engaged in a full reconsideration of the BTA issue, and gave all interested parties, including plaintiff, a noticed opportunity to appear and to present evidence, briefing, and argument pertinent to the BTA determination. The court rejected plaintiff's argument that Code Civ. Proc., § 1094.5, subd. (e), precluded the board from accepting and considering new evidence on remand absent a showing that such evidence could not have been produced at the original administrative proceeding, or was improperly excluded therefrom. The court further concluded that the board did not err by basing its BTA determination on a finding that the costs of alternative cooling technologies for the powerplant were wholly disproportionate to the anticipated environmental benefits. The board's use of this standard was proper. (Opinion by Baxter, J., with Cantil-Sakauye, C. J., Kennard, Werdegar, Chin, Corrigan, JJ., and Kitching, J.,* concurring. Concurring opinion by Werdegar, J., with Cantil-Sakauye, C. J., concurring (see p. 539).) **[*500]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[⬇] (1)

Pollution and Conservation Laws § 5—Porter-Cologne Act—NPDES Permit—Judicial Review—Administrative Mandamus.

Pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) decisions and orders of a regional water board, including the issuance and renewal of National Pollutant Discharge Elimination System permits, are reviewable by administrative appeal to the State Water Resources Control Board, and then by petition for administrative mandamus in the superior court (Code Civ. Proc., § 1094.5; Wat. Code, §§ 13320, 13330). In the mandamus proceeding, the superior court is obliged to exercise its independent judgment on the evidence before the administrative agency, i.e., to determine whether the agency's findings are supported by the weight of the evidence.

CA(2)[⬇] (2)

Electricity, Gas, and Steam § 2—Thermal Powerplants—Siting—Expedited Processing and Review of Applications.

The Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, § 25000 et seq.) mandates simplified and expedited processing and review of applications to certify the siting, construction, and modification of thermal powerplants. The act accords the State Energy Resources Conservation and Development Commission the exclusive power to certify all sites and related facilities for thermal powerplants with generating capacities of 50 or more megawatts, whether a new site and related facility or a change or addition to an existing facility (Pub. Resources Code, § 25500). When a certification application is filed, the commission undertakes a lengthy review process that involves multiple staff assessments, communication with other state and federal regulatory agencies, environmental impact analysis, and a series of public hearings (Pub. Resources Code, §§ 25519–25521). With one exception, the commission may not certify a proposed facility that does not meet all applicable federal, state, regional, and local laws (Wat. Code, § 25525). Accordingly, the issuance of a certificate by the commission is in lieu of any

* Associate Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and supersedes any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law (Wat. Code, § 25500).

CA(3)[⬇] (3)

Electricity, Gas, and Steam § 2—Thermal Powerplants—Certification Decision—Judicial Review.

The Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, § 25000 et seq.) constrains judicial review of a State Energy Resources **[*501]** Conservation and Development Commission powerplant certification decision. Pub. Resources Code, § 25531, subd. (a), establishes that the Supreme Court alone has jurisdiction to review powerplant certification decisions by the commission.

CA(4)[⬇] (4)

Statutes § 29—Construction—Language—Legislative Intent—Plain Meaning.

When interpreting statutes, a court begins with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls. Potentially conflicting statutes must be read in the context of the entire statutory scheme, so that all provisions can be harmonized and given effect.

CA(5)[⬇] (5)

Electricity, Gas, and Steam § 2—Thermal Powerplants—Certification Decision—Judicial Review—Case or Controversy.

Pub. Resources Code, § 25531, subd. (a), part of the Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, § 25000 et seq.), specifies the extent of the Supreme Court's exclusive direct review jurisdiction as mandated by the act. Under § 25531, subd. (a), the decisions of the State Energy Resources Conservation and Development Commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court. Read together with § 25531, subd. (a), § 25531, subd. (c), simply confirms that no other court may review directly a certification decision of the commission, or may otherwise entertain a case or controversy that attacks such a decision indirectly by raising a matter the commission determined, or could have determined, for purposes of the certification proceeding. Section 25531 neither states nor implies a legislative intent to interfere with normal mandamus review of the actions of another agency, simply because that agency, exercising functions within its exclusive authority, has independently decided an issue the commission also must or might have addressed for its own purposes.

CA(6)[⬇] (6)

Pollution and Conservation Laws § 5—Porter-Cologne Act—NPDES Permit—Judicial Review—Administrative Mandamus.

Under the federal Clean Water Act of 1977 (Pub.L. No. 95-217 (Dec. 27, 1977) 91 Stat. 1566), any facility that discharges wastewater into a navigable water source must have an unexpired permit, conforming to federal water quality standards, in order to do so. Only the State Water Resources Control Board or a regional water board may issue a federally compliant discharge permit; such a decision is entirely outside, and independent of, the State Energy Resources Conservation and Development Commission's authority. Under the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.), judicial review of the

decisions of these agencies, including those to grant or renew National Pollutant Discharge Elimination System permits, is by mandamus in the superior court.

[*502] CA(7)[⬇] (7)

Pollution and Conservation Laws § 5—NPDES Permit—Judicial Review—Jurisdiction—Case or Controversy.

Under the Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, § 25000 et seq.), only the decisions of the State Energy Resources Conservation and Development Commission on any application for certification of a site and related facility are subject to exclusive review in the Supreme Court (Pub. Resources Code, § 25531, subd. (a)), and other courts are deprived of jurisdiction only of a case or controversy concerning a matter which was, or could have been, determined in a proceeding before the commission (§ 25531, subd. (c)). A National Pollutant Discharge Elimination System (NPDES) permit decision by a regional water board is not a certification decision. Conversely, under the NPDES permit program, neither certification proceedings, nor findings the commission may make in connection with such proceedings, can result in the issuance or renewal of an NPDES permit; only the State Water Resources Control Board and the regional water boards may issue or renew such permits. Hence, a challenge to the issuance or renewal of an NPDES permit is not a case or controversy concerning a matter which was, or could have been, determined by the commission.

CA(8)[⬇] (8)

Electricity, Gas, and Steam § 2—Thermal Powerplants—Certification Decision—Judicial Review—NPDES Permit.

Nothing in the Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, § 25000 et seq.) states or implies that where a thermal powerplant has concurrently sought both a renewal from the Regional Water Board of its National Pollutant Discharge Elimination System permit, and a State Energy Resources Conservation and Development Commission certification to install additional generating capacity, the regional water board's decision, normally reviewable in the superior court pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) is suddenly subject to the exclusive review provisions of the Warren-Alquist Act. There is no basis for reading such a requirement into the latter statute.

CA(9)[⬇] (9)

Administrative Law § 110—Judicial Review—Administrative Mandamus—Evidence—Remand.

Properly understood and interpreted, Code Civ. Proc., § 1094.5, subds. (e) & (f), impose no absolute bar on the use of prejudgment limited remand procedures. Moreover, when a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, the statute does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified.

[*503] CA(10)[⬇] (10)

Administrative Law § 99—Judicial Review—Administrative Mandamus—Final Judgment.

On its face, Code Civ. Proc., § 1094.5, subd. (f), indicates the form of final judgment the court may issue in an administrative mandamus action. Section 1094.5, subd. (f), states that the last step the trial court must take in the proceeding is either to command the agency to set aside its decision, or to deny the writ. Nothing in § 1094.5, subd. (f),

purports to limit procedures the court may appropriately employ before it renders a final judgment. Nothing in § 1094.5, subd. (f), purports to limit procedures the court may appropriately employ before it renders a final judgment. Code Civ. Proc., § 187, broadly provides that whenever the California Constitution or a statute confers jurisdiction on a court, all the means necessary to carry that jurisdiction into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by the Code of Civil Procedure or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code. Section 1094.5, subd. (f), does not specifically point out the prejudgment procedures to be followed in an administrative mandamus action, nor do its terms prohibit the court from adopting a suitable process or mode of proceeding when addressing the issues presented. Hence, nothing in § 1094.5, subd. (f)'s language suggests an intent to limit or repeal § 187 for purposes of administrative mandamus actions.

CA(11)[⬇] (11)

Administrative Law § 99—Judicial Review—Administrative Mandamus—Remand.

Code Civ. Proc., § 1094.5, subd. (f), provides that, when granting mandamus relief, the court may order the reconsideration of the case in the light of the court's opinion and judgment. This clearly implies that, in the final judgment itself, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action. That being so, no reason appears why, in appropriate circumstances, the same objective cannot be accomplished by a remand prior to judgment. Indeed, such a device, properly employed, promotes efficiency and expedition by allowing the court to retain jurisdiction in the already pending mandamus proceeding, thereby eliminating the potential need for a new mandamus action to review the agency's decision on reconsideration.

CA(12)[⬇] (12)

Administrative Law § 99—Judicial Review—Administrative Mandamus—Remand—Reconsideration—Due Process.

Any agency reconsideration must fully comport with due process, and may not simply allow the agency to rubberstamp its prior unsupported decision.

[*504] CA(13)[⬇] (13)

Administrative Law § 99—Judicial Review—Administrative Mandamus—Remand—Reconsideration.

Code Civ. Proc., § 1094.5, subd. (f), imposes no blanket prohibition on the appropriate use, in an administrative mandamus action, of a prejudgment remand for agency reconsideration of one or more issues pertinent to the agency's decision. (Disapproving to the extent inconsistent: *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886 [236 Cal.Rptr. 794], and *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212 [13 Cal.Rptr.2d 182].)

CA(14)[⬇] (14)

Administrative Law § 103—Judicial Review—Administrative Mandamus—Remand—Evidence.

Code Civ. Proc., § 1094.5, subd. (e), is not intended to prevent the court, upon finding that the administrative record itself lacks evidence sufficient to support the agency's decision, from remanding for consideration of additional evidence. A more reasonable interpretation, which fully honors the statutory language, is that § 1094.5, subd. (e), simply prevents a mandamus petitioner

from challenging an agency decision that is supported by the administrative record on the basis of evidence, presented to the court, which could have been, but was not, presented to the administrative body.

CA(15)[⬇] (15)

Administrative Law § 103—Judicial Review—Administrative Mandamus—Remand—Evidence.

Code Civ. Proc., § 1094.5, subd. (e), merely confirms that while, in most cases, the court is limited to the face of the administrative record in deciding whether the agency's decision is valid as it stands, in fairness, the court may consider, or may permit the agency to consider, extra-record evidence for a contrary outcome, if persuaded that such evidence was not available, or was improperly excluded, at the original agency proceeding.

CA(16)[⬇] (16)

Administrative Law § 103—Judicial Review—Administrative Mandamus—Remand—Evidence.

Code Civ. Proc., § 1094.5, subd. (e), promotes orderly procedure, and the proper distinction between agency and judicial roles, by ensuring that, with rare exceptions, the court will review a quasi-judicial administrative decision on the record actually before the agency, not on the basis of evidence withheld from the agency and first presented to the reviewing court. But once the court has reviewed the administrative record, and has found it wanting, § 1094.5 does not preclude the court from remanding for the agency's reconsideration in appropriate proceedings that allow the agency to fill the evidentiary gap. (Disapproving to the extent inconsistent: *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344 [29 Cal.Rptr.3d 728], and *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41 [12 Cal.Rptr.2d 601].)

[*505] CA(17)[⬇] (17)

Electricity, Gas, and Steam § 2—Thermal Power Plant—NPDES Permit—Best Technology Available—Alternative Cooling Technologies—Wholly Disproportionate—Standard.

In a case in which a regional water board issued a National Pollutant Discharge Elimination System permit allowing a thermal powerplant to draw cooling water from a harbor and slough, the board did not err by basing its best technology available determination on a finding that the costs of alternative cooling technologies for the powerplant were wholly disproportionate to the anticipated environmental benefits.

[Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2011) ch. 33, § 33.81; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 889, 893, 896; 8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 325.]

Counsel: Earthjustice, Mills Legal Clinic of Stanford Law School, Deborah A. Sivas, Leah J. Russin and Holly D. Gordon for Plaintiff and Appellant.

Kurt R. Wiese, Barbara Baird; Daniel P. Selmi; John J. Sansone, County Counsel (San Diego), Paula Forbis, Deputy County Counsel; Law Offices of Nancy Diamond, Nancy Diamond; Steven M. Woodside, County Counsel (Sonoma) and Cory W. O'Donnell, Deputy County Counsel, for South Coast Air Quality Management District, San Diego County Air Pollution Control District, North Coast Unified Air Quality Management District and Northern Sonoma County Air Pollution Control District as Amici Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Gordon Burns and Manuel M. Medeiros, State Solicitors General, J. Matthew Rodriquez, Chief Assistant Attorney General, Mary E. Hackenbracht and Kathleen

Kenealy, Assistant Attorneys General, John Davidson, Anita E. Ruud and Michael M. Edson, Deputy Attorneys General, for Defendants and Appellants.

Pillsbury Winthrop Shaw Pittman, [****2] Sarah G. Flanagan, John M. Grenfell and Blaine I. Green for Real Parties in Interest and Appellants.

Michael J. Levy and William M. Chamberlain for California Energy Commission as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Judges: Opinion by Baxter, J., with Cantil-Sakauye, C. J., Kennard, Werdegar, Chin, Corrigan, and Kitching, JJ., concurring. Concurring opinion by Werdegar, J., with Cantil-Sakauye, C. J., concurring.

Opinion by: Baxter [*506]

Opinion

[**84] [***662] **BAXTER, J.**—Voices of the Wetlands, an environmental organization, filed this administrative mandamus action in the Monterey County Superior Court to challenge the issuance, by the California Regional Water Quality Control Board, Central Coast Region (Regional Water Board), of a federally required permit authorizing the Moss Landing Power Plant (MLPP) to draw cooling water from the adjacent Moss Landing Harbor and Elkhorn [**85] Slough. [1] The case, now more than a decade old, presents issues concerning the technological and environmental standards, and the procedures for administrative and judicial [****3] review, that apply when a thermal powerplant, while pursuing the issuance or renewal of a cooling water intake permit from a regional water board, also seeks necessary approval from another state agency, the State Energy Resources Conservation and Development Commission (Energy Commission), of a plan to add additional generating units to the plant, with related modifications to the cooling intake system.

Against a complex procedural backdrop, we will reach the following conclusions:

First, the superior court had jurisdiction to entertain the administrative mandamus petition here under review. We thus reject the contention of defendants and the real party in interest that, because the substantive issues plaintiff seeks to raise on review of the Regional Water Board's decision [****5] to renew the plant's cooling water intake permit were also involved in the Energy Commission's approval of the plant expansion, statutes applicable to the latter process placed exclusive review jurisdiction in this court.
[*507]

Second, the trial court did not err when, after concluding that the original record before the Regional Water Board did not support the board's finding on a single issue crucial to issuance of the cooling water intake permit, the court deferred a final judgment, ordered an interlocutory remand to the board for further "comprehensive" examination of that issue, then denied mandamus after determining that the additional evidence and

[1] In the case title in this court, and hereafter in our discussion, we refer to Voices of the Wetlands, the mandamus petitioner, as "plaintiff." (See Cal. Style Manual (4th ed. 2000) § 6:28, pp. 230–231.) The mandamus petition named as respondents the State Water Resources Control Board (State Water Board) and the Regional Water Board. In the case title in this court, and hereafter as convenient in our discussion, we refer to these parties as "defendants." (*Ibid.*) The mandamus petition also named Duke Energy North America LLC and its subsidiary, Duke Energy Moss Landing, LLC (collectively Duke), then the MLPP's owners, as real parties in interest. At some point, apparently during the appellate process, the MLPP changed ownership. The current owner is Dynegy Moss Landing LLC (Dynegy), [****4] an entity unrelated to Duke. Dynegy has filed all pleadings and briefs in this court as the MLPP's owner and as real party in interest. As Duke's successor in interest, Dynegy is entitled to continue the action in Duke's name (Code Civ. Proc., § 368.5), and Dynegy has not moved to substitute itself as a formally named party (see Cal. Rules of Court, rule 8.36(a)). Accordingly, to maintain title symmetry with the Court of Appeal decision, and to facilitate tracking and legal research by the bench, bar, and public, we have retained Duke in the case title in this court as the real parties in interest and appellants. (See Cal. Style Manual, *supra*, § 6:28, p. 230.) As the context dictates, our discussion hereafter refers variously to Duke, Dynegy, or "real party in interest" (singular or plural), or "the MLPP's owner."

analysis considered by the board on remand supported the board's reaffirmed finding.

Third, recent United States Supreme Court authority confirms that, when applying federal Clean Water Act of 1977 (CWA; Pub.L. No. 95-217 (Dec. 27, 1977) 91 Stat. 1566) standards **[***663]** for the issuance of this permit, the Regional Water Board properly utilized cost-benefit analysis, and in particular a "wholly disproportionate" cost-benefit standard, to conclude that the MLPP's existing cooling water intake design, as upgraded to accommodate the plant expansion, "reflect[ed] the *best technology available* for minimizing **[****6]** adverse environmental impact." (CWA, § 316(b), codified at 33 U.S.C. § 1326(b), italics added (hereafter CWA section 316(b)).)

We decline to address several other issues discussed by the parties. For instance, plaintiff insists the Regional Water Board violated CWA section 316(b) by approving compensatory mitigation measures—a habitat restoration program funded by the MLPP's owner—as a means of satisfying the requirement to use the best technology available (BTA). The legal issue whether section 316(b) allows such an approach is certainly significant (see *Riverkeeper, Inc. v. U.S. E.P.A.* (2d Cir. 2007) 475 F.3d 83, 110 (*Riverkeeper II*); *Riverkeeper, Inc. v. U.S. E.P.A.* (2d Cir. 2004) 358 F.3d 174, 189–191 (*Riverkeeper I*)), and it has not been finally resolved.

However, the trial court found, as a matter of fact, that the Regional Water Board had not directly linked the habitat restoration **[**86]** program to its BTA determination. The Court of Appeal concluded that the trial court's no-linkage finding had substantial evidentiary support. Here, as in the Court of Appeal, defendants and real party in interest decline to pursue the legal issue, urging only that the trial court's factual finding should not be disturbed. **[****7]** As so framed, the issue presented is case and fact specific, and involves no significant question of national or statewide importance. Accordingly, we exercise our discretion not to consider it. (See Cal. Rules of Court, rule 8.516(b)(3).) By so proceeding, we expressly do not decide whether compensatory mitigation and habitat restoration measures can be components of BTA, and we leave that issue for another day.

Finally, in its briefs on the merits, plaintiff advances issues it did not raise in its petition for review. Plaintiff now insists the evidence in the administrative record does not support the Regional Water Board's finding that the costs **[*508]** of alternative cooling technologies would be "wholly disproportionate" to their environmental benefits. Plaintiff also urges that even if the board properly considered compensatory restoration measures as a means of satisfying BTA, the record does not support its determination that the habitat restoration project it approved was sufficient to offset the environmental damage caused by the MLPP's cooling system.

These issues are case and fact specific, did not factor into our decision to grant review, and do not currently appear to be matters **[****8]** of significant national or statewide interest. Again, therefore, we decline to address them.

Accordingly, we will affirm the judgment of the Court of Appeal.

FACTS AND PROCEDURAL BACKGROUND

The MLPP, in operation under various owners for nearly 60 years, sits at the mouth of Elkhorn Slough, an ecologically rich tidal estuary that drains into Monterey Bay between the cities of Santa Cruz and Monterey. As a thermal powerplant, the MLPP uses superheated steam to generate electricity. The plant's cooling system appropriates water from Moss Landing Harbor, and water from the adjacent slough is also drawn into the system. The MLPP has traditionally employed a once-through cooling system, in which water continuously passes from the source through the plant, then back into the

source at a warmer temperature. The thermal effects of the cooling system aside, **[***664]** the intake current kills some aquatic and marine life by trapping larger organisms against the intake screens (impingement) and by sucking smaller organisms through the screens into the plant (entrainment). [2]

HN1[↑] Under the CWA, the MLPP must have a National Pollutant Discharge Elimination System (NPDES) permit in order to draw cooling water from the harbor and slough. The discharge of a "pollutant" from a "point source" into navigable waters may only occur under the terms and conditions of such a permit, which must be renewed at least every five years. (33 U.S.C. §§ 1311, 1342(a), (b).) In California, NPDES permits, which must comply with all minimum federal clean water requirements, are issued under an EPA-approved state water quality control program **[****10]** administered, pursuant to the **[*509]** Porter-Cologne Water Quality Control Act (Porter-Cologne Act; Wat. Code, § 13000 et seq.), by the State Water Board and the nine regional water boards. (*Id.*, §§ 13372, 13377; see 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.21–123.25 (2011); 39 Fed.Reg. 26061 (July 16, 1974); 54 Fed.Reg. 40664–40665 (Oct. 3, 1989).)

In 1999, Duke applied to the Energy Commission for approval of Duke's plan to modernize the MLPP by adding two new 530- **[**87]** megawatt gas-fired generators. These new units would supplement the two 750-megawatt generators, units 6 and 7, already in operation, and would replace units 1 through 5, older generators that were no longer being used. Pursuant to the Warren-Alquist State Energy Resources Conservation and Development Act (Warren-Alquist Act; Pub. Resources Code, § 25000 et seq.), the siting, construction, or modification of a thermal powerplant with a generating capacity in excess of 50 megawatts must be certified by the Energy Commission. (*Id.*, §§ 25110, 25120, 25500.) As set forth in greater detail below, the commission's certification must be consistent with all applicable federal laws (*id.*, §§ 25514, subd. (a)(2), 25525), and is "in lieu of **[****11]** any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law" (*id.*, § 25500).

Concurrently with its Energy Commission application, Duke applied to the Regional Water Board for renewal of its NPDES permit—which was due to expire in any event—and to include therein terms and conditions consistent with operation of the new generators. In both applications, Duke proposed various modifications to the design and operation of the existing once-through cooling system, both to accommodate the new generators, and to minimize aquatic and marine mortality resulting from cooling water intake operations. [3] However, the proposal did not contemplate **[***665]** conversion of the plant to either a closed-cycle or a dry-cooling system (see fn. 2, *ante*).

In order to renew the plant's NPDES permit, the Regional Water Board was required, among other

[2] Alternative cooling technologies exist, particularly including closed-cycle and dry-cooling systems. A closed-cycle system uses a holding **[****9]** basin, reservoir, or tower to retain, cool, and continuously recycle a single supply of cooling water within the plant. Such a system requires renewal from an outside water source only to replace evaporation loss. Dry cooling eliminates the need for cooling water, instead employing air as the cooling medium. These designs substantially reduce or eliminate impingement and entrainment damage, as compared to a once-through water cooling system, but they may produce their own adverse environmental effects, and converting an existing powerplant from a once-through system to closed-cycle or dry-cooling technology involves significant additional expense.

[3] As the Regional Water Board's order issuing the NPDES permit explained, the MLPP had two cooling water intake stations, one which served the currently operational units 6 and 7, and the other, then inactive, which had served the retired units 1 through 5. Under the MLPP proposal, this latter station would be reactivated to serve the proposed new generators. Changes in **[****12]** the design and operation of the existing once-through cooling system would be employed to reduce impingement mortality, including alterations in the angles of the intake screens, the use of finer mesh on the screens, reductions in cooling water intake velocity made possible by the design of the new generators, and the elimination of a 350-foot tunnel in front of the intake screens.

things, to determine, under section 316(b) of the CWA, that "the location, design, construction, and capacity of [the MLPP's] cooling water intake structures reflect[ed] the best technology available for minimizing adverse environmental impact [(i.e., BTA)]." (33 U.S.C. **[*510]** § 1326(b); see *id.*, §§ 1316(b)(1)(A), 1342(b)(1)(A).) In the year 2000, when the MLPP's Energy Commission and Regional Water Board applications were pending, there were no federal regulations in place directing permitting agencies how to apply the BTA standard. When lacking regulatory guidance for applying the CWA's NPDES permit standards, including section 316(b)'s BTA standard for cooling water intake structures, agencies were expected to exercise **[****13]** their "best professional judgment" on a case-by-case basis. (See, e.g., *Entergy Corp. v. Riverkeeper, Inc.* (2009) 556 U.S. 208, 213 [173 L.Ed.2d 369, 129 S. Ct. 1498, 1503] (*Entergy Corp.*); *National Resources Defense Council v. U.S. E.P.A.* (9th Cir. 1988) 863 F.2d 1420, 1425.)

The Energy Commission and Regional Water Board proceedings went forward concurrently, and were coordinated to a significant degree. As noted by the Court of Appeal, " 'the [Energy] Commission and the [Regional Water Board] formed a Technical Working Group (TWG) made up of representatives from various regulatory agencies, the scientific community, and Duke ... . The TWG worked to design biological resource studies and then validate the results of those studies.' "

On October 25, 2000, after full agency review and opportunity for public comment, the Energy Commission approved the application for certification and authorized construction of the MLPP modernization project. Under the federal-compliance provisions of the Warren-Alquist Act, the commission addressed the BTA issue. In this regard, the commission determined that design alternatives to Duke's proposed modifications of the MLPP's cooling intake system either would not significantly **[****14]** reduce environmental damage to the source of cooling water, or were economically infeasible, and that the proposed **[**88]** modifications represented the most effective economically feasible alternative considered. The commission thus concluded that this proposal represented BTA for purposes of section 316(b) of the CWA, though it "recommend[ed]" that, prior to each five-year renewal of the NPDES permit, the Regional Water Board require the plant's owner to provide an analysis of "alternatives and modifications to the cooling water intake system 1.) which are feasible under [the California Environmental Quality Act] and 2.) [which] could significantly reduce entrainment impacts to marine organisms."

As a separate condition of certification, the Energy Commission specified that the MLPP's owner would provide $ 7 million to fund an Elkhorn Slough watershed acquisition and enhancement project. The commission concluded that compliance with "existing and new permits, including the ... NPDES ... permit[,] will result in no significant water quality degradation." Finally, the commission entered a formal finding that the conditions of certification, if implemented, would "ensure that the project **[****15]** will be designed, sited, and operated **[***666]** in conformity with applicable local, regional, state, and federal laws, **[*511]** ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards."

On October 27, 2000, after similar full procedures, the Regional Water Board issued its revised Waste Discharge Requirements Order No. 00-041 (Order No. 00-041), which included NPDES permit No. CA0006254, applicable to the MLPP. The stated purpose of the order was to permit, pursuant to conditions and limitations specified in the order, the "discharge of industrial process wastewater, uncontaminated cooling water and storm water from the [MLPP]."

In finding No. 48 of its order, the Regional Water Board addressed CWA section 316(b)'s BTA

mandate, as required for issuance of the permit. The order recited that the powerplant "must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. *If the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In* ***[****16]*** *this case the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits.* However, Duke Energy will upgrade the existing intake structure for the new units to minimize the impacts due to impingement of larger fish on the traveling screens, and will fund a mitigation package to directly enhance and protect habitat resources in the Elkhorn Slough watershed ... ." (Italics added.)

In finding No. 49, the Regional Water Board set forth the required cooling system modifications and the environmental results to be expected therefrom. Subsequent findings detailed the features of the habitat enhancement program to be funded by a $ 7 million deposit from the powerplant's owner.

No person or entity sought administrative or judicial relief to stop or stay construction or operation of the plant additions and modifications under the terms and conditions of the Energy Commission's certification order, nor was any other form of judicial review of the commission's order pursued. The project to install the two new generating units at the MLPP, with attendant modifications to the cooling intake system, has since been constructed, and has been in operation **[****17]** since 2002.

Meanwhile, plaintiff did file with the State Water Board an administrative appeal of the Regional Water Board's Order No. 00-041. On June 21, 2001, the State Water Board rejected the appeal.

On July 26, 2001, plaintiff filed the instant petition for administrative mandamus (Code Civ. Proc., § 1094.5 (section 1094.5)) in the Monterey **[*512]** County Superior Court (No. M54889). The petition claimed that the Regional Water Board had failed to comply with the CWA, in that the October 2000 NPDES permit issued to Duke did not satisfy the BTA requirement of section 316(b) of that statute. The prayer for relief asked that Order No. 00-041, issuing the permit, be set aside. However, plaintiff did not seek injunctive or other relief to halt, delay, or suspend the operative effect of the 2000 **[**89]** NPDES permit while the mandamus challenge was pending. [4]

Defendants and real parties in interest demurred to the petition, asserting, among other **[***667]** things, lack of subject matter jurisdiction, in that the claims for **[****18]** relief concerned matters determined by the Energy Commission, whose decisions the Warren-Alquist Act insulates from review by the superior court. The commission, as amicus curiae, filed a supporting memorandum. The trial court overruled the demurrers. Duke sought a writ of mandate in the Court of Appeal, Sixth Appellate District, to challenge this decision. (*Duke Energy Moss Landing v. Superior Court*, June 12, 2002, H024416.) The Court of Appeal summarily denied mandate.

The superior court then considered plaintiff's claims on the merits. On October 1, 2002, after a hearing, the court issued its intended decision. In this tentative ruling, the court rejected finding No. 48 of the Regional Water Board's Order No. 00-041—the board's determination that the MLPP's cooling water system satisfied BTA—concluding that this finding was not supported by the weight of the evidence. The intended decision proposed to order issuance of a peremptory writ of mandate, directing the board "to conduct a thorough and comprehensive analysis of [BTA] applicable to the [MLPP]." However, the intended decision specified that "[n]othing in this decision compels an interruption in the ongoing plant operation

---

[4] The 2000 NPDES permit here at issue expired in 2005. We are advised that the MLPP's cooling system is currently operating under an administrative extension of this permit. (See 40 C.F.R. § 122.6 (2011).)

[**19]** during the ... board's review of this matter."

On October 29, 2002, after receiving initial objections from real parties in interest, the court designated the intended decision as the statement of decision and ordered plaintiff to prepare a proposed judgment for review and signature. Plaintiff submitted a proposed judgment granting a peremptory writ of mandate and setting aside the challenged NPDES permit.

Defendants and real parties in interest objected that a judgment setting aside the permit would conflict with the intended decision's proviso that no interruption in current plant operations was being ordered, and would require the Regional Water Board to start the NPDES permit process over from "square one." These parties submitted an alternative proposed judgment that **[*513]** granted the peremptory writ and remanded to the board "for further proceedings in [the board's] discretion that are consistent with this Judgment and the Statement of Decision," again specifying that nothing in the judgment compelled an interruption in ongoing plant operations pending the board's review.

Ultimately, on March 7, 2003, the court issued an order which (1) stated that finding No. 48 was not supported by the weight of the evidence, **[****20]** (2) remanded Order No. 00-041 to the Regional Water Board "to conduct a thorough and comprehensive analysis with respect to Finding No. 48," and (3) directed the board to advise the court when it had completed its proceedings on remand "so that the [c]ourt may schedule a status conference." Plaintiff's petition for mandate in the Court of Appeal, seeking to set aside the March 7, 2003, order (*Voices of the Wetlands v. Superior Court* (Apr. 18, 2003, H025844)) was summarily denied.

On remand, the Regional Water Board issued a notice soliciting written testimony, evidence, and argument from the parties—including, for this purpose, both plaintiff and the Energy Commission—as to (1) what alternatives to once-through cooling were effective to reduce entrainment, (2) the costs, feasibility, and environmental benefits of such alternatives, and (3) whether the costs of any such alternatives were wholly disproportionate to their environmental benefits. The parties, and the board's staff, thereafter submitted voluminous materials in conformity with the notice.

On May 15, 2003, the Regional Water Board held a public hearing on the issues specified in the remand order. Plaintiff **[***668]** participated in **[****21]** the hearing. The parties had the opportunity to summarize their evidence, cross-examine witnesses, and present closing arguments. Members of the public in attendance were also allowed to comment. The board members' discussion indicated a **[**90]** majority view that closed-cycle cooling, despite its ability to reduce entrainment, would actually have adverse effects on air and water quality and would reduce plant efficiency, and that more expensive cooling alternatives were not justified by their environmental benefits, given the overall good health of the adjacent marine habitat after 50 years of plant operations. These considerations, the board majority concluded, supported the original determination that the costs of alternatives to the MLPP's once-through cooling system were wholly disproportionate to the corresponding environmental benefits. By a four-to-one vote, the board approved a motion declaring that, for the reasons specified in the foregoing discussion, "Finding [No.] 48 in NPDES order 00041 is supported by the weight of the evidence."
[*514]

Plaintiff filed an administrative appeal of the Regional Water Board's decision on remand. The State Water Board summarily denied the appeal on grounds **[****22]** that it failed to "raise substantial issues that are appropriate for review."

On October 15, 2003, plaintiff filed a second superior court mandate petition (*Voices of the Wetlands v. California Regional Water Quality*

Control Bd. (Super. Ct. Monterey County, No. M67321)), attacking the Regional Water Board's resolution on remand on multiple grounds. On July 21, 2004, acting on the petition at issue here, No. M54889, the court issued a statement of decision resolving the postremand issues the parties had agreed remained open. In pertinent part, the court ruled that (1) the board's limitation on the scope of the remand issues complied with the court's remand order, (2) in deciding whether finding No. 48 had sufficient support, the court could consider the new evidence developed on remand, (3) plaintiff was correct that mitigation measures could not be considered in determining BTA (citing *Riverkeeper I, supra*, 358 F.3d 174), but the board had not used the $ 7 million Elkhorn Slough habitat restoration plan as a "substitute" for selecting BTA, and the board's BTA determination "[did] not rest on that plan as the basis for its [BTA] finding," and (4) the board on remand conducted "a sufficiently **[****23]** comprehensive analysis of the potential technological alternatives" to once-through cooling, "and the record contains a realistic basis for concluding that the existing modified [cooling] system provides [BTA] for the [MLPP]."

On August 17, 2004, the court entered judgment denying a peremptory writ of mandate in No. M54889. On the parties' stipulation, the court thereafter entered an order of dismissal with prejudice in No. M67321.

Plaintiff appealed in No. M54889, urging that the trial court erred in ordering an interlocutory remand, and in denying mandate to overturn the NPDES permit on grounds that the Regional Water Board had improperly determined BTA. Defendants and real parties in interest cross-appealed on the issue whether the superior court had jurisdiction to entertain the mandamus petition.

