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April 29, 2026

VIA CSM DROPBOX

Ms. Juliana F. Gmur
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2021-0105, Case No. 22-TC-01: **Claimants' Rebuttal Comments**

Dear Ms. Gmur:

Attached please find Claimants County of Los Angeles and Los Angeles County Flood Control District's Rebuttal Comments.

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

I declare under penalty of perjury that the foregoing, signed on April 29, 2026, is true and correct to the best of my personal knowledge, information or belief.

/s/

Howard Gest
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CLAIMANTS' REBUTTAL COMMENTS

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2021-0105, Case No. 22-TC-01

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I. INTRODUCTION

This test claim seeks reimbursement for mandates imposed by Los Angeles Regional Water Quality Control Board Order No. R4-2021-0105, *Waste Discharge Requirements and National Pollutant Discharge Elimination System (NPDES) Permit for Municipal Separate Storm Sewer System (MS4) Discharges Within the Costal Watersheds of Los Angeles and Ventura Counties* (the "2021 Permit"). This permit became effective on September 11, 2021.

Specifically, Claimants County of Los Angeles ("County") and the Los Angeles County Flood Control District ("District") (collectively, "Claimants") seek a subvention of funds for the following mandates:

1. Requirements to comply with Water Quality-Based Effluent Limitations ("WQBELs") set forth in 2021 Permit Part IV.A.2 and Attachments J through S (except Attachments K, L and N);

2. Requirements to comply with monitoring requirements for WQBELs set forth in 2021 Permit Part VII and Attachment E;

3. Requirements relating to the prohibition of non-stormwater discharges through the permittees' MS4s and an Illicit Discharge Detection and Elimination Program, set forth in 2021 Permit Parts III and VIII.I.5, 6, and 8;

4. Requirements relating to public information and participation programs set forth in 2021 Permit Parts VIII.D.1, 3 and 4;

5. Requirements relating to tracking, inspecting, and enforcing post-construction Best Management Practices ("BMPs") as set forth in 2021 Permit Parts VIII.F.3.c.i, ii, and iii;

6. Requirements relating to construction sites set forth in 2021 Permit Parts VIII.G.4.a, 5.a, 5.b.i and ii; and

7. Public Agency requirements, including maintaining an updated database of permittee-owned or operated facilities and an Integrated Pesticide Management Program as set forth in 2021 Permit Parts VIII.H.2 and H.5.

The State Water Resources Control Board ("State Board") and Los Angeles Regional Water Quality Control Board ("Regional Board") (collectively, the "Water Boards") contend that reimbursement for these mandates should be denied because Claimants allegedly have fee authority, the mandates are not new or a high level of service, or the mandates are required by federal law.

These contentions lack merit. Claimants will first address the mandate issues. Claimants will then address the issue of whether Claimants have fee authority.

II. COMPLIANCE WITH WATER QUALITY-BASED EFFLUENT LIMITATIONS IS A NEW PROGRAM OR HIGHER LEVEL OF SERVICE

A. The Permit's Requirements to Comply with Water Quality-Based Effluent Limitations Are a New Program or Higher Level of Service

2021 Permit Part IV.A.2 requires Claimants to comply with WQBELs set forth in 2021 Permit Attachments K through S (except Attachments K, L and N). These WQBELs are derived from Total Maximum Daily Loads ("TMDLs") adopted into the Permit. 2021 Permit Part IV.B.1.d.

The Water Boards contend that these are not reimbursable state mandates because 33 of the 36 TMDLs incorporated in the 2021 Permit were previously in Los Angeles Regional Board Order No. R4-2012-0175 ("2012 Permit"). The Water Boards contend these requirements are therefore not a "new program or higher level of service." The Water Boards further contend that Claimants have fee authority to pay for these mandates. Comments of the State Water Resources Control Board and Los Angeles Regional Water Quality Control Board on Test Claim, dated January 20, 2026 ("Water Boards' Comments") at 9-11.

It is not sufficient, however, to merely assert that 33 of the TMDLs had been reflected in the 2012 Permit. When these TMDLs were incorporated into the 2021 Permit, a new, independent obligation, often with more stringent requirements, was imposed. As a result, these 33 TMDLs did impose a new program or higher level of service.

First, the TMDLs in the 2021 Permit imposed requirements that were not required under the 2012 Permit. Many of the TMDLs allowed higher levels of pollutant discharges under the 2012 Permit than were allowed under the 2021 Permit. The following TMDL WQBELs had more stringent limits under the 2021 Permit as compared to the 2012 Permit as compliance dates became due under the 2021 Permit:

TMDL	Compliance Date	Permit Page
Santa Clara River Estuary and Reaches 3, 5, 6, and 7 Bacteria TMDL (dry weather)	3/21/2023	M-2
Malibu Creek Bacteria TMDL	7/15/2026	O-14
Malibu Creek Watershed Nutrients TMDL	7/15/2026	O-18
Ballona Creek Estuary Toxic Pollutants TMDL (sediment-bound total PCBs)	1/11/2025	O-22

Ballona Creek Estuary Toxic Pollutants TMDL (metals)	7/15/2026	O-22
Ballona Creek Estuary Toxics TMDL, sediment-bound total PCBs discharged to Ballona Creek Estuary	7/15/2026	O-22
Ballona Creek, Ballona Estuary and Sepulveda Channel Bacteria TMDL	7/15/2026	O-26, O-27
Ballona Creek Metals TMDL (wet weather)	7/15/2026	O-33, O-34
Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL	7/15/2024	O-36
Marina del Rey Harbor Toxic Pollutants TMDL	7/15/2024	O-39
Los Angeles River and Tributaries Metals TMDL (dry weather)	1/11/2024	Q-2
Los Angeles River Bacteria Implementations Schedule (dry weather)	3/23/2022; 3/23/2023; 9/23/2023; 3/23/2024; 3/23/2025;	Q-6, Q-7, Q-8, Q-9
San Gabriel River and Tributaries Metals and Selenium TMDL (wet weather)	9/30/2026	R-1
San Gabriel River and Tributaries Metals and Selenium TMDL (dry weather)	9/30/2023	R-1
Los Cerritos Channels Metals TMDL	9/30/2023	S-1

These more stringent limits constituted a higher level of service.

Second, the 2012 Permit's obligations terminated on September 11, 2021, the date the 2021 Permit became effective. (See 2021 Permit, p. 11 (This Order supersedes . . . Order No. R4-2012-0175 . . . .").) Absent any other legal compulsion after that date, the Claimants were not required to implement any programs to implement the TMDLs. *See City of Arcadia v. United States EPA*, 265 F.Supp.2d 1142, 1144 (N.D. Calif. 2003) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans. [Citation.] A TMDL does not, by itself, prohibit any conduct or require any actions."). Thus, Claimants

had no obligation to comply with any of the requirements imposed by the 2012 permit after September 11, 2021, including the TMDL WQBELs. The only reason the Claimants had any obligation to comply with TMDL WQBEL obligations after September 2021 was because those obligations were imposed by the 2021 Permit.

"Higher level of service" refers to "state mandated increases in the services provided by local agencies." *Dept. of Finance v. Commission on State Mandates (2021)* 59 Cal.App.5th 546, 556 ("*Dept. of Finance II*"). The obligations imposed under the 2012 Permit ceased with the termination of that permit. Thus, under the 2012 Permit, there is no obligation to comply with water quality-based effluent limitations after September 2021, when the 2012 Permit terminated. The 2021 Permit, however, extended that obligation for the life of the 2021 Permit, *i.e.,* it increased the services the Claimants must provide from September 2021 until the end of the 2021 permit, a "state mandated increase in the services provided by the local agencies." *Id.*

The Water Boards nevertheless argue that the Commission has already found that these TMDLs were not "new" when the Commission addressed the 2012 Permit, and that this ruling should apply equally here (Water Boards' Comments at 10-12). The Commission's decision with respect to the 2012 Permit, however, is not binding precedent. The Commission has the opportunity and should consider these issues anew.

The Commission found that the TMDLs in the 2012 Permit did not impose a new program because the 2001 Permit had contained receiving water limitations and discharge prohibitions that, according to the Commission, essentially required permittees to limit their discharges consistent with what became the TMDL WQBELs. According to the Commission, "the only difference between the prior permit and the test claim permit is that the test claim permit now identifies the waste load allocations for the pollutants calculated in the TMDLs so that claimants know the percentage of pollutant loads that need to be reduced to meet the existing water quality standards in the affected water bodies." *In Re Test Claim* California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, Case Nos. 13-TC-01 and 02 (December 5, 2025) ("Commission Decision") at 111.

It is an error of law, however, to compare the TMDLs, or anything else in the test claim permit, with the receiving water limitations and discharge prohibitions set forth in the 2001 Permit, Parts 2.1 or 2.2, because those prohibitions have specifically been found to be unlawful under the Clean Water Act.

In *City and County of San Francisco v. Environmental Protection Agency,* 604 U.S. 334, 343 (2025) the United States Supreme Court was called upon to address this very question, whether receiving water limitations that prohibited any "discharge that 'contributes to a violation of applicable water quality standard' for receiving waters," and a discharge prohibition that prohibited "any discharge that 'creates pollution, contamination or nuisance as defined by California Water Code section 13050 . . . ." could lawfully be included in an NPDES permit. 604 U.S. at 343. Referring to these prohibitions as "end result" requirements that impose upon a permittee responsibility for the quality of the water in a body of water, as compared to the quality of water in a

permittee's discharge, *Id*. at 338, the Supreme Court specifically found that the Clean Water Act "does not authorize EPA to impose NPDES permit requirements that condition permit holders compliance on whether receiving waters meet applicable water quality standards." *Id.* at 345-346.

It is therefore an error of law to compare the requirements in the 2021 Permit, and specifically, the TMDLs, with the receiving water limitations and discharge prohibitions in the 2001 or 2012 Permit. When determining whether a mandate is new, the Commission should only compare the 2012 and 2021 permit requirements with lawful requirements, not unlawful ones.

It is also an error of fact to compare the 2021 Permit's WQBEL provisions with the 2001 Permit's receiving water limitations. As a matter of fact, the requirements are imposed on different water bodies and require different actions.

As the Supreme Court recognized in *City and County of San Francisco*, receiving water limitations focus on "'end-result' requirements." 604 U.S. at 338. In other words, receiving water limitations relate to the quality of the receiving water, such as the Los Angeles, San Gabriel or Santa Clara Rivers, or the Pacific Ocean, itself.

In contrast, TMDLs and their WQBELs focus on a specific permittee's discharge from its MS4, before it goes into the receiving water. Whereas the quality of receiving waters may be impacted by many different discharges and natural sources, the TMDL WQBELs (sometimes referred to as Waste Load Allocations ("WLAs")) require the permittee to take certain actions to reduce the pollutants in its own discharge.

This difference results in the imposition of different requirements on the permittees. Whereas under the 2001 Permit the permittees were only legally obligated to address the water quality of the receiving water, the 2021 Permit's WQBELs required the permittees to address their own specific discharges at the location (their "outfalls") where they discharged *into* the receiving water.

In *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 ("*San Diego Permit Appeal II"*), the court addressed a similar question. In this case the state contended that the prior permit required permittees to prohibit non-stormwater discharges and reduce the discharge of pollutants in stormwater from the MS4 to the maximum extent practicable, and new permit conditions did not change that obligation. The state argued that

> "a condition that did not appear in prior permits or has been updated to require additional expenditures is not new because it does not increase permittees' underlying obligation to eliminate or reduce the discharge of pollutants from their MS4s to the maximum extent practicable. Rather, the condition insures compliance with the same

> standard that has applied since 1990 when permittees obtained their first permit." [1]

The Court of Appeal rejected that argument, finding that "the application of [Article XIII B] Section 6, however, does not turn on whether the underlying obligation to abate pollution remains the same." Instead,

> "to determine whether a program imposed by a permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. [Citations.] This is so even though the conditions were designed to satisfy the same standard of performance." [2]

Thus, even if the Commission could compare the 2021 Permit TMDL WQBEL provisions with receiving water limitations, it would be an error to find that the WQBELs are not a new program simply because they were designed to satisfy the same standard of performance as the 2001 or 2012 Permit receiving water limitations and discharge prohibitions. The WQBELs in the 2021 Permit required conduct and programs aimed at reaching more stringent pollution limits in Claimants MS4 discharges. These limits did not exist under the 2001 and 2012 Permits.

B. The 2021 Permit Imposed Three New TMDLs Which Are Reimbursable Mandates

As the Water Boards recognize, the 2021 Permit contains three new TMDLs and their associated WQBELs: (1) The Santa Clara River Lakes Nutrients TMDL (Lake Elizabeth only) (2021 Permit, Attachment M); (2) The Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments (Permit, Attachment O); and (3) The San Gabriel River, Estuary, and Tributaries Indicator Bacteria TMDL (Attachment R). Water Boards' Comments at 12-13.

The Water Boards contend that these requirements are not new because Claimants were already required by the 2001 and 2012 permits to comply with water quality standards and, if there is an exceedance, to identify the source and implement additional BMPs and monitoring (Water Boards' Comments at 13).

As set forth above, however, the WQBELs for these three TMDLs impose a requirement qualitatively different than the general obligation to comply with receiving water limitations. As the Court's held in *San Diego Permit Appeal II*, 85th Cal. App.5th at 559, the application of article XIII B, section 6, does not turn on whether the underlying obligation to abate pollution is the same. Instead,

> "to determine whether a program imposed by a permit is new,

[1] 85 Cal.App.5th at 559.

[2] *Id.*

> we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. [Citations] This is so even though the conditions were designed to satisfy the same standard of performance."

85 Cal.App. 5th at 559.

Here, the legal requirements imposed by incorporation of these three new TMDLs are different than the obligations required by the general receiving water limitations in the prior permits. Again, under the prior permits, the focus was on the quality of the receiving water itself, not the discharge from the MS4. Here, the WQBELs regulate the discharge from Claimants' MS4, a discharge that was not directly regulated in the past. Specifically:

> (1) The Santa Clara River Lakes Nutrients TMDL (Lake Elizabeth only) places a limit on the amount of phosphorous and nitrogen that can be present and discharges to the lake. (2021 permit, page M-4). These limits were not in any enforceable permit or other document prior to their incorporation into the 2021 Permit.
>
> (2) The Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients to Address Benthic Community Impairments likewise limits the amount of phosphorous and nitrogen that can be present in discharges in several water sheds below Malibu Lake. Permit, Page O-20. Again, these requirements were not present in any enforceable document until their placement into the 2021 Permit.
>
> (3) The San Gabriel River, Estuary, and Tributaries Indicator Bacteria TMDL limits the amount of total coliform, fecal coliform, and enterococcus and E. coli in discharges to the San Gabriel River and its tributaries. Like the other two new TMDLs, these requirements were not present or enforceable in any enforceable document prior to their inclusion into the 2021 permit.

These three new TMDLs, therefore, imposed a new program or higher level of service. The limitations they imposed on Claimants' MS4 discharges did not exist prior to the inclusion of these TMDLs into the 2021 Permit. These are new legal requirements that are imposed. They therefore constitute a new program or higher level of service. *San Diego Permit Appeal II*, 85 Cal.App. 5th at 559.

Moreover, again, it is error to compare the new WQBEL requirements against the prior receiving water limitations in the prior permits. Those receiving water limitations have specifically been found to be unlawful under the Clean Water Act. *City and County San Francisco v. Environmental Protection Agency,* 604 US 334 (2025). When determining whether a mandate is new, the Commission should compare the 2021 permit requirements with lawful requirements, not unlawful ones. It is an abuse of discretion to do otherwise.

Finally, the Malibu Creek and Lagoon TMDL for Sedimentation and Nutrients is a United States EPA-established TMDL, not one adopted by the Regional Board. In its decision with respect to TMDLs incorporated into the 2012 permit, the Commission found that the requirement to develop a watershed management program for EPA-adopted TMDLs did constitute a state mandate. Commission Decision at 126-146. The Water Boards contend that this finding is not applicable here because the Regional Board adopted an implantation plan for this TMDL in 2016 (Water Boards' Comments at 13-14).

The TMDL, however, did not create any legally mandated obligation until it was incorporated into the 2021 Permit. That incorporation then imposed obligations with which Claimants had to comply prior to the effective date of a revised implementation plan. See 2021 Permit, Attachment O, Part IV.D. 2 through 4 (Permit, page O- 20). Like the US EPA-adopted TMDLs addressed in the 2012 Permit, Claimants were compelled to comply with nitrogen and phosphorous requirements with respect to discharges to Malibu Creek and Lagoon so that they would be in compliance with the permit prior to the effective date of the revised implementation plan. See Permit, Attachment O, Part IV.D. 2 and 4.