Meanwhile, in July 2004, the EPA finally promulgated regulations setting BTA standards for the cooling systems of existing powerplants. (69 Fed.Reg. 41576 (July 9, 2004); see 40 C.F.R. § 125.90 et seq. (2011) (Phase II regulations).) [5] As explained **[***669]** in greater detail below, the Phase II regulations established national performance standards based on the impingement and **[*515]** entrainment mortality **[****24]** rates to be expected from closed-cycle cooling (see fn. 2, *ante*). However, the regulations allowed existing facilities to meet those standards by alternative cooling system technologies, or, where reliance on such a technology alone was less feasible, less cost effective, or less environmentally desirable, by using restoration measures as a supplementary aid to compliance. A facility could also obtain a site-specific determination of BTA based on performance "as close as practicable" to the national standards, where, in the particular case, the costs of strict compliance would be "significantly greater" than those considered by the EPA director when formulating the regulations (the "cost-cost" alternative), or than the environmental benefits **[**91]** to be expected (the "cost-benefit" alternative). (40 C.F.R. suspended § 125.94 (2011).)

In 2007, while the instant appeal was pending, the United States Court of Appeals for the Second Circuit issued its decision in *Riverkeeper II*, addressing the Phase II regulations. [6] The *Riverkeeper II* court concluded that these regulations were invalid **[****25]** under section 316(b) of the CWA insofar as they permitted the use of (1) cost-benefit analysis (as opposed to stricter cost-effectiveness analysis) [7] and (2) compensatory restoration measures for purposes of determining BTA. (*Riverkeeper II, supra*, 475 F.3d 83, 98–105, 108–110, 114–115.)

---

[5] The EPA had previously issued regulations governing BTA for the cooling systems of new powerplants (Phase I regulations).

[6] In *Riverkeeper I, supra*, 358 F.3d 174, the same court of appeals had previously considered challenges to the Phase I regulations.

[7] Thus, *Riverkeeper II* concluded that CWA section 316(b)'s BTA standard does allow selection of the least costly technology "whose performance does not essentially differ from the performance of the best-performing technology whose cost the industry reasonably can bear." (*Riverkeeper II, supra*, 475 F.3d 83, 101.)

Thereafter, the Court of Appeal for the Sixth Appellate District unanimously affirmed the trial court judgment in this case. The Court of Appeal concluded that (1) the superior court properly entertained the mandamus petition; (2) the court did not err by ordering, in advance of a final judgment, an interlocutory remand to the Regional Water Board; (3) the board properly considered new evidence on remand; (4) section 316(b) of the CWA does not permit the use of compensatory **[****26]** restoration measures as a factor in establishing BTA (citing *Riverkeeper II*), but substantial evidence in the administrative record supports the trial court's determination that the board did not employ mitigation measures as " 'a *substitute* for selecting the best technology available' "; (5) the board could properly conclude that BTA did not require the implementation of cooling technologies whose costs were "wholly disproportionate" to their environmental benefits; and (6) the administrative record substantially supports the trial court's ultimate determination that, in the MLPP's case, the costs of alternative technologies to once-through cooling were wholly disproportionate to the expected environmental results.
[*516]

Plaintiff sought review, raising three contentions: (1) section 316(b) of the CWA does not permit a cost-benefit analysis, such as the Regional Water Board's "wholly disproportionate" standard, in determining BTA; (2) the board improperly accepted compensatory restoration measures—specifically, the $ 7 million Elkhorn Slough habitat enhancement program—as a factor in achieving BTA; and (3) the trial court improperly ordered an interlocutory remand after finding insufficient **[****27]** evidence to support the board's BTA finding. In its answer to the petition for review, Dynegy **[***670]** urged that if review was granted, we should conclude the superior court lacked subject matter jurisdiction, because the BTA determination was subsumed in the Energy Commission's powerplant certification, as to which review was solely in this court.

We granted review and deferred briefing pending the United States Supreme Court's resolution of the then pending petitions for certiorari in *Riverkeeper II*. The high court subsequently granted certiorari. In April 2009, the court issued its decision in *Entergy Corp.*, resolving certain of the issues addressed by the court of appeals in *Riverkeeper II*. Our discussion below proceeds accordingly.

DISCUSSION [8]

A. *Superior court jurisdiction.*

HN2[↑] CA(1)[↑] **(1)** Pursuant to the Porter-Cologne Act, decisions and orders of the Regional Water Board, including the issuance and renewal of NPDES permits, are reviewable by administrative appeal to the State Water Board, and then by petition for administrative mandamus **[**92]** in the superior court. (§ 1094.5; Wat. Code, §§ 13320, 13330.) In the mandamus proceeding, the superior court is obliged to exercise its independent judgment on the evidence before the administrative agency, i.e., to determine whether the agency's findings are supported by the weight of the evidence. (§ 1094.5, subd. (c); Wat. Code, § 13330, subd. (d).)

Plaintiff pursued these avenues of relief. Nonetheless, defendants and Dynegy, joined by the Energy Commission as amicus curiae, urge at the outset that the superior court lacked jurisdiction to entertain plaintiff's petition for mandate in this case. The trial court and the Court of Appeal rejected this contention. We do so as well.
[*517]

CA(2)[↑] **(2)** The jurisdictional argument is based

---

[8] The Energy Commission has filed an amicus curiae brief urging, in support of defendants and Dynegy, that the Regional Water Board's permit decision was properly reviewable only in this court. An amicus curiae brief in support of plaintiff has been jointly filed by the North Coast Unified Air Quality Management District, the Northern Sonoma County Air Pollution Control District, the South Coast Air Quality Management District, and the San Diego County **[****28]** Air Pollution Control District.

on**HN3**[↑] the Warren-Alquist Act, which mandates simplified and expedited processing and review of applications to certify the siting, construction, and modification **[****29]** of thermal powerplants. **[***671]** The Warren-Alquist Act accords the Energy Commission "the exclusive power to certify all sites and related facilities" for thermal powerplants with generating capacities of 50 or more megawatts, "whether a new site and related facility or a change or addition to an existing facility." (Pub. Resources Code, § 25500; see also *id.*, §§ 25110, 25119, 25120.) **HN4**[↑] When a certification application is filed, the commission undertakes a lengthy review process that involves multiple staff assessments, communication with other state and federal regulatory agencies, environmental impact analysis, and a series of public hearings. (*Id.*, §§ 25519–25521.) With an exception not relevant here, the commission may not certify a proposed facility that does not meet all applicable federal, state, regional, and local laws. (*Id.*, § 25525.) Accordingly, "[t]he issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation **[****30]** of any state, local, or regional agency, or federal agency to the extent permitted by federal law." (*Id.*, § 25500.)

HN5[↑] **CA(3)**[↑] **(3)** The Warren-Alquist Act also constrains judicial review of an Energy Commission powerplant certification decision. Between 1996 and 2001, the statute provided that review of such a decision was exclusively by a petition for writ of review in the Court of Appeal or the Supreme Court. (Pub. Resources Code, former § 25531, subd. (a); Pub. Utilities Code, § 1759, subd. (a).) [9] An emergency amendment to Public Resources Code section 25531, subdivision (a), effective in May 2001, establishes that this court alone now has jurisdiction to review powerplant certification decisions by the commission. (Pub. Resources Code, § 25531, subd. (a), as amended by Stats. 2001, 1st Ex. Sess. 2001–2002, ch. 12, § 8, pp. 8101–8102.)

Subdivision (c) of Public Resources Code section 25531 further provides that **HN6**[↑] "[s]ubject to the right of judicial review of decisions of the [Energy] **[*518]** [C]ommission," as set forth in subdivision (a), "no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission."

Defendants **[****32]** and Dynegy urge as follows. Under the particular circumstances of this **[**93]** case, the fundamental issue presented—whether the MLPP's once-through cooling water intake system satisfied BTA for purposes of section 316(b) of the CWA—is one which "was, or could have been" (Pub. Resources Code, § 25531, subd. (c)), and indeed, had to be, determined in the certification proceeding before the Energy Commission. In order to certify the proposed expansion of the MLPP, the commission was required to find, and did find, that the project, including the intended modifications to the MLPP's cooling intake system, conformed to all applicable local, state, and federal

[9] Adopted as part of the Public Utilities Act in 1951, Public Utilities Code section 1759, subdivision (a), originally provided for exclusive Supreme Court review of the Public Utility Commission's decisions and orders. (Stats. 1951, ch. 764, § 1759, p. 2091.) Public Resources Code section 25531, subdivision (a), adopted as part of the Warren-Alquist Act in 1974, originally **[****31]** provided that review of powerplant siting decisions by the Energy Commission would be the same as for Public Utility Commission decisions granting or denying certificates of public convenience and necessity for powerplants. (Stats. 1974, ch. 276, § 2, pp. 501, 532.) In 1996, Public Utilities Code section 1759, subdivision (a), was amended to allow review of Public Utilities Commission decisions either by this court or by the Court of Appeal. (Stats. 1996, ch. 855, § 10, p. 4555.) The effect, under then unamended Public Resources Code section 25531, subdivision (a), was to establish similar review for Energy Commission powerplant siting certifications.

laws, including section 316(b). Hence, the "case or controversy" advanced by plaintiff "concern[s] a matter" within the commission's purview, and was thus subject to the Warren-Alquist Act's exclusive-review provisions, with which plaintiff did not comply.

Plaintiff makes the following response: Entirely aside from the plant expansion project, the MLPP cannot operate its cooling water intake system without a federally required, time-limited NPDES permit. Under both federal and state law, only the State Water Board and the regional water **[****33]** boards have authority in California to issue or renew such permits. Although the MLPP's NPDES permit renewal process coincided with its Energy Commission certification proceedings, and the two matters were significantly coordinated, it is the Regional Water Board's decision to renew the NPDES permit, not the Energy Commission's certification of the plant expansion, that is the subject of this "case or **[***672]** controversy." The Porter-Cologne Act thus provides for mandamus review by the superior court of the Regional Water Board's permit decision.

Indeed, plaintiff emphasizes, such a conclusion in this case does not thwart the Warren-Alquist Act's purpose to expedite the certification of new powerplant capacity. Plaintiff notes that it never sought to stop, delay, or suspend the construction and operation of the MLPP expansion project in conformity with the Energy Commission's certification, including the approved modifications to the cooling water intake system, and the project has long since been implemented.

CA(4)[↑] **(4)** Applying well-established principles of statutory construction, we conclude, as did the Court of Appeal, that plaintiff has the better argument. HN7[↑] **[*519]** When interpreting statutes, we begin with **[****34]** the plain, commonsense meaning of the language used by the Legislature. (E.g., *Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 288 [93 Cal. Rptr. 3d 369, 206 P.3d 739].) If the language is unambiguous, the plain meaning controls. (*Ibid.*) Potentially conflicting statutes must be read in the context of the entire statutory scheme, so that all provisions can be harmonized and given effect. (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831 [95 Cal. Rptr. 3d 164, 209 P.3d 73].)

Here, however, there is no actual conflict. Under the plain language of the two statutory schemes, as applicable to this case, each agency—the Regional Water Board and the Energy Commission—had exclusive jurisdiction in a discrete area of thermal powerplant operations, and a distinct provision for judicial review applied in each case. Under the Warren-Alquist Act, the commission had sole authority to certify, i.e., to grant general permission for, the MLPP's proposal to install and operate additional generating capacity, and to modify other plant systems as necessary to accommodate this expansion. There is no question, under the unambiguous language of the Warren-Alquist Act, that the **[****35]** commission's certification order was subject to judicial review in this court alone. Plaintiff did not seek judicial review of the commission's certification decision, and that determination has long since become final and binding.

However, as defendants and Dynegy concede, regardless of any plans for new generating capacity that might involve the Energy Commission, a federal law, the CWA, obliged the MLPP to have in effect at all times a valid NPDES permit in order to cycle cooling water from Elkhorn Slough and Moss Landing Harbor in and out of the plant. The Porter-Cologne Act assigns the exclusive authority to issue, renew, and modify such permits to the State Water Board and the regional water boards. This statute further **[**94]** plainly specifies that these agencies' decisions are reviewable by mandamus in the superior court. Plaintiff mounted such a judicial challenge to the NPDES permit renewal granted to the MLPP by the Regional Water Board.

Defendants and Dynegy note that the Warren-Alquist Act requires the Energy Commission, before issuing a powerplant certification, to find conformity with all "applicable local, regional, state, and federal standards, ordinances, or laws." (Pub. Resources Code, § 25523, subd. (d)(1); **[****36]** see also *id.*, § 25514, subd. (a)(2).) Hence, these parties insist, the issue underlying this litigation—whether the MLPP's cooling water intake system, with its proposed modifications, satisfied BTA for purposes of the CWA—is a "matter" which, in this particular instance, "was, or could have been, determined" by the Energy Commission (Pub. Resources Code, § 25531, subd. (c)) **[***673]** as a **[*520]** necessary component of its decision to certify the plant expansion. Accordingly, the argument runs, only this court had "jurisdiction to hear or determine any case or controversy concerning [that] matter." (*Ibid.*)

We are not persuaded. When the judicial review provisions of the Warren-Alquist Act, as set forth in Public Resources Code section 25531, are read in context, the meaning of subdivision (c)'s critical phrase "any case or controversy concerning any matter which **[***674]** was, or could have been, determined in a proceeding before the [Energy] [C]ommission" is unmistakably clear.

CA(5)[↑] **(5)** We must analyze the words of subdivision (c) of Public Resources Code section 25531 in conjunction with subdivision (a) of the same section. **HN8**[↑] Subdivision (a) specifies the extent of this court's exclusive direct review jurisdiction **[****37]** as mandated by the Warren-Alquist Act. Under subdivision (a), "[t]he decisions of the [Energy] [C]ommission *on any application for certification of a site and related facility* are subject to judicial review by the Supreme Court of California." (Italics added.) Read together with subdivision (a), subdivision (c) simply confirms that no other court may review directly a *certification decision* of the commission, or may otherwise entertain a "case or controversy" that attacks *such a decision* indirectly by raising a "matter" the commission determined, "or could have ... determined," *for purposes of* the certification proceeding. Section 25531 neither states nor implies a legislative intent to interfere with normal mandamus review of the actions of *another* agency, simply because that agency, exercising functions within *its* exclusive authority, has independently decided an issue the commission also must or might have addressed for its own purposes.

The Energy Commission did find, in connection with the MLPP's certification application, that the cooling system modifications proposed in connection with the expansion project satisfied the CWA's BTA requirement. But the commission made this finding only **[****38]** to support its decision, under the Warren-Alquist Act, to certify the proposed expansion. If plaintiff had challenged this certification on grounds the commission's BTA finding was improper, the "case or controversy concerning [that] matter" (Pub. Resources Code, § 25531, subd. (c)) could only have proceeded in accordance with the Warren-Alquist Act.

However, despite the interagency cooperation on the MLPP's expansion application, and the agencies' agreement that the plant's cooling system satisfied BTA, the fact remains that only the Regional Water Board had authority, under the Porter-Cologne Act, and by EPA approval for purposes of the CWA, to determine the BTA issue *as necessary for renewal of the plant's federally required NPDES permit.*
[*521]

[*675]** Defendants and Dynegy concede this exclusive administrative authority of the Regional Water Board. Nonetheless, they imply that the board's BTA finding was ratified, adopted, and subsumed in the Energy Commission's certification decision. Such is not the case. By law, each agency made an independent BTA determination, based on its distinct and separate regulatory function. Had the two agencies disagreed about BTA, the Energy Commission might still **[****39]** have been able to certify the plant expansion, but it could not have

overruled or countermanded a decision by the Regional Water Board to deny or condition an NPDES permit renewal **[**95]** on grounds the plant's cooling system did not satisfy BTA.

It follows that, by attacking only the Regional Water Board's decision to renew the plant's federally required NPDES permit, plaintiff has not raised a "case or controversy concerning any matter which was, or could have been, determined in a proceeding before the [Energy] [C]ommission." (Pub. Resources Code, § 25531, subd. (c).) Hence, plaintiff's lawsuit, limited to an examination of the propriety of the permit renewal, is not affected by the judicial review provisions of the Warren-Alquist Act.

Defendants and Dynegy point out that under the Warren-Alquist Act, "[t]he issuance of a certificate by the [Energy] [C]ommission" for the siting, construction, or expansion of a thermal powerplant "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, **[****40]** ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law." (Pub. Resources Code, § 25500.) Under this provision, a commission certification clearly supplants and supersedes all state, county, district, and city permits and approvals that would otherwise be required for the siting, construction, and expansion of a thermal powerplant.

CA(6)[↑] (6) But Public Resources Code section 25500 acknowledges, as it must, the supremacy of *federal* law. HN9[↑] Under the CWA, a federal statute, any facility that discharges wastewater into a navigable water source, as the MLPP has always done, must have an unexpired permit, conforming to federal water quality standards, in order to do so. Pursuant to the regulatory approval of a "federal agency," the EPA, only the State Water Board or a regional water board may issue a federally compliant discharge permit; such a decision is entirely outside, and independent of, the Energy Commission's authority. Under the Porter-Cologne Act, judicial review of the decisions of these agencies, including those to grant or renew NPDES permits, is by mandamus in the superior court. **[*522]**

Defendants and Dynegy nonetheless insist that **[****41]** the NPDES permit at issue here is a *state*, not a federal, permit, as to which federal law requires no particular avenue of review beyond minimum standards of due process. Hence, these parties urge, the state agency's decision is entirely subject, within the limits of due process, to the state's own preferences for judicial review. Accordingly, they assert, California may conclude, and has concluded, that when the issuance of a wastewater discharge permit is linked to a powerplant certification proceeding, the Warren-Alquist Act's "one-stop shopping" requirement of exclusive review by this court prevails over the review provisions that would otherwise apply, under the Porter-Cologne Act, to decisions of the State Water Board and the regional water boards.

The contention lacks merit. It is true, as these parties observe, that the CWA does not directly delegate to a state agency the authority to administer the federal clean water program; instead, it allows the EPA director to "suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems that operate under those states' own laws in lieu of the federal framework. (33 U.S.C. § 1342(b); see **[****42]** *Shell Oil Co. v. Train* (9th Cir. 1978) 585 F.2d 408, 410.) But the distinction is of little moment for our purposes. The state-administered program must conform to federal standards, and it must be approved by a federal agency, the EPA. In California, the EPA has approved a program under which the federally required permits are issued and renewed, not by the Energy Commission, but solely by the State Water Board and the regional water boards. (54 Fed.Reg. 40664–40665 (Oct. 3, 1989); 39 Fed.Reg. 26061 (July 16, 1974); Wat. Code, §

13377.)

CA(7)[↑] (7) Defendants and Dynegy suggest that, even if this is so, federal law does not prohibit resort to the Warren-Alquist Act's restrictive provisions for judicial review in cases where, as here, a proceeding for issuance or renewal of an NPDES permit coincides with a powerplant certification proceeding before the Energy Commission. Perhaps not. But HN10[↑] under the Warren-Alquist Act itself, only "[t]he decisions of the [Energy] [C]ommission **[**96]** *on any application for certification of a site and related facility*" are subject to exclusive review in this court (Pub. Resources Code, § 25531, subd. (a), italics added), and other courts are deprived of jurisdiction **[****43]** only of a "case or controversy concerning [a] matter which *was, or could have been*, determined in a proceeding before the commission" (*id.*, subd. (c), italics added).

As we have seen, an NPDES permit decision by a regional water board is not an Energy Commission certification decision. Conversely, under California's EPA-approved NPDES permit program, neither commission certification proceedings, nor findings the commission may make in connection with such proceedings, can result in the issuance or renewal of an NPDES permit; only **[*523]** the State Water Board and the regional water boards may issue or renew such permits. Hence, a challenge to the issuance or renewal of an NPDES permit is not a "case or controversy concerning [a] matter which was, or could have been, determined" by the commission. (Pub. Resources Code, § 25531, subd. (c).)

HN11[↑] CA(8)[↑] **(8)** Nothing in the Warren-Alquist Act states or implies that where a powerplant has concurrently sought both a renewal from the Regional Water Board of its NPDES wastewater discharge permit, and an Energy Commission certification to install additional generating capacity, the regional water board's decision, normally reviewable in the superior court pursuant to **[****44]** the Porter-Cologne Act, is suddenly subject to the exclusive-review provisions of the Warren-Alquist Act. We see no basis for reading such a requirement into the latter statute. [10]

---

[10] Dynegy alludes to the portion of Public Resources Code section 25531, subdivision (c) which states that "[s]ubject to the right of judicial review [in this court] of decisions of the [Energy] [C]ommission, no court ... has jurisdiction ... to *stop or delay* the construction *or operation* of any thermal powerplant except to enforce compliance with ... a decision of the commission." (Italics added.) Dynegy implies that because the superior court was thus deprived of authority to enforce any NPDES permit ruling it might make by "stop[ping] or delay[ing]" the wastewater discharge "operation[s]" of the MLPP, it must therefore have been deprived of all jurisdiction to entertain a challenge to the ruling. Like the Court of Appeal, we conclude we need not, and we do not, directly address whether the superior court had "stop or delay" authority, because no such stoppage or delay was sought or ordered in this case. But we do have serious doubts about Dynegy's premise. We have explained that under federal and California **[****45]** water quality laws, all industrial facilities, including thermal powerplants, that discharge wastewater into navigable water sources may only do so under the terms of valid NPDES permits. The State Water Board and the regional water boards have exclusive authority and responsibility to issue, renew, and administer such permits, and a powerplant certification by the Energy Commission cannot operate "in lieu" (Pub. Resources Code, § 25500) of a properly issued, federally required NPDES permit. Review of a decision of the State Water Board or a regional water board is by mandamus in the superior court, which court, upon proper evidence and findings, may command the agency to "set aside [its] order or decision," and direct the agency "to take such further action as is specially enjoined upon it by law." (Code Civ. Proc., § 1094.5, subd. (f).) Of course, the agency's compliance with such an order withdraws the federal and state legal authority for the plant's wastewater discharge "operation[s]." Moreover, if the State Water Board or a regional water board perceives a "threatened or continuing" violation of the permit provisions, it may require the Attorney General to seek direct injunctive **[****46]** relief against the violator. (Wat. Code, § 13386.)

Construed literally, the no "stop or delay" provision of Public Resources Code section 25531, subdivision (c), would entirely swallow these provisions as applied to thermal powerplants; it would *never* allow a superior court to prevent the illegal wastewater activities of such a plant "except to enforce compliance with ... a decision of *the* [*Energy*] [*C*]*ommission*"—an agency which, *even in connection with a powerplant certification*, has no direct authority over wastewater discharge violations, or the issuance, renewal, or administration of NPDES permits.

Fairly read in context, and properly harmonized with the requirements of federal and state water quality laws, the cited portion of Public Resources Code section 25531, subdivision (c), like the rest of the section, operates only with respect to "decisions" *properly*

[*524]

[***676] Defendants and Dynegy stress that the purposes of the Warren-Alquist Act, including its "one stop" permit process and its provision for exclusive judicial review, are to [**97] consolidate the state's regulation of electrical generation and transmission facilities, and to expedite the operative effect of powerplant certifications by the Energy Commission. (See, e.g., Pub. Resources Code, § 25006; *County of Sonoma v. State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 368 [220 Cal. Rptr. 114, 708 P.2d 693]; *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal. App. 3d 437, 453 [197 Cal. Rptr. 866].) Superior court jurisdiction in this case, they urge, defeats these statutory aims.

However, as we have explained, a federal law, the CWA, requires all industrial facilities, including thermal powerplants, that discharge wastewater into navigable water sources to have in effect unexpired NPDES permits authorizing such discharge. This requirement is independent of the Energy Commission's certification, under California law, of an application to locate, construct, or expand such a powerplant. As defendants and Dynegy concede, a state statute, the Porter-Cologne [****48] Act—specifically approved by the federal agency responsible for authorizing state administration of the CWA's requirements—assigns the issuance and renewal of NPDES permits exclusively to the State Water Board and the regional water boards. Although the Energy Commission must make a general finding, before issuing a powerplant certification, that the project conforms to all applicable local, regional, state, and federal laws, such a certification cannot contravene, subsume, encompass, supersede, substitute for, or operate in lieu of, the federally required NPDES permit.

The Porter-Cologne Act provides that review of NPDES permit decisions by the State Water Board or the regional water boards is in the superior court. No provision of either the Porter-Cologne Act or the Warren-Alquist Act states or suggests that these review provisions are altered simply because an NPDES permit issuance or renewal proceeding took place concurrently, or in connection, with a certification proceeding for the same powerplant. Hence, we have no basis to conclude that the purposes of the Warren-Alquist Act are impaired by recognizing superior court jurisdiction under the circumstances of this case.

For [****49] these reasons, we conclude that the superior court had subject matter jurisdiction of the instant mandamus proceeding.

[*525]

[***677] B. *Interlocutory remand.*

Plaintiff urges that under section 1094.5, once the trial court found insufficient evidence to support the Regional Water Board's finding No. 48 (the BTA finding), the court had no choice but to render a final mandamus judgment directing the board to set aside its Order No. 00-041, renewing the MLPP's wastewater discharge permit. The court thus erred, plaintiff insists, when it instead (1) retained jurisdiction pending an interlocutory remand to the board for reconsideration of finding No. 48; (2) allowed the board to take new evidence and reaffirm its finding; then (3) denied mandamus relief after concluding that the administrative record, as augmented on remand, supported the board's determination. We conclude that no error occurred.

Plaintiff bases its argument on two portions of section 1094.5—subdivisions (e) and (f). Subdivision (e) provides that**HN12**[↑] "[w]here the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly

within the purview of the Energy Commission, i.e., powerplant certifications. The subdivision precludes any court except this court from "stop[ping] or delay[ing]" the "operation" of a thermal powerplant insofar as such "operation" is authorized by the Energy Commission's decision, under the Warren-Alquist Act, to certify [****47] the plant's siting, construction, or expansion.

excluded at the hearing before [the **[****50]** agency], it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case." Subdivision (f) states that **HN13**[↑] "[t]he court shall enter judgment either commanding respondent [(the agency)] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment ... ."

Read together, plaintiff asserts, these provisions establish that the court (1) may order the administrative agency to reconsider its decision only as part of a final judgment **[**98]** granting a writ of mandate; (2) in such event, must specify that the entire "case" be reconsidered; and (3) may allow the agency, upon reconsideration, to accept and consider new evidence *only* when such evidence (a) could not earlier have been produced before the agency with due diligence or (b) was improperly excluded at the initial administrative hearing.

As plaintiff **[****51]** observes, defendants and Dynegy do not claim that the evidence the court found wanting was unavailable at the time of the Regional Water Board's proceedings, or that the agency improperly rejected an attempt to present such evidence. Hence, plaintiff urges, upon concluding that the board's BTA finding was not supported by the weight of the evidence then contained in the administrative record, the trial court was required to enter a final judgment granting the requested writ of mandamus and overturning the agency's permit renewal order in its entirety.
[*526]

CA(9)[↑] **(9)** We conclude, however, that, **HN14**[↑] properly understood and interpreted, subdivisions (e) and (f) of section 1094.5 impose no absolute bar on the use of prejudgment limited remand procedures such as the one employed here. Moreover, when a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, the statute does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified.

CA(10)[↑] **(10)** To determine the meaning of these provisions, we must first examine their words, which **[****52]** have remained unchanged since section 1094.5 was adopted over six decades ago. (Stats. 1945, ch. 868, § 1, pp. 1636–1637.) The statutory language simply does not support the arbitrary and restrictive **[***678]** **[***679]** construction plaintiff advocates. **HN15**[↑] On its face, subdivision (f) of section 1094.5 indicates the form of *final judgment* the court may issue in an administrative mandamus action. Unremarkably, subdivision (f) states that the last step the trial court shall take in the proceeding is either to command the agency to set aside its decision, or to deny the writ. The trial court here followed that mandate; it issued a final judgment denying a writ of mandamus.

As defendants and Dynegy observe, nothing in subdivision (f) of section 1094.5 purports to limit procedures the court may appropriately employ *before* it renders a final judgment. A more general statute covers that subject. Code of Civil Procedure section 187, adopted in 1872, broadly provides that whenever the Constitution or a statute confers jurisdiction on a court, "all the means necessary to carry it [(that jurisdiction)] into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding *be not specifically* ***[****53]** *pointed out* by this Code or the statute, *any suitable process or mode of proceeding may be adopted* which may appear most conformable to the spirit of this Code." (Italics added.)

Subdivision (f) of section 1094.5 does not

"specifically point[] out" the prejudgment procedures to be followed in an administrative mandamus action, nor do its terms prohibit the court from "adopt[ing]" a "suitable process or mode of proceeding" when addressing the issues presented. (Code Civ. Proc., § 187.) Hence, we find nothing in subdivision (f)'s language that suggests an intent to limit or repeal Code of Civil Procedure section 187 for purposes of administrative mandamus actions. (See, e.g., *Ste. Marie v. Riverside County Regional Park & Open-Space Dist., supra*, 46 Cal.4th 282, 296 [implied repeals disfavored].)

Extrinsic aids to interpretation do not persuade us otherwise. The limited available legislative history of section 1094.5 does not suggest the Legislature's intent to limit the application of Code of Civil Procedure section 187, **[*527]** as it might appropriately apply in administrative mandamus actions, or to categorically confine the mandamus court only to postjudgment remands. (See, e.g., Cal. Dept. **[****54]** of Justice, Inter-Departmental Communication to Governor re Sen. Bill No. 736 (1945 Reg. Sess.) June 7, 1945, pp. 1–3; Legis. Counsel, Rep. on Sen. Bill No. 736 (1945 Reg. Sess.) June 9, 1945, pp. 1–2.)

Decisions have long expressed the assumption that the court in a mandamus action has **[**99]** inherent power, in proper circumstances, to remand to the agency for further proceedings prior to the entry of a final judgment. (See, e.g., *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81 [118 Cal. Rptr. 34, 529 P.2d 66] (*No Oil*) [professing no "question" of trial court's power in traditional mandamus to order interlocutory remand to agency for clarification of findings]; *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 600 [297 P.2d 967] [noting there is "no question" of a court's power under Code Civ. Proc., § 187 to remand, prior to a final mandamus judgment, for further necessary and appropriate agency proceedings; "aside from" court's power under § 1094.5 to enter judgment remanding for consideration of evidence not available, or improperly excluded, in original agency proceeding, "such a power to remand" prior to judgment "also exists under the inherent powers of the court"]; *Garcia v. California Emp. Stab. Com.* (1945) 71 Cal. App. 2d 107, 114 [161 P.2d 972] **[****55]** [in original mandamus action, Court of Appeal, without issuing final judgment, remanded for further agency proceedings after finding that evidence in administrative record was insufficient to support denial of unemployment **[***680]** benefits].) In *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.* (1986) 185 Cal. App. 3d 996 [230 Cal. Rptr. 225] (*Rapid Transit Advocates*), an administrative mandamus action governed by section 1094.5, the Court of Appeal, citing *No Oil* and *Keeler*, expressly upheld the trial court's order continuing the trial and remanding for clarification of the agency's findings. (*Rapid Transit Advocates, supra*, at pp. 1002–1003.)

We perceive no compelling reason why the Legislature would have wished to categorically bar interlocutory remands in administrative mandamus actions. Though its arguments have varied somewhat, we understand plaintiff to raise two basic objections to such a procedure.

First, plaintiff insists, the purpose of an administrative mandamus suit is to determine, once and for all, whether an agency has acted "without, or in excess of jurisdiction," in that the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, **[****56]** or the findings are not supported by the evidence." (§ 1094.5, subd. (b).) If the agency's action, as originally presented for review, is found defective by these standards, plaintiff urges, that action must simply be set aside, and the administrative process—assuming further proceedings are appropriate at all—must begin anew. Plaintiff contends the instant trial court violated these **[*528]** principles by withholding final judgment on the validity of the Regional Water Board's NPDES permit determination while allowing the agency to reconsider, and justify, a single finding the court had deemed insufficiently

supported.

Second, plaintiff seems to suggest, a limited prejudgment remand raises the danger of a sham proceeding, in which interested parties are denied the opportunity to argue or present evidence, and the agency simply concocts a post hoc rationalization for the decision it has already made. Such concerns appear paramount in two Court of Appeal decisions that expressly disagreed with *Rapid Transit Advocates, supra*, 185 Cal. App. 3d 996, and broadly asserted that section 1094.5 bars interlocutory, as opposed to postjudgment, remands in administrative mandamus proceedings. (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1220–1222 [13 Cal. Rptr. 2d 182]; **[****57]** *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal. App. 3d 886, 898–900 [236 Cal. Rptr. 794] (*Resource Defense Fund*).)

CA(11)[↑] **(11)** But considerations of fairness and proper agency decisionmaking do not justify the absolute prohibition for which plaintiff argues. Significantly, **HN16**[↑] subdivision (f) of section 1094.5 provides that, when granting mandamus relief, the court may "order the reconsideration of the case *in the light of the court's opinion and judgment*." (Italics added.) This clearly implies that, in the final judgment itself, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action. That being so, no reason appears why, in appropriate circumstances, the same objective **[**100]** cannot be accomplished by a remand prior to judgment. Indeed, such a device, properly employed, promotes efficiency and expedition by allowing the court to retain jurisdiction in the already pending mandamus proceeding, thereby eliminating the potential need for a new mandamus action to review the agency's decision on reconsideration.

CA(12)[↑] **(12)** We agree with plaintiff, and with the courts in *Sierra* **[****58]** *Club v. Contra Costa County* and *Resource Defense Fund*, that **HN17**[↑] any agency reconsideration must fully comport with due process, and may not simply allow the agency to rubberstamp **[***681]** its prior unsupported decision. Indeed, the judgments in *Sierra Club v. Contra Costa County* and *Resource Defense Fund* could have been based solely on the conclusions of the Courts of Appeal in those cases that the particular agency decisions on remand suffered from such flaws. [11]

[*529]

However, a limited interlocutory remand raises no greater inherent danger in these regards than does a final judgment ordering limited reconsideration, as expressly authorized by subdivision (f) of section 1094.5. No fundamental concerns about fair, sound, and complete agency decisionmaking impose the need for a categorical bar on such prejudgment remands.