III. COMPLIANCE WITH MONITORING REQUIREMENTS FOR WATER QUALITY-BASED EFFLUENT LIMITATIONS IS A NEW PROGRAM OR HIGHER LEVEL OF SERVICE

In conjunction with the requirement to comply with WQBELs, the 2021 Permit imposes the obligation to monitor, *i.e.,* sample and analyze the water, to determine compliance with that obligation.

Specifically, 2021 Permit Part VII requires the permittees, including the Claimants, "to comply with the [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order and Standard Provisions relating to monitoring, reporting, and record keeping in Attachment D of this Order." 2021 Permit, p. 40.

2021 Permit Attachment E, Part III.C.2.a, requires this monitoring to "align with the requirements in Attachments K through S of the Order," which set forth the WQBELs with which the permittees, including the Claimants, must comply. *See* 2021 Permit, Part IV.A.2

To that end, Attachment E, Sections VI.A.3.b and VII.E.2.b specifically require to be monitored "[p]ollutants assigned a WQBEL . . . and parameters to determine compliance with WQBELs." [3]

The Water Boards contend that these monitoring requirements are not a new program or higher level of service because federal law requires a monitoring program,

[3] Attachment E to the Permit also requires the monitoring program, whether an Integrated Monitoring Program or a Coordinated Integrated Monitoring Program, to address "all TMDL" monitoring requirements. 2021 Permit, Attachment E, Parts III.A.4 and B.5.

and these monitoring requirements were previously required under the 2012 Permit (Water Boards' Comments at 14-15).

As set forth above, however, the Commission should reconsider its findings with respect to the WQBEL obligations imposed by the permit. In any event, the WQBEL monitoring is a new program or higher level of service because the 2021 Permit extends the period the monitoring is required. In addition, new monitoring requirements were imposed in conjunction with the 3 new TMDLs incorporated into the 2021 Permit.

"Higher level of service" refers to "state mandated increases in the services provided by local agencies." *Dept. of Finance II,* 59 Cal.App. 5th at 556. The obligations imposed under the 2012 Permit ceased with the termination of that permit.

Thus, under the 2012 Permit, there is no obligation to monitor compliance with WQBELs after September 2021, when the 2012 Permit terminated. The 2021 Permit, however, extended that obligation for the life of the 2021 Permit, *i.e.,* it increased the services the Claimants must provide from September 2021 until the end of the 2021 Permit, a "state mandated increase in the services provided by the local agencies." *Id.* This constituted a higher level of service.

In addition, as discussed above, the 2021 Permit included 3 new TMDLs. Monitoring that had not been previously required is required for the WQBELs associated with these TMDLs. The obligation to include these three, new monitoring obligations is a new program or higher level of service. This obligation did not exist under the 2012 Permit.

IV. REQUIREMENTS RELATING TO THE PROHIBITION OF NON-STORMWATER DISCHARGES THROUGH PERMITTEES' MS4s ARE A NEW PROGRAM OR HIGHER LEVEL OF SERVICE

A. The 2021 Permit Non-Stormwater Discharge Requirements Constitute a New Program or Higher Level of Service

Contrary to the Water Boards' assertions (Water Boards' Comments at 15-19), the 2021 Permit's non-stormwater discharge requirements go beyond the federal requirements and as such are state mandates. They also are a new program or higher level of service.

The Clean Water Act requires MS4 NPDES permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(ii). The implementing federal regulation, 40 CFR 122.26(d)(2)(iv)(B), provides in pertinent part that an MS4 permittee should have (1) a program to prevent illicit discharges (with the exception of certain specified discharges unless they are identified as sources of pollutants); (2) procedures to screen portions of the MS4 during the lifetime of the permit to identify potential illicit discharges; (3), procedures to investigate portions of the MS4 that have a reasonable potential based on that screening to contain illicit discharges; (4) procedures to respond to spills; (5) a program to promote, publicize and facilitate public reporting of illicit discharges; (6) an educational and public

information program to facilitate the proper management and disposal of used oil and toxic materials; and (7) controls to limit infiltration of seepage from municipal sanitary sewers.

Here, the non-stormwater Permit requirements go beyond the requirements set forth in the federal CWA regulations, which do not mandate the obligations imposed by 2021 Permit. Specifically:

(1) 2021 Permit Part III.A.5.a requires Claimants to develop procedures to require conditionally exempt non-stormwater dischargers to notify the Claimants, obtain pertinent permits, conduct monitoring, implement BMPs in accordance with Table 5 of the Permit, and maintain records. The federal regulations, however, do not require MS4 dischargers to police exempt or conditionally exempt non-stormwater dischargers. The Regional Board designed and imposed these requirements as a matter of its discretion.

(2) 2021 Permit Part III.A.5.b requires Claimants to maintain records of all conditionally exempt non-stormwater discharges in an electronic database. Nothing in the federal regulations require MS4 operators to create such a database.

(3) 2021 Permit Part III.A.5.c requires Claimants to evaluate monitoring data collected pursuant to the Permit's Monitoring and Reporting Program (Permit Attachment E) and other associated data and information to determine, among other things, if authorized or conditionally authorized non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations and/or water quality based effluent limitations. Nothing in the federal regulations require MS4 operators to analyze monitoring data to determine if another entity is causing such exceedances. Moreover, as discussed below, the Regional Board has in fact shifted this responsibility from itself onto the permittees, including the Claimants.

(4) 2021 Permit Part III.A.6 requires Claimants to address non-stormwater discharges if they are found to be such a source of pollutants, through effective prohibition, conditions, diversions, or treatment. These tasks involve, among other things, meeting with non-stormwater dischargers, identifying and analyzing the nature of non-stormwater discharges, the development and implementation of discharge procedures, conducting public education efforts and evaluating monitoring data. Like the evaluation tasks set forth above, nothing in the federal regulations imposes an obligation on MS4 operators to perform these activities or otherwise police third-party dischargers. This also is a Regional Board responsibility that has been shifted onto the Claimants.

Because these non-stormwater requirements are not required by the federal statute or regulations, the Regional Board imposed them as a matter of discretion. Because they were imposed as a matter of discretion, they are state, not federal mandates. *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, 765, 771.

Additionally, by specifying the steps to be taken by the Claimants with regard to the evaluation of non-stormwater discharges, including the development and

implementation of procedures, the evaluation of monitoring data, reporting to the Regional Board, and coordination with local water purveyors and other requirements, the Regional Board in the 2021Permit has specified the means of compliance with the non-stormwater discharge requirements. *Long Beach Unified School Dist. v State of California* (1990) 225 Cal.App.3d 155, 172-73. Thus, even if these requirements were federal in origin, the Regional Board' specification of compliance, usurping the County and District's ability to design their own program, renders these Permit provisions state mandates. *Id*.; *Dept. of Finance,* 1 Cal. 5th at 771.

Finally, under the California Water Code, it is the Regional Board's duty, not the Claimants, to regulate discharges from these non-stormwater dischargers. Water Code §§ 13260 and 13263. *See Dept. of Finance,* 1 Cal.5th at 770. To the extent that these activities were previously performed by the Regional Board, such as the responsibility to evaluate monitoring data and police non-stormwater dischargers, the Regional Board in the Permit freely chose to shift these obligations onto Claimants rather than perform them itself. As such, a state mandate was imposed. *Id. at 770-771; Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94.

Nevertheless, the Water Boards contend that these obligations are voluntary in that they can be addressed as part of Claimant's Watershed Management Program,[4] and are not new, having been previously required under the 2012 Permit (Water Boards' Comments at 17-18).

The Claimants, however, did not have a choice with respect to implementing the specific requirements set forth above. If Claimants did not prepare a Watershed Management Program ("WMP"), these non-stormwater requirements would have applied to them. 2021 Permit, Part III A. If Claimants did prepare a WMP, Claimants would have still been required to comply with the requirements of Part III. A. 2021 Permit Part IX A.4.b specifically required any WMP to ensure that "non-stormwater discharges that are a source of pollutants are prohibited pursuant to Part III.A of this Order." 2021 Permit Part IX.B.6.b likewise required Claimants "to effectively prohibit the source of pollutants consistent with Parts III.A (Prohibitions – Non-Stormwater Discharges) and VIII.I (IDDE) of this Order."

Thus, Claimants compliance with the non-stormwater requirements set forth in Part III. A was not voluntary. Claimants had to comply with these requirements both if it did not prepare a WMP or if it did so.

To the extent that these non-stormwater requirements were continued from the 2012 Permit, for the reasons discussed above, they still constituted a higher level of service. "Higher level of service" refers to "state mandated increases in the services

[4] Claimants do not concede that preparing a WMP was truly voluntary. Given the fact that compliance with receiving water limitations and interim milestones in several TMDLs could not feasibly be achieved, preparation and participation in a WMP was the only viable option. Claimants were "practically compelled" to prepare WMPs for the various watersheds.

provided by local agencies." *Dept. of Finance II,* 59 Cal.App.5th at 556. Even if some of these non-stormwater requirements were originally implemented under the 2012 Permit, the requirements ceased with the termination of that permit. The 2021 Permit, however, extended that obligation for the life of the 2021 Permit, *i.e.,* it increased the services the Claimants must provide from September 2021 until the end of the 2021 permit, a "state mandated increase in the services provided by the local agencies." *Id.*

Finally, to the extent the Commission addressed these obligations in its decision on the 2012 Permit, that decision is not binding, and the Commission is free to reconsider the issues with respect to the 2021 Permit. For the reasons set forth above, the Commission should do so.

B. 2021 Permit Part III. A.5.b (Electronic Database) Is a New Program or Higher Level of Service

The Water Boards concede that 2012 Permit Part III.A.5.b, the obligation to create and maintain an electronic data base of conditionally-exempt, non-stormwater discharges of greater than 100,000 gallons, is a new obligation, not previously required by the 2012 Permit (Water Boards' Comments at 18-19). It is not required by the federal regulations, but instead has been imposed as a matter of discretion by the Regional Board. This requirement is a new program or higher level of service. *See Dept. of Finance,* 1 Cal. 5th at 765; *Long Beach Unified School Dist.,* 225 Cal.App.3d at 172-73.

V. MINIMUM CONTROL MEASURES

The 2012 Permit Section VIII sets forth several "minimum control measures" that permittees must implement. Like other aspects of the permit, the Water Boards argue that the minimum control measures are not new programs or higher levels of service because permittees can customize the minimum control measures in their WMPs and that the measures were previously required under the 2012 Permit (Water Boards' Comments at 19-20). For the reasons set forth below, these arguments should be rejected.

A. Implementation of the Minimum Control Measures Is Not Voluntary

First, the Water Boards argue that. with respect to the 2012 Permit, the Commission found that minimum control measures do not impose a mandated new program or higher level of service when they can be addressed in a WMP, and that finding should be applied here. (Water Boards' Comments at 20-21; *See In Re Test Claim,* California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, Case Nos. 13-TC-01 and 13-TC-02, p. 195.)

Whether a permittee complies with the minimum control measures as written or as addressed in a WMP, however, does not address the question of whether compliance is compelled. Under the 2021 Permit, compliance is required in either event.

This is evidenced by the permit itself. Permit Part VIII sets forth minimum control

measures. Each permittee "shall implement the requirements in Parts VIII.D through VIII.I below or may in lieu of the requirements I Parts VIII.D through VIII.I, implement customized actions within each of these general categories and control measures as set forth in an approved Watershed Management Program per Part IX of this order." 2021 Permit Part VIII.A.1.

2021 Permit Part IX sets forth the requirements of the Watershed Management Programs. 2021 Permit Part IX.B.6.a.i specifically requires any WMP to include minimum control measures, including the ones at issue here. Permittees may customize the control measures, but they must be included or a rationale and appropriate documentation provided for its elimination. 2021 Permit Part IX.B.6.a. Permittees do not control whether any modification is acceptable. Permittees can propose a modification, but it still must be approved by the Regional Board when it approves a WMP. The modification, if any, is still directed by the Regional Board. 2021 Permit Part IX.B.6.a.iv.

Thus, permittees do not have a choice as to whether to implement minimum control measures. Permittees must comply with the minimum control measures either under the terms of the permit itself or as part of a WMP. The measures may be customized, but only after approval by the Regional Board. 2021 Permit Part IX.B.6.a.iii and iv. The measures are still mandated. If a permittee did not include the minimum control measures in its WMP, the WMP would not be approved unless the Regional Board approved the lack of inclusion. *Id.*

It would also be erroneous to find that these specific minimum control measures were required by federal law. 40 C.F.R. Section 122.26(d)(2)(iv) requires Claimants to have a stormwater management program. The program shall include, inter alia, a description of a planning process to reduce the discharge of pollutants from commercial and residential areas, including new and significant redevelopment; to address illicit discharges; to address discharges from municipal landfills; and a program to reduce pollutant discharges from construction sites. 40 C.F.R. Section 122.26(d)(2)(iv)(A)-(D).

This federal regulation does not, however, designate the specific activities which must be undertaken to address these areas. For example, as discussed below, the 2021 Permit's public information and participation program specifically requires each Claimant to conduct educational activities and public information focusing on certain wastes and material, and develop metrics for measuring the effectiveness of public information programs. These specific requirements are not found in the federal regulations.

The WMP, nevertheless, must contain these requirements. 2021 Permit Part IX.A.4.a specifically provides that the Watershed Management Program must be "consistent" with Permit Parts IX.B through E, which includes Part IX, B.6.a.i, the minimum control measures at issue here. Thus, Claimants are constrained with respect to implementation of these minimum measures. The 2012 Permit requires that these control measures be included or otherwise addressed. 2021 Permit Parts IX.A.4.a and IX.B.6.a.

Therefore, even if Claimants prepare a WMP, they still must implement minimum control measures. The requirements are not voluntary because permittees must comply

either under the terms of the permit itself or as part of a WMP. Because the Regional Board exercised its discretion to specify these specific activities, which can be changed only with the Regional Board's approval, these requirements are mandates. *Department of Finance*, 1 Cal. 5th at 771; *Long Beach Unified School District*, 225 Cal.App.3d at 172-173;

B. Public Information Program Requirements (Permit Parts VIII.D.1, D.3, and D.4)

2021 Permit Part VIII.D.1 requires the Claimants to continue its public information and participation program, either collaboratively, in partnership with stormwater member agencies, or individually.

2021 Permit Part VIII.D.3 requires the Claimants to create opportunities for public engagement in stormwater planning and program implementation, and to conduct educational activities and public information focusing on certain wastes and materials identified in that part.

2021 Permit Part VIII.D.4 requires the Claimants to develop metrics for measuring the effectiveness of its program in reaching the general public and the socioeconomic and ethnic groups in the Los Angeles region, increasing the understanding of the importance of stormwater management, increasing support for stormwater management programs, facilitating pollution prevention and educating and involving residents.

The Water Boards contend that these public information requirements are not new because permittees could implement their own program under the WMP and because they were present under the 2012 permit (Water Boards' Comments at 21-22).

As set forth above, however, the fact that the public information and participation program could be included as part of the WMP does not mean these requirements were not mandated. The 2021 Permit required permittees to comply with these public information requirements either pursuant to the terms of the permit itself or under a WMP. Permittees did not have a choice and could not independently choose to forgo these requirements. Even the requirements in the WMP were ultimately selected and approved by the Regional Board's Executive Officer when approving the WMP, not Claimants. 2021 Permit Part IX B.6.a.iv ("Such modifications, *once approved,* as part of the WMP . . . .")

Additionally, similar to other permit requirements, the 2012 Permit public information and participation requirements terminated upon the termination of the 2012 permit. After the 2012 Permit terminated, there was no obligation to comply with them. By including them in the 2021 Permit, the public received services that they would not have otherwise received. This constituted a higher level of service, as, rather than ending upon the termination of the 2012 Permit, the public continued to receive these services through the life of the 2021 Permit.

Finally, the Water Boards concede that 2021 Permit Part VI.D.4 was not required under the 2012 Permit (Water Boards' Comments at 21-22). Permit Part VIII.D.4 requires Claimants to develop metrics for measuring the effectiveness of its program. Nowhere in

the federal regulations do the regulations specify a requirement for these metrics. As a new program, 2021 Part VI.D.4. constituted a new program or higher level of service.