---

[11] Thus, in *Resource Defense Fund*, a case involving the California Environmental Quality Act (CEQA), the trial court ordered an interlocutory remand to allow a city council to supply *missing* findings in support of an annexation approval. The order simply provided that the court would enter judgment after the council's action, or the expiration of 60 days. The Court of Appeal noted that this sparse and abbreviated procedure raised "serious questions of due process: it effectively precluded any possible challenge to the sufficiency of the evidence to support the new findings" and "fostered a *post hoc* rationalization ... ." (*Resource Defense Fund, supra*, 191 Cal. App. 3d 886, 900.) In *Sierra Club v. Contra Costa County*, the trial court **[****59]** determined that an environmental impact report (EIR), required by CEQA, was inadequate because it failed to fully analyze, and the county board of supervisors had thus failed to fully consider, less environmentally damaging alternatives to a massive residential development approved by the board. The court nonetheless denied the mandamus relief requested by opponents of the development, " 'with the exception that the County should administratively make further findings on alternatives.' " (*Sierra Club v. Contra Costa County, supra*, 10 Cal.App.4th 1212, 1216.) The board then adopted supplemental findings. Promptly thereafter, the court found the EIR, as so augmented, to be " 'legally adequate in all respects,' " whereupon the court discharged the alternative writ and entered judgment for the county. (*Id.*, at pp. 1216–1217.) Besides finding that this procedure did not satisfy the specific requirements of CEQA, the Court of Appeal stressed that, as was the case in *Resource Defense Fund*, the trial court's procedure raised serious questions of due process by insulating the board's supplemental findings "from any meaningful challenge." (*Sierra Club v. Contra Costa County, supra*, at p. 1221.) **[****60]**

CA(13)[↑] **(13)** Accordingly, we are persuaded that HN18[↑] subdivision (f) of section 1094.5 imposes no blanket prohibition on the appropriate use, in an administrative mandamus action, of a prejudgment remand for agency reconsideration of one or more issues pertinent to the agency's decision. We reject plaintiff's contrary argument. To the extent the Courts of Appeal in *Resource Defense Fund* and *Sierra Club v. Contra Costa County* concluded otherwise, we will disapprove those decisions.

We are further convinced that the interlocutory remand in this case was not employed, or conducted, improperly. Under the circumstances presented, the trial court's choice to utilize this device was eminently practical. Plaintiff's mandamus petition challenged only a single, discrete facet of the lengthy and complex NPDES permit order—the order's treatment of the BTA issue. **[****61]** The trial court ultimately concluded that a single finding on this issue—finding No. 48—lacked evidentiary and analytic support. Confronted with this situation, the trial court reasonably concluded it need not, and should not, enter a final judgment vacating the entire permit pending further consideration of that issue.

Such a judgment, even if it included an order narrowing the issues, would have required a new permit proceeding and, most likely, a new mandamus action to review the resulting decision. In the interim, the MLPP's authority to use the cooling system essential to its electrical generation operations **[*530]** would be cast in **[***682]** doubt. Instead, the court reasonably decided it could achieve the necessary further examination of the BTA issue by postponing a final judgment pending **[**101]** the Regional Water Board's focused reconsideration of that matter. The court thus properly exercised its inherent authority to adopt a "suitable process or mode of proceeding" in aid of its jurisdiction. (Code Civ. Proc., § 187.)

Moreover, unlike the procedures at issue in *Resource Defense Fund* and *Sierra Club v. Contra Costa County*, the instant remand was not unfair, and it produced no mere post hoc rationalization **[****62]** by the agency. On the contrary, in compliance with the trial court's directive, the Regional Water Board engaged in a full reconsideration of the BTA issue, and gave all interested parties, including plaintiff, a noticed opportunity to appear and to present evidence, briefing, and argument pertinent to the BTA determination.

Nor was the Regional Water Board's finding on remand insulated from meaningful review. Plaintiff was able to pursue, and did pursue, its statutory right to seek an administrative appeal of the board's BTA finding on remand, and then was allowed, in the resumed judicial proceedings, a full opportunity to dispute the foundation for that finding.

For all these reasons, we find no error in the trial court's use of an interlocutory remand to resolve perceived deficiencies in the Regional Water Board's BTA finding.

We similarly reject plaintiff's argument that subdivision (e) of section 1094.5 precluded the Regional Water Board from accepting and considering new evidence on remand absent a showing that such evidence could not have been produced at the original administrative proceeding, or was improperly excluded therefrom. We do not read subdivision (e) to impose such **[****63]** a limitation under the circumstances presented here.

As explained above, subdivision (e) of section 1094.5 provides that "[w]here the court finds that there *is relevant evidence*" (italics added) which could not with reasonable diligence have been produced, or was improperly excluded, in the administrative proceeding, the court may remand the case "to be reconsidered in the light of *that evidence*." (Italics added.) To the extent this language is ambiguous, plaintiff extracts the most radical interpretation—that when a court, for whatever reason, directs or authorizes the agency to reconsider its prior decision, in whole or in part, the agency is always confined to the evidence it

previously received, with the exception of evidence the court determines was unavailable, or wrongly excluded, in the original administrative proceeding.

But the precise circumstances of this case illustrate why plaintiff's construction makes little sense. The instant trial court found that the Regional **[*531]** Water Board's finding No. 48 was *not sufficiently supported* by the original administrative record. The only possible cure for such a deficiency is the agency's reconsideration of its decision *on the basis of additional* ***[****64]*** *evidence*. Plaintiff's construction of subdivision (e) of section 1094.5 would categorically preclude the court, except in narrow circumstances, from authorizing the agency to reach a better considered and better supported result *on a sufficient record*. Unless those narrow exceptions applied, any reconsideration at all would thus simply be futile; the very flaw the court had found could not be remedied.

Yet section 1094.5 contains no other indication that the Legislature intended such a constraint on the scope of an agency reconsideration directed or authorized by the court. Indeed, subdivision (f) broadly provides that when the court directs the agency decision to be set aside, it "may order the reconsideration of the case in the **[***683]** light of the court's opinion and judgment ... but the judgment shall not limit or control in any way the discretion legally vested in the [agency]." The implication is plain that if, as here, the court finds the administrative record *insufficient* to support the original agency determination, it may order reconsideration *in the light of that judicial finding*—i.e., a reconsideration in which the agency may entertain all the additional evidence necessary **[****65]** to support its new decision.

Moreover, had the instant trial court simply vacated the Regional Water Board's issuance of the NPDES permit in this case, the MLPP's owner could, should, and would simply have commenced a new permit proceeding before the board. Plaintiff does not suggest that, in such a new proceeding, the **[**102]** board would be limited to the evidence it had considered before, plus only previously unavailable or improperly excluded evidence. On the contrary, the board would have been empowered to receive and consider, de novo, all evidence pertinent to its decision whether to issue the requested permit. Accordingly, there is no reason to conclude the board lacks such authority when directed or ordered by the court to reconsider an insufficiently supported decision.

Albeit with little analysis, a number of decisions have expressed the unremarkable principle that, when an agency determination is set aside for *insufficiency of the evidence* in the administrative record, the proper course is to remand to the agency for further appropriate proceedings—presumably the agency's consideration of additional evidence as the basis for its decision on reconsideration. (See, e.g., *Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 268 [246 P.2d 656]; **[****66]** *La Prade v. Department of Water & Power* (1945) 27 Cal.2d 47, 53 [162 P.2d 13]; *Carlton v. Department of Motor Vehicles* (1988) 203 Cal. App. 3d 1428, 1434 [250 Cal. Rptr. 809].)
[*532]

CA(14)[↑] **(14)** Accordingly, we are persuaded that **HN19**[↑] section 1094.5, subdivision (e) is not intended to prevent the court, upon finding that the administrative record itself *lacks* evidence sufficient to support the agency's decision, from remanding for consideration of additional evidence. A more reasonable interpretation, which fully honors the statutory language, is that subdivision (e) simply prevents a mandamus petitioner from challenging an agency decision that *is* supported by the administrative record on the basis of evidence, presented to the court, which could have been, but was not, presented to the administrative body.

This interpretation adheres most closely to the literal words of section 1094.5, subdivision (e). As noted, the subdivision provides that when the court determines there "is relevant evidence" meeting the statutory criteria, it may remand to the agency for consideration of "that evidence," or, in cases where

the court is authorized to weigh the evidence independently, the court may "admit *the evidence*" (italics added) in the judicial proceeding **[****67]** itself. Read most naturally, this language contemplates a situation in which a party to the mandamus action has actually proffered to the court specific evidence not included in the administrative record. Subdivision (e) provides that the court may remand for agency consideration of *such evidence*, or may consider the evidence itself, only if *that evidence* could not reasonably have been presented, or was improperly excluded, at the administrative proceeding.

CA(15)[↑] (15) Thus, **HN20[↑]** subdivision (e) of section 1094.5 merely confirms that while, in most cases, the court is limited to the face of the administrative record in deciding whether the agency's decision is valid as it stands, in fairness, the court may consider, or may permit the agency to consider, extra-record evidence for a contrary outcome, if persuaded that such evidence was not **[***684]** available, or was improperly excluded, at the original agency proceeding. (See *No Oil, supra*, 13 Cal.3d 68, 79, fn. 6 [in administrative mandamus action, "the court reviews the administrative record, receiving additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record"].)

The limited available **[****68]** legislative history of Senate Bill No. 736 (1945 Reg. Sess.), in which section 1094.5 was adopted, is consistent with this view. The Department of Justice advised the Governor that the bill was designed to settle areas of confusion which had arisen about judicial review of administrative decisions, and would, as "a most important consideration, ... permit the court to remand administrative proceedings for further consideration by the administrative agency in cases where relevant evidence was not available or was wrongfully excluded from the administrative hearings *so that the administrative agency, rather than the court, may finally determine the whole proceeding and the court may in turn actually review the administrative [*533] action. The latter consideration accords both to the administrative agency and the reviewing court their primary functions and the opportunity of carrying out the legislative intent in authorizing the administrative agency to conduct and determine its own proceedings.*" (Cal. **[**103]** Dept. of Justice, Inter-Departmental Communication to Governor re Sen. Bill No. 736 (1945 Reg. Sess.) June 7, 1945, p. 1, italics added.)

This explanation indicates an intent to provide that **[****69]** where the reviewing court learns of evidence the agency should have considered, but did not or could not do so for reasons beyond the control of the participants in the administrative proceeding, the court may give the agency, the appropriate primary decision maker, the opportunity to include this evidence in its determination, subject to the court's limited review of the resulting administrative record for abuse of discretion. Nothing suggests, on the other hand, that the court is powerless to allow reconsideration by the agency, with such additional evidence as the agency may find appropriate, when the court finds, in the first instance, that there is not enough evidence in the original administrative record to support the agency's decision.

The decisional law also generally supports our conclusion. Courts have most frequently applied subdivision (e) of section 1094.5 simply to determine whether and when an agency decision may be challenged on mandamus with evidence outside the administrative record. [12] On the

---

[12] E.g., *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 863 [28 Cal. Rptr. 3d 316, 111 P.3d 294] (in administrative mandamus action challenging coastal zone permit, evidence proffered by mandamus petitioner, which was not part of administrative record, that coastal commission members did not personally review final EIR before granting permit, could not be considered); *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257 [115 Cal.Rptr. 497, 524 P.2d 1281] (in administrative mandamus action challenging coastal zone permit, mandamus petitioner was not entitled to propound interrogatories to determine whether coastal commission denied fair hearing by receiving, and relying upon, secret prehearing testimony by commission staff);

other [***685] hand, our research has disclosed only two decisions holding or suggesting that section 1094.5 [*534] precludes a remand for new evidence when, as happened here, the trial court [****70] finds that the existing administrative record simply fails to support the agency's original determination.

Thus, in *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344 [29 [**104] Cal. Rptr. 3d 728] (*Ashford*), the Court of Appeal held that except under the circumstances specifically set forth in subdivision (e) of section 1094.5, there was no ground for a remand to give a public employer a second chance to provide additional evidence in support of the original, inadequately founded, administrative decision to terminate an employee. (*Ashford, supra*, at pp. 350–354.) Similarly, in *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41 [12 Cal. Rptr. 2d 601] (*Newman*), the Court of Appeal concluded that the trial court erred when, after finding insufficient evidence in the administrative record to support the medical termination of a California Highway Patrol (CHP) employee, the court remanded for further proceedings. In the Court of Appeal's view, subdivision *(f)* of section 1094.5 prevented a remand for agency reconsideration when the agency had failed to reach a result substantially supported by the evidence. The Court of Appeal stated that the CHP had failed in its burden to prove grounds for the employee's dismissal, and was [****74] "not now entitled to a second opportunity to establish its case." (*Newman, supra*, at p. 49.)

Ashford and *Newman* illustrate circumstances in which due process principles entirely separate from section 1094.5 may preclude successive administrative proceedings. It may well be, as *Ashford* and *Newman* suggested, that there should be no second chance to muster sufficient evidence [***686] to impose administrative sanctions on a fundamental or vested right, such as the right against dismissal from tenured public employment except upon good cause.
[*535]

But we find no such categorical bar in section 1094.5 itself. The quasi-judicial administrative proceedings governed by this statute include a wide variety of matters, including applications for

---

Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357, 366–367 [54 Cal. Rptr. 3d 485] (in administrative mandamus action by neighborhood organization challenging city's allowance of nonconforming school playground, court could not consider mandamus petitioner's proffer of correspondence to and from city officials, not included in administrative record, as evidence of school's " 'ongoing land use [****71] violations' "); *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101–109 [63 Cal. Rptr. 2d 743] (under § 1094.5, subd. (e), discovery to obtain evidence that administrative hearing was not fair is permissible only if evidence sought is relevant and could not, with reasonable diligence, have been presented in administrative proceeding); *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1591–1598 [45 Cal. Rptr. 2d 822] (expression of expert opinion that postdates administrative proceeding is not truly "new" evidence of "emergent facts" which would justify remand, at mandamus petitioner's behest, under § 1094.5, subd. (e)); *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 355–357 [25 Cal. Rptr. 2d 852] (in administrative mandamus action challenging suspension of driver's license on ground of licensee's seizure disorder, mandamus petitioner could obtain remand to Department of Motor Vehicles (DMV) under § 1094.5, subd. (e) for consideration of physician's declaration, which postdated DMV hearing, that disorder was being well controlled by medication); *Armondo v. Department of Motor Vehicles* (1993) 15 Cal.App.4th 1174, 1180 [19 Cal. Rptr. 2d 399] (in mandamus action challenging administrative suspension of driver's [****72] license based on breathalyzer results, court properly excluded, absent showing that § 1094.5, subd. (e) exception applied, petitioner's proffered evidence that local crime laboratory was not licensed to use particular breathalyzer model); *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal. App. 3d 872, 881–882 [233 Cal. Rptr. 708] (car dealer seeking mandamus review of administrative discipline could introduce evidence outside administrative record on issue of appropriate penalty only if such evidence could not, with reasonable diligence, have been presented in administrative proceeding); *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal. App. 3d 586, 596–597 [155 Cal. Rptr. 63] (administrative mandamus petitioner may introduce evidence beyond administrative record if such evidence relates to events that postdate agency proceeding); see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 564 [38 Cal. Rptr. 2d 139, 888 P.2d 1268] (evidence outside administrative record was not admissible in traditional mandamus action to determine, under Pub. Resources Code, § 21168.5, a provision of CEQA, whether the agency's decision constituted a " 'prejudicial abuse of discretion,' " either because the agency " '[did] not proceed[] in [****73] a manner required by law,' " or because its decision was not supported by " 'substantial evidence' ").

permits and licenses, that have nothing to do with disciplinary or punitive sanctions. Here, as plaintiff concedes, even if the instant trial court had vacated the MLPP's NPDES permit renewal for lack of evidence, the plant could, should, and would have begun anew the process for obtaining this permit, essential to the continuation of its electrical generation operations. In this new proceeding, the Regional Water Board could, should, and would have considered all evidence **[****75]** relevant to its permit decision, regardless of whether that evidence had been presented in the prior proceeding. No reason appears to construe section 1094.5 to preclude such new evidence when the court, having found insufficient record support for the agency's decision, remands for reconsideration of that matter.

CA(16)[↑] **(16)** In sum, **HN21**[↑] section 1094.5, subdivision (e), promotes orderly procedure, and the proper distinction between agency and judicial roles, by ensuring that, with rare exceptions, the court will review a quasi-judicial administrative decision on the record actually before the agency, not on the basis of evidence withheld from the agency and first presented to the reviewing court. But once the court has reviewed the administrative record, and has found it wanting, section 1094.5 does not preclude the court from remanding for the agency's reconsideration in appropriate proceedings that allow the agency to fill the evidentiary gap. To the extent the analyses in *Ashford* and *Newman* are inconsistent with these conclusions, we will disapprove those decisions.

Here, the trial court found that the administrative record did not support one finding by the agency in support of its issuance of a **[****76]** permit essential to the permittee's operations. Hence, the court acted properly by remanding to the agency for additional evidence and analysis on this issue. No error occurred.

C. *"Best technology available" under CWA section 316(b).*

As indicated, finding No. 48 of the Regional Water Board's order issuing the MLPP's 2000 NPDES permit renewal addressed the requirement, under CWA section 316(b), that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." (33 U.S.C. § 1326(b).) In this regard, the board determined that "[i]f the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative **[**105]** methods to mitigate these adverse environmental impacts." The board further found that, though the MLPP's existing once-through cooling system would be modified and upgraded in certain respects to minimize adverse impacts on aquatic life, **[*536]** proposed alternatives to this basic system were "wholly disproportionate to the environmental benefits." After complying, on remand, with the superior court's **[****77]** directive to analyze the available technologies more closely, the board confirmed finding No. 48, and the superior court denied mandamus.

As we have noted, shortly before the superior court issued its final judgment, the EPA promulgated the Phase II regulations applying CWA section 316(b)'s BTA standard to *existing* electric powerplants. **[***687]** (69 Fed.Reg., *supra*, p. 41576; 40 C.F.R. § 125.90 et seq. (2011).) The Phase II regulations did not follow the approach of the Phase I regulations, which had required *new* powerplants either to adopt closed-cycle cooling systems or to achieve comparable environmental performance—i.e., up to 98 percent reductions in impingement and entrainment mortality relative to typical once-through systems. (69 Fed.Reg., *supra*, pp. 41576, 41601, 41605.) The EPA declined to impose such a stringent requirement on existing powerplants because it concluded that conversion to closed-cycle systems was impossible or economically impracticable for many existing facilities, that such conversions could have adverse impacts on the environment and on the plants' production and consumption of energy, and that

other, less costly technologies could approach the environmental benefits **[****78]** of closed-cycle systems. (*Id.*, at p. 41605.)

Instead, therefore, the Phase II regulations set national performance standards requiring an existing facility to reduce impingement and entrainment mortality rates by 60 to 95 percent compared to the rates estimated to arise from a typical once-through system at the site. (40 C.F.R. suspended §§ 125.93, 125.94(b)(1), (2) (2011).) The regulations provided alternative means of achieving compliance, based on a range of available technologies the EPA had determined were "commercially available and economically practicable." (69 Fed.Reg., *supra*, pp. 41576, 41602.)

The Phase II regulations also allowed a powerplant to seek and receive a site-specific variance from the standards. Such a variance could be obtained by establishing that the plant's costs of literal compliance would be "significantly greater" than (1) the costs the EPA had considered in setting the performance standards or (2) "the benefits of complying" with the standards. (40 C.F.R. suspended § 125.94(a)(5)(i), (ii) (2011).) If a variance was granted, the plant would be required to employ remedial measures that yielded results "as close as practicable to the applicable **[****79]** performance standards." (*Ibid.*)

While the instant appeal was pending, the Second Circuit addressed the Phase II regulations in *Riverkeeper II*. The federal court held that while section 316(b) of the CWA allows consideration of extreme forms of economic burden or unfeasibility, the Phase II regulations were invalid under **[*537]** section 316(b) insofar as, among other things, they determined BTA, or allowed such a site-specific determination, based on mere cost-benefit analysis—i.e., a simple comparison between the expense of a particular cooling system technology and its expected environmental benefits. (*Riverkeeper II, supra*, 475 F.3d 83, 98–105, 114–115.) Nonetheless, the Court of Appeal in this case subsequently upheld the Regional Water Board's "wholly disproportionate" determination, concluding that it was not foreclosed by *Riverkeeper II*.

On review in this court, plaintiff, relying heavily on *Riverkeeper II*, renewed its argument that the Regional Water Board had employed a cost-benefit analysis forbidden by CWA section 316(b). At the time we granted review, petitions for certiorari were pending in *Riverkeeper II*. The United States Supreme Court thereafter granted certiorari and rendered **[****80]** its decision in *Entergy Corp.* *Entergy Corp.* reversed *Riverkeeper II*, unequivocally holding that "the EPA *permissibly* relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. The Court of Appeals' reliance in part on the agency's use of cost-benefit **[**106]** analysis in invalidating the site-specific cost-benefit variance provision [citation] **[***688]** was therefore in error, as was its remand of the national performance standards for clarification of whether cost-benefit analysis was impermissibly used [citation]." (*Entergy Corp, supra*, 556 U.S. 208, 226 [129 S. Ct. 1498, 1510], italics added.)

In our view, this holding clearly disposes of plaintiff's general claim that CWA section 316(b) prohibited the Regional Water Board from premising its BTA finding on a comparison of costs and benefits. Though the Regional Water Board's 2000 decision to renew the MLPP's NPDES permit preceded the Phase II regulations, and was not based upon them, there is no reason to assume the Regional Water Board, using its "best professional judgment" in the preregulatory era, was forbidden to apply a form **[****81]** of analysis the United States Supreme Court has determined was properly employed in subsequent regulations interpreting the statute at issue.

Moreover, a portion of the majority's opinion in *Entergy Corp.*, though dictum, undermines plaintiff's further contention that the particular cost-

benefit standard employed by the Regional Water Board—i.e., whether the costs of alternatives to the MLPP's once-through cooling system were "wholly disproportionate" to the expected environmental benefits—was improper.

In his concurring and dissenting opinion in *Entergy Corp.*, Justice Breyer had asserted that, while he agreed some form of cost-benefit analysis was **[*538]** permissible under CWA section 316(b), the EPA had failed to explain why, in the Phase II regulations, it had abandoned its traditional "wholly disproportionate" standard in favor of one allowing site-specific variances where the costs of compliance were merely " 'significantly greater' " than the anticipated benefits to the environment. (*Entergy Corp., supra*, 556 U.S. 208, 236 [129 S. Ct. 1498, 1515] (conc. & dis. opn. of Breyer, J.).)

In response, the majority noted that the issue raised by Justice Breyer had no bearing on the basic permissibility **[****82]** of cost-benefit analysis, "the only question presented here." Nonetheless, the majority remarked, "It seems to us ... that the EPA's explanation was ample. [The EPA] explained that the 'wholly out of proportion' standard was inappropriate for the existing facilities subject to the Phase II rules because those facilities lack 'the greater flexibility available to new facilities for selecting the location of their intakes and installing technologies at lower costs relative to the costs associated with retrofitting existing facilities,' and because 'economically impracticable impacts on energy prices, production costs, and energy production ... could occur if large numbers of Phase II existing facilities incurred costs that were more than "significantly greater" than but not "wholly out of proportion" to the costs in the EPA's record.' [Citation.]" (*Entergy Corp., supra*, 556 U.S. 208, 222, fn. 8 [129 S. Ct. 1498, 1510, fn. 8].)

CA(17)[↑] **(17)** The clear implication is that the "wholly disproportionate" standard of cost-benefit analysis—the very standard employed by the Regional Water Board in this case—is *more stringent* than section 316(b) of the CWA requires for existing powerplants such as **[****83]** the MLPP. Rather, the *Entergy Corp.* majority suggested, the EPA was free, having "ampl[y]" explained and justified its choice, to select for such facilities a more lenient "significantly greater" standard of economic and environmental practicality. Under these circumstances, we discern no basis to hold that the board erred by basing its BTA determination on a finding that the costs of alternative cooling technologies for the MLPP were "wholly disproportionate" to the anticipated environmental benefits. We conclude **[***689]** that the board's use of this standard was proper. [13] **[*539]**

[**107] DISPOSITION

The Court of Appeal's judgment is affirmed. To the extent the Court of Appeal decisions in *Ashford v. Culver City Unified School Dist., supra*, 130 Cal.App.4th 344, *Sierra Club v. Contra Costa County, supra*, 10 Cal.App.4th 1212, *Newman v. State Personnel Bd., supra*, 10 Cal.App.4th 41, and *Resource Defense Fund v. Local Agency Formation Com., supra*, 191 Cal. App. 3d 886, are inconsistent with the views expressed herein, those decisions are disapproved.

---

[13] Following the *Riverkeeper II* decision, the EPA withdrew the Phase II regulations (72 Fed.Reg. 37107–37109 (July 9, 2007)), and they have not been reissued. We have taken judicial notice that in May 2010, seeking to fill the regulatory vacuum, the State Water Board adopted a Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (2010 Power Plant Cooling Policy). Under this policy, the State Water Board, rather than the regional water boards, will issue all NPDES permits to affected powerplants. Thermal powerplants with once-through cooling systems will be required, by specified **[****84]** compliance dates, to reduce intake flow rates to mandated levels, or to adopt other operational and/or structural controls to achieve commensurate reductions in impingement and entrainment mortality. In the interim, affected plants must adopt mitigating measures to control impingement and entrainment damage.

Several powerplant owners, including Dynegy, have filed a petition for mandate challenging the 2010 Power Plant Cooling Policy. (*Genon Energy, Inc. v. State Water Resources Control Board* (Super. Ct. Sacramento County, Oct. 27, 2010, No. 2010-80000701).)

Cantil-Sakauye, C. J., Kennard, J., Werdegar, J., Chin, J., Corrigan, J., and Kitching, J.,* concurred.

Concur by: Werdegar

Concur

WERDEGAR, J., Concurring.—I fully concur in the majority opinion. I write separately only to point out a limitation on the scope of our decision today.

The majority correctly holds that Code of Civil Procedure section 1094.5, governing the procedure to be followed in adjudicating petitions for writ of administrative mandate, does not preclude a trial court from ordering an interlocutory remand requiring agency reconsideration of one or more specific findings or decisions; nor is the agency precluded, under this statute, from considering new evidence on such a remand. (Maj. opn., *ante*, at pp. 529–530.) Because the remand order at issue in this case related to compliance with a provision of the federal Clean Water Act of 1977 (33 U.S.C. § 1326(b)) rather than to compliance with the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.), the majority has no occasion here to consider whether a trial court may, similarly, order remand for reconsideration of an agency decision for compliance with CEQA without issuing a writ of mandate.

Public Resources Code section 21168.9, subdivision (a) **[****86]** provides that if a court finds a public agency's finding or decision to have been made in violation of CEQA, "the court shall enter an order that includes one or more of the following" mandates. The statute specifically outlines the scope of the mandate to be issued, including as necessary that the agency void its findings **[*540]** and decisions, take any actions required to come into compliance with CEQA, and in the meantime suspend any part of the project at issue that might cause an adverse environmental effect. (Pub. Resources Code, § 21168.9, subd. (a)(1)–(3).) **[***690]** Balancing these commands with protections against an overbroad writ, the statute limits the order to "only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division," provided the noncomplying portion of the decision or finding is severable from the complying portion. (*Id.*, subd. (b).) The order is to be made by "peremptory writ of mandate," and the trial court is to retain jurisdiction "by way of a return to the peremptory writ" to ensure agency compliance. (*Ibid.*)

Consequently, while CEQA challenges are often brought through a petition **[****87]** for administrative mandate under Code of Civil Procedure section 1094.5, CEQA contains its own detailed and balanced remedial scheme, offering protections for both agencies and those challenging agency action under CEQA. I do not read the majority's analysis of the administrative mandate procedure in this non-CEQA case as speaking to the procedures to be followed when an agency's action is found to have violated CEQA.

Cantil-Sakauye, C. J., concurred.

End of Document

*Associate Justice of the Court of Appeal, Second Appellate [****85] District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Arreola v. County of Monterey

Court of Appeal of California, Sixth Appellate District

June 25, 2002, Decided ; June 25, 2002, Filed

No. H021339.

Reporter

99 Cal. App. 4th 722 *; 122 Cal. Rptr. 2d 38 **; 2002 Cal. App. LEXIS 4319 ***; 2002 Cal. Daily Op. Service 5668; 2002 Daily Journal DAR 7131

JAMES ARREOLA et al., Plaintiffs and Respondents, v. COUNTY OF MONTEREY et al., Defendants and Appellants. [And five other cases. *]

Subsequent History: Order Modifying Opinion and Denying Petition for Rehearing July 23, 2002, Reported at: 2002 Cal. App. LEXIS 4423.

Review Denied September 18, 2002, Reported at: 2002 Cal. LEXIS 6194.

Prior History: Superior Court of Monterey County. Super. Ct. Nos. 105661, 106592, 106782, 106829, 107040 and 107041. Robert A. O'Farrell, Judge.

Disposition: The judgment is affirmed.

Core Terms

Counties, flooding, channel, highway, trial court, drainage, plaintiffs', levee, storm, river, inverse condemnation, deliberate, flood control, entity, cases, flood control project, public improvement, public entity, statement of decision, landowners, built, floodwater, vegetation, freeboard, damages, flows, factors, Fish, private property, obstruction

Case Summary

Procedural Posture

About 300 plaintiff businesses and individual were involved in six complaints filed against defendants, state, counties, and water agencies, over a flood. The Monterey County Superior Court (California) consolidated the matters and found the counties and agencies negligent, and, along with the state, liable for inverse condemnation, dangerous condition of public property, and nuisance. The state, counties, and agencies appealed.

Overview

A river formed the counties' border and was in a flood plain. A federal flood control act authorized construction of a project which local agencies would later maintain. Levees were built. Vegetation and sandbars were mechanically cleared from 1949 till 1972 when the state fish and game department demanded protection of the riparian habitat. Herbicides and other methods were used to try to clear the channel but it became more clogged and more costly to clear. The state built a highway embankment downriver. A 1995 flood overtopped the levee and it gave way. The appellate court found that the trial court properly assessed the reasonableness of the counties' policy to let the channel deteriorate. In the context of inverse condemnation, "maintenance" of the project was a species of "construction." Reasons for the counties' policy choices were irrelevant to the determination that their conduct was deliberate. The state was strictly liable for its conduct. Plaintiffs were not expected to have taken measures to protect their land from the downstream embankment obstruction. The state had a duty to avoid

* Baeza v. County of Monterey (No. 106592); Calcote v. County of Monterey (No. 106782); Clint Miller Farms, Inc. v. County of Monterey (No. 106829); Phoenix Assurance Co. v. County of Monterey (No. 107040); Allendale Mutual Ins. Co. v. County of Monterey (No. 107041).

obstructing floodwater regardless of the flood's cause. Flooding was foreseeable.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Real Property Law > Eminent Domain Proceedings > General Overview

HN1[⬇] Real Property Law, Eminent Domain Proceedings

See Cal. Const. art. I, § 19.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Remedies

HN2[⬇] Special Proceedings, Eminent Domain Proceedings

When a public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation."

Governments > Public Improvements > Sanitation & Water

Torts > Public Entity Liability > Liability > General Overview

HN3[⬇] Public Improvements, Sanitation & Water

Where a public agency's design, construction, or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction, or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters. The public entity is not immune from suit, but neither is it strictly liable.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

Civil Procedure > ... > Eminent Domain Proceedings > Pleadings > General Overview

HN4[⬇] Special Proceedings, Eminent Domain Proceedings

In California, the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) is a conditional privilege, subject to the Belair v. Riverside County Flood Control District rule of reasonableness. To determine reasonableness in such a case, a trial court must consider: (1) the overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the

project or is peculiar only to the plaintiff. Thus, in matters involving flood control projects, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiffs' property, and the unreasonable aspect of the improvement is a substantial cause of damage.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN5[⬇] Relief From Judgments, Motions for New Trials

See Cal. Civ. Proc. Code § 662.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN6[⬇] Special Proceedings, Eminent Domain Proceedings

To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of Cal. Const. art. I, § 19. "Public use" is the threshold requirement. The destruction or damaging of property is sufficiently connected with "public use" as required by the constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN7[⬇] Special Proceedings, Eminent Domain Proceedings

The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. That is why simple negligence cannot support the constitutional claim. This is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > ... > Elements > Just Compensation > Property Valuation

Real Property Law > Eminent Domain Proceedings > General Overview

HN8[⬇] Special Proceedings, Eminent Domain Proceedings

Inadequate maintenance can support liability in inverse condemnation.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN9[⬇] Special Proceedings, Eminent Domain Proceedings

In order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action -- or inaction -- in the face of that known risk.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN10[⬇] Standards of Review, Substantial Evidence

In reviewing the sufficiency of the evidence to support the findings of a trial court, an appellate court considers the evidence in the light most favorable to the winning party, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

Governments > Local Governments > Claims By & Against

HN11[⬇] Special Proceedings, Eminent Domain Proceedings

In order to establish a causal connection between a public improvement and a plaintiff's damages, there must be a showing of a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. Where independently generated forces not induced by the public flood control improvement -- such as a rainstorm -- contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, that is, where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, that is, where the storm exceeded the project's design capacity. A project's capacity, therefore, bears upon the element of causation. This is true whether in considering inverse condemnation claims or tort causes of action.

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

HN12[↓] Public Improvements, Sanitation & Water

To the extent that a public project contributes to an injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN13[↓] Testimony, Expert Witnesses

Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. This rule does not apply to the personal opinions of an expert.

Civil Procedure > Trials > General Overview

HN14[↓] Civil Procedure, Trials

A tentative decision is not binding on a court and the court may instruct a party to prepare a proposed statement of decision. Cal. R. Ct. 232(a), (c). The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. Cal. R. Ct. 232(b), (d).

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Defenses

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

HN15[↓] Special Proceedings, Eminent Domain Proceedings

A public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. But a rule of reasonableness, rather than the extremes of strict liability or immunity, is appropriate in cases involving flood control projects.

Governments > Public Improvements > Sanitation & Water

Real Property Law > Water Rights > Riparian Rights

HN16[↓] Public Improvements, Sanitation & Water

Under the "natural watercourse" rule, a riparian landowner has a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, Cal. Const. art. I, § 19, mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

Governments > Public Improvements > Sanitation & Water

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN17[↓] Public Improvements, Sanitation & Water

Diversion of a watercourse is not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. Resolution of flood control cases involves a balancing of the public interest in encouraging flood control projects with the potential private harm they could cause. A public agency would not be strictly liable for damage resulting from a failed flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply.

Torts > ... > Elements > Duty > Foreseeability of Harm

Torts > ... > Elements > Duty > General Overview

HN18[↓] Duty, Foreseeability of Harm

Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. Cal. Gov't Code § 835. The question of whether a duty exists is one of law. A court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.