C. Post-Construction Best Management Practices (Permit Parts VIII.F.3.c.i, c.ii, and c.iii)

2021 Permit Part VIII.F.3.c.i requires the permittees, except the two flood control districts, to implement a GIS or other electronic system to track projects that are required to have post-construction Best Management Practices (BMPs), including project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreements, inspection dates and summaries, and corrective action.

2021 Permit Part VIII.F.3.c.ii requires the permittees, except the two flood control districts, to inspect all development sites upon completion of construction and before issuance of an occupancy certificate to ensure proper installation of Low Impact Development ("LID") measures, structural BMPs, treatment control BMPs and hydromodification control BMPs.

2021 Permit Part VI.F.3.c.iii requires the permittees, except the two flood control districts, to develop a post-construction BMP checklist and to inspect at an interval of at least once every two years County-operated post-construction BMPs to assess operations and condition.

The above-described requirements are not required by either the CWA or its regulations. Additionally, even were the requirements considered to be required under federal law, the Regional Board's specification, through these Permit provisions, of how to comply with such requirements itself constitutes a state mandate.

The federal CWA regulations require that MS4 permits include a:

> description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant new redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

40 CFR § 122.26(d)(2)(iv)(A)(2). Nothing in this regulation requires that permittees develop a tracking system for post-construction BMPs or to inspect construction site BMPs for compliance with stormwater requirements. Similarly, nothing in the regulation requires routine inspections of post-construction BMPs operated by the permittees. Both in the exceedance of federal requirements, and in the specification of compliance set forth in the Permit that goes beyond federal requirements, state mandates have been created. *Dept. of Finance,* 1 Cal. 5th at 765, 771; *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at 172-73.

The Commission recognized that these requirements were new programs mandated by the 2012 Permit. *In Re Test Claim,* California Regional Water Quality

Control Board, Los Angeles Region, Order No. R4-2012-0175, Case Nos. 13-TC-01 and 13-TC-02 at 225-227. That same analysis applies here.

Nevertheless, the Water Boards contend that these requirements are no longer a state mandate because permittees can include these requirements in a WMP (Water Boards' Comments at 23). As discussed above with respect to the other minimum control measures, however, the fact that these obligations could be included in a WMP does not vitiate the compulsory nature of these requirements. 2021 Permit Part IX.B.6.a.i.(c) specifically requires permittees to address these obligations (referred to as "Planning and Land Development Program"). Permittees may customize these measures, but they still must be included unless the Executive Officer approves the modification when he or she approves the WMP. Permit Part XI.B.6.a.iv. The Permittees do not control whether any modification is acceptable. That is a decision made by the Regional Board. *Id.*

D. Construction Site Requirements (Permit Parts VIII.G.4.a, G.5.a, G.5.b.i, and G.5.b.ii)

2021 Permit Part VIII.G.4.a requires the County to require the implementation of effective erosion and sediment control BMPs, including a minimum set of BMPs at all construction sites and roadway paving or repair operations (public and private projects). This includes specific BMPs set forth in the Permit's Tables 7 and 8.

2021 Permit Part VIII.G.5.a requires the County to have a procedure to verify that construction sites one acre or greater have existing coverage under applicable permits, including the state-issued General Construction Activities Stormwater Permit and State or Regional Water Board 401 Water Quality Certification if needed, and has submitted a post-construction plan that complies with the 2021 Permit's post-construction requirements (2021 Permit Part VIII.F).

2021 Permit Part VIII.G.5.b.i requires the County to have an electronic system to inventory grading, encroachment, demolition, building or construction permits (and any other municipal authorization to move soil and/or conduct construction or destruction that involves land disturbance).

2021 Permit Part VIII.G.5.b.ii requires the County to update the inventory and requires the inventory to contain, among other items, contact information for a project, the latitude and longitude of the project, basic site information, the site's risk level, current construction phase where feasible, inspection dates, start and anticipated completion dates, whether the project has submitted a Notice of Intent and obtained coverage under the State Board-issued General Construction Activities Stormwater Permit, a description of post-construction BMPs, and a comparison of pre-construction stormwater runoff volume versus post-construction stormwater runoff volume.

The Water Boards raise the same contention with respect to these obligations as they have raised with respect to other minimum control measures, i.e. that these are not mandates because they can be addressed in a WMP. The Water Boards argue that these requirements were carried over from the 2012 Permit "with slight modifications," and the

Commission found that, with respect to these obligations under the 2012 Permit, they were not mandated because they could be addressed in the WMP (Water Boards' Comments at 24-25).

As discussed above with respect to other minimum control measures, however, the fact that these obligations could be included in a WMP does not render them voluntary. 2021 Permit Part IX.B.6.a.i.(d) requires permittees to address these obligations (referred to as "Development Construction Program"). Permittees may customize these measures, but they still must be included unless the Executive Officer approves the modification. The permittees do not control whether any modification is acceptable. That is a decision made by the Regional Board. 2021 Permit Part IX.B.6.a.iv.

E. Public Agency Requirements (Permit Parts VIII.H.2 and H.5.b)

2021 Permit Part VIII.H.2 requires the Claimants to maintain an updated inventory or database of all permittee-owned or operated facilities that are potential sources of stormwater pollution, including 27 separate categories of facilities that are required to be in the inventory. The inventory must include the name and address of the facility, contact information, a narrative description of activities performed and potential pollution sources, coverage under any individual or general NPDES permits or waivers, a description of BMPs, and, for trash control devices, an indication of whether it is a partial or certified full capture system. The inventory must be updated at least once during the permit term with information collected through field activities or other readily available informational databases.

2021 Permit Part VIII.H.5.b requires the Claimants to implement an Integrated Pesticide Management ("IPM") program, including restrictions on the use of pesticides, restricting treatments only to remove the target organism, selection of pest controls that minimize risks to human health, beneficial non-target organisms and the environment, partnering with other agencies and organizations to encourage the use of an IPM program, adopt and verifiably implement policies, procedures and/or ordinances requiring the minimization of pesticide use, and encouraging the use of IPM techniques in public agency facilities and activities. Additionally, the County must reduce the use of pesticides that cause impairments of surface waters by preparing and updating annually an inventory of pesticides, quantifying pesticide use by staff and contractors, and implementing IPM alternatives where feasible to reduce pesticide use.

Like other minimum control measures, the Water Boards contend that the Commission has found that these public agency activities can be addressed through a WMP, and that the same analysis should apply here (Water Boards' Comments at 25).

As set forth above, however, the Commission's prior decision is not precedent. For the reasons discussed above, the mere fact that these requirements can be included in the WMP does not render them voluntary. Permittees must either comply with these provisions in accordance with the permit or include them in a WMP. See 2021 Permit IX.B.6.a.i.(e). The obligation to comply with these requirements or something similar under a WMP is subject to approval by the Regional Board (Permit Part XI.B.6.a.iv). No

modification can exist except upon the Regional Board's approval. As such, these public agency requirements are as much compelled when a WMP is prepared as when no WMP exists.

F. Illicit Discharge Detection and Elimination Program (Permit Parts VIII.I.5, I.6. and I.8)

2021 Permit Part VIII.I.5 requires the Claimants to have a spill response plan that includes procedures that prevent, contain, and respond to all sewage and other spills that may discharge into the storm sewer system.

2021 Permit Part VIII.I.6 requires the Claimants to publicize and provide a means for public reporting of illicit discharges and other water quality impacts from stormwater and non-stormwater discharges into or from the storm sewer system.

2012 Permit Part VIII.I.8 requires the Claimants to document all public reports of illicit discharges, the dates and results of illicit discharge investigations, any corrective actions taken, any follow-up inspections and the date the investigation was closed.

The Water Boards contend that these requirements were carried over from the 2012 Permit, and that the Commission has already found that these provisions are not new (Water Boards' Comments at 20).

The Commission's prior decision on the 2012 Permit is not precedent and can be reconsidered. In any event, similar to other minimum control measures, these Illicit Discharge Detection and Elimination Program mandates constitute a higher level of service. But for the 2021 Permit, the obligation to comply with this program would not exist after termination of the 2012 Permit. The 2021 Permit extended this service for the public, creating a greater obligation than what had existed before.

VI. THE COMMISSION SHOULD NOT FIND THAT CLAIMANTS HAVE FEE AUTHORITY

The Water Boards also argue that, regardless of whether any element of the 2021 Permit is a state mandate, reimbursement should be denied because Claimants have fee authority (Water Boards' Comments at 3-6). Government Code section 17556(d) provides in pertinent part that the Commission should not find costs mandated by the state where the local agency or school district "has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service." Government Code section 17556(d), however, does not apply where voter approval is required. Where voter approval is required, the local agency does not have the authority to levy service charges, fees, or assessments. *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App. 5th 535, 579-581.

Thus, the issue is whether Claimants have the authority to assess service charges, fees or assessments without voter approval. Claimants acknowledge that some of these issues were addressed in the Commission's decision on Los Angeles Regional Water Quality Control Board Order No. R4-2012-0175. *In Re Test Claim* California Regional

Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, Case No. 13-TC-01 and 13-TC-02. The Commission's decision in that test claim, however, is not binding precedent and the Commission has the opportunity to and should consider these issues anew.

The Water Boards contend that a subvention of funds is not available to Claimants after January 1, 2018 (Water Boards' Comments at 3-4). This contention is based on the effective date of Senate Bill 231 ("SB 231"), which amended Govt. Code § 53750 and enacted Govt. Code § 53751 to overrule *Howard Jarvis Taxpayers' Ass'n v. City of Salinas ("City of Salinas").*[5] *City of Salinas* held that an exemption from the majority taxpayer vote requirement for property-related fees for "sewer services" in article XIII D, section 6(c) of the California Constitution did not cover storm sewers or storm drainage fees.[6] SB 231 purported to "correct" that court's interpretation of Proposition 218.

Claimants submit that based on governing caselaw, in adopting Proposition 218 and article XIII D, section 6(c) in 1996, the intent of the voters was not to include storm water drainage within the "sewer" voter exemption, and thus SB 231 should not be relied upon by the Commission to limit subvention of funds for expenditures made on and after January 1, 2018.

A. Claimants' Ability to Impose Property-Related Fees is Limited by Article XIII D of the California Constitution

1. California Constitution Article XIII Sections C and D

Under California Constitution article XIII C, section 1(e), a "tax" is "any levy, charge, or exaction of any kind imposed by a local government," except for certain exceptions set forth therein. All taxes are deemed to be either "general" or "special" taxes. Article XIII C, section 2(a).

"General tax" is defined to be "any tax imposed for general governmental purposes." Article XIII C, section 1(a). No local government may impose, extend or increase any general tax until that tax is submitted to the electorate and approved by a majority vote. Article XIII C, section 2(b).

"Special tax" is defined to be "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." Article XIII C, section 1(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. Article XIII C, section 2(d). *See also* article XIII A, section 4.

Article XIII C, section 1(e) excepts from the definition of a tax certain levies or charges. As is pertinent here, they include:

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[5] (2002) 98 Cal.App.4th 1351.

[6] 98 Cal.App.4th at 1358-1359.

(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.

. . .

(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. Article XIII C, section 1(e).

Article XIII D of the California Constitution sets forth the procedures and requirements for existing, new or increased property-related fees and charges. Under article XIII D, section 6, a property-related 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 article XIII D, 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.[7]

Article XIII D, section 6 further requires voter approval of new or increased fees and charges. Specifically, it provides that "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."[8]

In *City of Salinas,* the court held that the exemption from the majority taxpayer vote requirement for property-related fees for "sewer services" in article XIII D, section 6(c) of the California Constitution did not cover storm sewers or storm drainage fees.[9]

The Water Boards contend that Claimants can impose a fee without voter approval because the enactment of Senate Bill 231 in 2017 effectively amended the definition of "sewer" in article XIII D, section 6 to include storm sewers, and thus no vote is now required to impose it. This argument lacks merit.

2. SB 231 Misinterprets Article XIII D, Section 6 and Should Not Be Relied upon By the Commission

SB 231 purported to re-define "sewer" in Calif. Const. art. XIII D, section 6(c) by amending the Proposition 218 Omnibus Implementation Act, Govt. Code § 53750 *et seq.* ("Implementation Act"). SB 231 attempted to do this by adding a definition of "sewer" to Government Code § 53750 that included storm sewers "for purposes of article XIII C and D," and enacting a new Government Code section 53751 that sets forth legislative findings and declarations.

Legislation must be consistent with the California Constitution. If legislation is not, then it is unconstitutional.[10] Here, SB 231 is inconsistent with article XIII D, section 6, and the voter's intent in adopting it.

In *Dept. of Finance v. Commission on State Mandates ("San Diego Permit Appeal II)*[11] the question before the court was whether "voters intended the word 'sewer' in Proposition 218 to exempt fees for only sanitary sewers or both sanitary and stormwater

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[7] Article XIII D, Section 6(b).
[8] Article XIII D, Section 6(c).
[9] 98 Cal.App.4th at 1358-359.
[10] *County of Los Angeles v. Comm'n on State Mandates* (2007) 150 Cal.App.4th 898, 921 (statute that shielded actions of Regional Water Quality Control Boards, including MS4 Permits, from article XIII B, section 6 is unconstitutional as inconsistent with section 6).
[11] (2022) 85 Cal.App. 5th 535.

sewers from the measure's voting requirement."[12] The court first looked at dictionary definitions of "sewer," but refused to hold that these were controlling: "We do not start and end statutory interpretation with dictionary definitions."[13] The court instead explained that "the meaning of a statute may not be determined from a single word or sentence; the words must be *construed in context*, and provisions relating to the same subject matter must be harmonized to the extent possible."[14]

The court then turned to how Proposition 218 used the term "sewer" in context:

> Analyzing Proposition 218's use of the word "sewer" in context renders the meaning clear. In the initiative, we find a clause – the measure's only other use of the word "sewer" – in which the voters distinguished the word "sewer" from a drainage system. Section 4 of article XIII D established procedures and voter approval requirements for creating assessments. Section 5 of article XIII D imposed those requirements on all existing, new, or increased assessments with exceptions. Of relevance here, one of the exempt existing assessments is: "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."
>
> If possible, we construe statutes and constitutional provisions to give meaning to every word, phrase, sentence, and part of an act. [Citation omitted.] Thus, when the Legislature, or in this case the voters, use different words in the same sentence, we assume they intended the words to have different meanings. [Citation omitted.] By using "sewers" and "drainage systems" in the same sentence, the voters intended the words to have different meanings. Were it not so, the use of the terms to convey the same meaning would render them superfluous, an interpretation courts are to avoid.[15]

The court also employed the legal maxim *expressio unius est exclusio alterius* ("'when language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful' and that the Legislature intended a different meaning"[16]) to address how different parts of Proposition 218 used the terms "sewers" and "drainage systems." The court noted that the infrastructure listed in the exempt assessments section, art. XIII D, section 5, referred to both "sewers" *and* "drainage systems." By contrast, the taxpayer vote exemption in

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[12] 85 Cal.App. 5th at 567.

[13] *Ibid.*

[14] *Ibid*. (emphasis supplied).

[15] *Id.* at 567-568.

[16] *Id.* at 568 (quoting *In re Ethan C.* (2012) 54 Cal. 4th 610, 638).

article XIII D, section 6(c) referred only to "sewer . . . services."

The court concluded:

> Given that the voters intended to differentiate between "sewers" and "[d]rainage systems," and that storm drainage systems provide water drainage,[17] we conclude the voters did not intend the exemption of "sewer" service fees from article XIII D's voter-approval requirement to include fees for stormwater drainage systems.[18]

San Diego Permit Appeal II did not address the constitutionality of SB 231 because in determining that the statute was not retroactive, the court found that it did not apply to the test claim before it.[19] However, its discussion of article XIII D section 6 is instructive and should be followed.

In expanding the type of facilities and services covered by the term "sewer," SB 231 invalidly reinterpreted Proposition 218 in a way that ignored voter intent. Thus, SB 231 does not provide authority to bar Claimants from seeking a subvention of funds for costs incurred on and after January 1, 2018.

3. The Statutes and Cases Cited in Support of SB 231 are Inapposite

San Diego Permit Appeal II held that the meaning of a "sewer" in article XIII D, section 6 was clear and reliance on further "interpretative aids" was not required.[20] Even though not required, however, the invalidity of SB 231 is reinforced by the fact that the statutes and cases SB 231 cites do not support its definition of "sewer" in the Implementation Act.