Real Property Law > Water Rights > Riparian Rights

Torts > Premises & Property Liability > General Premises Liability > General Overview

HN19[↓] Water Rights, Riparian Rights

Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater.

Torts > Products Liability > Types of Defects > Design Defects

Torts > Negligence > Defenses > General Overview

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN20[↓] Types of Defects, Design Defects

A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. Cal. Gov't Code § 835(a). However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity if there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or (b) a reasonable legislative body or other body or employee could have approved the plan or design. Cal. Gov't Code § 830.6. A public entity claiming design immunity must plead and prove three essential elements: (1) a causal relationship between the plan and the accident; (2) discretionary

approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design. Resolution of the third element is a matter for the court, not the jury. The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN21[⬇] Standards of Review, Substantial Evidence

In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN22[⬇] Judgment as Matter of Law, Directed Verdicts

A ruling or decision, itself correct in law, will not be disturbed on appeal merely because it was given for a wrong reason.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review

Real Property Law > Inverse Condemnation > Defenses

Torts > ... > Elements > Causation > Intervening Causation

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > ... > Elements > Causation > Causation in Fact

HN23[⬇] Eminent Domain Proceedings, Appellate Review

Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. A defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, where the facts upon which a defendant bases its claim are materially undisputed, an appellate court applies independent review.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN24[⬇] Special Proceedings, Eminent Domain Proceedings

Having the power and the duty to act and failure to do so, in the face of a known risk, is sufficient to support liability under Cal. Const. art. I, § 19. A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as plaintiffs can show substantial participation, it is immaterial which sovereign holds title or has the responsibility for operation of a project.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN25[] Special Proceedings, Eminent Domain Proceedings

In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct.

Torts > Public Entity Liability > Liability > General Overview

HN26[] Public Entity Liability, Liability

In tort cases, in identifying a defendant with whom control resides, location of the power to correct the dangerous condition is an aid. The ability to remedy the risk also tends to support a contention that the entity is responsible for it. Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN27[] Special Proceedings, Eminent Domain Proceedings

A public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that the project would result in some damage to private property, or that it took the calculated risk that damage would result.

Governments > Local Governments > Employees & Officials

HN28[] Local Governments, Employees & Officials

Monterey County, California employees are considered ex officio employees of the Monterey County Water Resources Agency (MCWRA) and are required to perform the same duties for MCWRA that they perform for Monterey. Cal. Water Code App. § 52-16 (former Cal. Water Code App. §§ 52-2, 52-8).

Torts > Public Entity Liability > Liability > General Overview

HN29[↓] Public Entity Liability, Liability

Common governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry of whether an agency is under county control.

Real Property Law > Eminent Domain Proceedings > General Overview

HN30[↓] Real Property Law, Eminent Domain Proceedings

An owner of private property ought not to contribute more than his or her proper share to a public undertaking.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Individuals who had suffered property damage brought an action against the state, a county and its flood control and water conservation district, and a second county and its water resources agency, seeking damages in inverse condemnation, and tort damages for nuisance, dangerous condition of public property, and negligence, arising from flood damage caused when a river levee project failed during a heavy rainstorm and the flood waters were further obstructed by a state highway. Plaintiffs alleged that the flooding occurred due to reduced water capacity in the levee project channel, caused by the failure of the county defendants to keep that channel clear, and that the state defendant failed to design the highway with adequate provision for flooding. The jury found all defendants liable on the tort claims, and the court found all defendants liable on the inverse condemnation claims and entered a judgment for plaintiffs. (Superior Court of Monterey County, Nos. 105661, 106592, 106782, 106829, 107040 and 107041, Robert A. O'Farrell, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly found the county defendants were liable to plaintiffs in inverse condemnation based on their failure to properly maintain the levee project, since their knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger. The court held that the trial court did not err in defining the levee project's water capacity, and that substantial expert evidence supported the jury's finding, pertinent to plaintiffs' tort claims against the county defendants, that peak flows during the storm did not exceed the project's design capacity. The court held that the trial court did not err in finding the state defendant liable in inverse condemnation based on its unreasonable design of the highway, which failed to account for a foreseeable flood, and that design immunity (Gov. Code, § 830.6) failed to provide this defendant with a defense to plaintiffs' tort claims. The court held that both the county defendant and its water resources agency were properly found liable to plaintiffs, since the county was directly, and not derivatively, liable. (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)

Appellate Review § 145—Scope of Review—Questions of Law and Fact.

--When arguments on appeal are related to facts

that are materially undisputed, the appellate court independently reviews the trial court's findings and conclusions.

CA(2)[⬇] (2)

Eminent Domain § 132—Inverse Condemnation—Nature and Purpose of Action—Against Public Entity—Policy—Limitations on Claim.

--When a public use results in damage to private property without having been preceded by just compensation, the property owner may bring an inverse condemnation action against the public entity to recover it. The fundamental policy for the constitutional requirement of just compensation (Cal. Const., art. I, § 19) is based on a consideration of whether the owner of the damaged property if uncompensated would contribute more than his or her proper share to the public undertaking. Any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable whether foreseeable or not. The only limits to a claim are that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned.

CA(3)[⬇] (3)

Waters § 93—Protection Against Surface Waters—Public Improvements—Common Enemy Doctrine—Natural Watercourse Rule—Immunity Limited by Rule of Reasonableness.

--In certain circumstances particular to water law, a landowner has a right to inflict damages upon the property of others for the purpose of protecting his or her own property. These circumstances include the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). However, a public entity is not immunized from liability under these rules, but rather is subject to a rule of reasonableness. When a public agency's design, construction, or maintenance of a flood control project poses an unreasonable risk of harm to the plaintiffs, and the unreasonable aspect of the improvement is a substantial cause of the damage, the plaintiffs may recover regardless of the fact that the project's purpose is to contain the common enemy of floodwaters. The public entity is not immune from suit, but neither is it strictly liable. A public entity's privilege to discharge surface water into a natural watercourse is also a conditional privilege, subject to a rule of reasonableness.

CA(4)[⬇] (4)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability in Inverse Condemnation—Rule of Reasonableness—Determination of Reasonableness.

--In matters involving flood control projects, a public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff, and the unreasonable aspect of the improvement is a substantial cause of the damage. To determine reasonableness, a trial court must consider the following factors: (1) the overall public purpose being served by the improvement project, (2) the degree to which the plaintiff's loss is offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership, and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

CA(5)[⬇] (5)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—

Inverse Condemnation—Trial Court's Determination of Reasonableness.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court properly analyzed the reasonableness of defendants' actions in finding they were liable to plaintiffs. The court balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to plaintiffs' property in finding that defendants acted unreasonably. In so doing, the court properly considered (1) the overall public purpose being served by the improvement project, (2) the degree to which plaintiffs' loss was offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of plaintiffs' damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind plaintiffs sustained was generally considered as a normal risk of land ownership, and (6) the degree to which similar damage was distributed at large over other beneficiaries of the project or was peculiar only to plaintiffs. Based on these considerations, the court found that defendants' long-standing negligent operation of the project served no legitimate purpose, that feasible alternatives were available, and that the flood would not have occurred had defendants properly maintained the project.

CA(6a)[⬇] (6a) CA(6b)[⬇] (6b) CA(6c)[⬇] (6c)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Liability Based on Improper Maintenance of Public Project.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court did not err in basing defendants' liability on their failure to properly maintain the project. Inadequate maintenance can support a finding of a public entity's liability in inverse condemnation. The deliberateness required for inverse condemnation liability is satisfied by a finding that the public improvement, as designed, constructed, and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. In this case, the trial court expressly found that the manner in which the levee project channel was maintained for over 20 years was a deliberate policy. Further, substantial evidence supported the trial court's finding that defendants' maintenance plan was unreasonable and deliberate. Defendants' knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1057.]

CA(7)[⬇] (7)

Eminent Domain § 132—Inverse Condemnation—Liability of Public Entity—Relation to Public Use—Whether Negligence Can Support Claim.

--To be subject to liability in inverse condemnation, the governmental action at issue must relate to the public use element of Cal. Const., art. I, § 19. The destruction or damaging of property is sufficiently connected with public use if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use, so long as the entity deliberately acts to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of

the deliberate design, construction, or maintenance of the public improvement. The fundamental justification is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. Simple negligence cannot support a constitutional claim. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

CA(8)[] (8)

Appellate Review § 155—Scope of Review—Sufficiency of Evidence—Inferences.

--In reviewing the sufficiency of the evidence to support the findings of the trial court, the appellate court considers the evidence in the light most favorable to the prevailing parties, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

CA(9a)[] (9a) CA(9b)[] (9b)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability—Design Capacity of Levee—Water Capacity Plus Freeboard.

--In an action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, the trial court did not err in defining the project's water capacity, and substantial expert evidence supported the jury's finding that peak flows during the storm did not exceed that capacity. When an independently generated force, such as a rainstorm, contributes to the injury, proximate cause is established when the injury occurred in substantial part because the public improvement failed to function as it was intended. Causation is not established, however, when the storm exceeds the project's design capacity. In this case, it would have been improper to fail to include the three-foot freeboard, which was the distance from the top of the levee to the surface of the water at maximum capacity, within the design capacity, since the extra room the freeboard was intended to provide was eliminated by defendants' ineffective maintenance. Thus, it was appropriate to permit the finder of fact to decide if the flood occasioned by the rainstorm exceeded the protection the project was intended to provide, including the freeboard, which was part of that protection.

CA(10)[] (10)

Appellate Review § 41—Presenting and Preserving Questions in Trial Court—Witnesses—Objection to Expert Evidence.

--When a party fails to make a record of its objection to expert evidence at trial, that party fails to preserve the issue for appeal.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394.]

CA(11)[] (11)

Evidence § 81—Opinion Evidence—Expert Witnesses.

--Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. However, this rule does not apply to the personal opinions of an expert.

CA(12a)[] (12a) CA(12b)[] (12b)

Waters § 96—Protection Against Floodwaters—State's Liability for Design of Highway Embankment That Captured Floodwaters: Government Tort Liability § 9.2—Dangerous Condition of Public Property.

--In an action against the state by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in finding defendant liable based on its design of the highway, which provided for a raised embankment that acted to dam the floodwaters. Public policy does not necessarily require a reasonableness calculus in all contexts in which a trial court determines the inverse condemnation liability of a public entity. In this case, public policy favored strict liability rather than reasonableness, since defendant was bound not to obstruct the flow of water from plaintiffs' upstream land. Further, defendant had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood. The traditional rule applicable to riparian landowners, according to which both upstream and downstream landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other, was applicable to defendant. Further, the harm that resulted was unquestionably foreseeable, since the state's highway planning manual required that a highway's drainage structures be able to accommodate a 100-year storm, and defendant was aware that the levee project on the same floodplain as the highway would not accommodate such a storm.

CA(13)[] (13)

Negligence § 92—Actions—Questions of Law and Fact—Duty of Care.

--The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. All persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations; foreseeability of a particular kind of harm is one of the most crucial.

CA(14a)[] (14a) CA(14b)[] (14b) CA(14c)[] (14c) CA(14d)[] (14d)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required Showing—Reasonableness of Design: Nuisances § 9—Liability of Public Entities.

--In an action against the state by individuals who sought tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in denying defendant's motion for a directed verdict based on design immunity (Gov. Code, § 830.6). Defendant failed to present evidence of a basis upon which a reasonable state official could have approved the highway design. The culverts installed through the highway embankment were not designed to accommodate floodwater. Defendant knew that the river levee project that was located in the same floodplain as the highway could not accommodate a 100-year storm, that flooding was foreseeable, and that the drainage design should have taken that into account. Defendant did not offer any evidence indicating that a reasonable public employee would have approved a design that did not take flooding into account. Further, the failure of the river levee project in a heavy rainstorm, which caused the flood, was not a superseding cause that extinguished defendant's liability, since the flooding was foreseeable. Thus, the flooding, whether caused by the levee failure or a 100-year storm, was not so extraordinary an event that defendant should have been relieved of liability.

CA(15)[] (15)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required

Showing—Reasonableness of Design—Trial Court Determination.

--A public entity is immune from liability for a dangerous condition of public property under Gov. Code, § 830.6, if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity, and the entity can plead or prove three essential elements: (1) a causal relationship between the plan and the accident, (2) discretionary approval of the plan prior to construction, and (3) substantial evidence supporting the reasonableness of the design. Resolution of the reasonableness of the design is a matter for the court, not the jury. The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity that approved the design. The trial court must apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

CA(16)[⬇] (16)

Appellate Review § 135—Scope of Review—Presumptions—Where Ruling Correct, but Reasoning Not.

--A ruling or decision that is correct in law will not be disturbed on appeal merely because it was issued by the trial court for the wrong reason.

CA(17)[⬇] (17)

Negligence § 19—Actions—Trial—Questions of Law and Fact—Proximate Cause—Superseding Cause: Eminent Domain § 131—Inverse Condemnation—Defense.

--Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen, and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, when the facts are materially undisputed, the appellate court applies its independent review.

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975.]

CA(18)[⬇] (18)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Concurrent Liability of County and County Water Resources Agency.

--In an action against a county and the county water resources agency by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, both defendants were properly found liable to plaintiffs. The record was clear that the judgment against the county was based on its direct liability. In an inverse condemnation action, so long as the plaintiffs can show a public entity's substantial participation in a public project that proximately caused injury, it is immaterial which entity had the ultimate responsibility for operation of the project. The basis for liability is that the public entity had the power to control or direct the aspect of the improvement that is alleged to have caused the injury. In this case, the county expressly assumed responsibility

for the project's operation and maintenance, and also exercised control by virtue of its financial control of the agency. In addition, the county board of supervisors was aware of the project's maintenance needs, and of the risk of flooding it posed. In failing to expend funds on the project, the county took the risk that plaintiffs would be harmed. Therefore, it was proper to require the county to bear its share of plaintiffs' loss.

Counsel: Lepper & Harrington, Gary M. Lepper, Matthew P. Harrington; and Samuel Torres, Jr., County Counsel, for Defendants and Appellants County of Santa Cruz and Santa Cruz County Flood Control and Water Conservation District.

Bruce A. Behrens, David Gossage, Janet Wong and Lucille Y. Baca for Defendant and Appellant State of California.

McDonough, Holland & Allen, Kronick, Moskovitz, Tiedemann & Girard, Mark A. Wasser, Andrew P. Pugno; and Adrienne M. Grover, County Counsel, for Defendants and Appellants County of Monterey and Monterey County Water Resources Agency.

Morrison & Foerster, James P. Bennett, George C. Harris, Andrew D. Muhlbach, John A. Pacheco; Law Offices of Haselton & Haselton, Joseph G. Haselton; Carlson, Calladine & Peterson, Randy W. Gimple; Johnson & James, Omar F. James and Robert K. Johnson for Plaintiffs and Respondents.

Judges: (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Opinion by: Premo

Opinion

PREMO, Acting P. [*730] J.

[44]** Defendants, County of Santa Cruz, Santa Cruz County Flood Control and Water Conservation District (collectively Santa Cruz), Monterey County Water Resources Agency (MCWRA), and County of Monterey (Monterey), were found liable in tort and inverse condemnation for extensive damage caused when the Pajaro River Levee Project (the Project) failed during a heavy rainstorm in 1995. Defendant State of California (State) was also found liable in tort and inverse condemnation for damage caused when Highway 1 obstructed the path of the floodwater on its way to the sea. For reasons we shall explain, we affirm.

[*731] A. INTRODUCTION

This action commenced with the filing of six different complaints on behalf of approximately 300 plaintiffs. The essence of plaintiffs' claims against Santa Cruz, MCWRA, and Monterey was that their failure to keep the Project channel clear diminished its capacity and ultimately caused a levee to fail during the storm. As against State, plaintiffs alleged that the drainage culverts under Highway 1 were too small to drain the flood and the resultant damming effect caused higher flood levels and destructive ponding of the floodwater.

[*3]** The individual matters were consolidated, and the liability and damages phases were bifurcated for trial. The tort causes **[**45]** of action were tried to a jury. The inverse condemnation claims were simultaneously tried to the court. The jury found all defendants liable for dangerous condition of public property and nuisance. The counties and the water agencies were also found liable for negligence, and, with the exception of Monterey, for violation of mandatory duty. The trial court found all defendants liable on the inverse condemnation claims.

In order to obtain review of the liability issues prior to trial of the damages phase the parties selected Tony's Auto Center as a representative plaintiff and stipulated to damages as to that plaintiff only. Judgment in favor of Tony's Auto Center was filed January 6, 2000. The county and water agency defendants jointly moved for a new trial and that motion was denied. All defendants filed timely

notice of appeal. [1]

[***4] B. FACTS

1. *The Project*

The Pajaro River is formed by the union of several smaller tributaries in the Counties of San Benito and Santa Clara. It flows through Chittenden Pass in the Santa Cruz Mountains and emerges into the Pajaro Valley, eventually emptying into Monterey Bay. The river forms the border between the Counties of Santa Cruz on the north and Monterey on the south. The Pajaro Valley is an historic floodplain. Today, most of the valley is devoted to agriculture. Its two population centers are the City of Watsonville on the Santa Cruz side of the river, and the small town of Pajaro just across the river from Watsonville on the Monterey side.

[*732] The federal Flood Control Act of 1944 (Pub.L. No. 78-534, ch. 665 (Dec. 22, 1944) 58 Stat. 887) authorized the United States Army Corps of Engineers (the Corps) to construct the Project upon receipt of assurances from the responsible local agencies that they would, among other things, operate and maintain the Project as the Corps required. The California Water Resources Act authorized the State's portion of the project and directed the four affected counties (Santa Clara, San Benito, Santa Cruz, and Monterey) to give the required written [***5] assurances. (Stats. 1945, ch. 1514, p. 2827.) Before the counties took any action, the California Legislature created the Monterey County Flood Control and Water Conservation District, and the new district replaced Monterey for purposes of the Water Resources Act. (Stats. 1947, ch. 699, §§ 2, 4, p. 1739.) MCWRA succeeded to the responsibilities of the Monterey County Flood Control and Water Conservation District in 1990. (Stats. 1990, ch. 1159, p. 4831.)

In 1947, the three counties and Monterey County Flood Control and Water Conservation District signed a resolution giving the assurances required by the federal Flood Control Act. Shortly thereafter, Monterey joined the other three counties in executing an indemnity agreement under which each county accepted responsibility for the portion of the Project located within its borders, and guaranteed as to each other the assurances that had been given to the Corps.

2. *Maintenance of the Project*

The Project design consisted primarily of clearing the river channel and constructing earthen levees along both sides of the river, beginning near Murphy's Crossing [**46] east of Watsonville and extending westward to the mouth of the river. The [***6] Corps completed the Project in 1949 and transferred responsibility for its maintenance to the local interests. The Corps provided an "Operation and Maintenance Manual" to guide maintenance efforts. One goal of maintenance was to maintain the Project's capacity. Federal regulations, which were incorporated into the manual, specified that the channel be kept clear of shoals, weeds and wild growth. (See 33 C.F.R. § 208.10(g)(1) (2001).) Vegetation and shoals in the channel decrease its capacity. Therefore, it was important to keep the channel clear in order to maintain the capacity it was intended to have.

The Corps had designed the Project to have a capacity of 19,000 cubic feet per second (c.f.s.). The Corps' 1946 "Definite Project Report" stated that the Project would be built to "contain a two-per-cent-chance flood within a 3-foot freeboard." The "freeboard" to which the report refers is the distance from the top of the levee to the surface of the water at the level the project [*733] is designed to carry. Freeboard is included as a safety feature. It provides additional capacity to take care of unforeseen factors, although it is not intended to contain water for long periods [***7] of time. The Corps' report explained: "The channel capacity will be 19,000 c.f.s. above the mouth of Corralitos Creek [the point at which the Project failed in 1995

[1] Although appeal is taken only from the judgment in favor of the single representative plaintiff, our decision is applicable to the entire action. The following discussion refers to "plaintiffs" as a reflection of that practical reality.

[2]] . . . ."2 The Corps' documents pointed out that by encroaching on the freeboard the Project would hold 23,000 c.f.s. at the pertinent location and still have one foot of freeboard remaining. That means that the Project was designed to contain 19,000 c.f.s. at the point at which the Project ultimately failed, and, if unaccounted factors had not diminished the channel's capacity, there would still be room to safely carry, at least for a short period of time, an additional 4,000 c.f.s.

From 1949 until 1972, the vegetation and sandbars were removed with a tractor and a bulldozer. The effectiveness of these channel clearing efforts was demonstrated by the Project's performance during two storms in the 1950's. In a 1955 storm, the **[***8]** Chittenden [3] gauge reported flows of 24,000 c.f.s. Even with such a high flow there remained over two feet of freeboard near the point where the levee failed in 1995. In 1958 the Project contained flows of 23,500 c.f.s., although with slightly less freeboard remaining.

The continuous mechanized clearing of the channel stopped around 1972. The California Department of Fish and Game (Fish and Game) had demanded a halt to mechanical clearing of the channel in order to protect the riparian habitat. In an apparent attempt to conform to both the demands of Fish and Game and the Corps' Project maintenance **[***9]** requirements, Santa Cruz began using herbicides to kill the vegetation in the channel. Without regular mechanized clearing, however, vegetation and sandbars built up, impeding the flow of winter runoff. As the Project deteriorated, it reverted more and more to riparian habitat, which in turn encouraged the claim of Fish and Game to jurisdiction over the Project. Although Fish and **[**47]** Game had procedures by which the local agencies could appeal the department's decisions, the local agencies never appealed.

In addition to Fish and Game, local environmental interests made thorough maintenance of the channel more challenging by actively supporting efforts to preserve the river's habitat. In 1976, Supervisor Gary Patton wrote **[*734]** to the Legislature on behalf of the Santa Cruz County Board of Supervisors to support Fish and Game policies and to encourage strong legislation to protect river habitat and regulate streambed alteration. In 1977, Santa Cruz adopted an ordinance designed to "preserve, protect and restore riparian corridors." In 1980, the county fish and game commission was given authority to restore fishery habitat in the Pajaro River, and to review public works projects **[***10]** that involved any alteration of the streambed or of streamside vegetation.

As the channel became more clogged, thorough clearing became more expensive. The passage of Proposition 13 in 1978 made funding more of a problem in general so that through the 1980's the Santa Cruz County Department of Public Works did not have funds to remove trees and other vegetation in the channel. MCWRA [4] had no significant funds to participate in channel clearing efforts, and since 1974 had concentrated almost exclusively on levee maintenance. Although Supervisor Marc Del Piero asked his colleagues several times to approve allocations to MCWRA from Monterey's general fund, with one minor exception, he was never successful.

The presence of vegetation and sandbars within the channel proliferated and posed an acknowledged risk of flooding. By 1977 **[***11]** area farmers had become concerned about the lack of mechanized clearing and expressed their concerns to supervisors in both counties. Watsonville officials wrote to the

---

[2] Corralitos Creek is also known as Salsipuedes Creek. It joins the Pajaro River just east of the City of Watsonville.

[3] The Chittenden gauge, which is located on the river several miles east of the Project, continuously measures the depth of the water. Hydrologists periodically measure the width and velocity of the stream. By graphing the periodic measurements they can estimate the volume of the discharge at any given depth. The data from the Chittenden gauge is used to estimate the water flow further down the river in the Project channel.

[4] Unless the context requires a distinction, we shall hereafter refer to MCWRA and its predecessor, Monterey County Flood Control and Water Conservation District, simply as MCWRA.

Santa Cruz County Department of Public Works in 1985, 1987 and 1988, asking that something be done. The agencies responsible for Project maintenance were also worried about the condition of the channel. By 1988, Joseph Madruga, chief engineer for MCWRA, had come to the conclusion that vegetation and sandbars in the channel had reduced its capacity by at least 50 percent. John Fantham, director of the Santa Cruz County Department of Public Works, had recognized the risk of flooding as early as 1983. Later, both agencies acknowledged that the 1995 flood was due in substantial part to the failure to clear the channel.

Meanwhile, the Corps had been performing inspections of the Project about twice a year. Although the Corps issued only one notice that the Project was in an unacceptable condition, the majority of the semiannual evaluations expressed concern that dense vegetation in the channel posed a serious constriction on the flow. Many of the Corps' evaluations included notice to both the MCWRA board and the Santa **[***12]** Cruz County Board of **[*735]** Supervisors that lack of maintenance could disqualify the Project for future federal assistance in the event of a flood. The Corps actually did temporarily disqualify the Project for that reason in 1992.

By 1988, the issue had come to the attention of Congressman Leon Panetta. Congressman Panetta convened the Pajaro River Task Force to determine what was to be done about the conflicting concerns of flood control and habitat restoration. The task force was made up of representatives **[**48]** from all the responsible and affected agencies, Fish and Game, and the Corps. Supervisor Del Piero and Mr. Madruga represented the Monterey interests. Mr. Fantham and Supervisor Robley Levy represented Santa Cruz. After over two years of work, the task force produced the "Pajaro River Corridor Management Plan," which called for the hand clearing of vegetation. Both Mr. Fantham and Mr. Madruga felt that the plan was inadequate, and would do no more than maintain the status quo. Mr. Madruga voiced his objection at the task force meeting and in a letter to Mr. Fantham in which he advocated a program of thinning and removal of selected vegetation using heavy equipment. **[***13]** According to Mr. Madruga, this was the "only method that can accomplish the flood protection necessary to protect the citizens of the Pajaro Valley at a reasonable cost and in a reasonable time frame." Notwithstanding these reservations, the task force unanimously approved the plan in October 1991, although there is no evidence it was ever formally adopted by the agencies charged with implementing it.

Finally, beginning in the early 1990's, the agencies on both sides of the river began more aggressive efforts to clear the channel. In 1991, at the urging of Supervisor Del Piero, MCWRA applied for a permit to use a backhoe and bulldozer to clear the channel. Fish and Game issued the permit, but limited its permission to hand clearing and then later halted the work. In 1993, at the invitation of area farmers, then Director of Fish and Game, Boyd Gibbons toured the Project. Gibbons was sufficiently concerned with the condition of the channel that he instructed his staff to work with the counties to get the necessary work done as soon as possible. Thereafter, Santa Cruz obtained permits to do some mechanized clearing of the channel. However, the work that was done was not enough to entirely **[***14]** clear the vegetation and sediment that had been allowed to collect over the preceding 20 years.

3. *Highway 1*

Highway 1 runs north to south and crosses the Pajaro River at the lower end of the Pajaro Valley, west of Watsonville. State began planning the construction of the subject portion of the highway in the 1950's. At the time, **[*736]** Highway 1 ran through Watsonville. The new section was to bypass the city. The bypass required the construction of a new bridge over the river and an earthen embankment elevating the highway at the south end of the bridge. Trafton Road today runs under Highway 1 on the southern side of the river.

Before State built the bypass, water passed through this area along a path in the vicinity of Trafton Road. The planned embankment would obstruct the existing drainage in that area. To compensate, State needed to design a drainage system for the embankment.

Investigation, design and construction of the embankment continued through the late 1960's. State's design criteria required that drainage through embankments be able to discharge a 100-year flood without causing water to back up over adjacent private property. State's engineers explained that this **[***15]** criterion did not require the drainage system in this case to accommodate flows escaping from the Project channel. According to State, the drainage needed only to pass rainwater runoff from a 700-acre area immediately adjacent to the highway. Using those guidelines, State engineers approved plans for two 48-inch culverts that could accommodate 98 c.f.s. The design documents showed that this design actually anticipated that "[s]hallow flooding on peak flow **[**49]** can be expected for some distance outside the [right of way]."

4. *The Flood*

The Project protected the valley for over 45 years until the storm of March 1995. On the night of March 10-11, 1995, the river overtopped the levee on the Monterey side, upriver from its junction with Corralitos (Salsipuedes) Creek. The resultant rush of water over the levee eroded the back side of the levee and it gave way, inundating the surrounding valley.

The vegetation and sediment that had been allowed to accumulate in the channel caused the river flow to be higher than it would have been had it been properly cleared. On the night of the storm, the maximum flow at the Chittenden gauge was estimated to have been 21,300 c.f.s. Plaintiffs' **[***16]** expert, Dr. Robert Curry, testified that in his opinion the 21,300 c.f.s. overestimated the flow because it did not take into account a number of factors taking place within the channel or downriver from the gauge. According to Dr. Curry, these factors served to reduce the actual flow at the break site to 16,000 to 18,500 c.f.s., most likely around 17,500 c.f.s.

When the levee failed, the floodwaters ran onto the historically flooded valley floor until they reached the Highway 1 embankment. The Highway 1 culverts were quickly overwhelmed, so that the water backed up on the east **[*737]** side of the highway, flooding more acreage than it otherwise would have flooded, and standing in many places for an extended period of time. The standing water exacerbated the flood damage because it caused the deposition of vast amounts of destructive sediment, all of which had to be removed when the floodwaters finally receded.

C. DISCUSSION

1. *Summary of Issues and Scope of Review*

The two counties and their related water agencies contend: (1) the trial court did not make the determination of unreasonableness that is necessary to support inverse condemnation liability, (2) inverse condemnation **[***17]** liability may not be based on shoddy maintenance of a public improvement, (3) the trial court used an erroneous definition of the Project's "design capacity," (4) there was insufficient evidence to support a finding that the Project did not perform within its capacity, and (5) the trial court erred in adopting the plaintiffs' proposed statement of decision.

MCWRA separately contends that the trial court erred in failing to apportion among the defendants the damages of the single plaintiff, Tony's Auto Center. Since MCWRA stipulated to the judgment in the form it was entered, MCWRA is estopped to complain of error, if any there was. (*Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 420 [185 Cal. Rptr. 654, 650 P.2d 1171].)

State contends: (1) the trial court applied an improper standard of unreasonableness in ruling on the inverse condemnation claim, (2) State could not

be liable in tort because it had no duty to protect plaintiffs from failure of the Project, (3) State is immune from tort liability under Government Code section 830.6 (design immunity), and (4) the breach of the levee was a superseding cause.

Monterey argues separately that it is not liable because it did not have any responsibility for the Project.

CA(1)[↑] **(1)** Except where noted, defendants' arguments relate to facts that are materially undisputed. We therefore apply our independent review. (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799, [35 Cal. Rptr. 2d 418, 883 P.2d 960].)

2. *Inverse Condemnation--Legal Background*

CA(2)[↑] **(2)** **HN1**[↑] "Private property may be taken or damaged **[***18]** for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, hereafter article I, section 19.) **HN2**[↑] When a **[**50]** public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation." (*Breidert v. Southern Pac. Co.* (1964) 61 Cal. 2d 659, 663, fn. 1, [39 Cal. Rptr. 903, 394 P.2d 719].)

[*738] Early inverse condemnation cases presumed that article I, section 19 (then § 14) merely provided an exception to the general rule of governmental immunity and that a public entity could only be liable in inverse condemnation if a private party could be held liable for the same injury. (*Archer v. City of Los Angeles* (1941) 19 Cal. 2d 19, 24, [119 P.2d 1] (*Archer*).) *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250, [42 Cal. Rptr. 89, 398 P.2d 129] (*Albers*) explained that the constitutional provision actually provided a broader basis for governmental liability. *Albers* confirmed that the **[***19]** fundamental policy basis for the constitutional requirement of just compensation is a consideration of " 'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' " (*Id.* at p. 262.) According to *Albers*, "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under [article I, section 19] of our Constitution whether foreseeable or not." (*Id.* at pp. 263-264.) The only limits to the claim were that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned. (*Holtz v. Superior Court* (1970) 3 Cal. 3d 296, 304, [90 Cal. Rptr. 345, 475 P.2d 441] (*Holtz*).)

CA(3)[↑] **(3)** Although *Albers* had held that the inverse condemnation plaintiff was entitled to compensation without regard to fault, *Albers* left open two exceptions to that rule--the *Gray* exception, which is not pertinent here, and the *Archer* exception. (*Albers, supra*, 62 Cal. 2d at p. 263, **[***20]** and see *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 163 P. 1024; *Archer, supra*, 19 Cal. 2d at p. 24.) In brief, the so-called *Archer* exception involved the circumstances, peculiar to water law, in which a landowner had a right to inflict damage upon the property of others for the purpose of protecting his or her own property. Such circumstances included the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). Under private water law analysis, these rules immunized the landowner from liability for resulting damage to downstream property. (See *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal. 3d 550, 563-564, [253 Cal. Rptr. 693, 764 P.2d 1070] (*Belair*); *Archer, supra*, 19 Cal. 2d at pp. 24-26; *Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327, 350, [27 Cal. Rptr. 2d 613, 867 P.2d 724] (*Locklin*).) Presumably, under the *Archer* exception, a public entity would be completely immune from liability if the entity's conduct were of the type that would have been immune under these water law principles.

Like this **[***21]** case, *Belair* involved flood damage that occurred after a levee failed. *Belair* modified *Albers* and adopted a rule of reasonableness to be **[*739]** applied in the context of flood control litigation. *Belair* determined that application of the *Albers* rule of strict liability would discourage needed flood control projects by making the entity the insurer of the property the project was designed to protect. (*Belair, supra,* 47 Cal. 3d at p. 565 **[**51]** .) On the other hand, to apply the *Archer* exception would unfairly burden the private landowner by requiring the landowner to bear a disproportionate share of the damage caused by failure of the public project. To balance these conflicting concerns *Belair* held: **HN3**[↑] "[W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the projects purpose is to contain the 'common enemy' of floodwaters." (*Ibid.*) Under *Belair*, the public entity is not immune from suit, but neither **[***22]** is it strictly liable.

Belair left open the question of how to determine reasonableness in the inverse condemnation context. That question was answered in *Locklin.* The *Locklin* plaintiffs had alleged that increased runoff from creek side public works caused erosion damage to their property downstream. *Locklin* held that **HN4**[↑] the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) was a conditional privilege, subject to the *Belair* rule of reasonableness. **CA(4)**[↑] **(4)** *Locklin* explained that to determine reasonableness in such a case, the trial court must consider what are now commonly referred to as the "*Locklin* factors." THEY ARE: "(1) [t]he overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at **[***23]** large over other beneficiaries of the project or is peculiar only to the plaintiff." (*Locklin, supra,* 7 Cal. 4th at pp. 368-369.)

Thus, in matters involving flood control projects, or in circumstances such as those before the court in *Locklin*, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage. In those circumstances, unreasonableness is determined by balancing the factors set forth in *Locklin.*

[*740] 3. *Counties' Issues* [5]

a. *The Trial Court Properly Balanced the "Locklin Factors."*

CA(5)[↑] **(5)** Counties contend **[***24]** that the trial court did not analyze the reasonableness of their actions according to the requirements of *Locklin.* The plaintiffs' proposed statement of decision referred specifically to the six *Locklin* factors and the trial court's consideration of each of them. The trial court acknowledged that the balancing analysis in the proposed statement of decision was correct, but felt that the discussion was not necessary for a statement of decision and had it stricken. The trial court instead stated, "The Court has balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to the plaintiffs' property, and finds that the County defendants acted unreasonably. *See* **[**52]** *Belair,* 47 Cal.3d at

[5] In this section we address the issues raised in briefs filed by Santa Cruz and MCWRA. Monterey joins the arguments raised in both briefs. To simplify our discussion, we shall refer in this section to both counties and their related water agencies as "Counties."

[pp.] 566-67, [253 Cal. Rptr. 693, 764 P.2d 1070]."

Counties brought the absence of the *Locklin* factors to the trial court's attention in connection with the hearing on the motion for new trial. Plaintiffs, therefore, moved to amend the statement of decision to include the previously stricken analysis. In response, the court ruled, "In fact, I did make those findings. And the reason for deleting them from the proposed statement was a disposition for brevity. I think they were there. **[***25]** I did consider them. I will grant the motion to insert them back into the statement of decision of the court for clarity." As permitted by Code of Civil Procedure section 662, [6] the trial court amended the statement of decision to include the *Locklin* analysis. We reproduce that portion in the margin. [7]

[*26]** Counties now argue that the trial court came to a final decision without the necessary balancing and then merely plugged the hole by inserting the **[*741]** previously stricken language into the statement of decision. We will not second-guess the trial court's subjective reasoning. The trial court specifically stated that it had considered the factors and made the findings. The statement of decision that is before us includes the appropriate analysis and we have no reason to reject it.

Counties also contend that the reasonableness calculus must be made as of the time the public entity is making the decision to approve the project, and that the trial court incorrectly focused on conduct that took place after adoption of the federal maintenance regulations. This contention **[**53]** confuses the purpose of the balancing analysis. The balancing analysis required by *Locklin* applies to the public entities' action that results in the injury. In *Belair*, *supra*, 47 Cal. 3d 550, it was the design of the levee system that resulted in the injury so that the reasonableness of the design would have been the proper consideration. Here, the trial court applied the analysis to the Counties' long-standing policy of allowing the Project **[***27]** channel to deteriorate. (See fn. 7, *ante*.) As we explain in more detail in the following section, it was that long-standing policy that caused the damage. We find that the trial court appropriately assessed the reasonableness of that policy according to the factors set forth in *Locklin, supra*, 7 Cal. 4th at page 369. (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal. 4th 432, 454, [63 Cal. Rptr. 2d 89, 935 P.2d 796] (*Bunch II*).)

b. *Inadequate Project Maintenance Supports Inverse Condemnation Liability.*

[6] Code of Civil Procedure section 662 reads in pertinent part: **HN5**[↑] "In ruling on [a new trial] motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues . . . ."

[7] "The court considered each of the following factors in making its determination that the Counties acted unreasonably when the public benefit is balanced against the private damage: (i) The overall public purpose being served by the improvement project; (ii) the degree to which the plaintiffs' loss is offset by reciprocal benefits; (iii) the availability to the public entities of feasible alternatives with lower risks; (iv) the severity of the plaintiffs' damage in relation to risk-bearing capabilities; (v) the extent to which damage of the kind the plaintiffs sustained is generally considered as a normal risk of land ownership; and (vi) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiffs. The Court finds that the efforts of the Counties to prevent foreseeable damage to plaintiffs were not reasonable in light of the potential for damage posed by the Counties' conduct, the cost to the Counties of reasonable measures to avoid such damage, and the availability of and the cost to the plaintiffs of means of protecting their property from damage. [P] The Court's determination is supported by the following: First, the 'purpose' of the improvement project involved--a flood control project--militates strongly in favor of liability in light of the enormous 'damage potential of a defective flood control project.' Second, the longstanding negligent operation of a flood control project, such as is documented here, serves no legitimate purpose, nor does it promote any 'reciprocal benefit' which offsets or justifies the damage that was caused by the failure of the Project. Third, 'feasible alternatives' which would have prevented the March 1995 floods were available to the defendants--i.e., continuous maintenance of the Project, including the type of maintenance that was in fact performed through the early 1970's. Fourth, the damage inflicted upon the populace of the Pajaro Valley as a result of the March 1995 flood was in fact 'enormous.' Finally, these damages were not a 'normal risk' of land ownership or of the sort that any of the intended 'beneficiaries' of the Project should be expected to bear. On the contrary, the flood of March 1995 would not have occurred had the Counties maintained the Project in the manner required by law."

CA(6a)[↑] **(6a)** Counties next contend that the trial court incorrectly based liability upon a finding of negligence, which is not the type of government action to which inverse condemnation applies. Counties also contend that the Corps' prescribed maintenance was the only "plan" of maintenance Counties ever adopted and that there is insufficient evidence to support a contrary finding. We find no merit in either contention.

[*742] CA(7)[↑] **(7)** HN6[↑] To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of article I, section 19. "Public use" is the threshold requirement. (Cal. Const., art. I, § 19.) "The destruction or damaging **[***28]** of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." (*House v. L. A. County Flood Control Dist.* (1944) 25 Cal. 2d 384, 396, [153 P.2d 950] (conc. opn. of Traynor, J.).) A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. (*Bauer v. County of Ventura* (1955) 45 Cal. 2d 276, 284-285, [289 P.2d 1] (*Bauer*).)

The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement. HN7[↑] "The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged." (*Yee v. City of Sausalito* (1983) 141 Cal. App. 3d 917, 920, [190 Cal. Rptr. 595], disapproved on other grounds in *Bunch II, supra*, 15 Cal. 4th **[***29]** at pp. 447-451.) That is why simple negligence cannot support the constitutional claim. For example, in *Hayashi v. Alameda County Flood Control* (1959) 167 Cal. App. 2d 584, [334 P.2d 1048] the appellate court held that the plaintiffs had not stated a cause of action for inverse condemnation because, although the defendant's failure to repair a levee within 10 to 21 days was negligence, it was not "a deliberate plan with regard to the construction of public works." (*Id.* at pp. 590-592.) That is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed. (See Van Alstyne, **[**54]** *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 489-490 (Van Alstyne).)

The leading case on the issue is *Bauer*. In *Bauer*, a drainage ditch ran along the downhill border of the plaintiffs' property. As originally constructed, any overflow **[***30]** from the ditch would have run downhill and away from the plaintiffs' property. As time went on, the downhill side of the ditch was built up higher and higher with dirt and debris so that when the ditch later overflowed, it flooded the plaintiffs' land. The county argued that the change in the ditch was a result of its maintenance and negligent maintenance was not the "public use" to which inverse condemnation liability **[*743]** would attach. The Supreme Court disagreed, explaining: "The rather obscure line between the concepts of 'construction' and 'maintenance' is disclosed by any attempt to define them in mutually exclusive terms and to characterize the raising of a bank of an existing ditch as one or the other. If the 'maintenance' consists of an alteration of the ditch by raising one of the banks, then in a material sense 'maintenance' becomes a species of 'construction.' Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule . . . . The defendants' argument that damage from maintenance is beyond the purview of [article I,] section [19] invites an artificial distinction which would turn simply upon the passage of time **[***31]** between the original construction and

the subsequent alteration and must therefore be rejected." (*Bauer, supra*, 45 Cal. 2d at p. 285.)

CA(6b)[↑] **(6b)** Other cases have also found that HN8[↑] inadequate maintenance can support liability in inverse condemnation. Two such cases involved damage to property caused by broken water pipes that the public entities had failed to properly maintain. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal. App. 3d 683, 696-698, [194 Cal. Rptr. 582] (*McMahan's*), disapproved on other grounds, *Bunch II, supra*, 15 Cal. 4th at pp. 447-451; *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, [96 Cal. Rptr. 2d 897] (*Pacific Bell*).) In both *McMahan's* and *Pacific Bell* the defendants argued that the city's negligent maintenance of its water system was not the type of deliberate government action that could support liability in inverse condemnation. (*McMahan's, supra*, 146 Cal. App. 3d at p. 693; *Pacific Bell, supra*, 81 Cal. App. 4th at p. 607.) In neither case had the city affirmatively passed a resolution or otherwise enacted a plan that was facially inadequate. But in both cases the city knew that **[***32]** the maintenance program being applied to its water system was inadequate and did not take action to remedy the inadequacy. In *Pacific Bell*, the city repeatedly denied requests for water rate increases to fund repair and replacement of the water system. (*Pacific Bell, supra*, 81 Cal. App. 4th at p. 607.) In *McMahan's*, the city did not accelerate its program of water main replacement in spite of a water rate study showing that such a program was necessary to prevent a continued deterioration of the system. (*McMahan's, supra*, 146 Cal. App. 3d at p. 695.)

The *Pacific Bell* court found that the deliberateness required for inverse condemnation liability was satisfied by a finding that the public improvement, as designed, constructed and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. (*Pacific Bell, supra*, 81 Cal. App. 4th at p. 607; and see *House v. L.A. County Flood Control Dist., supra*, 25 Cal. 2d at p. 396.) The **[**55]** court pointed out that the damage to private property that resulted from such an inherent **[*744]** risk was a direct cost of the public improvement. In **[***33]** *Pacific Bell*, the city could have incurred the cost in advance by monitoring and replacing the system before a failure caused damage. When it chose not to do so, article I, section 19 required that the cost be absorbed by the taxpayers as a whole, and not by the individual landowner. (*Pacific Bell, supra*, 81 Cal. App. 4th at pp. 607-608, citing *Holtz, supra*, 3 Cal. 3d at pp. 310-311.)

The *McMahan's* court used the same rationale to reject the defendant's contention that its conduct could only be characterized as negligence. Relying on *Bauer, supra*, 45 Cal. 2d 276, *McMahan's* determined that "whether the City's program of water main installation and replacement is characterized as 'construction' or 'maintenance,' the fact remains that it was inadequate and contributed to the break due to corrosion of the [broken] main. The City's knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers, supra*, 62 Cal. 2d 250." (*McMahan's, supra*, 146 Cal. App. 3d at p. 696.)

We conclude that HN9[↑] in order to prove the type of governmental conduct that will support liability **[***34]** in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action--or inaction--in the face of that known risk.

i. *The Trial Court Found That Counties Adopted an Unreasonable Plan.*

During trial, neither side raised the issue of deliberate action. The heart of plaintiffs' case was that Counties had failed to maintain the project as required by the Corps, allowing silt and vegetation to build up and diminish the capacity of the Project. Counties defended by attempting to show, among other things, that their conduct was reasonable in light of regulatory and fiscal restrictions. The trial court's statement of decision referred to the litany

of maintenance deficiencies and concluded, "[T]he evidence is persuasive that the County defendants did not act reasonably with regard to their maintenance obligation. Moreover the trial record refuted the Counties' arguments that they acted reasonably in light of regulatory impediments and funding limitations. The Counties' maintenance duties required that certain necessary steps be taken to effectively keep the channel clear. If those 'necessary steps' **[***35]** required greater efforts in the face of funding and regulatory obstructions, then a reasonable course of conduct required a more aggressive approach to overcoming these claimed impediments."

About three months after the statement of decision was filed, the Third District Court of Appeal filed **[*745]** *Paterno v. State of California* (1999) 74 Cal. App. 4th 68, [87 Cal. Rptr. 2d 754] (*Paterno*). *Paterno*, like this case, was an appeal from a judgment for the plaintiff on an inverse condemnation claim arising from a broken levee. The *Paterno* court held that the trial court's statement of decision was deficient because it based liability "almost entirely on the violation of standards for levee maintenance, in other words, *departures from the lawful plan*, rather than on an unreasonable plan." (*Id.* at p. 90.) The appellate court reversed and remanded the case for retrial, noting that Paterno would have to identify upon what plans he relied and then prove **[**56]** that the plan caused his injury. (*Id.* at p. 91, [87 Cal. Rptr. 2d 754].)

After judgment was entered in favor of the test plaintiff in this case, Counties filed a new trial motion. (Code Civ. Proc., § 657 **[***36]** .) Relying upon *Paterno*, they argued that the trial court's decision was against law because the court had based liability on negligent maintenance, not on adoption of an unreasonable plan of maintenance. The trial court denied the new trial motion, but amended the statement of decision to include the finding: "[T]he maintenance deficiencies which the Court's Statement of Decision summarized all resulted from plans or policies which defendants adopted and implemented over a twenty-year period." Thus, the trial court's statement of decision, as amended, found that Counties had adopted and implemented unreasonable plans or policies by failing, over a 20-year period, to take a more aggressive approach to maintenance of the Project.

Paterno does not affect our conclusion. In *Paterno*, the appellate court determined that the trial court had adopted the view that unreasonable conduct, as required by *Belair*, meant ordinary negligence, and therefore, that the trial court had not made the necessary finding. (*Paterno, supra*, 74 Cal. App. 4th at pp. 86, 88.) Unlike the trial court in *Paterno*, the trial court in this case expressly found that the manner **[***37]** in which the channel was maintained for over 20 years was a deliberate policy of the local public agencies responsible for the Project. Such a determination is a finding of the deliberate government action necessary for inverse condemnation liability.

ii. *There Is Substantial Evidence of an Unreasonable Plan of Maintenance.*

Counties insist that the only evidence of a "plan" of maintenance was the Corps' maintenance requirements. **CA(8)**[↑] **(8)** **HN10**[↑] In reviewing the sufficiency of the evidence to support the findings of the trial court, we apply the basic principle of appellate practice and consider the evidence in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal. 3d 1130, 1133, [275 Cal. Rptr. 797, 800 P.2d 1227].)

[*746] **CA(6c)**[↑] **(6c)** The record is replete with evidence to support the finding that Counties' maintenance of the Project was conducted pursuant to Counties' deliberate policies. Counties were aware of the maintenance program being applied to the Project and knew that the buildup of vegetation and sand bars diminished the protection the Project **[***38]** was intended to provide. Area

farmers, Watsonville officials, and the highest ranking people in both Counties' water agencies alerted county officials to the risk of flooding and to that which needed to be done to remedy the problem. In spite of that knowledge, Counties did not take any action to correct the situation until 1991 or later. Instead, Counties allowed Fish and Game regulations and perceived funding limitations to drive the actual program of maintenance. Thus, Counties' knowing failure to clear the Project channel, in the face of repeated warnings and complaints was not mere negligent execution of the Corps' reasonable plan of maintenance. The "plan" was the long-term failure to mitigate a known danger. That failure persisted for 20 years.

MCWRA argues that it was only Santa Cruz that affirmatively supported the Fish and Game policies of habitat restoration and, therefore, any unreasonable plan or policy of maintenance should be attributable to Santa Cruz, alone. We disagree. It is not necessary to find that **[**57]** Counties expressly endorsed or enacted a contrary policy in order to find that the actual maintenance of the Project was conducted pursuant to deliberate governmental **[***39]** action. It is sufficient that Counties were aware of the risk of failing to adequately clear the channel and chose to tolerate that risk. The reason for the choice is irrelevant to the determination that the action was deliberate. MCWRA indisputably had the obligation, knew the risk, and did not act. Moreover, MCWRA made other, deliberate policy decisions relating to Project maintenance. Among other things, MCWRA's Assistant General Manager and Chief Engineer testified that he had regularly been successful in preventing Fish and Game from interfering with his use of mechanized equipment to maintain other flood control projects in his jurisdiction, and that he chose not to challenge Fish and Game decisions in connection with the Project because he feared jeopardizing the department's cooperation with future permit applications.

Counties also argue that the Corps' semiannual evaluations, which, with one exception, never found Project maintenance to be categorically unacceptable, show that Counties' actual maintenance program was reasonable. The Corps' evaluations are not dispositive. Since the Corps' declaration of unacceptability would have cut off Corps assistance in the event of an emergency, we may **[***40]** infer that such declarations were made only sparingly. Moreover, it is undisputed that the Corps regularly pointed out the problem of vegetation growing in the channel, and that the water agency personnel believed that the maintenance program did not conform to Corps requirements and that it compromised the Project's capacity.

[*747] In sum, the record demonstrates that Counties' policy makers made explicit and deliberate decisions with unfortunate but inevitable results. Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance.

c. *The Trial Court Did Not Err in Defining "Design Capacity."*

CA(9a)[↑] (9a) Counties argued at trial that they could not be liable if the storm had generated more water than the Project had been designed to handle. Counties' evidence was that the peak flow during the storm was 21,300 c. **[***41]** f.s. and the Project's capacity was only 19,000 c.f.s. Plaintiffs' evidence was that the peak flow was somewhere between 16,000 c.f.s. and 18,500 c.f.s., but in any event, less than 19,000 c.f.s. Plaintiffs also argued that by considering the freeboard built into the Project's design, the Project's functional capacity was something more than 19,000 c.f.s. At the close of trial, the court defined the Project's capacity as "19,000 c.f.s. with 3 feet of freeboard." Counties

now argue that this definition was erroneous and affects both the inverse condemnation and tort results.

Counties insist that design capacity is a question of law to be determined from the design documents, and that the trial court was obligated to define capacity as 19,000 c.f.s. *within*, not *with*, three feet of freeboard. As we understand the argument, the Corps' Definite Project Report uses "within" and that means that the capacity was 19,000 c.f.s. and no more. By changing "within" to "with," the finder of fact was incorrectly allowed to add the freeboard to the design capacity, which in this **[**58]** case would increase the total capacity to 23,000 c.f.s. [8] The definition was appropriate if it was correct in law **[***42]** and supported by the evidence. (Code Civ. Proc., §§ 607a, 609; and see *LeMons v. Regents of University of California* (1978) 21 Cal. 3d 869, 875, [148 Cal. Rptr. 355, 582 P.2d 946], and *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 335, [145 Cal. Rptr. 47].) We find that it was.

The concept of "design capacity" comes from the *Belair* case. The appellate court in *Belair* had decided that because the plaintiffs' land had been historically subject to flooding, the levee failure **[***43]** could not be the proximate **[*748]** cause of the damage because it had not increased that historical risk. (*Belair, supra*, 47 Cal. 3d at p. 558.) The Supreme Court disagreed. *Belair* determined that a flood control project serves the public good by preventing damage that would otherwise be expected to occur in the normal course of events. The flood control project could be a concurring cause of flood damage because adjoining landowners rely on the protection it was built to provide. However, as *Belair* acknowledged, the flood control project could only be a concurring cause if the flood was one the Project was designed to accommodate.

Specifically, *Belair* held: "Thus, **HN11**[↑] in order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of ' "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." [Citations.]' (*Souza v. Silver Development Co.* [(1985)] 164 Cal. App. 3d [165] at p. 171, fn. omitted.) Where independently generated forces not induced by the public flood control improvement--such as a rainstorm--contribute **[***44]** to the injury, proximate cause is established where the public improvement constitutes a *substantial concurring cause of the injury*, i.e., where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity." (*Belair, supra*, 47 Cal. 3d at pp. 559-560.)

A project's capacity, therefore, bears upon the element of causation. This is true whether we are considering the inverse condemnation claims or the tort causes of action. Counties understandably focus on the dictum in the latter half of *Belair*'s discussion quoted above, in which the court posits, by way of example, that if a storm exceeded the project's "design capacity" the project would no longer be a substantial factor in causing the damage. By narrowing the focus to the phrase "design capacity," Counties have constructed the argument that the relevant level of protection the Project was designed to provide is the single number **[***45]** linked to the term "design capacity" in the Corps' Definite Project Report. According to Counties, freeboard does not count.

In our view, *Belair* did not intend the bright-line

[8] Plaintiffs argue that Counties have waived objection to the court's use of the word "with" by affirmatively acquiescing to its use below. Although we agree that Counties did not object below to the use of the word "with" versus "within," the record as a whole makes it quite clear that Counties consistently urged a definition of design capacity that would exclude consideration of freeboard. We will, therefore, treat the merits of the issue.

rule Counties seek to apply. Such a rule is inconsistent with traditional **[**59]** concepts of causation, and would not advance the just compensation requirement of the Constitution. That is especially true on the facts of this case. As the *Belair* court stated, the issue is whether there is a " ' "substantial" cause-and-effect relationship **[*749]** [between the public project and the injury] which excludes the probability that other forces *alone* produced the injury.' (Van Alstyne, *supra*, 20 Hastings L.J. at p. 436, italics added.)" (*Belair*, *supra*, 47 Cal. 3d at p. 559.) **HN12**[↑] To the extent that the public project contributes to the injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case. (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 572, fn. 6, [224 Cal. Rptr. 664, 715 P.2d 624].)

Keeping in mind that the issue is one of causation, we find that it would have been improper to cut off Counties' liability, **[***46]** as a matter of law, at the Project's design capacity of 19,000 c.f.s. because there was evidence to show that the Project was able to hold more than that. The Corps' documents specified that the freeboard could be encroached to allow the Project to carry 23,000 c.f.s. at the point in the channel where the breach ultimately occurred. That means that, with 19,000 c.f.s. in the channel, unless something had occurred to diminish capacity, there would still be room for an additional 4,000 c.f.s. Of significance in this case is the evidence that the extra room the freeboard was intended to provide was eliminated by Counties' ineffective maintenance. For these reasons, it was appropriate to permit the finder of fact to decide if the flood exceeded the protection the Project was intended to provide by permitting a finding that the freeboard was part of that protection. This is the definition the trial court gave. Accordingly, there was no error.

d. *There Was Substantial Evidence to Support the Findings of Liability.*

Counties next argue that there was insufficient evidence to support a finding that flows exceeded Project capacity. Applying the deferential standard of substantial evidence **[***47]** review, we find no merit to the argument. (*In re Marriage of Arceneaux, supra*, 51 Cal. 3d at p. 1133.)

The trial court found that if properly maintained the Project would have "safely conveyed well over 21,000 c.f.s. without overtopping." The jury was not asked to make a finding of capacity. The jury found only that peak flows did not exceed the design capacity of the Project. Even if we assume the jury chose 19,000 c.f.s. as the relevant capacity, there was sufficient evidence to support a finding that the flood did not exceed that. Plaintiffs' expert, Dr. Robert Curry, is a geologist with a specialty in geomorphology. He estimated that the range of likely flows at the site of the Project failure was 16,000 c.f.s. to 18,500 c.f.s., most likely around 17,500 c.f.s. Counties argue that Dr. Curry's scientific techniques were not proven reliable or generally accepted by others in his field, and his opinions should not have been **[*750]** admitted. **CA(10)**[↑] **(10)** Counties did not make a record of their objection below and, therefore, have not preserved the issue for appeal. **CA(11)**[↑] **(11)** (See fn. 9.) (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal. 3d 180, 184, fn. 1, [151 Cal. Rptr. 837, 588 P.2d 1261]; and **[***48]** see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.) [9] **CA(9b)**[↑] **(9b)** Dr. **[**60]** Curry's testimony provides substantial evidence to support a finding that the peak flows did not exceed

---

[9] Having reviewed the evidence in detail, we find that the objection, had it been recorded, would have properly been overruled. **HN13**[↑] Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. (*People v. Kelly* (1976) 17 Cal. 3d 24, [130 Cal. Rptr. 144, 549 P.2d 1240].) The *Kelly* rule does not apply to the personal opinions of an expert. (*People v. McDonald* (1984) 37 Cal. 3d 351, 372-373, [208 Cal. Rptr. 236, 690 P.2d 709]; *Wilson v. Phillips* (1999) 73 Cal. App. 4th 250, 254-256, [86 Cal. Rptr. 2d 204].) Counties' challenge to Dr. Curry's testimony is that he "theorized" and "hypothesized" about the factors that he believed affected the level of the flood. Counties' objection relates only to the credibility of his opinion, and thus was not subject to exclusion under the *Kelly* rule.

19,000 c.f.s.

[*49]** e. *The Parties Are Expected to Draft the Statement of Decision.*

Counties finally challenge the trial court's statement of decision on the ground it reflects plaintiffs' reasoning, analysis and decision and not that of the trial court. Counties acknowledge there is no authority for their challenge, but argue that in this case the statement of decision was so plainly a rehashing of plaintiffs' closing argument that it simply cannot reflect the trial court's decision. According to Counties, it is hard to believe that the trial judge agreed so wholeheartedly with the other side.

The California Rules of Court provide that **HN14**[↑] the tentative decision is not binding on the court and that the court may instruct a party to prepare a proposed statement of decision. (Cal. Rules of Court, rule 232(a) & (c).) The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. (Cal. Rules of Court, rule 232(b) & (d).) Those procedures were followed here, and we can find no basis in the record or in law to warrant further comment on the issue.

4. *State's Issues*

a. *State's Liability [***50] for Inverse Condemnation Does Not Require a Showing of Unreasonableness.*

CA(12a)[↑] **(12a)** The trial court's statement of decision refers to State's liability in a single paragraph: "The State of California, Department of Transportation, acted unreasonably in its design and construction of Highway 1 where it **[*751]** crosses the Pajaro River flood plain. [State] failed to follow its own manual's design criteria for that section of highway. This failure resulted in a dangerous condition of public property. The raised highway embankment functioned as a dam that caused some properties to suffer flood damage and others to be damaged more severely than they would have if the highway design had allowed proper drainage." State contends that the trial court did not use the proper measure of reasonableness in finding State liable, and that State's actions were reasonable in any event. Plaintiffs argue, among other things, that the rule of reasonableness does not apply to State. According to plaintiffs, State is strictly liable and the trial court's application of a reasonableness analysis was unnecessary. We agree with plaintiffs.

The rule of reasonableness was developed in a series of cases beginning with *Belair* **[***51]** . The general rule is that **HN15**[↑] a public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. (*Albers, supra,* 62 Cal. 2d at pp. 263-264.) *Belair* modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects. (*Belair, supra,* 47 Cal. 3d at p. 565.) *Locklin* applied *Belair*'s rule of reasonableness where the defendants were alleged to have drained surface water into a natural watercourse, increasing the volume and velocity of the **[**61]** watercourse, and causing erosion of plaintiffs' downstream property. (*Locklin, supra,* 7 Cal. 4th at p. 337.) **HN16**[↑] Under the "natural watercourse" rule, a riparian landowner had a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. (*Id.* at pp. 346-347.) Like *Belair*, *Locklin* declined to impose strict liability, and held: "Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, **[***52]** article I, section 19 of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners." (*Id.* at p. 367.)

Both *Belair* and *Locklin* applied the reasonableness rule to conduct that was at one time privileged

under traditional water law principles. Predictably, the plaintiffs in the next case argued that conduct that had not been so privileged was subject to the general rule of strict liability. (*Bunch II, supra*, 15 Cal. 4th 432.) *Bunch II*, like *Belair*, involved the failure of a flood control project. However, in *Bunch II* the injury was caused by the defendants' having diverted and rechanneled a natural watercourse. **HN17**[↑] Diversion of a watercourse was not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. *Bunch II* confirmed that resolution of flood control cases involved a balancing of the public interest in encouraging flood control projects with the potential private harm they **[*752]** could cause. *Bunch II* held that the public agency would not be strictly liable for damage resulting from a failed **[***53]** flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply. (*Id.* at p. 451)

Although these three cases suggest a trend toward incorporating reasonableness into the inverse condemnation analysis, that trend does not extend to State's conduct in this case because of the public policy considerations to which the reasonableness requirement is tethered. The 1969 article by Professor Van Alstyne provides some insight. (Van Alstyne, *supra*, 20 Hastings L.J. 431.) Van Alstyne noted that the state of inverse condemnation law at the time was very unpredictable due to the courts' application of a variety of conflicting legal principles. Van Alstyne encouraged the courts to abandon reliance upon private law principles and to apply principles of public policy to all inverse condemnation claims arising from unintended physical damage to private property. According to Van Alstyne, public policy does not necessarily require a reasonableness calculus in all contexts. For example, in cases of environmental pollution, a rule of strict liability might provide **[***54]** incentive for the development of antipollution programs. (*Id.* at p. 503.) On the other hand, in what Van Alstyne termed "water damage" cases, a rule that balanced the conflicting concerns of public benefit and private harm would better serve the public in the long run. (*Id.* at p. 502.).

Our Supreme Court adopted the balancing analysis suggested by Van Alstyne in the *Belair*, *Bunch II*, and *Locklin* cases. In *Locklin*, the offending conduct (discharge of surface water into a natural watercourse) would have been privileged under traditional water law principles. The corresponding burden of that privilege fell on the downstream landowners who had to take steps to protect their land from such **[**62]** upstream discharges or suffer the consequences. (*Locklin, supra*, 7 Cal. 4th at pp. 351-352, [27 Cal. Rptr. 2d 613, 867 P.2d 724].) Therefore, since the watercourse naturally subjected the downstream property to flooding and erosion, it would have been unfair to apply a strict liability analysis to public entity landowners upstream. The decisive constitutional consideration of ensuring equitable allocation of the cost of the public undertaking was best advanced in such **[***55]** a case by requiring the downstream owner to show that the public agency had exceeded its privilege by acting unreasonably. (*Id.* at p. 367.)

Policy considerations also favored application of a reasonableness analysis in *Belair* and *Bunch II*, which were both flood control cases. In *Belair* and *Bunch II,* the public improvement had been erected to protect the land that was ultimately injured when the project failed. The project's purpose, to protect private property from the flooding that it could otherwise expect to **[*753]** suffer periodically, was an important policy reason to apply the balancing analysis. Without requiring the plaintiff to make a showing of unreasonableness, the public agency that built or operated the project would become the guarantor of the land it had undertaken to protect.

An appellate opinion decided after *Belair*, *Bunch II*, and *Locklin* illustrates a situation where public policy favored strict liability rather than reasonableness. (*Akins v. State of California* (1998) 61 Cal. App. 4th 1, [71 Cal. Rptr. 2d 314].) In *Akins* the defendants had intentionally diverted

floodwater onto the plaintiffs' lands for the purpose of protecting **[***56]** other property from flooding. There was no evidence that the project was erected to protect the plaintiffs' property or that the plaintiffs' property had historically been subject to flooding. Since the public improvement involved flood control, *Belair* and *Bunch II* arguably mandated application of a reasonableness analysis. However, the appellate court found that the reasonableness standard did not apply, reasoning that regardless of the importance of flood control, "[u]sing private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from those owners whose properties are flooded a contribution in excess of their proper share to the public undertaking. We see no reason to put such property owners to the task of proving the governmental entities acted unreasonably in order for the owners to recover in inverse condemnation." (*Id.* at p. 29.)

The policy reasons for applying a rule of reasonableness in *Belair*, *Bunch II*, and *Locklin* do not apply in this case. The conduct of which plaintiffs complain is that State caused Highway 1 to obstruct the path of the floodwater. Such conduct was not **[***57]** privileged under traditional water law precepts. (*Los Angeles C. Assn v. Los Angeles* (1894) 103 Cal. 461, 467-468, [37 P. 375]; *Conniff v. San Francisco* (1885) 67 Cal. 45, [7 P. 41].) Therefore, State does not enjoy a conditional privilege as it would under the facts of *Locklin*, and plaintiffs' property would not have been subject to a corresponding burden. In fact, the reverse is true. It is plaintiffs, as the upstream owners, who likely would have had a privilege in this case. And State, as the downstream owner, was bound not to obstruct the flow of water from the plaintiffs' upstream land. (*Locklin*, *supra*, 7 Cal. 4th at p. 350; and see *Smith v. City of Los Angeles* (1944) 66 Cal. App. 2d 562, 572, [153 P.2d 69].) Therefore, the consideration that controlled the result in *Locklin* (fair apportionment of the loss) is not present here because plaintiffs would not have been expected to take measures **[**63]** to protect their land from a downstream obstruction like the Highway 1 embankment.

The policy reasons for applying reasonableness in *Belair* and *Bunch II* are not present here, either. Highway 1 was not a flood control project **[***58]** and was **[*754]** not built to protect the plaintiffs' land. The damming effect of the highway created a risk to which those properties would not have been subject if the highway had not been built. The public benefit of the highway extends well beyond the landowners in the Pajaro Valley. While the same may be said of a flood control project, such a project directly benefits the owners of the land in the floodplain, and only indirectly benefits the public as whole. Highway 1, on the other hand, benefits the traveling public as a whole. The owners of the adjacent lands derive no greater benefit from the highway than any other member of the public.

"[T]he underlying purpose of our constitutional provision in inverse--as well as ordinary--condemnation is 'to distribute throughout the community the loss inflicted upon the individual . . . .' " (*Holtz, supra*, 3 Cal. 3d at p. 303.) State, in furtherance of the larger public purpose (transportation) has caused injury to a discrete group of private landowners. Those landowners received no more benefit from State's project than did any other user of the State highway system. Plaintiffs ought not to be required to prove unreasonableness **[***59]** in order to recover just compensation for their damage. We hold, therefore, that *Belair*'s rule of reasonableness does not apply to State in this case. In light of our holding, the trial court was not required to undertake the reasonableness analysis required by *Locklin*. The court's conclusion that State's conduct was unreasonable was unnecessary to its determination that State is liable in inverse condemnation, but does not affect its correctness.

b. *State Had a Duty to Avoid Obstructing the Floodplain.*

The jury found State liable for nuisance and for maintaining a dangerous condition of public

property. (Civ. Code, § 3479; Gov. Code, § 835.) State argues that it cannot be liable for these torts because it does not have a duty to protect plaintiffs' property from the failure of a flood control project over which it had no control. State assumes that plaintiffs' claim is premised upon the theory that State should have designed its drainage anticipating that the Project would fail. State misses the point. Plaintiffs do not allege that State is responsible for the failure of the Project or the resulting flood. Plaintiffs allege **[***60]** only that State is responsible for that portion of the damage that can be attributed to the highway's obstruction of the floodplain. Whether the flood occurred because the Project failed to function as intended, or because the rainstorm exceeded the Project's capacity, plaintiffs' claim against State would be the same. As we interpret plaintiffs' position, State had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood.

CA(13)[↑] (13) HN18[↑] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be **[*755]** imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 434, [131 Cal. Rptr. 14, 551 P.2d 334].) In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 112, [70 Cal. Rptr. 97, 443 P.2d 561].) Duty is usually determined based upon a number of **[**64]** considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. (See *Dillon v. Legg* (1968) 68 Cal. 2d 728, 739, [69 Cal. Rptr. 72, 441 P.2d 912]; **[***61]** Gov. Code, § 835.)