Govt. Code § 53751 cites the following statutes and cases:

(a) Pub. Util. Code § 230.5: This statute is referenced[21] as the source for the SB 231's new definition of "sewer." This statute defines "sewer system" to encompass both sanitary and storm sewers and appurtenant systems. However, the statute is in a section of the Public Utilities Code regarding privately owned sewer and water systems

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[17] The court cited the Implementation Act's definition of "drainage systems" as "any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for *other types of water drainage."* 85 Cal.App.5th at 568 (emphasis in original).

[18] 85 Cal. App.5th at 568.

[19] *Id.* at 577.

[20] 85 Cal.App.5th at 569.

[21] Govt. Code § 53751(i)(1).

regulated by the Public Utilities Commission,[22] and not a "system of public improvements that is intended to provide . . . for other types of water drainage."[23] Such small private systems may well provide both sanitary and stormwater service, but they are not the same as public MS4 systems nor are they the type of public projects that Proposition 218 addressed.

(b) Govt. Code § 23010.3. This statute[24] relates to the authorization for counties to spend money for the construction of certain conveyances, and defines those conveyances as "any sanitary sewer, storm sewer, or drainage improvements . . ." Citation to this statute does not support SB 213, since the language distinguishes "sanitary sewer," "storm sewer" and "drainage improvements" as separate items, and also contradicts the statement in Govt. Code § 53751(g) that the phrase "sanitary sewerage" is uncommon. The phrase "sanitary sewer" is commonly found, as noted below.

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

(d) *Los Angeles County Flood Cont. Dist. v. Southern Cal. Edison Co.*[25] is cited[26] for the proposition that the California Supreme Court "stated that 'no distinction has been made between sanitary sewers and storm drains or sewers.'" This case concerned whether Edison was legally responsible to pay to relocate its gas lines to allow construction of flood district storm drains. The Court concluded that the utility was. In holding that there was no distinction between sanitary sewers and storm drains or sewers *as to Edison's payment obligation,* the Court was not also holding that a "sewer" necessarily filled both sanitary and storm functions. In fact, the Court distinguished between "sanitary sewers" and "storm drains or sewers" in the language of the opinion.[27]

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

[23] Govt. Code § 53750(d).

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

[25] (1958) 51 Cal. 2d 331

[26] Govt. Code § 53751(i)(4)

[27] 51 Cal. 2d at 335.

(e) *County of Riverside v. Whitlock,*[28] *Ramseier v. Oakley Sanitary Dist.,*[29] and *Torson v. Fleming*[30] were also cited in Govt. Code § 53751(i)(5) as examples of "[m]any other cases where the term 'sewer' has been used interchangeably to refer to both sanitary and storm sewers." However, the holdings in these cases are more limited. *County of Riverside* refers to "sewer" only in a footnote, which quotes from an Interim Assembly Committee Report discussing public improvements including "streets, storm and sanitary sewers, sidewalks, curbs, etc." (language which distinguishes between storm and sanitary sewers).[31] In another footnote quoting Street & Highways Code § 2932 regarding assessments for public improvements, the phrase "sewerage or drainage facilities" is employed, again reflecting a distinction between these functions and assigning the function of sanitary services to "sewerage."[32]

Ramseier involved a dispute over a contract to expand a district's "storm and sanitary sewer system."[33] This was the only reference to "sewers" in the case, and that reference distinguished between "storm" and "sanitary" sewers. The rationale for citation to *Torson* is unclear; the case involved a requested extension of a sanitary sewer, and the statutes cited in the case referred, separately, to both "sanitary" and "storm" sewers.[34] While these cases present only limited examples of how the term "storm sewer" or "sanitary sewer" were employed, in all of them, a distinction was drawn between them.

4. The Legislature and the Courts Considered "Sewers" to be Different from "Storm Drains" Prior to the Adoption of Article XIII D, Section 6, Which Supports the Construction that "Sewer" Within the Meaning of Article XIII D, Section 6(c) Does Not Include Storm Drains

There are numerous pre-Proposition 218 California statutes and cases which identify the term "sewer" as denoting only sanitary sewers and not storm drains. For example, Education Code § 81310, in identifying the power of a community college board to convey an easement to a utility, refers to "water, *sewer*, gas, or *storm drain* pipes or ditches, electric or telephone lines, and access roads . . . ." (Emphasis added.) There is no ambiguity in this statute – the "sewer" being referred cannot be a storm sewer, as "storm drain" pipes are specifically referenced.[35]

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[28] (1972) 22 Cal.App.3d 863.

[29] (1961) 197 Cal.App.2d 722.

[30] (1928) 91 Cal. App. 168.

[31] 22 Cal.App.3d at 874 n.9.

[32] 22 Cal.App.3d at 869 n.8.

[33] 197 Cal.App.2d at 723.

[34] 91 Cal.App. at 172.

[35] *See K.C. v. Superior Court* (2018) 24 Cal.App.5th 1001, 1011 n.4 (when Legislature uses different words in the same sentence, it is assumed that it intended the words to have different meanings).

Another example is Govt. Code § 66452.6, relating to the timing of extensions for subdivision tentative map act approval, which defines "public improvements" to include "traffic controls, streets, roads, highways, freeways, bridges, overcrossings, street interchanges, *flood control or storm drain facilities*, *sewer facilities*, water facilities, and lighting facilities."[36] Again, there is no ambiguity; the Legislature separately defined "flood control or storm drain facilities" from "sewer facilities."

Similarly, Health & Safety Code § 6520.1 provides that a sanitary district can prohibit a private property owner from connecting "any house, habitation, or structure requiring *sewerage or drainage* disposal service to any privately owned *sewer* or *storm drain* in the district."

Defining "sewer" as a sanitary utility distinct from "storm drain" continued after the adoption of Proposition 218. For example, in Water Code § 8007, effective May 21, 2009, the Legislature made the extension of certain utilities into disadvantaged unincorporated areas subject to the prevailing wage law, and defined those utilities as the city's "water, *sewer, or storm drain* system." (emphasis added).

Cases, too, have used the term "sewer" to mean a sanitary sewer instead of a storm drain. For example, in *E.L. White, Inc. v. Huntington Beach*,[37] the Supreme Court used the terms "storm drain" and "sewer" separately in discussing the liability of the city and a contractor for a fatal industrial accident.[38] In *Shea v. Los Angeles,*[39] the court referred separately to "sanitary sewer" and "sewers" in addition to a "storm drain." In *Boynton v. City of Lockport Mun. Sewer Dist.,*[40] the court discussed whether "sewer rates" were properly assessed by the city, and in that case, the court consistently used the term "sewer" to refer to sanitary sewers handling sewage.

Thus, there is significant evidence, in the language of article XIII D itself, in the interpretation courts are required to give to the measure, and in the prevailing legislative and judicial usage of the term "sewer," to support the holding in *San Diego Permit Appeal II* that Proposition 218 voters intended what *City of Salinas* found, that storm drainage was different from sewers and could not be included in the voter exclusion provision in article XIII D, section 6(c). As such, SB 231 is an unconstitutional attempt by the Legislature to ignore the intent of the voters and should not be relied upon by the Commission to refuse a subvention of funds for the costs of unfunded state mandates incurred on and after January 1, 2018.

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

[37] (1978) 21 Cal. 3d 497.

[38] 21 Cal.3d at 502.

[39] (1935) 6 Cal.App.2d 534, 535-36.

[40] (1972) 28 Cal.App.3d 91, 93-96.

5. Neither the Department of Finance Nor the Water Boards Have Shown that the Substantive Requirements of Article XIII D, Section 6, Can be Met in this Test Claim

Neither the Department of Finance nor the Water Boards have shown that the substantive requirements of article XIII D, section 6, can be met with regard to the specific provisions at issue in this Test Claim. The Department of Finance and the Water Boards have the burden of proof on this issue. *Dept. of Finance v. Commission,* 1 Cal. 5th at 769.

The agencies have failed to show that Claimants can assess property-related fees. First, the Department of Finance merely asserts in its comments on the Test Claim that Claimants can assess fees "so long as they are imposed in accordance with Proposition 218."[41] There is no discussion of the substantive requirements of article XIII D, section 6.

Similarly, in their comments on fee authority for the requirements in the 2021 Permit, the Water Boards do not discuss any of the substantive requirements of article XIII D, section 6 but rather simply assert that Claimants have fee authority (Water Boards' Comments at 3-4). There is thus no evidence in the record that the state agencies have assessed the ability of Claimants to apply property-related fees that met the substantive requirements of the California Constitution, and no evidence in the record on which the Commission can rely to make a finding that Claimants can assess fees in accordance with the requirements of article XIII D, section 6(b).

B. Measure W Funds are Not Fees Within the Meaning of Government Code Section 17556(d)

The Water Boards also contend that reimbursement should be denied because Claimants can use Measure W funds to pay for the mandates at issue (Water Boards' Comments at 6-7). This argument also lacks merit.

Measure W enacted a special parcel tax on properties within the boundaries of the Los Angeles County Flood Control District to be used for projects and programs to increase stormwater capture or reduce stormwater runoff. Los Angeles County Flood Control District Ordinance Nos. 16.02 and 16.04. Ten percent of the funds are allocated to the District for implementation and administration of projects and programs, forty percent are allocated to municipalities within the District, and fifty percent are allocated to implementation, operation and maintenance, and administration of regional programs. Ordinance No. 16.04.A.

The Water Boards contend this tax is a property-related *fee* and that, under Government Code section 17556(d), the Commission should not find costs mandated by the state where a local agency or school district has the authority to levy service charges, fees, or assessments. This contention is erroneous. Measure W imposes a *special parcel tax,* not a *fee*. Flood Control District Ordinance Nos. 16.02 and 16.08.

[41] Letter from Department of Finance, dated March 12, 2024.

As discussed above, the distinction between a fee and a tax is well established under California law. Article XIII C, section 1(e) of the California Constitution defines a tax to mean any levy, charge or exaction of any kind imposed by a local government except for specific charges referenced therein.

A tax is either a general tax or a special tax. Article XIII C, section 2(a). General taxes are imposed for general governmental purposes. Article XIII C, section 1(a). No local government can impose, extend, or increase any general tax unless it is submitted to the electorate and approved by a majority vote. Article XIII C, section 2(b).

Special taxes are imposed for specific purposes. Article XIII C, section 1(d). No local government can impose, extend, or increase any special tax unless it is submitted to the electorate and approved by a two-thirds vote. Article XIII C, section 2(d).

In contrast, a fee is a charge that is reasonably related to specific costs or benefits for which the charge is assessed. It cannot exceed that reasonable relation without becoming a tax. *See Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 260-263; *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876.

Measure W was presented to the electorate as a special tax requiring a two-thirds vote for passage. *See* Ballot Pamphlet, General Election (November 6, 2018), Impartial Analysis of Measure W.[42] It was a special tax, as it was imposed for a specific purpose. It was not a fee, as it was not adopted pursuant to the procedures for the adoption of property-related fees set forth in Cal. Const. Article XIII D, section 6. And it was adopted by a two-thirds vote, as required for a special tax.

Accordingly, Measure W did not enact a fee within the meaning of Government Code section 17556(d). It enacted a special tax.

C. Claimants Do Not Have the Ability to Impose Regulatory Fees for All Test Claim Permit Provisions at Issue

The Water Boards also assert that Claimants can assess regulatory fees. Specifically, the Water Boards contend that the Flood Control District has fee authority by reason of Assembly Bill 2554, which amended the Los Angeles County Flood Control Act (Water Boards' Comments at 7). Under that amendment, however, any such fee must still comply with article XIII D, section 6, of the California Constitution. Indeed, that limitation is specifically articulated in Section 8 of Assembly Bill 2554, which gives the Flood Control District authority "to impose a fee or charge, in compliance with the applicable provisions of article XIII D of the California Constitution . . . ."

As discussed above, article XIII D, section 6(c), requires a vote of the electorate unless the fee is considered a sewer charge within the meaning of that section. For the

[42] Ballot pamp.,General Elec. (Nov. 6, 2018), Impartial Analysis of Measure W, p. LA 379-031 available at https://web.archive.org/web/20181129085917/lavote.net/WebApps/PollLocator/ballot/3861/379.pdf (last accessed on April 28, 2026).

reasons set forth above, "sewer" within the meaning of article XIII D, section 6(c) refers to sanitary sewers, not stormwater pipes and channels. Assembly Bill 2554, therefore does not give the Flood Control District the authority to assess a fee without first obtaining approval through a vote of the electorate.

In any event, even if a fee could be assessed without a vote of the electorate, the fee must also still comply with the requirements set forth in article XIII D, section 6(b), *i.e.,* the fee cannot exceed the amount required to provide the property-related service, cannot be used for any purpose other than that for which the fee is imposed, cannot exceed the proportional cost of the service attributable to the parcel, cannot be imposed unless the service is actually used by or available to the property owner, and cannot be imposed for general governmental services. The provisions in the permit at issue here cannot be paid for through regulatory fees that meet these requirements. Specifically:

(a) **Compliance with WQBELs.** Compliance with WQBELs (2021 Permit Part IV.A.2) cannot be paid for by regulatory fees. Under article XIII C, section 1(e), any assessment is a tax unless it is imposed for a specific benefit conferred or privilege granted and does not exceed the reasonable cost related thereto. Here, however, there are no specific property-related benefits or costs associated with compliance with the WQBELs that are conferred upon or arising from a specific property upon which the fee can be assessed. Compliance with WQBELs results in a general benefit to the public and/or environment, not to a specific property owner.

(b) **WQBEL Monitoring Requirements**. The same is true for WQBEL monitoring requirements (2021 Permit Part VII and Attachment E). There is no specific property owner on whom a fee can constitutionally be imposed, *i.e.*, upon whom is conferred a benefit or privilege, the reasonable cost of which can be calculated and assessed. This monitoring conveys a general benefit to the public.

(c) **Non-stormwater Discharges.** The same is true with respect to the Claimants' efforts to prohibit non-stormwater discharges and their Illicit Discharge and Elimination Programs (2021 Permit Parts III and VIII.I.5,6, and 8). This is a general benefit to the public and environment. There is no person or entity who is receiving this benefit upon whom a fee can be proportionately assessed. Indeed, sometimes the source of the discharge is not even known. See 2021 Permit Part VIII.I.2 (permittees obligated to investigate source of discharge).

(d) **Public Information Program Requirements.** The public information program requirements (2021 Permit Parts VIII.D.1,3 and 4) are for the benefit of the public. Again, there is no identifiable group of property owners who receive a benefit or cause a cost that can be assessed a fee in relation to their property-related activity.

(e) **Requirements Applicable to Municipal Projects.** The permittees are required to maintain an updated database of all permittee-owned or operated facilities that are potential sources of stormwater pollution (2021 Permit Part VIII.H.2). As this relates to permittees' own facilities, there is no property owner on whom the cost of this activity can constitutionally be imposed, as it does not relate to a property owner's own

property. Instead, it is a general benefit to the public. The permittees are also required to implement an Integrated Pesticide Management Program for use on their own landscape, park and recreational facilities (2021 Permit Part VIII.H.5). Again, there is no private person or entity specifically receiving this benefit upon whom a fee can be assessed; this relates to permittees own property Instead, this is a general benefit to the public.

VII. CONCLUSION

For the foregoing reasons, and the reasons set forth in Claimants' Narrative Statement and Declarations in support of this test claim, the Commission should find that the obligations imposed by the 2021 Permit are reimbursable state mandates.

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

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On April 29, 2026, I served the:

- **Current Mailing List dated April 27, 2026**
- **Claimants' Rebuttal Comments filed April 29, 2026**

  California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2021-0105, 22-TC-01
  Los Angeles Regional Water Quality Control Board Order No. R4-2021-0105: Parts III.A.1, A.3.a, A.3.b, A.5.a, A.5.b, A.5.c, A.6; Parts IV.A.2 and B and Attachments J through S (except Attachments K, L and N); Part VII and Attachment E; Parts VIII.D.1, D.3, D.4; Parts VIII.F.3.c.i, F.3.c.ii, F.3.c.iii; Parts VIII.G.4.a, G.5.a, G.5.b.i, G.5.b.ii; Parts VIII.H.2 and H.5.b; and Parts VIII.I.5, I.6, I.8., effective September 11, 2021
  County of Los Angeles and Los Angeles County Flood Control District, 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 April 29, 2026 at Sacramento, California.

David Chavez
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/27/26

Claim Number: 22-TC-01

Matter: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2021-0105

Claimants: County of Los Angeles
Los Angeles County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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