The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. (*Ballard v. Uribe, supra*, 41 Cal. 3d at p. 573, fn. 6.) **CA(12b)[↑] (12b) HN19[↑]** Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. (*Locklin, supra*, 7 Cal. 4th at pp. 337, 354-356; *Keys v. Romley* (1966) 64 Cal. 2d 396, 409, [50 Cal. Rptr. 273, 412 P.2d 529].) Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. (*Mitchell v. City of Santa Barbara* (1941) 48 Cal. App. 2d 568, 571, [120 P.2d 131].) The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater. (*Ibid.*) This common law allocation of duty is appropriate here.

The harm of which plaintiffs complain is that the highway obstruction caused **[***62]** the floodwater to rise higher and stand on the land longer than it would have done if unobstructed. This harm was unquestionably foreseeable. State's "1989/90 Training Course Manual" POINTS OUT: "A primary cause of flooding in highway and bridge construction is the blocking of a normal drainage flow pattern. Construction of fills, drainage structures and appurtenant structures such as retaining walls all have the potential for blocking the normal flow of drainage water and thus causing flooding. The blocked flow does not necessarily have to be a watercourse; blockage of an existing flood plain may result in flooding of previously untouched areas. [P] In either case, watercourse or flood plain, blockage will result in liability for any damages arising from consequent flooding."

In fact, the harm that State's project ultimately caused was actually foreseen before the highway bypass was ever built. State designed the drainage culverts around 1960. The 1960 design documents presumed that peak flows would result in shallow flooding "for some distance outside the [right of way]." According to State's engineers, these peak flows were **[*756]** presumed to consist only of rainwater runoff from **[***63]** the surrounding area, not floodwater. Thus, even in the absence of a flood, State's design presumed that some water

would back up behind the highway during the heaviest rains.

State's "Design Planning Manual" required that its highway drainage structures be able to accommodate a 100-year storm. In 1963, the Corps reported that a 100-year storm was expected to generate flows within the Project channel of 43,500 c.f.s., a significantly greater volume than it had previously estimated. State concedes that it was aware of the Corps' 1963 estimate of the size of a 100-year storm, and that it knew there was no chance the Project, as it then existed, could contain that volume. Thus, State was aware before it began building the highway bypass in the late 1960's that in the event of a 100-year storm, flooding was virtually certain to occur.

State argues that it had no duty to consider the possibility of a flood because in its correspondence with State engineers the Corps told State that it should assume a Project expansion was going forward. This assurance, however, did not have any bearing on the drainage design or whether **[**65]** that design should consider the risk of flooding. The acknowledged **[***64]** purpose of the Corps' assurance was to assist State's engineers in designing the bridge. In light of the information it received from the Corps, State designed its bridge over the river so that the Corps could make improvements under the bridge without the need to revise the bridge structure. Those improvements were, at best, years away. (And, so far as we can ascertain from the record, no such improvements were ever made.)

It is undisputed, therefore, that when State built the highway bypass in the late 1960's it knew that the Project would not contain a 100-year storm and that no enlargement of the Project had been approved or commenced at that point. A 100-year storm was just as likely to occur in 1970 as it was at any later time. Having built an embankment across the historic floodplain, State also must have known that its embankment would block the flow of floodwater unless it designed the drainage to accommodate a flood.

State cannot avoid liability for the 1995 flood because the Project failed rather than because the storm overwhelmed it. State was expected to design its drainage for a 100-year storm. Since a flood was almost certain to occur in the event of a **[***65]** 100-year storm, State, as a downstream riparian landowner, had a duty to design the highway bypass to avoid obstructing the geologic floodplain. Therefore, it does not matter that the storm that generated the flood in this case was of a lesser magnitude and should have been contained by the Project. State had a duty to anticipate the consequences of a 100-year storm and design accordingly.

[*757] c. Government Code Section 830.6*Government Code* Section 830.6 *Is Not a Defense.*

CA(14a)[↑] **(14a)** At the close of all the evidence State moved for a directed verdict on the basis of Government Code section 830.6, design immunity. The trial court denied the motion and the jury ultimately found State liable for a dangerous condition of public property and nuisance. State contends the court erred in denying its directed verdict motion. We disagree.

CA(15)[↑] **(15)** **HN20**[↑] A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. (Gov. Code, § 835, subd. (a).) However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a **[***66]** plan or design approved in advance by the entity if "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design . . . or (b) a reasonable legislative body or other body or employee could have approved the plan or design." (Gov. Code, § 830.6.) "The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity

which approved the design." (*Bane v. State of California* (1989) 208 Cal. App. 3d 860, 866, [256 Cal. Rptr. 468].) A public entity claiming design immunity must plead and prove three essential elements: " '(1) [a] causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; [and] (3) substantial evidence supporting the reasonableness of the design.' [Citation.]" (*Higgins v. State of California* (1997) 54 Cal. App. 4th 177, 185, [62 Cal. Rptr. 2d 459].)

The elements of causation and approval are not contested. The focus of State's challenge is the third element of the design immunity defense, substantial evidence of the reasonableness of the culvert design. **[***67]** Government Code section 830.6 **[**66]** makes the resolution of this element a matter for the court, not the jury. (*Cornette v. Department of Transportation* (2001) 26 Cal. 4th 63, 66, [109 Cal. Rptr. 2d 1, 26 P.3d 332].) The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable State official could have approved the challenged design. (*Morfin v. State of California* (1993) 12 Cal. App. 4th 812, 815, [15 Cal. Rptr. 2d 861].) If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. (*Higgins v. State of California, supra*, 54 Cal. App. 4th at p. 185.) **HN21**[↑] In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. (*People v. Bassett* (1968) 69 Cal. 2d 122, 139, [70 Cal. Rptr. 193, 443 P.2d 777]; *Grenier v. City of Irwindale* (1997) 57 Cal. App. 4th 931, 940, [67 Cal. Rptr. 2d 454].) **CA(14b)**[↑] **(14b)** Keeping that standard in mind, we review the evidence to determine whether **[*758]** there is a basis upon which a reasonable State official could have approved the culvert design.

State installed **[***68]** two 48-inch culverts through the embankment on the southern side of the bridge it built over the Pajaro River. There is no dispute that the culverts were not designed to accommodate floodwater. They were designed to accommodate only the rainwater runoff from the adjacent 700 acres. The span beneath the bridge itself provided plenty of clearance for highwater flows down the river channel. However, if the water escaped the channel, it would follow the contour of the floodplain toward the embankment at the southern end of the bridge. The floodwater would have to pass through whatever drainage was installed in the new embankment in order to reach the sea. Plaintiffs point out that since State knew before it built the Highway 1 bypass that the Project could not accommodate more than about 26,000 c.f.s., and that a 100-year storm would generate flows well above that, flooding was foreseeable and the drainage design should have taken it into account. [10]

[*69]** State's expert, Steve Price, testified that the culverts conformed to the requirements of State's Design Planning Manual and the design itself was "reasonable." He stated that it was not in conformance with the best engineering practices to design the drainage for Project failure and that State did not evaluate the Corps' projects at the time the drainage in this case was installed. Plaintiff's expert, Dr. Curry, had testified that the actual Pajaro River watershed consisted of 1,100 square miles. Price testified, however, that it was appropriate to consider only the 700 acres in calculating runoff because "[t]here are other drainage systems and facilities that are taking care of that water."

State's engineer, Lance Gorman, testified that a reasonable drainage design would accommodate flooding only if the river had not incorporated man-made flood control improvements. According to both Price and Gorman, because there was an

---

[10] Plaintiffs also claim that the culverts' gradient flowed upriver rather than down, the opposite of the way they were designed. Arguably, this defect could also defeat the design immunity defense. (*Cameron v. State of California* (1972) 7 Cal. 3d 318, 326, [102 Cal. Rptr. 305, 497 P.2d 777].) In light of our conclusion that there is insufficient evidence to support the reasonableness of the design, we need not reach this issue.

existing flood control project, the highway drainage design did not have to consider floodwater. Gorman testified that State worked only within its own area and that it would expect the Corps to provide for flooding, noting that State had expected the Corps to improve **[***70]** the Project to accommodate **[**67]** a 100-year storm. Another reason State never considered flooding, according to Gorman, was that it had never been asked to do so.

[*759] The chronology of the State's project is significant. The Corps' flood control project was built in 1949 and, according to Gorman, up until at least 1958 it was reasonable to presume it would hold a 100-year flood. The Highway 1 drainage was designed in 1959 and revised in 1960. In June 1963, the Corps published its "Interim Report," showing that it expected a 100-year storm would generate 43,500 c.f.s. This volume greatly exceeded the Project's capacity. Nevertheless, in September 1963, State engineers approved the 1960 drainage design without reconsidering it in light of the Corps' Interim Report. Mr. Gorman conceded that by 1964, given the Corps' reevaluation of a 100-year storm, it would have been "questionable" to continue to assume the Project would hold such a flood. Thus, according to State's own engineer it "probably would have been better" to design for the Corps' new analysis.

The purpose of the design immunity statute is to avoid having the finders of fact "reweighing the same factors considered by the governmental **[***71]** entity which approved the design." (*Bane v. State of California, supra,* 208 Cal. App. 3d at p. 866.) Since State's engineers never took flooding into consideration, it is questionable whether the immunity applies at all. Presuming that it does, we find that State has not offered substantial evidence of reasonableness.

Although State offered evidence that its original design was reasonable, we are troubled by the conclusory nature of that evidence. State's engineers testified that the design was reasonable, but the only foundation offered for their conclusion was the presumption that someone or something else would take care of flooding. Such evidence lacks the solid value necessary to constitute substantial evidence. Moreover, State effectively concedes that under the circumstances that existed at the time the design was approved in 1963, it was no longer reasonable to rely on the Project to contain a 100-year flood. The unreasonableness of the design is further demonstrated by the design documents themselves, which in 1960 presumed that peak flows would cause some shallow flooding. Logic tells us that once it was determined that a 100-year storm was certain to **[***72]** overtop the Project, more extensive flooding would occur. Under these circumstances, we find that State has not offered any substantial evidence upon the basis of which a reasonable public employee could have approved a design that did not take flooding into account.

The trial court's ruling on State's motion for a directed verdict suggests that the court incorrectly intended to allow the jury to determine the reasonableness of the design. It is clear from the record, however, that the jury was not asked to make that determination. **CA(16)**[↑] **(16) HN22**[↑] A ruling or decision, itself **[*760]** correct in law, will not be disturbed on appeal merely because it was given for a wrong reason. (*D' Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 18-19, [112 Cal. Rptr. 786, 520 P.2d 10].) **CA(14c)**[↑] **(14c)** Because our independent examination of the record leads us to conclude that State had not offered substantial evidence of the reasonableness of the drainage design, the trial court did not err in denying State's motion for directed verdict.

d. *Failure of the Project Was Not a Superseding Cause.*

State argues that the breach of the levee was an intervening force that was so extraordinary that it operates as **[***73]** a **[**68]** superseding cause of plaintiffs' injury, cutting off its own liability on all

claims. CA(17)[↑] (17) HN23[↑] Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. (Rest.2d Torts, § 441, subd. (1), p. 465.) A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. (Rest.2d Torts, § 442, subds. (b) & (c), p. 467; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975, p. 366; *Akins v. County of Sonoma* (1967) 67 Cal. 2d 185, 199, [60 Cal. Rptr. 499, 430 P.2d 57].) Similar considerations may apply in the context of inverse condemnation. (*Belair, supra,* 47 Cal. 3d at pp. 559-560.) The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. (*Maupin v. Widling* (1987) 192 Cal. App. 3d 568, 578, [237 Cal. Rptr. 521].) The question is usually one for the trier of fact. **[***74]** (*Ballard v. Uribe, supra,* 41 Cal. 3d at p. 572, fn. 6.) However, since the facts upon which State bases its claim are materially undisputed, we apply our independent review. (*Ghirardo v. Antonioli, supra,* 8 Cal. 4th at p. 799.)

CA(14d)[↑] **(14d)** State argues that the chain of causation between State's project and the harm that plaintiffs sustained is broken by the extraordinary volume of floodwater flowing from the breach of the levee. Other than to note that the 1995 event was the first time its culverts had been overwhelmed, State does not explain in what way the flooding was not foreseeable, and has not carried its burden on this issue. On the other hand, we find ample evidence that flooding was within the scope of human foresight. The Highway 1 bypass was built across a floodplain. State knew at the time it built the culverts that the Project channel could not hold a 100-year storm so that in the event of a 100-year storm, flooding was almost certain to occur. And a 100-year storm was, indisputably, foreseeable. Thus, the flooding, whether caused by the failure of the levee or by the size of the storm, was not so extraordinary an event that State should **[***75]** be relieved of its liability.

[*761] 5. *Monterey Liability*

a. *Monterey's Liability Is Not Derivative.*

CA(18)[↑] **(18)** Monterey attacks the judgment against it on the ground that the trial court disregarded the separateness of Monterey and MCWRA and incorrectly determined that Monterey could be derivatively liable for MCWRA's inadequate maintenance of the Project. We reject this argument because the record is clear that the judgment against Monterey was based on Monterey's direct liability.

The jury received no instruction on vicarious liability, nor was the verdict form drafted to accommodate a vicarious liability theory. The special verdict identified each of the defendants separately, and the jury apportioned damages separately, assigning 30 percent to MCWRA and 23 percent to Monterey. The trial court expressly found that "Monterey County, while a separate legal entity from [MCWRA], concurrently exercised dominion and control over the Project," and concluded that Monterey and MCWRA were "jointly responsible." Therefore, both finders of fact determined that Monterey's liability was joint or concurrent, but not derivative.

[69]** b. *Monterey Substantially Participated in the Project.*

[*76]** Monterey contends that since it did not do anything about the maintenance of the Project channel, and because, it claims, it had no authority to do anything, it cannot be liable for inverse condemnation. We find that Monterey HN24[↑] had the power and the duty to act and that its failure to do so, in the face of a known risk, is sufficient to support liability under article I, section 19.

A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that

proximately caused injury to private property. (*Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal. App. 3d 976, 979-980, [283 Cal. Rptr. 13].) So long as the plaintiffs can show substantial participation, it is immaterial "which sovereign holds title or has the responsibility for operation of the project." (*Stoney Creek Orchards v. State of California* (1970) 12 Cal. App. 3d 903, 907, [91 Cal. Rptr. 139].)

In the majority of cases that apply the substantial participation test, the public entity has defended an inverse condemnation claim on the grounds that the **[***77]** improvement was private, not public. There is no dispute here that **[*762]** the Project was a public project. Thus, the holding in these cases is not directly applicable. However, the rationale is instructive. One such case is *Frustuck v. City of Fairfax* (1963) 212 Cal. App. 2d 345, [28 Cal. Rptr. 357] (*Frustuck*). In that case the city approved a subdivision and drainage plans for private property upstream from the plaintiffs' property. The subdivision increased runoff that ultimately harmed the plaintiff's property. The appellate court agreed that the harm had been caused by the drainage system's upstream diversion of water and that the city, in approving the plans for the subdivision, had substantially participated in that diversion. The court explained, "The liability of the City is not necessarily predicated upon the doing by it of the actual physical act of diversion. The basis of liability is its failure, in the exercise of its governmental power, to appreciate the probability that the drainage system from [the private subdivision] to the Frustuck property, functioning as deliberately conceived, and as altered and maintained by the diversion of waters from their normal channels, **[***78]** would result in some damage to private property." (*Id.* at p. 362; accord, *Sheffet v. County of Los Angeles* (1970) 3 Cal. App. 3d 720, 734-735, [84 Cal. Rptr. 11].)

HN25[↑] In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, as Monterey contends, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. (*McMahan's, supra,* 146 Cal. App. 3d 683; *Pacific Bell, supra,* 81 Cal. App. 4th 596.) Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct. **HN26**[↑] In tort cases, it has been held, "in identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low v. City of Sacramento* (1970) 7 Cal. App. 3d 826, 832, [87 Cal. Rptr. 173].) **[***79]** The ability to remedy the risk also tends to support a contention that the entity is responsible for it. "Where the public entity's relationship to the dangerous **[**70]** property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition . . . ." (*Id.* at pp. 833-834; accord, *Fuller v. State of California* (1975) 51 Cal. App. 3d 926, 946-948, [125 Cal. Rptr. 586].)

The rule we draw from these cases is that **HN27**[↑] a public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that **[*763]** the project would result in some damage to private property, or that it took the calculated risk that damage would result. (See *Frustuck, supra,* 212 Cal. App. 2d at p. 362.)

Returning to the instant matter, although Monterey contends that it had no obligation or any power to control the **[***80]** Project maintenance, the contention does not withstand scrutiny. In December 1947, Monterey entered into an indemnity agreement with Santa Cruz, San Benito

and Santa Clara Counties. Just two months before Monterey executed that agreement, MCWRA's predecessor, the Monterey County Flood Control and Water Conservation District, had given its assurance to the federal government that it, along with the other local interests, would maintain and operate the Project as the Corps required. This assurance is the "resolution marked Exhibit 'A' " in the following excerpt from the indemnity agreement that Monterey executed: "each County assumes to itself the sole obligation and responsibility occasioned by the adoption of the resolution marked Exhibit 'A,' for that portion of the project which is to be constructed within it's [*sic*] boundaries and being bound to each other County to hold them and each of them harmless and free from any liability or obligation arising by reason of the adoption of the resolution marked Exhibit 'A' as to that portion of said project within it's [*sic*] own boundaries; *meaning that each County will take care of the assurances given and obligations incurred* ***[***81]*** *by reason of the resolution marked Exhibit 'A' insofar as they relate to that part of the project being constructed within it's* [*sic*] *boundaries.*" [11] (Italics added.) The plain language of this agreement supports the conclusion that Monterey assumed responsibility for the Project's operation and maintenance.

In practice, Monterey did exercise control over the Project by virtue of its financial control over MCWRA. Monterey and MCWRA and its predecessor district have always shared a common board of supervisors and common boundaries. [12] **HN28**[↑] County **[***82]** employees are considered ex officio employees of MCWRA and are required to perform the same duties for MCWRA that they perform for Monterey. (Stats. 1990, ch. 1159, § 16, p. 4841, West's Ann. Wat.--Appen., *supra*, § 52-16; Stats. 1947, ch. 699, §§ 2, 7, 8, pp. 1739, 1744 [repealed], West's Ann. Wat.--Appen., former §§ 52-2, 52-7, 52-8. **[**71]** Although Monterey and MCWRA are **[*764]** separate entities, the fact that they had governing boards, employees, and boundaries in common is relevant to the analysis. **HN29**[↑] "[C]ommon governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry." (*Rider v. County of San Diego* (1991) 1 Cal. 4th 1, 12, [2 Cal. Rptr. 2d 490, 820 P.2d 1000] (*Rider I*).) Here, we find it significant because of the financial connection between the two entities.

Monterey financial statements reported MCWRA financial activity as if MCWRA was a part **[***83]** of the county. The statements expressly state that they do not report the financial activity of those agencies over which Monterey cannot impose its will or with which Monterey does not share a financial benefit, burden relationship. By implication, the inclusion of MCWRA on Monterey's financial statements means that Monterey itself considers that it is able to impose its will on MCWRA, and that there does exist a financial benefit, burden relationship between Monterey and MCWRA.

Further evidence of Monterey's control is the fact that MCWRA never had a revenue source, independent of the county's financial resources, that was sufficient to fulfill its promise to operate and maintain the Project. At least since 1974 MCWRA had entirely neglected the Project channel in favor of maintaining the levees because there was not enough money to do both. The main reason funding was so limited was that MCWRA's funding for the Project came from "Zone 1," the geographical area directly served by the Project. Zone 1 consists largely of agricultural land and the little town of Pajaro. Since the geographical area is relatively small and the town of Pajaro is economically

---

[11] Monterey argues in its opening brief that its execution of the indemnity agreement was probably a mistake, and that the water district should have executed it instead. Although Monterey insisted throughout the proceedings below that it was an improper defendant, it never argued that it might have executed the agreement by mistake. There is no direct evidence in the record to support this argument, and we decline to consider it for the first time on appeal.

[12] Although MCWRA is also governed by an appointed board of directors, that board did not come into being until the 1990 Water Resources Act. (Stats. 1991, ch. 1130, §§ 5, 10, pp. 5440, 5442, West's Ann. Wat.--Appen. (1999 ed.) §§ 52-48, 52-53.)

disadvantaged, the revenue **[***84]** -generating potential of Zone 1 is and always has been very limited. Therefore, the only way MCWRA could have afforded to undertake the needed maintenance of the Project was to depend upon assistance from the county.

There is no dispute that Monterey's board of supervisors was aware of the maintenance needs of the Project, and the risk of flooding that it posed. From time to time, the board allocated money from its general fund for other programs and projects undertaken by MCWRA. Although Supervisor Del Piero, who represented the district that included Zone 1, attempted several times during the 1970's and 1980's to have Monterey's board make allocations to augment MCWRA's Zone 1 funding, he was, for the most part, unsuccessful.

Monterey cites *Galli v. State of California* (1979) 98 Cal. App. 3d 662, [159 Cal. Rptr. 721] (*Galli*) in support of its contention that an entity cannot substantially participate if it has done nothing. In *Galli*, the local levee maintenance district was liable in tort and inverse condemnation for flood **[*765]** damage resulting from the failure of a levee. The plaintiffs argued that State should also be liable because it had substantially participated **[***85]** in the levee maintenance. The plaintiffs based their argument primarily upon the assertion that the levee was part of a comprehensive water resource development system under the general control of State and State knew that the levee had maintenance problems. (*Id.* at p. 688.) The appellate court rejected the plaintiffs' argument on the ground, among others, that the levee in question was a nonproject levee. A nonproject levee was not required to be maintained to State or federal standards and was not inspected by State, and, consequently, was not under the general control of State as far as its maintenance was concerned. For that **[**72]** reason, State's knowledge of the maintenance problems was not enough to establish substantial participation. (*Id.* at pp. 681, 688.) *Galli* is distinguishable because, as we have explained, Monterey's actual knowledge of the maintenance problems was coupled with its actual ability to control Project maintenance. [13]

[*86]** Monterey argues that it never had any obligation to maintain the Project or any obligation to fund MCWRA to do so. The Supreme Court rejected a similar argument long ago in *Shea v. City of San Bernardino* (1936) 7 Cal. 2d 688, [62 P.2d 365]. In that case the city argued that it was powerless to fix a dangerous condition that existed in a railroad crossing because the Railroad Commission had exclusive jurisdiction over its right of way. The Supreme Court held "the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city." (*Id.* at p. 693.) The court's rationale in that individual personal injury matter applies with even greater force where the risk threatens an injury such as that which occurred here.

The constitutional basis for all takings jurisprudence supports a finding of liability in these circumstances. That is, **[***87]** **HN30[↑]** the owner of private property ought not to contribute more than his or her proper share to the public undertaking. The purpose of article I, section 19 is to distribute throughout the community the loss that would otherwise fall upon the individual. (*Holtz, supra*, 3 Cal. 3d at p. 303.) If Monterey had chosen to fund maintenance efforts to the degree that Mr. Madruga and Supervisor Del Piero determined was necessary, the **[*766]** flood would not have occurred. In failing to expend funds on the Project, Monterey benefited the ultimate recipients of those

---

[13] Monterey also cites *Rider I, supra*, 1 Cal. 4th 1, *Vanoni v. County of Sonoma* (1974) 40 Cal. App. 3d 743, [115 Cal. Rptr. 485], and *Rider v. County of San Diego* (1992) 11 Cal. App. 4th 1410, [14 Cal. Rptr. 2d 885]. These cases involved certain constitutional taxing and debt limitation requirements and were decided on facts vastly different than those before us. We find them inapposite.

funds and took the risk that plaintiffs would be harmed as a result. Therefore, it is proper now to require the county to bear its share of the loss these plaintiffs incurred.

D. DISPOSITION

The judgment is affirmed.

Elia, J., and Wunderlich, J., concurred.

A petition for a rehearing was denied July 23, 2002, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied September 18, 2002. George, C. J., and Baxter, J., did not participate therein.

End of Document

Waste Resource Technologies v. Department of Public Health

Court of Appeal of California, First Appellate District, Division Four

March 16, 1994, Decided

No. A060784.

Reporter
23 Cal. App. 4th 299 *; 28 Cal. Rptr. 2d 422 **; 1994 Cal. App. LEXIS 233 ***; 94 Cal. Daily Op. Service 1900; 94 Daily Journal DAR 3463

WASTE RESOURCE TECHNOLOGIES et al., Plaintiffs, Cross-defendants and Appellants, v. DEPARTMENT OF PUBLIC HEALTH OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents; GOLDEN GATE DISPOSAL COMPANY et al., Interveners, Cross-complainants and Respondents.

Prior History: [***1] Superior Court of the City and County of San Francisco, No. 946390, Stuart R. Pollak, Judge.

Disposition: The judgment is affirmed.

Core Terms

waste management, Ordinance, collection, City's, disposal, solid waste, handling, local government, preemption, regulation, plaintiffs', materials, municipal, local regulation, police power, preempted, recycling, transportation, commercial value, city and county, local authority, Integrated, provisions, discarded, franchise, landfills, services

Case Summary

Procedural Posture

Plaintiffs, waste collection and recycling businesses, appealed an order of the Superior Court of the City and County of San Francisco (California), which granted injunctive relief against them in connection with their claims that a city ordinance allowing exclusive arrangements with certain waste collection companies was preempted by the California Integrated Waste Management Act of 1989, Cal. Pub. Res. Code § 40000.

Overview

Plaintiffs, waste collection and recycling businesses, filed suit against defendant city department of public health, claiming that a city ordinance that provided for exclusive arrangements with certain waste disposal companies was preempted by the California Integrated Waste Management Act of 1989 (Waste Management Act), Cal. Pub. Res. Code § 40000. Intervenors, waste disposal companies who held the exclusive franchises, cross-claimed against plaintiffs and were granted injunctive relief. On appeal, the court affirmed and held that § 40000 did not preempt the local ordinance, that the Waste Management Act looked to a partnership between state and local governments, with local governments retaining a substantial measure of regulatory independence and authority. The legislature recognized that not every aspect of the solid waste problem could be handled in the Waste Management Act, that the details should be left to local authorities with knowledge of local conditions, including the decision of whether local circumstances would be best served by an exclusive waste disposal service. The court ruled that defendant city's ordinance was validly enforced within its police powers.

Outcome

The court affirmed the order granting injunctive against plaintiffs, waste collection and recycling businesses, on the grounds that California's Integrated Waste Management Act of 1989 did not preempt a city ordinance granting exclusive

franchises to intervenor waste disposal companies, and that the ordinance was validly enforced as an exercise of the city's police power.

LexisNexis® Headnotes

Governments > Local Governments > Licenses

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN1[⬇] Local Governments, Licenses

A city has constitutional authorization to make and enforce within its limits all local, police, sanitary, or other ordinances and regulations not in conflict with general laws. Cal. Const. art. XI, § 7.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Hazardous Materials

Environmental Law > Hazardous Wastes & Toxic Substances > Transportation

Governments > Legislation > Types of Statutes

Banking Law > Regulators > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN2[⬇] Common Carrier Duties & Liabilities, Hazardous Materials

Preemption can be either express or implied. Preemption by implication exists when the scope or the goal of state legislation necessitates the abrogation of local regulation. In determining whether the legislature has preempted by implication to the exclusion of local regulation, a court must look to the whole purpose and scope of the legislative scheme. There are three tests: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN3[⬇] Legislation, Effect & Operation

Preemption by implication of legislative intent may not be found when the legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.

Governments > Public Improvements > General Overview

HN4[⬇] Governments, Public Improvements

See Cal. Pub. Res. Code § 40059.

Governments > Local Governments > Police Power

HN5[↓] Local Governments, Police Power

Long-established authority holds that intrusions upon property incidental to the exercise of police powers are accepted as damnum absque injuria. The very essence of the police power is that the deprivation of individual rights and property cannot prevent its operation.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Two corporations sought an injunction allowing them to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise that had been granted in accordance with a city ordinance requiring a permit to collect and dispose of refuse. The trial court denied injunctive relief to plaintiffs but granted it to the holders of the exclusive franchise, thereby permanently restraining plaintiffs from soliciting, contracting, collecting, or transporting refuse (as defined in the ordinance) for a fee. (Superior Court of the City and County of San Francisco, No. 946390, Stuart R. Pollak, Judge.)

The Court of Appeal affirmed. The court held that the Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq.) did not preempt the city's authority under the ordinance to grant exclusive refuse collection permits. The act does not include the plain language needed for express preemption and, since the act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority, preemption by implication of legislative intent may not be found. Furthermore, the court held that the city's determination that the materials plaintiffs wished to collect posed a threat to public health or safety so as to be within the reach of municipal police power had to be upheld on appeal. Plaintiffs failed to establish that the city's police powers were not exercised in good faith and in a constitutional manner. Moreover, although the ordinance required no permit for collection and disposal of refuse having a commercial value, the city's interpretation of "commercial value" as being from the standpoint of the producer of the refuse, rather than the collector of the refuse, was not unreasonable, arbitrary, or capricious. Also, the city had shown that the economic advantages accruing from exclusivity resulted in lower charges and increased efficiency in a number of programs that benefited refuse producers. Lastly, the court held that the ordinance did not violate a constitutional property right to work and earn a living from any legitimate business pursuit. (Opinion by Poche, J., with Anderson, P. J., and Reardon, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a)[↓] (1a) CA(1b)[↓] (1b)

Pollution and Conservation Laws § 3.2—Pollution—Solid Waste—Integrated Waste Management Act—As Preempting Local Regulation of Refuse Collection and Disposal—Authority of City to Grant Exclusive Franchise to Collect Refuse.

--In an action to allow plaintiffs to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise, the trial court properly ruled that the Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq.) did not preempt the city's authority under a city ordinance to grant exclusive refuse collection permits. The act does not include the plain language needed for express preemption and, since the act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority, preemption by implication of legislative intent may not be found.

Much in the act indicates that the Legislature did not intend a wholesale preclusion of political subdivisions' regulatory power, and Gov. Code, § 40059 (issues for local determination), indicates that the Legislature believed there was no need for statewide uniformity that outweighed the advantages of local governments retaining the power to handle problems peculiar to their communities.

CA(2)[⬇] (2)

Municipalities § 56—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Statutes or Charter—Test for Preemption.

--In determining whether the Legislature has preempted by implication to the exclusion of local regulation, a reviewing court must look to the whole purpose and scope of the legislative scheme. There are three tests: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

[See 8 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 794 et seq.]

CA(3)[⬇] (3)

Municipalities § 27—Police Power—Standard of Review—Authority of City to Grant Exclusive Franchise to Collect Refuse.

--In an action to allow plaintiffs to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise that had been granted in accordance with a city ordinance requiring a permit to collect and dispose of refuse, the city's determination that the materials plaintiffs wished to collect posed a threat to public health or safety so as to be within the reach of municipal police power had to be upheld on appeal. Plaintiffs failed to establish that the city's police powers were not exercised in good faith and in a constitutional manner. Moreover, although the ordinance required no permit for collection and disposal of refuse having a commercial value, the city's interpretation of "commercial value" as being from the standpoint of the producer of the refuse, rather than the collector of the refuse, was not unreasonable, arbitrary, or capricious. Also, the city had shown that the economic advantages accruing from exclusivity resulted in lower charges and increased efficiency in a number of programs that benefited refuse producers.

CA(4)[⬇] (4)

Municipalities § 54—Ordinances, Bylaws, and Resolutions—Validity—Ordinance Requiring Permit to Collect and Dispose of Refuse—As Violating Constitutional Property Rights.

--A city ordinance requiring a permit to collect and dispose of refuse did not violate a constitutional property right to work and earn a living from any legitimate business pursuit. The ordinance could be validly enforced as within the city's police powers, and intrusions upon property incidental to the exercise of those powers are accepted as *damnum absque injuria*. The very essence of the police power is that the deprivation of individual rights and property cannot prevent its operation.

Counsel: Reuben & Cera, James A. Reuben, Joeal Yodowitz and Andrew J. Junius for Plaintiffs, Cross-defendants and Appellants.

Louise H. Renne, City Attorney, and John D. Cooper, Deputy City Attorney, for Defendants and Respondents.

Howard, Rice, Nemerovski, Canady, Robertson & Falsk, Peter J. Busch and Todd E. Thompson for Interveners, Cross-complainants and Respondents.

Burke, Williams & Sorensen, Rufus C. Young, Jr., and Virginia R. Pesola as Amici Curiae.

Judges: Opinion by Poch, J., with Anderson, P. J., and Reardon, J., concurring.

Opinion by: POCHE, J.

Opinion

[*302] [423]** The City and County of San Francisco (City) has a long-standing practice of granting to private entities what amounts to an exclusive franchise to collect refuse. The issue presented is whether the City's authority to enter into this type of arrangement survived passage of the California Integrated Waste Management Act of 1989. [1] We conclude that the City still has the power to grant an exclusive refuse **[***2]** collection permit.

BACKGROUND

In November of 1932 the voters of San Francisco adopted an initiative measure entitled the Refuse Collection and Disposal Ordinance (Ordinance). [2] It divides the City into 97 "routes for the collection of refuse." Permits to collect or dispose of refuse from each of these routes are issued by the City's director of public health. Since the 1930's the only permit recipients have been Golden Gate Disposal Company and Sunset Scavenger Company (or their predecessors in interest), which are subsidiaries of Norcal Solid Waste Systems, Inc. As a general proposition, they alone are authorized to collect, transport, or dispose of "refuse," which the Ordinance comprehensively defines as "all waste and discarded materials from **[***3]** dwelling places, households, apartment houses, stores, office buildings, restaurants, hotels, institutions and all commercial establishments, including waste or discarded food, animal and vegetable matter from all kitchens thereof, waste paper, cans, glass, ashes, and boxes **[**424]** and cuttings from trees, lawns and **[*303]** gardens." [3] A permit is not, however, required for the collection, transportation, or disposal of "waste paper or other refuse having a commercial value."

The Ordinance--most recently amended in 1960--makes no mention of recycling which generated this litigation. Initially and primarily concerned with the collection **[***4]** of construction debris excluded from the Ordinance's definition of refuse (see fn. 3, *ante*), and having been blocked in their efforts to enter the recycling field, plaintiffs Waste Resource Technologies and L & K Debris Box Service, Inc., sought an injunction allowing "the collection and recycling, for a fee, of commercially valuable 'dry waste', consisting of cardboard, newspaper and other paper products, plastic bottles, sheet plastic, metal products, Styrofoam packing waste, discarded wood, and other similar commercially valuable materials."

Extensive proceedings before the trial court culminated with entry of a final judgment denying injunctive relief to plaintiffs but granting it to Norcal's subsidiaries; [4] plaintiffs were permanently restrained from soliciting, contracting, collecting, or transporting "refuse, as defined in . . . the . . .

---

[1] This enactment (which shall be cited hereinafter as the Waste Management Act or the Act) comprises Division 30 ("Waste Management") commencing with section 40000 of the Public Resources Code. Subsequent statutory references are to this code unless otherwise indicated.

[2] The Ordinance, which was subsequently amended in 1946, 1954, and 1960, appears as appendix A to the City's charter.

[3] Excluded from the definition of refuse are "debris and waste construction materials, including wood, brick, plaster, glass, cement, wire, and other ferrous materials, derived from the construction of or the partial or total demolition of buildings or other structures."

[4] A third Norcal subsidiary, Sanitary Fill Company, became a party during the course of proceedings in the trial court. It describes itself as owner and operator of "a transfer station . . . where in excess of 600,000 tons of refuse" collected annually by Golden Gate and Sunset Scavenger are processed and transported to the City's landfill site.

Ordinance," for a fee. Plaintiffs thereafter perfected this timely appeal.

[***5] REVIEW

Plaintiffs attack the judgment with an array of challenges to the City's power under the Ordinance to grant and enforce an exclusive permit system which prevents plaintiffs from continuing their collection and recycling operations. Mustering a number of arguments derived from provisions of the Waste Management Act, which they claim gives them a right to collect and recycle discarded materials not within its definition of solid waste, plaintiffs contend that the City's exclusivity arrangements are now prohibited by state law. The premise for these arguments is that the Ordinance is preempted by the Act. Turning to the permit exemption the Ordinance gives to "waste paper or other refuse having commercial value," plaintiffs claim that the City's interpretation of this language has been unreasonable and arbitrary. Lastly, plaintiffs submit that if the City's course of action does not run afoul of the Waste Management Act, it nevertheless exceeds the City's police powers and thus infringes constitutional rights belonging to plaintiffs and [*304] those who contract for plaintiffs' services. Plaintiffs also contend that, as to them, the City should be deemed estopped from its [***6] enforcement of the Ordinance.

Because it proves largely dispositive of these arguments, the preemption issue will be addressed first.

I

HN1[↑] The City has constitutional authorization to "make and enforce within its limits all local, police, sanitary, or other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) Prior to passage of the Waste Management Act, a substantial body of law upheld the police power of a municipality or unit of local government to legislate on the issue of refuse. [5] Equally well established was the concomitant right to grant an exclusive franchise or permit for refuse collection. (E.g., *Reduction Company* v. *Sanitary Works* (1905) 199 U.S. 306, 316-317 [50 L.Ed. 204, 208-209, 26 S.Ct. 100]; *In re Zhizhuzza* (1905) 147 Cal. 328, 335 [81 P. 955]; *Matula* v. *Superior Court* (1956) 146 Cal.App.2d 93, 98-99 [303 P.2d 871]; *Ponti* v. *Burastero* (1952) 112 Cal.App.2d 846, 851-853 [247 P.2d 597]; *Davis* v. *City of Santa Ana* (1952) 108 Cal.App.2d 669, 676-677 [239 [**425] P.2d 656]; [***7] *In re Sozzi* (1942) 54 Cal.App.2d 304, 306 [129 P.2d 40]; 7 McQuillin, Law of Municipal Corporations (3d ed. 1989) § 24.242, 24.245, 24.249-24.251.)

CA(1a)[↑] (1a) HN2[↑] Preemption can be either express or implied. The Waste Management Act does not include anything like the plain language needed for express preemption. [6] Preemption by implication exists when the scope or the goal of state legislation necessitates the abrogation of local regulation. This is what plaintiffs obliquely contend has been done to the Ordinance by the Act. The governing principles are familiar and fixed:

[***8] [*305] CA(2)[↑] (2) "In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the

---

[5] For the moment, we use "refuse" as an inclusive generic having no different meaning from other, equally familiar terms (e.g., trash, garbage, rubbish, etc.).

[6] Such as "The Legislature . . . finds that divergent and competing local tax measures imposed on financial corporations impair the uniform statewide regulation of banks and financial corporations. For this reason . . . the Legislature declares that the state, by this amendment, has preempted such local taxation" (Stats. 1979, ch. 1150, § 20, p. 4220) and "It is the intent of the Legislature that this article preempt all local regulations . . . concerning the transportation of hazardous waste . . .. No state agency, city, city and county, county, or other political subdivision of this state, including, but not limited to, a chartered city, city and county, or county, shall adopt or enforce any ordinance or regulation which is inconsistent with the rules and regulations adopted . . . pursuant to this article." (Health & Saf. Code, § 25167.3.)

For additional examples of state legislation held to oust local efforts, see *In re Murphy* (1923) 190 Cal. 286, 288 [212 P. 30]; *Ex parte Daniels* (1920) 183 Cal. 636, 641 [192 P. 442, 21 A.L.R. 1172].

legislative scheme. There are three tests: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.' . . . [P] CA(1b)[↑] (1b) HN3[↑] Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." (*People* ex rel. *Deukmejian* v. *County of Mendocino* (1984) 36 Cal.3d 476, 485 [204 Cal.Rptr. 897, 683 P.2d 1150] **[***9]** [citations omitted]; accord, *IT Corp.* v. *Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 90-91, 94 [2 Cal.Rptr.2d 513, 820 P.2d 1023] [text & fn. 10].)

The purposes of the Waste Management Act are "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs" (§ 40052). Diminishing landfill space was a particular concern. (See §§ 40000, 41780, 42861, 42870-42871, 46001.)

The Legislature intended to establish a "comprehensive program for solid waste management" (§ 40002) and the purview of the Waste Management Act is indeed broad, extending to what is done with "metallic discards" (§§ 42160-42165), a variety of paper products (§ 42200-42222, 42550-42563, **[***10]** 42750-42791), composted materials (§ 42230-42247), plastics (§§ 42300-42380), retreaded tires (§ 42400-42416), lead-acid and household batteries (§§ 42440-42450), household hazardous waste (§§ 47000-47550), and oil (§§ 48600-48691).

The Act reconstituted a state Integrated Waste Management Board (§§ 40400-40510) with the power to adopt "minimum standards" for solid waste handling and disposal (§ 43020; see § 40502). This board has many **[*306]** responsibilities, among which are approving the integrated waste management plans that all cities and counties must prepare (§§ 41750, 41800), regulating closed and **[**426]** active landfills (§§ 43500-43606, 46000-46507), and administering a fund taking in $20 million annually (§ 47900-48008; see § 46801). The board is also vested with the power to enforce the Act using a number of corrective actions (e.g., cease-and-desist orders, cleanup orders, civil penalties) (§§ 43300, 45000-45201).

But if the scope of the Waste Management Act is broad, it was not achieved by elbowing local government off the stage. Quite the contrary, the Legislature expressly declared that ". . . the responsibility for solid waste management is a shared responsibility between the **[***11]** state and local governments" (§ 40001, subd. (a)), and that local governmental responsibilities "are integral to the successful implementation" of the Act (§ 40703, subd. (a)). There are numerous provisions directing the state board to consult and coordinate with local governmental agencies (§§ 40703, 40914, 43301, 43307) and provide them with myriad types of assistance and information (§§ 40001, subd. (b), 40910, 41791.2, 42500, 42501, 42511, 42540, 42600, subds. (e)-(f), 42650, 43217, 47003, 47103). It is the cities and counties, each of which must designate a "local enforcement agency," that have the primary responsibility for policing the Act, with the state board providing oversight (§§ 43200-43309, 44001-44018, 44100-

44106, 44300-44817, 45000-45407).

In order to sustain plaintiffs' preemption claim, we would have to conclude that with passage of the Waste Management Act the state's entry into the field of refuse collection and disposal is so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy. The difficulties to such a conclusion are simply too great.

It should be apparent from **[***12]** the preceding statutory survey that the Waste Management Act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority. When the Legislature wanted to forbid local initiatives, it knew and used language appropriate to that goal in the Act. [7] The very narrow express quashing of local power in the Act undermines plaintiffs' claim of implied preemption. (See *IT Corp.* v. *Solano County Bd. of Supervisors, supra,* 1 Cal.4th 81 at pp. 94-95.)

[*307] In addition, much in the Waste Management Act indicates that **[***13]** the Legislature did not intend a wholesale preclusion of political subdivisions' regulatory power. There are many provisions attesting to the Legislature's desire to have state and local authorities work together in a cooperative effort. The Act leaves unimpaired local authority to "impose and enforce reasonable land use conditions or restrictions on solid waste management facilities" (§ 40053; see § 41851, 42023, 43208). It also includes an express grant of authority for local government to legislate increased penalties for unauthorized removal of specified materials (§ 41954). Moreover, the provision directing the state board to promulgate "minimum standards for solid waste handling . . . and disposal" (§ 43020) clearly suggests the possibility of local governments adopting additional standards. This also weighs against implied preemption. (See *Candid Enterprises, Inc.* v. *Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 886-888 [218 Cal.Rptr. 303, 705 P.2d 876].)

Courts "will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest **[***14]** to be served that may differ from one locality to another." (*Fisher* v. *City of Berkeley* (1984) 37 Cal.3d 644, 707 [209 Cal.Rptr. 682, 693 P.2d 261].) The Waste Management Act was in large measure a consolidation and recodification of existing law. (See Stats. 1989, ch. 1095, § 32, pp. 3899-3900; Legis. Counsel's Dig., Assem. Bill No. 939, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 409.) Prior to its passage courts accepted that, state legislation notwithstanding, **[**427]** the dominant role in refuse handling belonged to localities. (E.g., *City of Fresno* v. *Pinedale County Water Dist.* (1986) 184 Cal.App.3d 840, 847 [229 Cal.Rptr. 275]; *Matula* v. *Superior Court, supra,* 146 Cal.App.2d at pp. 99-101.) The antecedent statutes were viewed as acknowledging that allowance had to be made for "the unique circumstances of individual communities" and that the Legislature had therefore "empowered local governments to adopt refuse regulations which would best serve the local public interest." (*City of Camarillo* v. *Spadys Disposal Service* (1983) 144 Cal.App.3d 1027, 1031 [193 Cal.Rptr. 22].) **[***15]**

It is self-evident that the way in which Los Angeles deals with refuse may be entirely different from the approach of a small rural town. Provisions of the Waste Management Act demonstrate that the Legislature took account of this reality. It knew that factors such as geography and population density might require a different approach (see §§ 40973, 41782, 42500, 46203). Local conditions transcending city or county boundaries might

[7] The conspicuously unique flat taboo in the Waste Management Act is section 43208, which provides that ". . . no local governing body may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit . . . so as to prohibit or unreasonably regulate the operation of, or the disposal, treatment, or recovery of resources from solid wastes" by a specified type of facility.

require collection and disposal to be handled on a regional basis, and the Legislature encouraged such efforts (see §§ 40001, subd. (b), 40002, 41791.2). It therefore made provision in the Act for the creation and operation of regional **[*308]** agencies (§§ 40970-40975), garbage disposal districts (§§ 49000-49050), and garbage and refuse disposal districts (§ 49100-49195).

Touching all of these points, and close to being dispositive by itself, is HN4[↑] section 40059 (Government Code former section 66757). Given its importance, it deserves quotation in full:

"(a) Notwithstanding any other provision of law, each county, city, [8] district or other local governmental agency may determine all of the following:

[*16]** "(1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

"(2) Whether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.

"(b) Nothing in this division modifies or abrogates in any manner either of the following:

"(1) Any franchise previously granted or extended by any county or other local governmental agency.

"(2) Any contract, license, or any permit to collect solid waste previously granted or extended by a city, county, or a city and county."

[*17]** A number of conclusions--all of which are adverse to plaintiffs--can be extracted from this statute. First, the Legislature recognized that not every aspect of the solid waste problem could be handled in the Waste Management Act; the infinite details of actual day-to-day operations could not be resolved in Sacramento. Second, the Legislature further recognized that those details should more appropriately be specified by local authorities with **[*309]** greater knowledge of local conditions. Third, the Legislature made express provision for this element of local regulation. Fourth, the Legislature left local authorities the option of deciding that local circumstances attending solid waste handling would be best served by an exclusive service. [9] The gist of these conclusions is the **[**428]** Legislature's considered opinion that there was no need for statewide uniformity which outweighed the advantages of local governments retaining the power to handle problems peculiar to their communities.

[*18]** We do not believe that the Waste Management Act represents a fundamental change in the Legislature's traditional outlook towards the subject of waste handling. Section 40059--as well as the entire scope of the Act--establishes the Legislature's awareness that " 'substantial[] geographic, economic, ecological or other distinctions are persuasive of the need for local control' " and thus precludes the subject from being " 'comprehensively dealt with at the state level.' " (*Galvan* v. *Superior Court* (1969) 70 Cal.2d 851, 863-864 [76 Cal.Rptr. 642, 452 P.2d 930].) Beyond question, the Act not only anticipates and tolerates,

[8] As the state's sole city and county, San Francisco qualifies as both a city and a county for purposes of the Waste Management Act (§ 40115).

[9] The trial court had before it evidence that most local governments in California have opted for exclusive garbage collection arrangements. The fact that 78 municipalities appear as amici in support of the City tends to show that the practice is indeed widespread.

but as a practical matter demands, supplementary local regulation to spell out the details of solid waste collection and disposal. This is "convincing evidence that the state legislative scheme was not intended to occupy the field." (*IT Corp.* v. *Solano County Bd. of Supervisors, supra,* 1 Cal.4th at p. 94, fn. 10.) These factors demonstrate that there is no exclusive or even paramount state concern which requires disabling traditional local power in this area. There being no argument made concerning **[***19]** the impact upon transient citizens, not one of the three tests for implied preemption is satisfied. We find no legislative intent to displace deeply entrenched local authority. (See *City of Dublin* v. *County of Alameda* (1993) 14 Cal.App.4th 264, 275-279 [17 Cal.Rptr.2d 845].) Moreover, we conclude that the City's Ordinance harmonizes with the Waste Management Act and furthers its purpose.

II

With the preemption issue decided, plaintiffs' remaining contentions are very easily resolved.

Plaintiffs' arguments construing various provisions of the Waste Management Act look to finding statutory authorization for their conduct. The jumping-off point for all of these creative arguments is the premise that the **[*310]** Ordinance, having been preempted, is no longer a factor. But because the Ordinance is not preempted, it is the governing authority; it is the Act which has become irrelevant.

CA(3)[↑] **(3)** As for plaintiffs' claim that the materials they wish to collect do not pose a genuine threat to public health or safety and thus are beyond the reach of municipal police power, the City's contrary determination is to be taken as "well-nigh conclusive." **[***20]** (*Berman* v. *Parker* (1954) 348 U.S. 26, 32 [99 L.Ed. 27, 37, 75 S.Ct. 98].) The factors explored in the following paragraphs support the plausibility of that determination, which must therefore be upheld. (E.g., *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479]; *Ex parte Lacey* (1895) 108 Cal. 326, 328-329 [41 P. 411].) Once that is done, the subject matter nestles comfortably within the City's valid police powers. (E.g., *City of Fresno* v. *Pinedale County Water Dist., supra,* 184 Cal.App.3d at p. 847.) Those powers, which have been described as "whatever will promote the peace, comfort, convenience, and prosperity" of the City's citizens (*Escanaba Co.* v. *Chicago* (1882) 107 U.S. 678, 683 [27 L.Ed. 442, 445, 2 S.Ct. 185]) should "not be lightly limited." (*Miller* v. *Board of Public Works, supra,* at pp. 484-485.) **[***21]** They are presumed exercised in good faith and a constitutional manner. (E.g., *Ex parte Hadacheck* (1913) 165 Cal. 416, 421-422 [132 P. 584]; *Barenfeld* v. *City of Los Angeles* (1984) 162 Cal.App.3d 1035, 1040 [209 Cal.Rptr. 8].) Plaintiffs have not established otherwise.

An ordinance enacted pursuant to a municipality's police powers may be nullified if palpably unreasonable, arbitrary, or capricious. (E.g., *Barenfeld* v. *City of Los Angeles, supra,* 162 Cal.App.3d at p. 1040; *Brix* v. *City of San Rafael* (1979) 92 Cal.App.3d 47, 50-51 [154 Cal.Rptr. 647].) As previously mentioned, the Ordinance requires no permit for collection and disposal of "waste paper or other refuse having a commercial value." The city attorney initially interpreted "commercial value" from the standpoint of the collector of the refuse, **[**429]** but since 1964 has advised that "commercial value" should be viewed from the vantage point of the producer of the refuse. The City demonstrated that the different perspectives are intrinsically linked **[***22]** and are in fact somewhat circular. In brief, it has shown that the economic advantages accruing from exclusivity result in lower charges (for residential as opposed to commercial users) and increased efficiency in a number of programs (e.g., a curbside recycling program) that benefit refuse producers. [10]

---

[10] It would not be improper for the City to think that new entrants into the waste field would be inimical to the public good by hindering efficient and effective enforcement of the Ordinance. (See *City of Fresno* v. *Pinedale County Water Dist., supra,* 184 Cal.App.3d 840, 847; *Sievert* v. *City of National City* (1976) 60

Although reasonable minds could differ as to the wisdom of the policy behind it, the City's revised interpretation is now of long duration and must **[*311]** be respected as not unreasonable, arbitrary, or capricious. (E.g., *Miller* v. *Board of Public Works, supra,* 195 Cal. 477 at p. 490; *DeYoung* v. *City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].)

[*23]** CA(4)[↑] **(4)** Plaintiffs submit that the ordinance violates their "explicit constitutional property rights . . . to work and earn a living from any legitimate business pursuit." Although plaintiffs are probably not entitled to argue that the manner in which the City enforces the Ordinance infringes upon the rights of plaintiffs' once and future customers to acquire, possess, protect, and dispose of property (see *In re Cregler* (1961) 56 Cal.2d 308, 313 [14 Cal.Rptr. 289, 363 P.2d 305]), we will reach the merits because they are so clear-cut. It having already been shown that the Ordinance may be validly enforced as within the City's police powers, HN5[↑] long-established authority holds that intrusions upon property incidental to the exercise of those powers, are accepted as *damnum absque injuria.* (E.g., *Reduction Company* v. *Sanitary Works, supra,* 199 U.S. 306, 324-325 [50 L.Ed.2d 204, 212-213]; *In re Zhizhuzza, supra,* 147 Cal. at p. 335; *In re Pedrosian* (1932) 124 Cal.App. 692, 700-701 [13 P.2d 389].) As **[***24]** stated by our Supreme Court, ". . . the very essence of the police power . . . is that the deprivation of individual rights and property cannot prevent its operation" (*Beverly Oil Co.* v. *City of Los Angeles* (1953) 40 Cal.2d 552, 557 [254 P.2d 865]).

As for plaintiffs' estoppel argument, we will not address the merits of this factual issue which is unveiled here for the first time. (See *California Teachers' Assn.* v. *Governing Board* (1983) 145 Cal.App.3d 735, 746 [193 Cal.Rptr. 650]; *Coast Electric Co.* v. *Industrial Indemnity Co.* (1983) 144 Cal.App.3d 879, 886, fn. 3 [193 Cal.Rptr. 74].)

Cal.App.3d 234, 237 [131 Cal.Rptr. 358].)

The judgment is affirmed.

Anderson, P. J., and Reardon, J., concurred.

End of Document

TAB 2

Up^ Add To My Favorites

*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII C [VOTER APPROVAL FOR LOCAL TAX LEVIES] [SECTION 1 - SEC. 3] *(Article 13C added Nov. 5, 1996, by Prop. 218. Initiative measure.)*

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

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.

(Sec. 1 amended Nov. 2, 2010, by Prop. 26. Initiative measure.)

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is

imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

(Sec. 3 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

Up^ Add To My Favorites

*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII D [ASSESSMENT AND PROPERTY-RELATED FEE REFORM] [SECTION 1 - SEC. 6] *(Article 13D added Nov. 5, 1996, by Prop. 218. Initiative measure.)*

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

(c) Affect existing laws relating to the imposition of timber yield taxes.

(Sec. 1 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 2. Definitions. As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

(Sec. 3 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

(Sec. 4 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

(Sec. 5 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.
Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except 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. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

(Sec. 6 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

Cal Evid Code § 452

Deering's California Codes are current through Chapter 3 of the 2019 Regular Session.

Deering's California Codes Annotated > EVIDENCE CODE (§§ 1 — 1605) > Division 4 Judicial Notice (§§ 450 — 460)

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

End of Document

Cal Gov Code § 11515

Deering's California Codes are current through Chapter 3 of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 2 Government of the State of California (Divs. 1 — 5) > Division 3 Executive Department (Pts. 1 — 14) > Part 1 State Departments and Agencies (Chs. 1 — 11) > Chapter 5 Administrative Adjudication: Formal Hearing (§§ 11500 — 11530)

§ 11515. Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

History

Added Stats 1945 ch 867 § 1.

End of Document

View the 2017 California Code | View Previous Versions of the California Code

2011 California Code
Water Code
DIVISION 7. WATER QUALITY [13000 - 16104]
CHAPTER 27. California Watershed Improvement Act of 2009
Section 16100

Universal Citation: CA Water Code § 16100 (through 2012 Leg Sess)

This chapter shall be known and may be cited as the California Watershed Improvement Act of 2009.

(Added by Stats. 2009, Ch. 577, Sec. 1. Effective January 1, 2010.)

View the 2017 California Code | View Previous Versions of the California Code

2011 California Code
Water Code
DIVISION 7. WATER QUALITY [13000 - 16104]
CHAPTER 27. California Watershed Improvement Act of 2009
Section 16101

Universal Citation: CA Water Code § 16101 (through 2012 Leg Sess)

(a) Each county, city, or special district that is a permittee or copermittee under a national pollutant discharge elimination system (NPDES) permit for municipal separate storm sewer systems may develop, either individually or jointly with one or more permittees or copermittees, a watershed improvement plan that addresses major sources of pollutants in receiving water, stormwater, urban runoff, or other surface runoff pollution within the watershed or subwatershed to which the plan applies. The principal purpose of a watershed improvement plan is to implement existing and future water quality requirements and regulations by, among other things, where appropriate, identifying opportunities for stormwater detention, infiltration, use of natural treatment systems, water recycling, reuse, and supply augmentation; and providing programs and measures designed to promote, maintain, or achieve compliance with water quality laws and regulations, including water quality standards and other requirements of statewide plans, regional water quality control plans, total maximum daily loads, and NPDES permits.

(b) The process of developing a watershed improvement plan shall be open and transparent, and shall be conducted consistent with all applicable open meeting laws. A county, city, special district, or combination thereof, shall solicit input from entities representing resource agencies, water agencies, sanitation districts, the environmental

community, landowners, home builders, agricultural interests, and business and industry representatives.

(c) Each county, city, special district, or combination thereof shall notify the appropriate regional board of its intention to develop a watershed improvement plan. The regional board may, in its discretion, participate in the preparation of the plan. A watershed improvement plan shall be consistent with the regional board s water quality control plan.

(d) A watershed improvement plan shall include all of the following elements relevant to the waters within the watershed or subwatershed to which the plan applies:

(1) A description of the watershed or subwatershed improvement plan area, the rivers, streams, or manmade drainage channels within the plan area, the agencies with regulatory jurisdiction over matters to be addressed in the plan, the relevant receiving waters within or downstream from the plan area, and the county, city, special district, or combination thereof, participating in the plan.

(2) A description of the proposed facilities and actions that will improve the protection and enhancement of water quality and the designated beneficial uses of waters of the state, consistent with water quality laws and regulations.

(3) Recommendations for appropriate action by any entity, public or private, to facilitate achievement of, or consistency with, water quality objectives, standards, total maximum daily loads, or other water quality laws, regulations, standards, or requirements, a time schedule for the actions to be taken, and a description of appropriate measurement and monitoring to be undertaken to determine improvement in water quality.

(4) A coordinated economic analysis and financing plan that identifies the costs, effectiveness, and benefits of water quality improvements specified in the watershed improvement plan, and, where feasible, incorporates user-based and cost recovery approaches to financing, which place the cost of managing and treating surface runoff pollution on the generators of the pollutants.

(5) To the extent applicable, a description of regional best management practices, watershed-based natural treatment systems, low-flow diversion systems, stormwater capture, urban runoff capture, other measures constituting structural treatment best management practices, pollution prevention measures, low-impact development strategies, and site design, source control, and treatment control best management practices to promote improved water quality.

(6) A description of the proposed structure, operations, powers, and duties of the implementing entity for the watershed improvement plan.

(Added by Stats. 2009, Ch. 577, Sec. 1. Effective January 1, 2010.)

View the 2017 California Code | View Previous Versions of the California Code

2011 California Code
Water Code
DIVISION 7. WATER QUALITY [13000 - 16104]
CHAPTER 27. California Watershed Improvement Act of 2009
Section 16102

Universal Citation: CA Water Code § 16102 (through 2012 Leg Sess)

(a) A regional board shall review, in accordance with the reimbursement requirement described in subdivision (c), a watershed improvement plan developed pursuant to Section 16101 and may approve the plan, including any appropriate conditions to the approval, if the regional board finds that the proposed watershed improvement plan will facilitate compliance with water quality requirements. A regional board s review and approval of the watershed improvement plan shall be limited to components described in paragraphs (1), (2), (3), and (5) of subdivision (d) of Section 16101.

(b) A regional board may not approve a proposed watershed improvement plan that includes a geographical area included in an existing approved watershed improvement plan unless the regional board determines that it is infeasible to amend either the proposed watershed improvement plan or the approved watershed improvement plan to achieve the purposes of this chapter.

(c) The entity or entities that develop a watershed improvement plan that is submitted to the regional board for approval shall reimburse the regional board for its costs, including the costs to review and oversee the implementation of the plan, if nonstate funds are not available to cover the costs of the review and oversight. For the purpose of this paragraph,

the state board shall adopt a fee schedule by emergency regulation in the manner prescribed in paragraph (2) of subdivision (f) of Section 13260. Fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund established by Section 13260.

(d) A regional board may, if it deems appropriate, utilize provisions of approved watershed improvement plans to promote compliance with one or more of the regional board s regulatory plans or programs.

(e) Unless a regional board incorporates the provisions of a watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be compliance with those waste discharge requirements.

(Added by Stats. 2009, Ch. 577, Sec. 1. Effective January 1, 2010.)

View the 2017 California Code | View Previous Versions of the California Code

2011 California Code
Water Code
DIVISION 7. WATER QUALITY [13000 - 16104]
CHAPTER 27. California Watershed Improvement Act of 2009
Section 16103

Universal Citation: CA Water Code § 16103 (through 2012 Leg Sess)

(a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:

(1) The regional board has approved the watershed improvement plan.

(2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. Activities, for the purposes of this paragraph, means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhancement of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

(Added by Stats. 2009, Ch. 577, Sec. 1. Effective January 1, 2010.)

View the 2017 California Code | View Previous Versions of the California Code

2011 California Code
Water Code
DIVISION 7. WATER QUALITY [13000 - 16104]
CHAPTER 27. California Watershed Improvement Act of 2009
Section 16104

Universal Citation: CA Water Code § 16104 (through 2012 Leg Sess)

Nothing in this chapter alters requirements that govern the diversion of water.

(Added by Stats. 2009, Ch. 577, Sec. 1. Effective January 1, 2010.)

TAB 3

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: 10-TC-12 Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4; Filed on June 30, 2011; By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants; *Consolidated with* 12-TC-01 Filed on February 28, 2013; California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28; By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.	Case Nos.: 10-TC-12 and 12-TC-01 *Water Conservation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2014*) (*Served December 12, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

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 deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.[1]

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/30/2011	Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.[2]
10/07/2011	Department of Finance (Finance) requested an extension of time to file comments, which was approved.

[1] See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

[2] Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011	Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.
02/01/2012	DWR requested an extension of time to file comments, which was approved.
03/30/2012	DWR requested an extension of time to file comments, which was approved.
05/30/2012	DWR requested an extension of time to file comments, which was approved.
08/02/2012	DWR requested an extension of time to file comments, which was approved.
10/02/2012	DWR requested an extension of time to file comments, which was approved.
12/03/2012	DWR requested an extension of time to file comments, which was approved.
12/07/2012	Finance requested an extension of time to file comments, which was approved.
02/04/2013	DWR requested an extension of time to file comments, which was approved.
02/06/2013	Finance requested an extension of time to file comments, which was approved.
02/28/2013	Richvale and Biggs filed test claim 12-TC-01 with the Commission.[3]
03/06/2013	The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation*.
03/29/2013	DWR requested an extension of time to file comments, which was approved.
06/07/2013	Finance submitted written comments on the consolidated test claims.[4]
06/07/2013	DWR submitted written comments on the consolidated test claims.[5]
07/09/2013	Claimants requested an extension of time to file rebuttal comments, which was approved.
08/07/2013	Claimants filed rebuttal comments.[6]
08/22/2013	Commission staff issued a request for additional information regarding the eligibility status of the claimants.[7]
09/19/2013	Finance submitted comments in response to staff's request.[8]
09/20/2013	The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.
09/23/2013	DWR submitted comments in response to staff's request.[9]

[3] Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

[4] Exhibit C, Finance Comments on Consolidated Test Claims.

[5] Exhibit D, DWR Comments on Consolidated Test Claims.

[6] Exhibit E, Claimant Rebuttal Comments.

[7] Exhibit F, Request for Additional Information.

[8] Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013	The claimants submitted comments in response to staff's request.[10]
10/07/2013	SCO submitted comments in response to staff's request.[11]
11/12/2013	Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.[12]
11/22/2013	Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.[13]
11/25/2013	The executive director issued notice that the appeal would be heard on March 28, 2014.[14]
01/13/2014	Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.[15]
01/13/2014	Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.[16]
01/15/2014	Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.[17]
07/31/2014	Commission staff issued a draft proposed statement of decision.[18]
08/13/2014	South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

---

[9] Exhibit H, DWR Response to Commission Request for Comments.

[10] Exhibit I, Claimant Response to Commission Request for Comments.

[11] Exhibit J, SCO Response to Commission Request for Comments.

[12] Exhibit K, Notice of Pending Dismissal.

[13] Exhibit L, Appeal of Executive Director's Decision.

[14] Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

[15] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

[16] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[17] Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

[18] Exhibit Q, Draft Proposed Decision.

08/14/2014	Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
10/16/2014	Claimant filed comments on the draft proposed decision.[19]
10/17/2014	California Special Districts Association (CSDA) filed comments on the draft proposed decision.[20]
10/17/2014	Environmental Law Foundation (ELF)filed comments on the draft proposed decision.[21]
10/17/2014	DWR filed comments on the draft proposed decision.[22]
10/22/2014	Northern California Water Association (NCWA) filed late comments on the draft proposed decision.[23]
11/07/2014	Claimants filed late comments.[24]

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.[25] In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.[26] Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

---

[19] Exhibit R, Claimant Comments on Draft Proposed Decision.

[20] Exhibit S, CSDA Comments on Draft Proposed Decision.

[21] Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

[22] Exhibit U, DWR Comments on Draft Proposed Decision.

[23] Exhibit V, NCWA Comments on Draft Proposed Decision.

[24] Exhibit W, Claimants Late Rebuttal Comments.

[25] Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[26] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.[27] This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).[28] An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;[29] and a report on the supplier's progress in meeting urban water use targets.[30]

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.[31] In addition, the Act requires agricultural water suppliers (with specified exceptions)[32] to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),[33] describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.[34]

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;[35] and to make the proposed plan available for

---

[27] Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[28] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[29] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[30] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[31] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[32] See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

[33] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[34] Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[35] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.[36] An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP;[37] and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.[38]

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,[39] which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require "that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Moreover, article X, section 2 provides that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"[40] Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

---

[36] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[37] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[38] Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[39] Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

[40] Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.[41]
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs. [42]
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.[43]
- Water Code section 375(b) provides that public water suppliers may encourage conservation through "rate structure design." The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state's water policy and that water conservation pricing is a best management practice.[44]
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier's general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.[45]
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.[46]

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

---

[41] Statutes 1976, chapter 709, p. 1725, section 1.

[42] Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

[43] Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

[44] Statutes 1993, chapter 313, section 1.

[45] Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

[46] Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.[47] They have general authority to fix and collect charges for any service of the district.[48]
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.[49]
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.[50]

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.[51] This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.[52] The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level."[53] The Legislature declared as state policy that:

> (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
>
> (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

---

[47] Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

[48] Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

[49] Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

[50] Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

[51] Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

[52] Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

[53] Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.[54]

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.[55]

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.[56] Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in California," may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.[57]

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a "catastrophic interruption of water supplies," such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.[58]

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

---

[54] Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[55] Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

[56] Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

[57] Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

[58] Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.[59]

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.[60]

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.[61]

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan ... and any amendments or changes required as a result of that review shall be adopted pursuant to this article."[62] Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.[63]

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified..."[64]

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."[65] As amended by Statutes 2007, chapter 628, section 10644 requires an

---

[59] Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

[60] Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

[61] Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

[62] Water Code section 10640 (Stats. 1983, ch. 1009).

[63] Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[64] Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

[65] Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.[66] And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.[67]

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP "by complying with all the provisions of the 'Memorandum of Understanding Regarding Urban Water Conservation in California'...and by submitting the annual reports required by Section 6.2 of that memorandum."[68] These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier's "demand management measures" that are currently or could be implemented.[69]
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.[70]
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

---

[66] Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

[67] Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

[68] Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

[69] Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

[70] Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that "[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part."[71] The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier "may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan." Any best water management practice that is included in the plan that is identified in the "Memorandum of Understanding Regarding Urban Water Conservation in California" (discussed below) is deemed to be reasonable for the purposes of this section.[72] Therefore, suppliers are expressly authorized to recover the costs of implementing "reasonable water conservation measures" or any "best water management practice...identified in [the MOU for Urban Water Conservation]."

3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.[73] The 1986 Act stated in its legislative findings and declarations that "[t]he Constitution requires that water in the state be used in a reasonable and beneficial way..." and that "[t]he conservation of agricultural water supplies are of great concern." The findings and declarations further stated that "[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans," as are "[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board..." Therefore, the act stated that "it is the policy of the state as follows:"

(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.

(b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

---

[71] Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

[72] Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

[73] Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

(c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.[74]

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers "shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices…" That report "shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management…" If a "significant opportunity exists" to conserve water or improve the quality of drainage water, the supplier "shall prepare and adopt an agricultural water management plan…" (AWMP).[75] The Act provided, however, that an agricultural water supplier "may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part." The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.[76] In addition, an AWMP "shall address all of the following:" quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.[77]

The Act further provided that an agricultural water supplier required to prepare an AWMP "may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques."[78] And, "[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon." This requirement

---

[74] Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

[75] Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

[76] Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

[77] Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

[78] Former Water Code section 10841(as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.[79] In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and "shall file with [DWR] a copy of its plan no later than 30 days after adoption."[80] Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that "[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both."[81]

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,[82] and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.[83]

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:[84]

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.[85]
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

[79] Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

[80] Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

[81] Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

[82] Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

[83] See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[84] The Water Measurement Law was added by Statutes 1991, chapter 407.

[85] Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.[86]

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to "recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.[87]
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.[88]

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of "agricultural" and "urban retail" water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,[89] and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

---

[86] Section 527 as amended by statutes 2005, chapter 22.

[87] Section 526 as amended by Statutes 2004, chapter 884.

[88] Section 531.10 as added by Statutes 2007, chapter 675.

[89] See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of "agricultural water supplier" and "urban retail water supplier."

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of $72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."[90] South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."[91] Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."[92]

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include 'the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."[93] And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts…or to adopt a method for determining an urban water use target."[94]

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.[95] They further allege that they are required to adopt a pricing structure for water customers

---

[90] Exhibit A, 10-TC-12, page 3.

[91] *Ibid.*

[92] Exhibit A, 10-TC-12, page 4.

[93] Exhibit A, 10-TC-12, pages 7-8.

[94] Exhibit A, 10-TC-12, page 8.

[95] Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that "[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process."[96]

In addition, Richvale and Biggs allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices," as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.[97] Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to "various entities" and posted on the internet for public review.[98]

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered." In addition, prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible." And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the "contents of the plans" are "more encompassing than plans required under the former law."[99] Richvale and Biggs allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation."[100]

As discussed below, in the early stages of Commission staff's review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend "proceeds of taxes," within the meaning of articles XIII A and XIII B.[101] After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission's executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.[102] Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

---

[96] *Ibid.*

[97] Exhibit A, 10-TC-12, pages 4-6.

[98] Exhibit A, 10-TC-12, page 6.

[99] Exhibit A, 10-TC-12, page 8.

[100] Exhibit A, 10-TC-12, page 9.

[101] Exhibit F, Commission Request for Additional Information, page 1.

[102] Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.[103] This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.[104] Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least $1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.[105]

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that "[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process."[106] Therefore, claimants conclude that "[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218's majority protest procedure."[107]

In addition, claimants note the Commission's analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not "ignore a prior Commission decision that is directly on point…" The claimants assert that "as this Commission has already recognized…" Proposition 218 "created a legal barrier to establishing or increasing fees or charges…" and as a result claimants "can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject…" a fee increase.[108]

The claimants assert that the reasoning of the draft proposed decision "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..."[109] and "would create a class of local agencies that are per se ineligible for reimbursement under this test

---

[103] Exhibit L, Appeal of Executive Director's Decision.

[104] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[105] *Ibid.*

[106] Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

[107] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[108] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[109] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[110] The claimant calls this a "sea change in Constitutional interpretation..."[111]

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."[112] The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."[113] The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources...'"[114]

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."[115] The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."[116]

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.[117]

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."[118] Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.[119] Finance further

[110] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[111] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[112] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[113] Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

[114] Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

[115] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[116] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

[117] Exhibit W, Claimant Late Comments, pages 1-4.

[118] Exhibit C, Finance Comments, page 1.

[119] Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that "each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales."[120] Moreover, Finance argues that "special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B...*and only when the mandated costs in question can be recovered solely from the proceeds of taxes*."[121] Finance argues that the claimants "should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations."[122] Finance did not submit comments on the draft proposed decision.

State Controller's Office

In response to Commission staff's request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the "Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013," that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.[123] However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that "Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board," and that "Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO." However, the SCO noted that it "has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported." The SCO concluded, therefore, that "we are unable to determine which special district is subject to report an annual appropriations limit." The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a "program" within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a "new program," because it is "a refinement of urban and agricultural water conservation requirements that have been part of the law for years." DWR further asserts that even if the Act "were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs." And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because "they are free to choose alternative measurement methods." And finally, DWR argues that the Act does not impose any new programs or higher levels of service "because what is required is compliance with general and evolving water conservation standards based on

---

[120] Exhibit C, Finance Comments, page 2.

[121] Exhibit C, Finance Comments, page 2 [emphasis in original].

[122] Exhibit C, Finance Comments, page 2.

[123] Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California's Constitution revising water use standards."[124]

In comments on the draft proposed decision, DWR "concurs with and fully supports the ultimate conclusion reached…", but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.[125] DWR argues that "a law that governs private and public entities alike is not a 'program' for purposes of article XIII B…"[126] DWR continues:

> Claimants, in their Rebuttal Comments, ignore DWR's reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) "only 7.67%" of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable "programs" because those requirements "fall overwhelmingly on local governmental agencies."[127]

DWR maintains that "there are, in fact, 72 private wholesale and retail suppliers out of a total of 369…so the proportion of private water suppliers is actually 16.3 percent." And, "based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered."[128]

DWR acknowledges that there are more public than private water suppliers, but asserts that "[u]nder the Supreme Court's test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state."[129] DWR explains that "generally," in this context, is not synonymous with "commonly," and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, "generally" refers to

---

[124] Exhibit D, DWR Comments, page 2.

[125] Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

[126] Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

[127] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant's Rebuttal Comments, pages 3-4].

[128] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[129] Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning "those that apply to all persons or entities of a particular class."[130] The Water Conservation Act, DWR maintains, "does just that."[131]

In addition, DWR disputes that the provision of water services is a "classic governmental function," as asserted by the claimants.[132] The California Supreme Court has held that reimbursement should be limited to new "programs" that carry out the governmental function of providing services to the public.[133] DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

> Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the "government as sovereign." At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.[134]

DWR argues that "California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions." DWR continues: "Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*." "On the other hand," DWR reasons, "there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery."[135]

DWR thus "urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

---

[130] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391.

[131] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[132] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

[133] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

[134] Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[135] Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike." And, DWR reiterates: "contrary to Claimants' suggestion, water delivery, while clearly an important service, is not a classic "governmental function" in the constitutional sense."[136]

C. Interested Person Positions:[137]

California Special Districts Association

CSDA asserts that "the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6...as amended by Proposition 1A in 2004..."[138] CSDA argues that the draft proposed decision "rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6."[139]

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, "indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction."[140] CSDA further asserts that "[t]he plain language also mandates the state to appropriate the 'full payment amount' of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance."[141] CSDA reasons that "there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs." Therefore, absent "such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement...to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law."[142]

CSDA also argues that the voters' intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.[143] CSDA argues that "[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes..." In fact, CSDA argues, the LAO analysis indicates that Proposition 1A "expand(s) the circumstances under

---

[136] Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

[137] "Interested person" is defined in the Commission's regulations to mean "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (Cal. Code Regs., tit. 2, § 1181.2(j).)

[138] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[139] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[140] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[141] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[142] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[143] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer."[144] CSDA maintains that "[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision."[145] CSDA relies on the language of the ballot pamphlet, which states: "if the state does not fund a mandate within any year, the state must eliminate local government's duty to implement it for that same time period."[146] CSDA concludes that "[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes."[147]

In addition, CSDA argues that the Commission's analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.[148] Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to "majority protest procedures" and "may not be expended for general governmental services…which are available to the public at large in substantially the same manner as they are to property owners..." [149] And, revenues from property-related fees "may not be used for any purpose other than that for which the fee was imposed;" and "may not exceed the costs required to provide the property related service."[150] In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.[151] CSDA also notes that "Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue."[152] CSDA argues that "[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs."[153] CSDA goes on to argue that "[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

---

[144] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[145] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[146] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[147] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[148] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[149] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[150] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[151] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[152] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[153] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B."[154] CSDA concludes that "[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D."[155]

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, "[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim..."[156] ELF asserts that "the Commission should find that charges for irrigation water are not 'property-related fees' for the purposes of Article XIII D of the California Constitution."[157] Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);[158] however, ELF also argues that "charges for irrigation water are not 'property-related fees' at all." ELF reasons: "As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle."[159]

ELF continues: "Article XIII D, § 3 restricts local governments' ability to levy a new "assessment, fee, or charge" without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees)." However, ELF asserts that "Section 2 of Article XIII D makes Proposition 218's relatively limited reach abundantly clear."[160] ELF notes that section 2 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[161] ELF therefore reasons that "[f]ees that are not 'imposed upon a parcel' or that are not imposed upon a 'person as an incident of property ownership' or that are not a 'user fee or charge for a property related service' are not subject to Article XIII D."[162] ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*[163] the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.[164] The court, ELF

---

[154] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[155] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[156] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[157] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[158] Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

[159] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[160] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[161] California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[162] Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

[163] (2001) 24 Cal.4th 830.

[164] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was "not 'property related' because it was dependent on the property's use – it was not imposed on the property simply as an incident of ownership."[165]

ELF goes on to note that "no case has squarely addressed the issue…" but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrheim*,[166] the court held that a groundwater augmentation charge was a property-related fee, but "it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators."[167] And, ELF notes, other cases have found that domestic water use is "necessary for 'normal ownership and use of property.'"[168] ELF concludes that these cases, and others, "present no obstacle to the conclusion that irrigation water is not a property-related service."[169] ELF concludes that fees for irrigation water are not "property-related" but a business-related fee, and that therefore the Commission should deny this test claim.[170]

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to "highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley."[171] NCWA argues that "[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies' landowners."[172] NCWA continues: "The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission."[173] NCWA denies that any "exemptions" apply to the test claim statutes, and "urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers."[174]

IV. Discussion

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

---

[165] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

[166] (2007) 150 Cal.App.4th 1364.

[167] Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

[168] Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

[169] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[170] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[171] Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

[172] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[173] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[174] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

> 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, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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."[175] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] ..."[176]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[177]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[178]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[179]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

---

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

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

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

[178] *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56).

[179] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.[180]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[181] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[182] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[183]

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not "property-related" fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

---

[180] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[181] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[182] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

[183] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[184]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "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 that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties..."[185] 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 voters.[186]

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."[187] 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 the 'proceeds of taxes.'"[188]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[189] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[190]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[191] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to

---

[184] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

[185] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[186] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[187] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[188] *Ibid.*

[189] California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

[190] California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[191] California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[192] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds"; "investment (or authorizations to invest) funds...of an entity of local government in accounts at banks...or in liquid securities";[193] "[a]ppropriations for debt service"; "[a]ppropriations required to comply with mandates of the courts or the federal government"; and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[194]

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,[195] 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 and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[196]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

---

[192] California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[193] California Constitution, article XIII B, section 8.

[194] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[195] *County of Fresno, supra,* (1991) 53 Cal.3d 482.

[196] *Id,* at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness."[197] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[198]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[199] the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[200]

---

[197] (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

[198] *Id*, at p. 31.

[199] (1997) 55 Cal.App.4th 976.

[200] *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates,* affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[201]

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno, supra, Redevelopment Agency of San Marcos, supra,* and *City of El Monte, supra,* a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno, supra,* predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency, Redevelopment Agency of San Marcos,* and *City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.[202] In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218…" and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[203] In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.[204] The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."[205]

---

[201] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[202] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

[203] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

[204] See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions…" and "Articles XIII A, B, C, and D should be read together and harmonized…"].

[205] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno, supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.[206] Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.[207] If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.[208]

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.[209]

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,[210] can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.[211]

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A...severely restricted the *taxing* powers of local governments."[212] Article XIII B "was not intended to reach beyond taxation..." and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue..."[213] The issue, then, is

---

[206] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno*, *supra*, 53 Cal.3d at p. 485.

[207] See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."

[208] See *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

[209] *City of El Monte*, *supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976].

[210] See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency*, *supra* (1985) 169 Cal.App.3d 24; *County of Fresno*, *supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976.

[211] California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

[212] See *County of Fresno*, *supra*, 53 Cal.3d at p. 487 [emphasis added].

[213] *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;[214] it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.[215] However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.[216] CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.[217] 12-TC-01 was filed by Richvale and Biggs only,[218] and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.[219] However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.[220] The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

---

[214] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

[215] See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

[216] See California Constitution, article XIII B, section 6 (b-c).

[217] Exhibit A, Test Claim 10-TC-12.

[218] Exhibit B, Test Claim 12-TC-01.

[219] See Exhibit K, Notice of Pending Dismissal.

[220] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that "Richvale and Biggs do not receive property tax revenue."[221] With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it "does not receive an annual share of property tax revenue."[222] However, Biggs had earlier stated in a declaration by Karen Peters, the District's Executive Administrator, that "Biggs receives an annual share of property tax revenue," and for "Fiscal Year 2011 the amount of property tax revenue is expected to be approximately $64,000."[223] Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District's General Manager, states that "[t]hat revenue estimate actually reflects Biggs' *assessment*, equating to $2 per acre within Biggs' boundaries." Mr. Massa goes on to state that "Biggs does not currently receive any share of ad valorem *property tax* revenue."[224,225]

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and "other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes."[226] The "historical quirk" to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

---

[221] Exhibit I, Claimant Response to Request for Additional Information, page 1.

[222] Exhibit A, South Feather Water and Power Test Claim, page 22.

[223] Exhibit A, 10-TC-12, page 30.

[224] Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

[225] See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale's statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency's fee authority, and that the Districts are eligible for reimbursement "for the reasons already explained in the Districts' 'Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01.'" (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director's Decision)].

[226] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.[227] They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.[228] In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.[229]

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."[230] The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."[231] Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.[232] On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

---

[227] Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[228] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[229] Exhibit I, Claimant Response to Request for Additional Information, page 3.

[230] Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

[231] Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

[232] Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

"divert[ing] existing revenues from their authorized purposes..."[233] Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants' assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes[234] and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that "South Feather and Paradise receive property tax revenue," and "are in the process of establishing their appropriations limits for their current fiscal years."[235]

Declarations attached to claimants' response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, "I have not calculated or otherwise established Paradise's appropriation limit as set forth in Proposition 4." Mr. Phillips further states that "[a]t the request of Paradise's legal counsel, I have begun working to establish Paradise's appropriation limit and intend...to ask Paradise's Board of Directors to adopt a resolution...for its current fiscal year."[236] Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not "calculated or otherwise established South Feather's appropriation limit" during his employment with South Feather. Mr. Wong further states that "[a]t the request of South Feather's legal counsel, I have begun working to establish South Feather's appropriation limit and intend, after the requisite public review period, to ask South Feather's Board of Directors to adopt a resolution establishing South Feather's appropriation limit for its current fiscal year."[237]

---

[233] See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

[234] Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

[235] Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

[236] See Exhibit I, Claimant Response to Request for Additional Information, page 394.

[237] See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier "subject to the mandates imposed by the Agricultural Water Measurement Regulations…and the Water Conservation Act of 2009."[238] The declaration of Steve Knell, Oakdale's General Manager, attached to the Request for Substitution, states that Oakdale "receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties." The declaration further states that the District "received $5,701,730 in property taxes for 2011-2013 and expects to receive approximately $1.9 million in 2014."

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,[239] but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.[240]

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it "is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution," and is an agricultural water supplier, subject to "the mandates imposed by the Water Conservation Act of 2009…and the Agricultural Water Measurement Regulations."[241] In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District "received $520,420 in property taxes in 2013 and expects to receive $528,300 in 2014."[242]

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,[243] but Table 1 does not indicate an appropriations limit for the district.[244]

---

[238] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

[239] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

[240] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

[241] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

[242] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

[243] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

[244] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,[245] states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."[246] The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,[247] to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

[245] Exhibit A, Test Claim 10-TC-12, page 3.

[246] Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[247] Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."[248] The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."[249] The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier " is defined as "a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes."[250] The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."[251] Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."[252] The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.[253] However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

---

[248] Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[249] Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[250] Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[251] Exhibit A, 10-TC-12, page 2.

[252] Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[253] Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010…[254]

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010…the baseline daily per capita water use, urban water

[254] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data."[255]

And, section 10608.20(j) provides that an urban retail water supplier "shall be granted an extension to July 1, 2011…" to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 "that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part."[256]

Section 10608.40 provides that an urban retail water supplier shall also "report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631."[257]

Section 10608.24 provides that each urban retail water supplier "shall meet its interim urban water use target by December 31, 2015," and "shall meet its [final] urban water use target by December 31, 2020."[258]

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.[259] Pursuant to existing section 10621, that plan was required to be updated "once every five years…in years ending in five and zero."[260] And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

> (A) Single-family residential.
>
> (B) Multifamily.
>
> (C) Commercial.
>
> (D) Industrial.
>
> (E) Institutional and governmental.
>
> (F) Landscape.
>
> (G) Sales to other agencies.
>
> (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

---

[255] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[256] Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[257] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[258] Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[259] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[260] Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.[261]

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.[262]
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.[263]
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.[264]
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.[265]
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.[266]
- Meet interim urban water use target by December 31, 2015.[267]
- Meet final urban water use target by December 31, 2020.[268]

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

---

[261] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[262] Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[263] Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[264] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[265] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[266] Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[267] Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[268] Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that "[i]n complying with this part," an urban retail water supplier shall conduct at least one public hearing "to accomplish all of the following:" (1) allow community input regarding the urban retail water supplier's implementation plan; (2) consider the economic impacts of the urban retail water supplier's implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.[269]

The claimants assert that "prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target."[270]

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

> Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code...[271]

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier's water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.[272] As the implementing agency, DWRs interpretation of the Act is entitled to great weight.[273]

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

---

[269] Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[270] Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

[271] Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

[272] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[273] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.[274]

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

> The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.[275]

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."[276] However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."[277] The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."[278] The plain language of

---

[274] Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[275] Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[276] Exhibit A, 10-TC-12, page 3.

[277] Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[278] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that "[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California." In addition, the claimants allege that "a failure to meet the 20% target shall be a violation of law on and after January 1, 2021," citing Water Code section 10608.8.[279] The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

> (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
>
> (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
>
> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

[279] Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

(1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

(2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

(3) Facilitate the financing of capital improvements for on-farm irrigation systems.

(4) Implement an incentive pricing structure that promotes one or more of the following goals:

(A) More efficient water use at the farm level.

(B) Conjunctive use of groundwater.

(C) Appropriate increase of groundwater recharge.

(D) Reduction in problem drainage.

(E) Improved management of environmental resources.

(F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

(5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

(6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[280]

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate." In addition, they allege, agricultural water suppliers are required to "adopt a pricing structure for water customers based on the quantity of water delivered." The claimants further allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices" specified in section 10608.48(c).[281]

The claimants argue that prior to the test claim statute, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered," and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that "[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective." The claimants conclude that now "[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective."[282] In addition, the claimants assert that prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible."[283]

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

> (a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.
>
> (b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

---

[280] Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

[281] Exhibit A, Test Claim 10-TC-12, page 4.

[282] Exhibit A, 10-TC-12, page 8.

[283] Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.[284] Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]" if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2)*," which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.[285] The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.[286] As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.[287]

---

[284] Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

[285] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[286] Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

[287] Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.[288]

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.[289]
- *If the measures are locally cost effective and technically feasible,* implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:

  (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

  (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

  (3) Facilitate the financing of capital improvements for on-farm irrigation systems.

  (4) Implement an incentive pricing structure that promotes one or more of the following goals:

  (A) More efficient water use at the farm level.

  (B) Conjunctive use of groundwater.

  (C) Appropriate increase of groundwater recharge.

  (D) Reduction in problem drainage.

  (E) Improved management of environmental resources.

  (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

  (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

  (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

---

[288] Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

[289] Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[290]

2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that "[t]his part shall

[290] Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993..." Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.[291]

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.[292]

Section 10826, as added, provides that the plan "shall do all of the following:"

> (a) Describe the agricultural water supplier and the service area, including all of the following:
>
> (1) Size of the service area.
>
> (2) Location of the service area and its water management facilities.
>
> (3) Terrain and soils.
>
> (4) Climate.
>
> (5) Operating rules and regulations.
>
> (6) Water delivery measurements or calculations.
>
> (7) Water rate schedules and billing.
>
> (8) Water shortage allocation policies.
>
> (b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:
>
> (1) Surface water supply.
>
> (2) Groundwater supply.
>
> (3) Other water supplies.
>
> (4) Source water quality monitoring practices.
>
> (5) Water uses within the agricultural water supplier's service area, including all of the following:
>
> (A) Agricultural.
>
> (B) Environmental.
>
> (C) Recreational.
>
> (D) Municipal and industrial.
>
> (E) Groundwater recharge.
>
> (F) Transfers and exchanges.

---

[291] Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

[292] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(G) Other water uses.

(6) Drainage from the water supplier's service area.

(7) Water accounting, including all of the following:

(A) Quantifying the water supplier's water supplies.

(B) Tabulating water uses.

(C) Overall water budget.

(8) Water supply reliability.

(c) Include an analysis, based on available information, of the effect of climate change on future water supplies.

(d) Describe previous water management activities.

(e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.[293]

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."[294]

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."[295] And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."[296]

In addition, section 10828 provides that:

> (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply*:
>
> (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
>
> (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

---

[293] Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[294] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[295] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[296] *Ibid.*

(b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.[297]

And, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[298]

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the "schedule" for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.[299]

As noted above, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.[300] Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828."[301] Therefore, the requirements to include in a supplier's AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

---

[297] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[298] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[299] Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

[300] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[301] Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.[302] The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, "encourages" suppliers to file certain "documentation as an attachment with the USBR-accepted water management/conservation plan."[303] However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.[304]
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.[305]
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.[306]
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

---

[302] Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[303] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, "The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. "DWR *encourages* CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook)." Emphasis added.

[304] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[305] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[306] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.[307]

In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[308]

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.[309]

  In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[310]

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.[311]

  An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[312]

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR "may update the efficient water management practices required pursuant to [section 10608.48(c)]," but only after conducting public hearings. Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement" of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

---

[307] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[308] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[309] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[310] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[311] Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[312] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, "shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan."[313]

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

> Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...[314]

Section 10842 provides that an agricultural water supplier shall implement its AWMP "in accordance with the schedule set forth in its plan."[315]

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

> (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
>
> (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
>
> (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
>
> (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
>
> (6) The California State Library.
>
> (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[316]

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

---

[313] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[314] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[315] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[316] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.

(b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.[317]

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.[318] Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.[319] This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

> All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review process.*[320]

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

---

[317] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[318] See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

[319] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[320] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[321] That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.[322]
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.[323]
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.[324]
- Implement the AWMP in accordance with the schedule set forth in the AWMP.[325]
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
    - DWR.
    - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
    - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

---

[321] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[322] Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[323] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[324] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[325] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[326]

- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.[327]

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).[328] The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.[329] None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

---

[326] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[327] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[328] Code of Regulations, title 23, section 597 (Register 2012, No. 28).

[329] Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of "accuracy," "agricultural water supplier," "approved by an engineer," "best professional practices," "customer," "delivery point," "existing measurement device," "farm-gate," "irrigated acres," "manufactured device," "measurement device," "new or replacement measurement device," "recycled water," and "type of device."[330] Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

> An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.
>
> **(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer**
>
> An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).
>
> (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
>
> and,
>
> (2) A new or replacement measurement device shall be certified to be accurate to within:
>
> (A) ±5% by volume in the laboratory if using a laboratory certification;
>
> (B) ±10% by volume in the field if using a non-laboratory certification.
>
> **(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers**
>
> (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

[330] Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

(A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.

(B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.

(2) An agricultural water supplier choosing an option under paragraph (b)(l) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.

(B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(l)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:

(i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;

(ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

(iii) That it was approved by the agricultural water supplier's governing board or body.[331]

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement "at the delivery point or farm-gate of a single customer" using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate "by either (1) using an existing measurement device, certified to be accurate within ±12% by volume or (2) a new or replacement measurement device, certified to be accurate within ±5% by volume in the laboratory if using a laboratory certification or ±10% by volume in the field if using a non-laboratory certification." In addition, the claimants allege that the regulations provide for "limited exceptions" if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.[332] The claimants assert that prior to these regulations, "there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception."[333]

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that "[n]o local government is required to comply with those regulations." DWR asserts that "the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements…described in the 2009 Water Law." DWR concludes that "[the regulations] are optional, and the suppliers are free to comply with the law in other ways."[334]

Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement" to comply with the measurement requirements of subdivision (b).[335] The phrase "may use or implement" suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers "shall implement all of the following critical efficient management practices…(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered]."[336] Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

---

[331] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[332] Exhibit B, 12-TC-01, page 4.

[333] Exhibit B, 12-TC-01, page 6.

[334] Exhibit D, DWR Comments, page 11.

[335] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[336] *Ibid.*

supplier "shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section." The language states that the supplier "may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section."[337] There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it "shall" pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
    - An existing measurement device certified to be accurate to within ±12% by volume.
    - A new or replacement measurement device certified to be accurate to within:
        - ±5% by volume in the laboratory if using a laboratory certification;
        - ±10% by volume in the field if using a non-laboratory certification.

    If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.[338]
- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
    - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
    - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.[339]
- And, when a supplier chooses to measure water delivered at an upstream location:

---

[337] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[338] Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

[339] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
  - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
  - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
  - That it was approved by the agricultural water supplier's governing board or body.[340]

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

(1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:

(A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

(B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.

(2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

[340] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

(A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

(B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:

(i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

(ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.

(2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.

(3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

(1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.

(2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

(1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).

(2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.

(3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:

(A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.

(B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

(C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).

(4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of "existing, new or replacement measurement device[s]," as specified.[341] In addition, section 597.4 provides that field-testing "shall be performed" following "best professional practices," and either sampling "no less than 10% of existing devices," as recommended by the department, or developing a "sampling plan using an accepted statistical methodology." Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier "shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices..."[342] In addition, section 597.4 provides that records documenting compliance "shall be maintained...for ten years or two Agricultural Water Management Plan cycles."[343] Section 597.4 further provides that "all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored," and if a device no longer meets the accuracy requirements of section 597.3, the supplier "shall take appropriate corrective action," including repair or replacement, if necessary.[344] And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and "best professional practices" for water measurement in their agricultural water measurement plan.[345]

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.[346] To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.[347] In addition, for any agricultural water supplier that is also an urban water supplier,

---

[341] Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

[342] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[343] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[344] Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

[345] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

[346] Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

[347] See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.[348] To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
    - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
    - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.[349]
- Certify the initial accuracy of new or replacement measurement devices by either:
    - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
    - Non-laboratory certification after installation of a measurement device in the field, documented by either:
        - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devises for each type of device installed at specified locations; or
        - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.[350]
- Ensure that field-testing is performed as follows:

---

[348] Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

[349] Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

[350] Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.[351]

- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.[352]
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.[353]
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.[354]
- Report the information listed below in its Agricultural Water Management Plan(s). :
  - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

---

[351] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[352] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[353] Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

[354] Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
    - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.
    - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.
    - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.[355]

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

[355] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[356] 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.*[357]

Accordingly, in *Connell v. Superior Court of Sacramento County,*[358] the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: "rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[359] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[360] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees 'sufficient' to cover their costs,"

---

[356] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

[357] *Id,* at p. 487 [emphasis added].

[358] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

[359] *Id,* at p. 399.

[360] *Ibid.*

and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[361]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[362] The court further noted that, "this basic principle flows from common sense as well." The court reasoned: "As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[363]

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are "statutorily authorized to charge a fee for the delivery of water," and thus "each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue."[364] DWR asserted that "Senate Bill 1017, which amended the [Urban Water Management Act] in 1994," provides authority for an urban water supplier "to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates."[365]

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that "[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor." Section 35470 further provides that "[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.*"[366] In addition, section 50911 provides that an irrigation district may "[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands."[367]

---

[361] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

[362] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[363] *Ibid.*

[364] Exhibit C, Finance Comments on Test Claim, page 1.

[365] Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

[366] Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

[367] Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to "recover in its rates" for the costs incurred in preparing and implementing water conservation measures.[368] And, section 10608.48 expressly requires agricultural water suppliers to "[a]dopt a pricing structure for water customers based at least in part on quantity delivered."[369] This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.[370]

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants' statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and "ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09." The claimants argue that "under Proposition 218, Claimants' customers could reject the Board's action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates."[371] In comments on the draft proposed decision, the claimants reiterate, more urgently:

> The Commission should not accept its staff's invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission' s credibility, eviscerate the Commission's Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.[372]

For the following reasons, the claimant's argument is unsound. In *Connell v. Superior Court, supra* the court held that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs," and that the economic viability of the necessary rate increases "was irrelevant and injected improper factual questions into the inquiry."[373] *Connell* did not address the possible impact of Proposition 218 on the districts' fee authority, because the districts did not "contend that the services at issue...are among the 'many services'

---

[368] Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

[369] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[370] Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[371] Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[372] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[373] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218."[374] The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts' legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[375] article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

> Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> [¶…¶]
>
> (c) Voter Approval for New or Increased Fees and Charges. *Except 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. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

[374] 59 Cal.App.4th at p. 403.

[375] Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.[376]

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: "Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies' discretion, to unilaterally establish or increase fees or charges for the provision of water services."[377] After Proposition 218, the claimants argue they are now "authorized to do no more than *propose* a fee increase that can be rejected" by majority protest.[378] Furthermore, the claimants maintain that the Commission's decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments' fee authority: "[f]inding *Connell* inapposite, the Commission observed that 'The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.'"[379]

However, claimants' reliance on the Commission's prior action is misplaced, and claimants' assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants* and *the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.[380] The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,[381] "[w]ith some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996."[382] The Commission reasoned that "it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate,"[383] and that "[a]bsent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)."[384] Thus, the

---

[376] California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

[377] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[378] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[379] Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[380] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

[381] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

[382] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

[383] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

[384] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that "[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[385]

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.[386] The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[387] Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe "water service." Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission's earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service "are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority."[388] Claimants therefore argue that they "find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers."[389]

However, the so-called "majority protest provision," which claimants allege constitutes a legal barrier to claimants' fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants' fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,[390] or provide evidence that a court determined that Proposition 218 represents a

---

[385] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, at p. 401].

[386] See California Constitution, article XIII D, section 6(c).

[387] Government Code section 53750(m) (Stats. 2002, ch. 395).

[388] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[389] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[390] If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs "first incurred," within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels..."[391]

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

---

section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

[391] See article XIII D, section 6(a)(2).

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

RE: **Decision**

Water Conservation, 10-TC-12 and 12-TC-01
Water Conservation Act of 2009 et al.
South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: December 12, 2014

Heather Halsey, Executive Director

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 March 18, 2019, I served the:

- **Claimants' Rebuttal Comments filed March 15, 2019**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a , B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)a, E.5.c(3), E.5.e, E.6, F.1.a, F.1.b, F.2.a, F.2.b, F.2.c, F.3.b(3), and F.3.c, 16-TC-05
  County of Riverside, Riverside County Flood Control and Water Conservation District, and the Cities of Murrieta, Temecula, and Wildomar, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 18, 2019 at Sacramento, California.

Jill Magee

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 2/12/19

Claim Number: 16-TC-05

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a, B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)a, E.5.c(3), E.

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

Aaron Adams, City Manager, *City of Temecula*
Claimant Contact
41000 Main Street, Temecula, CA 92590
Phone: (951) 506-5100
aaron.adams@temeculaca.gov

Paul Angulo, Auditor-Controller, *County of Riverside*
Claimant Contact
4080 Lemon Street, 11th Floor, Riverside, CA 92502
Phone: (951) 955-3800
pangulo@rivco.org

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Cindy Black, City Clerk, *City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
ctzafopoulos@cityofsthelena.org

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

David Burhenn, *Burhenn & Gest, LLP*
Claimant Representative
624 South Grand Avenue, Suite 2200, Los Angeles, CA 90017
Phone: (213) 629-8788
dburhenn@burhenngest.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Daniel Carrigg, Deputy Executive Director/Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8222
Dcarrigg@cacities.org

Annette Chinn, *Cost Recovery Systems,Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Michael Coleman, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@muni1.com

Anita Dagan, Manager, Local Reimbursement Section, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 324-4112
Adagan@sco.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

David Gibson, Executive Officer, *San Diego Regional Water Quality Control Board*
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340
Phone: (858) 467-2952
dgibson@waterboards.ca.gov

Catherine George Hagan, Senior Staff Counsel, *State Water Resources Control Board*
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108
Phone: (619) 521-3012
catherine.hagan@waterboards.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Sunny Han, Project Manager, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5907
Sunny.han@surfcity-hb.org

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Erika Li, Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Jane McPherson, Financial Services Director, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
JmcPherson@oceansideca.org

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Gary Nordquist, City Manager, *City of Wildomar*
Claimant Contact
23873 Clinton Keith Road, Suite 201, Wildomar, CA 92595
Phone: (951) 677-7751
gnordquist@cityofwildomar.org

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*

1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.nunez@waterboards.ca.gov

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8214
jpina@cacities.org

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (949) 440-0845
markrewolinski@maximus.com

Brian Rutledge, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brian.Rutledge@dof.ca.gov

Theresa Schweitzer, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3140
tschweitzer@newportbeachca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Natalie Sidarous, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7453
nSidarous@sco.ca.gov

Michelle Skaggs Lawrence, City Manager, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
citymanager@oceansideca.org

Eileen Sobeck, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
Eileen.Sobeck@waterboards.ca.gov

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Tracy Sullivan, Legislative Analyst, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
tsullivan@counties.org

Kim Summers, City Manager, *City of Murrieta*
Claimant Contact
1 Town Square, Murrieta, CA 92562
Phone: (951) 461-6010
KSummers@murrietaCA.gov

Derk Symons, Staff Finance Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Derk.Symons@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Jason Uhley, General Manager - Chief Engineer, *Riverside County Flood Control*
Claimant Contact
and Water Conservation District, 1995 Market Street, Riverside, CA 95201
Phone: (951) 955-1201
juhley@rivco.org

Emel Wadhwani, Senior Staff Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3622
emel.wadhwani@waterboards.ca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*

3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Patrick Whitnell, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8281
pwhitnell@cacities.org

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov