STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

June 29, 2026

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

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

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

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018, 22-TC-07, as modified by Order No. R2-2023-0019; NPDES Permit No. CAS612008; Provisions C.3.b.i., C.3.b.ii.4., C.3.b.ii.5., C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., C.3.j.ii.4., C.5.f., C.8.d., C.8.e., C.8.f., C.10.a.i., C.10.a.ii., C.10.e., C.11.c., C.12.a., C.12.c., C.15.b.iii., C.17.a., C.20.b., C.21.b., Issued May 11, 2022, Effective July 1, 2022
Union City, Claimant

Dear Mr. Hill and Mr. Newmark:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments: Written comments may be filed on the Draft Proposed Decision **by July 20, 2026**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[1]

You are advised that comments filed with the Commission are required to be electronically filed (e-filed) in an unlocked legible and searchable PDF file, using the Commission's Dropbox. (Cal. Code Regs., tit. 2, § 1181.3(f).) Refer to https://www.csm.ca.gov/dropbox.shtml on the Commission's website for electronic filing instructions. If e-filing would cause the filer undue hardship or significant prejudice, filing may occur by first class mail, overnight delivery or personal service only upon approval of a request to the executive director. (Cal. Code Regs., tit. 2, § 1181.3(j).)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

[1] Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Hearing: This matter is set for hearing on **Friday, December 4, 2026** at 10:00 a.m. The Proposed Decision will be issued on or about November 20, 2026.

If you plan to address the Commission on this item, please notify the Commission Office not later than noon on the Tuesday prior to the hearing, **December 1, 2026**. Please also include the names of the people who will be speaking for inclusion on the witness list and the names and emails addresses of the people who will be speaking both in person and remotely to receive a hearing panelist link in Zoom. When calling or emailing, please identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Very truly yours,

Juliana F. Gmur
Executive Director

Hearing Date: December 4, 2026

ITEM ___

TEST CLAIM

DRAFT PROPOSED DECISION

California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018, as modified by Order No. R2-2023-0019,
NPDES Permit No. CAS612008; Provisions C.3.b.i., C.3.b.ii.4., C.3.b.ii.5., C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., C.3.j.ii.4., C.5.f., C.8.d., C.8.e., C.8.f., C.10.a.i., C.10.a.ii., C.10.e., C.11.c., C.12.a., C.12.c., C.15.b.iii., C.17.a., C.20.b., C.21.b., Issued May 11, 2022, Effective July 1, 2022

22-TC-07

Union City, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim alleges reimbursable state mandated activities arising from Order R2-2022-0018, "effective July 1, 2022, and amended in October 2023 by Order No. R2-2023-0019."[1] The claimant states, however, "None of the provisions of the MRP3 at issue in this Test Claim are affected by the October 2023 modifications."[2] The claimant has not requested reimbursement for any activities or requirements imposed by Order R2-2023-0019 and, thus, this Decision does not address the substantive requirements in Order R2-2023-0019.

The claimants have pled the following provisions from Order R2-2022-0018, alleging these provisions impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Provisions C.3.b.i., C.3.b.ii.4., and C.3.b.ii.5. - Implementation of low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for public and private new or widening road projects and road reconstruction projects of 5,000 square feet or more as required Provisions C.3.b.ii.4. and 5.[3] Provisions C.3.b.ii.4. and C.3.b.ii.5. identify the types of road projects and reconstruction projects that are subject to

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[1] Exhibit A, Test Claim, page 11.

[2] Exhibit A, Test Claim, page 11, footnote 1.

[3] Exhibit A, Test Claim, pages 24-25.

the requirements of Provision C.3.b.i., which imposes the LID source control, site design, and stormwater treatment requirements.[4]

- Provisions C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., and C.3.j.ii.4., which require the permittees to "update" their Green Infrastructure Plans developed under the prior permit[5] to ensure that municipal processes and ordinances allow and encourage green infrastructure; to retrofit projects that are not already defined as regulated projects with green infrastructure so that the impervious surface retrofits listed in Table H-1 of Attachment H are achieved; and to authorize the permittees, together with Water Board staff and science experts, to collectively form a Technical Working Group to discuss long term green infrastructure goals and recommend long term percentage reductions in permittees' impervious surfaces at individual, countywide, and regional scales.[6]
- Provision C.8.d., which requires the permittees to develop and implement LID monitoring plans to investigate pollutant removal benefits, hydrologic performance, and changes over time, and to form a Technical Advisory Group, which includes Water Board staff and science advisors, to review and make recommendations regarding the LID monitoring plans.[7]
- Provision C.5.f., which requires the permittees to develop a plan and schedule for updating the permittee's storm sewer system information and maps and include the plan and schedule in the 2026 Annual Report, make the current MS4 map available to the public, and reporting.[8]
- Provisions C.8.e.ii.1., C.8.e.ii.2., C.10.a.i., C.10.a.ii., and C.10.e., which address trash reduction requirements, including maps, retrofit requirements with full trash capture systems, trash monitoring, monitoring runoff from MS4 outfalls in low trash generation areas, and provide authority to submit a report identifying conditions under which it is impracticable to control trash with full trash capture systems.[9]
- Provision C.8.f. which requires pollutants of concern monitoring.[10]

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[4] Exhibit A, Test Claim, pages 24-25, 562-563, 568-570 (test claim permit, Provisions C.3.b.i., C.3.b.ii.4., and C.3.b.ii.5.).

[5] Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

[6] Exhibit A, Test Claim, pages 25-26, 605-610 (test claim permit, Provisions C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., and C.3.j.ii.4.).

[7] Exhibit A, Test Claim, pages 27, 643-647 (test claim permit, Provision C.8.d.).

[8] Exhibit A, Test Claim, pages 27, 629-630 (test claim permit, Provision C.5.f.).

[9] Exhibit A, Test Claim, pages 28-31, 651, 680-682, 689 (test claim permit, Provisions C.8.e.ii.1., C.8.e.ii.2., C.10.a.i., C.10.a.ii., and C.10.e.).

[10] Exhibit A, Test Claim, pages 29, 655-671 (test claim permit, Provision C.8.f.).

- Provision C.12.a., which requires the permittees to assess PCBs load reductions from stormwater in accordance with a previously adopted TMDL, including requirements to implement an assessment methodology and data collection program to quantify reductions and reporting.[11]
- Provisions C.11.c. and C.12.c., which require plans, schedules, and implementation of control measures for the reduction of mercury and PCBs in old industrial areas to achieve load reductions in accordance with the TMDLs.[12]
- Provision C.15.b.iii., which addresses non-stormwater emergency firefighting discharges and requires the permittees to convene a regionwide working group to identify and evaluate opportunities to reduce the adverse impacts of these discharges to the MS4, submit a Firefighting Discharges Report by September 30, 2025, implement the plan and BMPs proposed in the report, and submit reports to the Regional Board.[13]
- Provision C.17.a., which requires the permittees to collectively develop a report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness and specific milestones for reducing such discharges, submit a map of the locations of unsheltered homeless populations in relation to storm drain inlets and existing receiving waters with the 2023 Annual Report; submit an updated map with the 2025 Annual Report; implement BMPs to reduce the discharges associated with homelessness and assess the effectiveness of those BMPs.[14]
- Provision C.20.b., which requires the permittees to develop a cost reporting framework and methodology to perform the annual fiscal analysis required in Provision C.20.a.[15]
- Provision C.21.b., which requires the permittees to develop and implement an Asset Management Plan to ensure the satisfactory condition of hard assets, defined as "structural controls that serve a water quality function, for example: bioretention cells, pervious pavement systems, full trash capture devices, trash

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[11] Exhibit A, Test Claim, pages 33, 704-705 (test claim permit, Provision C.12.a.).

[12] Exhibit A, Test Claim, pages 32, 698-700, 707-708 (test claim permit, Provisions C.11.c., C.12.c.).

[13] Exhibit A, Test Claim, pages 33, 748-752 (test claim permit, Provision C.15.b.iii.).

[14] Exhibit A, Test Claim, pages 34, 757-759 (test claim permit, Provision C.17.a.).

[15] Exhibit A, Test Claim, pages 34-35, 777-778 (test claim permit, Provision C.20.a.).

receptacles, and pet waste stations"[16] and to complete a Climate Change Adaptation Report.[17]

For the reasons stated herein, staff recommends that the Commission on State Mandates (Commission) deny this Test Claim.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statue or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[18]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

Issue	**Description**	**Staff Recommendation**
Was the Test Claim timely filed?	Government Code section 17551 provides local government test claims shall be filed "not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs as a result	*Yes, the Test Claim was timely filed*. Because the Test Claim was filed June 30, 2023 (fiscal year 2022-2023), the potential period of reimbursement under Government Code section 17557 begins on July 1, 2021 (fiscal year 2021-2022). However, since the test claim permit

[16] Exhibit A, Test Claim, page 779, footnote 67.

[17] Exhibit A, Test Claim, pages 35-36, 779-780 (test claim permit, Provision C.21.b.).

[18] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue	Description	Staff Recommendation
	of a statute or executive order, whichever is later."[19] The test claim permit was adopted by the Regional Board on May 11, 2022, and became effective on July 1, 2022.[20] Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year."	(R2-2022-0018) has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or July 1, 2022.
Do the Provisions pled by the claimant impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.	The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared	*No, there are no costs mandated by the state.* The test claim permit imposes some new requirements, when compared to prior law. However, since the period of reimbursement for this Test Claim begins July 1, 2022, the permittees have the legal authority during the entire period of reimbursement to impose property-related stormwater fees and regulatory fees[22] sufficient as a matter of law

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

[20] Exhibit A, Test Claim, page 784 (test claim permit).

[22] California Constitution, article XI, section 7; Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

Issue	Description	Staff Recommendation
	to prior law, forcing them to spend their local proceeds of taxes.[21]	to cover the costs of all the requirements pled in this Test Claim including the new requirements identified herein pursuant to Government Code section 17556(d), and therefore there are no costs mandated by the state.[23] Since reimbursement is required only when all mandate elements are satisfied, including costs mandated by the state,[24] there are no findings on whether the *new* requirements mandate a new program or higher level of service.

Staff Analysis

The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim

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[21] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues).

[23] Government Code sections 17556(d), 53750, 53751; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565; and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[24] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

statute or executive order mandates *new* activities and associated costs compared to prior law, forcing them to spend their local proceeds of taxes.[25]

The Commission finds the test claim permit imposes the following new requirements on the permittees when compared to prior law.

Provision C.8.d., LID Monitoring:

- At the regional or countywide level, develop LID monitoring plans as specified.[26]
- Form a Technical Advisory Group, which includes Water Board staff and science advisors, to review and make recommendations regarding the LID monitoring plans before submission to the Executive Officer. Draft monitoring plans shall be submitted to the advisory group by March 1, 2023. Prior to the Executive Officer's approval or conditional approval of the LID monitoring plans, the advisory group shall be convened at least biannually. Thereafter, it shall be convened at least annually to provide continued feedback regarding the implementation.[27]
- Submit the LID monitoring plan for Executive Officer approval by May 1, 2023.[28]

Provision C.5.f., MS4 Maps:

- Develop a plan and schedule for updating the Permittee's storm sewer system information, and submitting the plan and schedule with the 2026 Annual Report. Permittees or countywide stormwater programs may work together or with the Oakland Museum of California to develop a plan and schedule for updating existing information, maps, drawings, and databases. The plan will consider the potential to identify storm sewer system component locations, size or specifications, materials of construction, and condition.[29]

Provision C.10.a.ii., trash:

- With the 2024 Annual Report, submit a revised Trash Generation Area Map that includes trash management areas, as well as private land drainage areas (See

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[25] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues).

[26] Exhibit A, Test Claim, pages 643-644.

[27] Exhibit A, Test Claim, page 645.

[28] Exhibit A, Test Claim, page 645.

[29] Exhibit A, Test Claim, pages 629-630.

Provision C.10.a.ii.b.) that will be retrofitted with full trash capture devices, or equivalent, by June 30, 2025. The updated trash generation map(s) shall include GIS layers and appropriate metadata (including tables etc.) that identify locations and associated drainage areas of full trash capture systems, and other trash control actions, and shall highlight any revisions or changes from the previous map(s).[30]

Provision C.11.c.iii.1. and C.12.c.iii.1., control measures for the reduction of mercury and PCBs in old industrial areas:

- By March 31, 2023, permittees shall submit plans and schedules for implementing control measures and stormwater diversion to wastewater treatment facilities in old industrial areas to address mercury and PCB load reduction requirements. This reporting shall include maps of the areas where control measures are to be implemented, the acreage of these catchments, and a description of design and sizing features all control measures, treatment devices and stormwater diversion facilities implemented for each treated catchment.

Provision C.15.b.iii., non-stormwater emergency firefighting discharges:

- Collectively convene a regionwide Firefighting Discharges Working Group (Working Group) together with Water Board staff and other stakeholders to identify and evaluate opportunities to reduce the impacts of emergency discharges to the MS4 associated with firefighting activity.[31]
- The Working Group shall:
  a. Prior to the submittal of the Firefighting Discharges Report, convene the Working Group at least twice per year. Thereafter, convene the Working Group at least annually.
  b. Assess the adequacy of existing BMPs and standard operating procedures (SOPs) to address the potential adverse water quality impacts of firefighting water and foam discharged during emergencies (e.g., containment and cleanup), including coordination within and between municipal departments, districts and jurisdictions, coordination between firefighting personnel and containment and cleanup crews, coordination with contracted staff, and coordination with relevant agencies (e.g., CalFire), as appropriate. If the existing BMPs and SOPs need updates or are otherwise inadequate, suggest changes to those BMPs and SOPs so that they are updated and adequate. If new BMPs and SOPs are needed, recommend model BMPs and SOPs.
  c. Assess the adequacy of existing resources (e.g., MS4 maps and maps that identify environmentally sensitive areas) used to determine if and how firefighting water and foam discharged during emergencies will impact

[30] Exhibit A, Test Claim, page 681 (test claim permit, Provision C.10.a.ii.).

[31] Exhibit A, Test Claim, pages 748-749.

receiving waters, in order to address pollutant discharges (e.g., by facilitating containment and cleanup).

d. Investigate which firefighting foams are the least environmentally harmful (i.e., have the least adverse water quality and beneficial use effects, including those related to biodegradation, biomagnification, bioaccumulation, and acute and chronic toxicity), both for Class A foams and Class B foams. Then, develop SOPs to use the least environmentally harmful firefighting foams (and dispose of the more environmentally harmful foams) and to reduce the use of firefighting foams, without jeopardizing the protection of life or property, during emergencies.

e. Prepare outreach materials on containment and cleanup BMPs and SOPs for contractors that are hired by private parties to participate in the containment and cleanup of discharges of firefighting water and foam associated with firefighting activities within their jurisdictions. Additionally, prepare outreach materials – regarding good housekeeping practices and preventive measures – for sites that are prone to firefighting emergencies. Distribute those outreach materials to all such contractors and sites by September 30, 2025. Subsequently, if it is identified that the outreach materials need to be revised or updated, they shall be revised or updated, and then redistributed.

f. Pursue coordination, information sharing, feedback and Working Group participation, from relevant agencies and organizations such as the California Department of Forestry and Fire Protection (Cal Fire), the California Department of Toxic Substances Control (DTSC), the U.S. Forest Service (USFS), the State and Regional Water Boards, permittees of other NPDES municipal stormwater permits, other state and federal agencies, and external workgroups (such as Petro-Chemical Mutual Aid), regarding interagency coordination and communication, BMPs, SOPs, and the least environmentally harmful firefighting foams.

g. Discuss reporting on emergency discharges of firefighting water and foam. The purpose of this reporting is first to provide transparency about the usage and water quality impacts of firefighting water and foam, and second to track reductions in those impacts over time, which is an anticipated outcome of the implementation of Provision C.15.b.iii. This shall include discussion of the timing of such reporting, and how that reporting will be submitted to the Water Board. This shall additionally include discussion of how reporting is triggered (e.g., if a certain level of discharge enters the MS4 system, if any level of discharge enters a receiving water, and if any level of PFAS foam is used pursuant the exemptions in SB 1044), as well as the content of the reporting (e.g., the date and time of the discharge, Material Safety Data Sheet (MSDS) and any supplemental information for that foam, the quantity of water and foam concentrate used, the quantity and rate of water and foam concentrate discharged to the MS4 and/or receiving water, the point of discharge to the MS4 and/or receiving water, and impacts).[32]

- Collectively submit a Firefighting Discharges Report by September 30, 2025, that describes progress on, and recommendations regarding, the implementation of the items listed above. The Firefighting Discharges Report shall be updated as needed on an ongoing basis, to incorporate recommendations by the Working Group.[33]

Provision C.17.a., discharges associated with unsheltered homeless populations:

- To encourage ongoing regional, countywide, and municipal coordination efforts, collectively develop a best management practice report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness into MS4s that impact water quality and specific milestones for reducing such discharges within a given timeframe. The report shall:
  a. Describe practices that may be implemented by permittees, including to address discharges associated with homelessness that are impacting water quality;
  b. Identify regional and countywide efforts and implementation actions to address discharges associated with homelessness (including how those efforts and actions have been affected by unsheltered homeless population growth). Include recommendations for engaging in these efforts and incorporating discharge-reduction strategies that also help meet the unsheltered population's clean water needs; and
  c. Identify actions taken during the COVID-19 pandemic to reduce the spread of the virus in homeless populations, such as temporarily housing homeless people in hotels, that may have reduced discharges associated with homelessness. Permittees shall consider the practicability of such actions for longer-term implementation.[34]
- With the 2023 Annual Report, submit a map identifying, within each permittee's jurisdiction, the approximate location(s) of unsheltered homeless populations, including homeless encampments and other areas where other unsheltered homeless people live. The map shall identify those location(s) in relation to storm drain inlets and existing streams, rivers, flood control channels, and other surface water bodies within the Permittee's jurisdiction. The map shall be updated once during the Permit term and submitted with the 2025 Annual Report. Where Permittees are working collaboratively to address discharges associated with

[32] Exhibit A, Test Claim, pages 749-751.

[33] Exhibit A, Test Claim, page 751.

[34] Exhibit A, Test Claim, pages 757-758.

homelessness, they may collaborate to submit a joint map that covers their respective jurisdictions.[35]

C.20.b., cost reporting framework and methodology:

- Develop a cost reporting framework and methodology to perform the fiscal analysis to be submitted to the Executive Office by June 30, 2023. "Permittees are encouraged to collaboratively develop the framework and methodology for purposes of efficiency, cost savings, and regionwide consistency and comparability. The framework shall consider identification of costs incurred solely to comply with this Order's requirements as listed in Provision C.20.b.(iii) as compared to costs shared with other programs or regulatory requirements, provide meaningful data to assess costs of different program areas, and allow for comparisons and to identify trends over time."[36]

C.21.b., asset management:

- Develop an Asset Management Plan by June 30, 2025, to ensure the satisfactory condition of hard assets.[37]
- Complete a Climate Change Adaptation Report to identify potential climate change-related threats to assets and appropriate adaptation strategies. The report shall assess existing, new, and increasing threats from climate change to the condition of permittees' inventoried hard assets over the next 50 years, and identify approaches that permittees may implement to address those threats, such as the modification of design standards and countywide technical guidance documents. The Climate Change Adaptation Report may be developed on an all-Permittee (regional) scale or countywide scale.[38]

The remaining requirements imposed by the test claim permit are either not new or do not mandate a new program or higher level of service.

Although there are new requirements imposed by the test claim permit, there are no costs mandated by the state for any of the requirements alleged to impose a reimbursable state-mandated program. The period of reimbursement for this Test Claim begins July 1, 2022, the permit's effective date[39] and, as more fully explained herein, the permittees have the legal authority during the entire period of reimbursement to impose property-related stormwater fees and regulatory fees[40] sufficient as a matter

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[35] Exhibit A, Test Claim, pages 758, 759.

[36] Exhibit A, Test Claim, pages 777-778.

[37] Exhibit A, Test Claim, pages 779-780.

[38] Exhibit A, Test Claim, page 780.

[39] Exhibit A, Test Claim, page 784.

[40] California Constitution, article XI, section 7; Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus

of law to cover the costs of all the requirements pled in this Test Claim including the new requirements identified above pursuant to Government Code section 17556(d), and therefore there are no costs mandated by the state.[41] Since reimbursement is required only when all mandate elements are satisfied, including costs mandated by the state,[42] there are no findings on whether the *new* requirements mandate a new program or higher level of service.

Conclusion

Based on the forgoing analysis, staff finds that the test claim permit does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and denies this Test Claim.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[41] Government Code sections 17556(d), 53750, 53751; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565; and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[42] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018, as modified by Order No. R2-2023-0019, NPDES Permit No. CAS612008* Provisions C.3.b.i.,[43] C.3.b.ii.4., C.3.b.ii.5., C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., C.3.j.ii.4., C.5.f., C.8.d., C.8.e., C.8.f., C.10.a.i., C.10.a.ii., C.10.e., C.11.c., C.12.a., C.12.c., C.15.b.iii., C.17.a., C.20.b., C.21.b., Issued May 11, 2022, Effective July 1, 2022 Filed on June 30, 2023 Union City, Claimant	Case No.: 22-TC-07 *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 4, 2026*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 4, 2026. [Witness list will be included in the adopted Decision.]

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/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	**Vote**
Lee Adams, County Supervisor	

[43] As explained herein, Provision C.3.b.i. was not expressly identified as a Provision number in the Test Claim pleading. However, the Test Claim narrative and declarations identify the requirements in Provision C.3.b.i. as they relate to the road projects and reconstruction projects in Provisions C.3.b.ii.4. and 5. and the costs associated with those requirements. (Exhibit A, Test Claim, pages 24, 46.) Therefore, this Decision addresses Provision C.3.b.i.

Member	Vote
Deborah Gallegos, Representative of the State Controller	
Karen Greene Ross, Public Member	
William Pahland, Representative of the State Treasurer, Vice Chairperson	
Michele Perrault, Representative of the Director of the Department of Finance, Chairperson	
Alexander Powell, Representative of the Director of the Governor's Office of Land Use and Climate Innovation	

Summary of the Findings

This Test Claim alleges reimbursable state mandated activities arising from Order R2-2022-0018, "effective July 1, 2022, and amended in October 2023 by Order No. R2-2023-0019."[44] Permit amendment R2-2023-0019 added Provision C.3.c.i.2.c.iii. to the permit regarding Alternative Treatment Systems, and amended Provision C.3.e.ii.5., regarding Special Project Criteria (Affordable Housing) and the reporting requirements in Provision C.3.e.v.3.f.[45] The claimant states, however, "None of the provisions of the MRP3 at issue in this Test Claim are affected by the October 2023 modifications."[46] The claimant has not requested reimbursement for any activities or requirements imposed by Order R2-2023-0019 and, thus, this Decision does not address the substantive requirements in Order R2-2023-0019.

The claimants have pled the following provisions from Order R2-2022-0018, alleging these provisions impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Provisions C.3.b.i., C.3.b.ii.4, and C.3.b.ii.5 - Implementation of low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for public and private new or widening road projects and road reconstruction projects of 5,000 square feet or more as required Provisions C.3.b.ii.4. and 5.[47] Provisions C.3.b.ii.4. and C.3.b.ii.5. identify the types of road projects and reconstruction projects that are subject to the requirements of Provision C.3.b.i., which imposes the LID source control, site design, and stormwater treatment requirements.[48]

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[44] Exhibit A, Test Claim, page 11.

[45] Exhibit X (4), Order R2-2023-0019.

[46] Exhibit A, Test Claim, page 11, footnote 1.

[47] Exhibit A, Test Claim, pages 24-25.

[48] Exhibit A, Test Claim, pages 562-563, 568-570 (test claim permit, Provisions C.3.b.i., C.3.b.ii.4, and C.3.b.ii.5.).

- Provisions C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., and C.3.j.ii.4., which require the permittees to "update" their Green Infrastructure Plans developed under the prior permit[49] to ensure that municipal processes and ordinances allow and encourage green infrastructure; to retrofit projects that are not already defined as regulated projects with green infrastructure so that the impervious surface retrofits listed in Table H-1 of Attachment H are achieved; and to authorize the permittees, together with Water Board staff and science experts, to collectively form a Technical Working Group to discuss long term green infrastructure goals and recommend long term percentage reductions in permittees' impervious surfaces at individual, countywide, and regional scales.[50]
- Provision C.8.d., which requires the permittees to develop and implement LID monitoring plans to investigate pollutant removal benefits, hydrologic performance, and changes over time, and to form a Technical Advisory Group, which includes Water Board staff and science advisors, to review and make recommendations regarding the LID monitoring plans.[51]
- Provision C.5.f., which requires the permittees to develop a plan and schedule for updating the permittee's storm sewer system information and maps and include the plan and schedule in the 2026 Annual Report, make the current MS4 map available to the public, and reporting.[52]
- Provisions C.8.e.ii..1., C.8.e.ii.2., C.10.a.i, C.10.a.ii., and C.10.e. , which address trash reduction requirements, including maps, retrofit requirements with full trash capture systems, trash monitoring, monitoring runoff from MS4 outfalls in low trash generation areas, and provide authority to submit a report identifying conditions under which it is impracticable to control trash with full trash capture systems.[53]
- Provision C.8.f. which requires pollutants of concern monitoring.[54]
- Provision C.12.a., which requires the permittees to assess PCBs load reductions from stormwater in accordance with a previously adopted TMDL, including

[49] Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

[50] Exhibit A, Test Claim, pages 25-26, 605-610 (test claim permit, Provisions C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., and C.3.j.ii.4.).

[51] Exhibit A, Test Claim, pages 27, 643-647 (test claim permit, Provision C.8.d.).

[52] Exhibit A, Test Claim, pages 27, 629-630 (test claim permit, Provision C.5.f.).

[53] Exhibit A, Test Claim, pages 29-31, 651, 680-682, 689 (test claim permit, Provisions C.8.e.ii.1., C.8.e.ii.2., C.10.a.i., C.10.a.ii., and C.10.e.).

[54] Exhibit A, Test Claim, pages 29, 655-671 (test claim permit, Provision C.8.f.).

requirements to implement an assessment methodology and data collection program to quantify reductions and reporting.[55]

- Provisions C.11.c. and C.12.c., which require plans, schedules, and implementation of control measures for the reduction of mercury and PCBs in old industrial areas to achieve load reductions in accordance with the TMDLs.[56]
- Provision C.15.b.iii., which addresses non-stormwater emergency firefighting discharges and requires the permittees to convene a regionwide working group to identify and evaluate opportunities to reduce the adverse impacts of these discharges to the MS4, submit a Firefighting Discharges Report by September 30, 2025, implement the plan and BMPs proposed in the report, and submit reports to the Regional Board.[57]
- Provision C.17.a., which requires the permittees to collectively develop a report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness and specific milestones for reducing such discharges, submit a map of the locations of unsheltered homeless populations in relation to storm drain inlets and existing receiving waters with the 2023 Annual Report; submit an updated map with the 2025 Annual Report; implement BMPs to reduce the discharges associated with homelessness and assess the effectiveness of those BMPs.[58]
- Provision C.20.b., which requires the permittees to develop a cost reporting framework and methodology to perform the annual fiscal analysis required in Provision C.20.a.[59]
- Provision C.21.b., which requires the permittees to develop and implement an Asset Management Plan to ensure the satisfactory condition of hard assets, defined as "structural controls that serve a water quality function, for example: bioretention cells, pervious pavement systems, full trash capture devices, trash receptacles, and pet waste stations"[60] and to complete a Climate Change Adaptation Report.[61]

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[55] Exhibit A, Test Claim, pages 33, 704-705 (test claim permit, Provision C.12.a.).

[56] Exhibit A, Test Claim, pages 32, 698-700, 707-708 (test claim permit, Provisions C.11.c., C.12.c.).

[57] Exhibit A, Test Claim, pages 33, 748-752 (test claim permit, Provision C.15.b.iii.).

[58] Exhibit A, Test Claim, pages 34, 757-759 (test claim permit, Provision C.17.a.).

[59] Exhibit A, Test Claim, pages 34-35, 777-778 (test claim permit, Provision C.20.a.).

[60] Exhibit A, Test Claim, page 779, footnote 67.

[61] Exhibit A, Test Claim, pages 35-36, 779-780 (test claim permit, Provision C.21.b.).

The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to prior law, forcing them to spend their local proceeds of taxes.[62]

The Commission finds the test claim permit imposes some new requirements on the permittees, as explained herein. However, there are no costs mandated by the state. The period of reimbursement for this Test Claim begins July 1, 2022, the permit's effective date[63] and, as more fully explained below, the permittees have the legal authority during the entire period of reimbursement to impose property-related stormwater fees and regulatory fees[64] sufficient as a matter of law to cover the costs of all the requirements pled in this Test Claim including the new requirements pursuant to Government Code section 17556(d), and therefore there are no costs mandated by the state.[65] Since reimbursement is required only when all mandate elements are satisfied, including costs mandated by the state,[66] there are no findings on whether the *new* requirements mandate a new program or higher level of service.

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[62] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues).

[63] Exhibit A, Test Claim, page 784 (test claim permit).

[64] California Constitution, article XI, section 7; Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[65] Government Code sections 17556(d), 53750, 53751; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565; and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[66] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

Accordingly, the Commission finds that the test claim permit does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and denies this Test Claim.

Table of Contents

COMMISSION FINDINGS

I. Chronology

07/01/2022 The test claim permit, San Francisco Bay Regional Water Control Board, Order R2-2022-0018, was adopted on May 11, 2022, and became effective July 1, 2022.[67]

06/30/2023 Union City filed the Test Claim.[68]

06/18/2024 Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date

07/08/2024-05/12/2025 The Water Boards and the Department of Finance request several extensions of time to respond to the Test Claim, which were granted for good cause.

03/28/2025 The claimant, the City of Dublin (Interested Party), and Alameda Countywide Clean Water Program (Interested Person) filed a Notice of Change of Representation.

07/15/2025 The Water Boards filed comments on the Test Claim.[69]

07/21/2025 Finance filed late comments on the Test Claim.[70]

08/13/2025-03/20/2026 The claimant requested several extensions of time to file rebuttal comments, which were granted for good cause.

06/29/2026 Commission staff issued the Draft Proposed Decision.[71]

II. Background

A. Federal Clean Water Act.

The federal Clean Water Act was enacted in 1972 and is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[72] The Act's national goal was to eliminate "the discharge of pollutants into the navigable waters" of the United States by the year 1985.[73] "To accomplish this goal the Act established 'effluent limitations,' which are restrictions on

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[67] Exhibit A, Test Claim, page 784 (test claim permit).

[68] Exhibit A, Test Claim.

[69] Exhibit B, Water Boards' Comments on the Test Claim, page 1.

[70] Exhibit C, Finance's Late Comments on the Test Claim, page 1.

[71] Exhibit D, Draft Proposed Decision.

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

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

the ‘quantities, rates, and concentrations of chemical, physical, biological, and other constituents’; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards.”[74]

The Clean Water Act prohibits pollutant discharges unless they comply with: (1) a permit; (2) established effluent limitations or standards; or (3) established national standards of performance.[75] The term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”[76] A “point source” is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”[77]

The Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the Act or the EPA Administrator, which must be designed to ensure that discharges do not violate applicable water quality standards established by EPA or the state.[78] A state may administer its own permitting system if authorized by EPA, so long as those standards and limitations are not “less stringent” than those in effect under the Clean Water Act [79]

In 1973, EPA adopted regulations to implement the Act which provided exclusions for several types of discharges including “uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity” and have not been identified “as a significant contributor of pollution.”[80] This particular exclusion applied only to municipal separate storm sewer systems (MS4s). In 1977, however, the Court in *Natural Resources Defense Council v. Costle* held EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and doing so

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

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

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

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

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

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

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

contravened Congress' intent.[81] Since the Act prohibits "the discharge of any pollutant by any person" without an NPDES permit, MS4 municipal storm sewer systems are included in the definition of a point source.[82]

Thus, the Clean Water Act was amended by the Water Quality Act of 1987 to require NPDES permits for stormwater discharges from MS4s, stormwater discharges associated with industrial and construction activities, and designated stormwater discharges considered significant contributors of pollutants to waters of the United States.[83] Federal law states that permits for discharges from MS4 municipal storm sewers:

- may be issued on a system- or jurisdiction-wide basis;
- shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[84]

Discharges from MS4s include stormwater runoff, which "…is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground."[85] Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies and, thus, stormwater runoff requires "best management practices" (BMPs) and controls to the maximum extent practicable to reduce the discharge of these pollutants as stated above. As the Ninth Circuit Court of Appeal stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-

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

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

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

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

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

> quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[86]

A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[87] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies.[88] Examples of illicit non-stormwater discharges include trash, sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[89] As stated above, federal law requires MS4 permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," except as authorized by an NPDES permit.[90]

On November 16, 1990, EPA published regulations (40 CFR Part 122), which prescribe permit application requirements for MS4s under the Clean Water Act. EPA regulations specify the information to be included in a permit application.[91] Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable; a program including

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

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

[88] Exhibit X (5), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

[89] Exhibit X (5), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

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

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

inspections and ordinances to detect and remove prohibited, illicit discharges; a monitoring program to ensure compliance with water quality standards; an assessment of controls and reporting; and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs.[92] The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions to ensure compliance with water quality standards.[93] The state is required to transmit to EPA a copy of each permit application and permit proposed to be issued.[94]

In addition, the Clean Water Act requires states to develop water quality standards and criteria to protect the beneficial uses of any given waterbody, which are included in the Regional Board's Basin Plans.[95] States are required to adopt water quality standards and criteria based on sound scientific rationale that identifies sufficient parameters or constituents to protect the designated use, and numerical values related to any constituents should be based on the U.S. EPA's guidance documents or other defensible methods.[96] The water quality standard or criteria can be expressed in narrative form, which are broad statements of desirable water quality goals, or in a numeric form, which identifies specific pollutant concentrations.[97] When water quality criteria are met, water quality will generally protect the designated use."[98] Federal regulations state the purpose of a water quality standard as follows:

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

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

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

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

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

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

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

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

fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.[99]

EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.[100] In addition, on May 18, 2000, U.S. EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR).[101] As the courts have explained, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the CWA.'"[102]

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

> Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [US EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[103]

When reviewing, revising, or adopting new water quality standards, the state is required to adopt numeric criteria for all toxic pollutants listed in federal law.[104]

The Clean Water Act also requires states to develop a list of "impaired" waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards necessary to permit the designated beneficial uses, such as fishing or recreation.[105] States must then rank those impaired waters by priority, and

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

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

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

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

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

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

[105] See United States Code, title 33, section 1313(d)(1)(A) (codifying CWA § 303(d) and stating: "Each State shall identify [as impaired] those waters within its boundaries for

establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[106]

B. The California Water Pollution Control Program

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[107] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[108]

The state water pollution control program was again modified, beginning in 1972, to substantially comply with the Clean Water Act, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[109]

Section 13160 provides the State Water Resources Control Board (State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers

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which the effluent limitations … are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.").

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

[107] Water Code section 13020.

[108] Water Code section 13000.

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

delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto."[110] Section 13001 describes the state and the nine regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the Clean Water Act, employs a combination of water quality standards and point source pollution controls.[111]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, or Basin Plans.[112] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[113] and provide the underlying basis for most of the regional board's actions (e.g., NPDES permit conditions, cleanup levels). Basin plans consist of three elements:

- Determination of beneficial uses;
- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[114]

Water Code sections 13240-13247 address the development and implementation of the basin plans, including "water quality objectives," defined in section 13050 as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[115] Section 13241 provides each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance."[116]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[117] In addition, section 13243 permits a

[110] Water Code section 13160.

[111] Water Code section 13142.

[112] Water Code sections 13240-13247.

[113] Water Code sections 11352–11354.

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

[115] Water Code section 13050.

[116] Water Code section 13241.

[117] Water Code section 13050.

regional board to define “certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”[118]

Sections 13260-13274 address the development of “waste discharge requirements,” which section 13374 states “is the equivalent of the term ‘permits’ as used” in federal law.[119] Section 13263 authorizes the regional boards, after a public hearing, to prescribe waste discharge requirements “as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system.” Section 13263 provides “[a]ll discharges of waste into waters of the state are privileges, not rights.”[120] Section 13372 states “[t]his chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto.” Section 13377 permits a regional board to issue waste discharge requirements “which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act].”[121] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit “if a discharge is to waters of both California and the United States.”

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

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

[118] Water Code section 13243.

[119] Water Code section 13374.

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

[121] Water Code section 13377.

permitting system now regulates discharges under both state and federal law. (Citations omitted.)[122]

California has adopted an Ocean Plan in accordance with federal law, applicable to interstate waters, and two other state-wide plans (California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP)), which establish water quality criteria or objectives for all fresh waters, bays and estuaries in the State.[123] These statewide plans contain narrative and numeric water quality criteria for toxic pollutants, in part to satisfy the Clean Water Act (United States Code, title 33, section 1313(c)(2)(B)). The water quality criteria contained in these statewide plans, together with the designated uses in each of the Basin Plans, create a set of water quality standards for waters within the State of California.[124]

C. The Test Claim Permit

The claimant contends that certain sections of the California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018, as modified by Order No. R2-2023-0019, impose a reimbursable state-mandated program. This is the third stormwater permit adopted by the San Francisco Bay Regional Water Quality Control Board the Commission has reviewed to determine if reimbursement is required under article XIII B, section 6.[125] The following local government permittees are subject to this permit:

- The Alameda Permittees. The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, which have joined together to form the Alameda Countywide Clean Water Program.
- The Contra Costa Permittees. The cities of Antioch, Brentwood, Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Oakley, Orinda, Pinole,

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

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

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

[125] The prior two permits were R2-2009-0074 at issue in *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074*,10-TC-02, 10-TC-03, and 10-TC-05, https://www.csm.ca.gov/decisions/10-TC-02-03-05-012425.pdf (accessed on June 25, 2026 for which the Commission adopted the Statewide Cost Estimate on June 12, 2026, and R2-2015-0049 at issue in *California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049*, 16-TC-03, https://www.csm.ca.gov/matters/16-TC-03.shtml (accessed on June 25, 2026), which is currently pending.

Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, the Contra Costa County Flood Control and Water Conservation District, which have joined together to form the Contra Costa Clean Water Program.

- The Santa Clara Permittees. The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, which have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program.
- The San Mateo Permittees. The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood and Sea Level Rise Resiliency District, and San Mateo County, which have joined together to form the San Mateo Countywide Water Pollution Prevention Program.
- The Solano Permittees. The cities of Fairfield, Suisun City, Vallejo, and the Vallejo Flood & Wastewater District, which have joined together to form the Solano Stormwater Alliance.[126]

III. Positions of the Parties

A. <u>Claimant's Position</u>

The claimant alleges the following sections of the test claim permit impose reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution:

- Implement low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for the following regulated projects: new or widening roads and road reconstruction projects. (Provisions C.3.b.i., and C.3.b.ii.4. and 5.)[127]

  "[T]hese requirements apply to "road projects that create 5,000 square feet or more of newly constructed contiguous impervious surface, that are both public and private road projects." (MPR3 at C.3-8, Section 7 at S7-0029.) Under the MRP2, the requirement applied only to "road projects that create 10,000 square feet or more of newly constructed contiguous impervious surface." . . . 'Road reconstruction projects' was not a regulated category under the MRP2 and, therefore, this is a new program."[128]

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[126] Exhibit A, Test Claim, page 542 (test claim permit).

[127] Exhibit A, Test Claim, pages 24-25.

[128] Exhibit A, Test Claim, page 24

- "[R]e-evaluate, update and/or supplement their Green Infrastructure Plans (completed under the MRP2) as needed to ensure that municipal processes and ordinances allow and appropriately encourage implementation of green infrastructure, and incorporate lessons learned. This includes revising implementation mechanisms; continuing to update related municipal plans; developing funding mechanisms; updating guidance, details and specifications as appropriate; implementing tracking/mapping tools; adopting/amending legal mechanisms as necessary; and conducting outreach and education." (Provision C.3.j.ii.1.a.-g.)[129]

  "To support its member agencies implementing the increased requirements under Provision C.3.j.ii.(1)(a)-(g), in Fiscal Year 22/23 the Program updated and maintained a GIS platform that allows members to track their green infrastructure projects in order to comply with this new requirement. (Mathews Decl., ¶ 9.i.) In Fiscal Year 22/23, the City commenced the process of updating its Green Infrastructure Plan. (Azim. Decl., ¶ 8.b.)"[130]

- Form a regional Technical Working Group to discuss long term GSI [green stormwater infrastructure] goals and recommend long term percentage reductions. (Provision C.3.j.ii.4.)[131]

  "These are new requirements not included in the MRP2. To support its member agencies implementing the increased requirements under Provision C.3.j.ii.(4), in Fiscal Year 22/23 the Program updated and maintained a GIS platform that allows members to track their green infrastructure projects in order to comply with this new requirement. (Mathews Decl., ¶ 9.i.)"[132]

- Implement, or cause to be implemented, green infrastructure projects within their jurisdictions which are not already defined as Regulated Projects such that impervious surface numeric retrofits are achieved. (Provision C.3.j.ii.2.a.-j.)[133]

  "The imposition of the numeric targets is new and will require Permittees to implement more retrofit projects in the MRP3 term than would have been required in the MRP2. The Permittees may meet the numeric retrofit requirements on a countywide basis. Though Permittees may meet their total individual numeric retrofit requirements on a countywide basis, each Permittee shall implement, or cause to be implemented, a green infrastructure project or projects treating no less than 0.2 acres of impervious surface within its jurisdiction, where that project is not already defined as a regulated project. *. . .* Alternatively, a Permittee may contribute substantially to such a green

[129] Exhibit A, Test Claim page 25.

[130] Exhibit A, Test Claim, page 25.

[131] Exhibit A, Test Claim, page 25.

[132] Exhibit A, Test Claim, page 25.

[133] Exhibit A, Test Claim, pages 25-26.

infrastructure project(s) outside of its jurisdiction and within its County. . . . The Fact Sheet acknowledges that these new requirements could cost Permittees up to $181 million of additional costs. . . . To support its member agencies implementing the increased requirements under Provision C.3.j.ii.(2)(a)-(j), in Fiscal Year 22/23 the Program updated and maintained a GIS platform that allows members to track their green infrastructure projects in order to comply with new requirement. (Mathews Decl., ¶ 9.i.) In Fiscal Year 22/23, the City attended meetings with the Program regarding these Provision C.3 requirements, including municipal staff training. (Azim. Decl., ¶ 8.b. In Fiscal Year 23/24, the City expects to expend approximately $520,000 in implementing bioretention treatment areas in compliance with this increased requirement which would not have been required under the MRP2. (*Id.*)"[134]

- Identify information missing from the current MS4 Maps and develop a plan and schedule to compile additional storm sewer system information, considering the potential to identify component locations, size or specifications, materials of construction and condition. (Provision C.5.f.)[135]
- Develop LID Monitoring Plans to implement the requirements in Provision C.8.d.iii-iv. (Provision C.8.d.)[136]

  "To support this new MRP3 requirement, in Fiscal Year 22/23 the Program collaborated with the other four countywide programs to form and fund the MRP3-required Technical Advisory Group ("TAG") with the necessary expertise related to LID monitoring, developed a regional quality assurance plan, identified monitoring locations, developed a monitoring plan for LID facilities in Alameda County, revised the monitoring and quality assurance plans based on feedback from the TAG, and submitted the plans to the Regional Water Board. (Mathews Decl., ¶ 9.c.)"[137]
- Collect and analyze the amount of trash discharged from MS4 outfalls to answer the questions of whether (1) Permittees' trash management actions effectively prevented trash from their jurisdictions from discharging to receiving waters, and (2) are discharges of trash from within Trash Management Areas controlled to a low trash generation level causing and/or contributing to adverse trash impacts in receiving waters. Specifically, Permittees must:

  (1) [C]ollect and analyze the amount of trash discharged from MS4 outfalls that drain tributary drainage areas controlled to the Low trash generation level, during storm events that will (or that Permittees estimate are likely to) result in discharges of trash through the MS4 system (Provision C.8.e.ii.1.).

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[134] Exhibit A, Test Claim, page 26.

[135] Exhibit A, Test Claim, page 27.

[136] Exhibit A, Test Claim, pages 27-28.

[137] Exhibit A, Test Claim, pages 27-28.

(2) [I]mplement a pilot program to directly (in-stream) sample sections of receiving waters that receive runoff primarily from MS4 outfalls that drain tributary drainage areas controlled to the Low trash generation level, during storm events that will (or that Permittees estimate are likely to) result in discharges of trash through the MS4 system (Provision C.8.e.ii.2.).[138]

"To support this effort, in Fiscal Year 22/23 the Program collaborated with the other four countywide programs to form and fund a separate MRP3-required TAG (with wholly different expertise than the MRP3-required TAG for the new LID monitoring program described above), developed a regional quality assurance plan, identified trash monitoring locations and developed a monitoring plan for the selected sites in Alameda County, revised the monitoring and quality assurance plans based on feedback from the TAG, and submitted the plans to the Regional Water Board. (Mathews Decl., ¶ 9.c.)"[139]

- Conduct Pollutants of Concern ("POC") monitoring to "assess inputs of select POCs to the Bay from local tributaries and urban runoff, provide information to assess compliance with receiving water limitations, support implementation of TMDLs and other pollutant control strategies, assess progress toward achieving wasteload allocations for TMDLs and help resolve uncertainties associated with loading estimates and impairments associated with these pollutants." (Provision C.8.f.)[140]

  "To support its member agencies in complying with this new requirement, in Fiscal Year 22/23 the Program developed and submitted a POC monitoring plan and initiated the required monitoring. (Mathews Decl., ¶ 9.d.)"[141]

- Implement trash load reduction control actions and demonstrate attainment of trash discharge reduction requirements of 90% by June 30, 2023; and 100% trash load reduction or no adverse impact to receiving waters from trash by June 30, 2025 If the 90% benchmark is not attained by June 30, 2023, Permittees must submit revised trash load reduction plan and an implementation schedule of additional trash load reduction control actions to achieve 90% and 100% benchmarks by September 30, 2023. (Provision C.10.a.i).[142]

  "This is a higher level of service than required by the MRP2 which required 70% by July 1, 2017 and 80% by July 1, 2019." "According to the MRP3 Fact Sheet, "Permittees will incur additional costs to proceed from MRP2's required 80 percent reduction in trash discharges to the Permit's required 100 percent reduction, to be achieved using a combination of measures determined by each

[138] Exhibit A, Test Claim. Page 28.

[139] Exhibit A, Test Claim, page 28.

[140] Exhibit A, Test Claim, page 29.

[141] Exhibit A, Test Claim, page 29.

[142] Exhibit A, Test Claim, pages 29-30.

Permittee, and consisting of full trash capture, or implementation of a range of controls equivalent to full trash capture…. Statewide, the economic analysis estimates that between $2.93 and $7.77 more per resident might need to be spent each year for the next ten years to implement the proposed Trash Amendments."[143]

"To support this higher level of service requirement, in Fiscal Year 22/23 the Program held subcommittee meetings and prepared guidance for members on the new requirements, updates and modifications were made to GIS maps to support members, and GIS-based inspection applications were developed. (Mathews Decl., ¶ 9.e.) The City expended costs on predesign and planning in Fiscal Year 22/23 associated with this higher level of service requirements. (Azim Decl., ¶ 8.d.)"[144]

- Ensure that private lands that are moderate, high, or very high trash generating, and that drain to storm drain inlets that Permittees do not own or operate (private), but that are plumbed to Permittees' storm drain systems are equipped with full trash capture systems or are managed with trash discharge control actions equivalent to or better than full trash capture systems by July 1, 2025. (Provision C.10.a.ii.)

  Provision C.10.a.ii of the MRP3 also requires Permittees to submit a revised Trash Generation Area Map by September 30, 2024 that includes trash management areas and private land drainage areas that will be retrofitted with full trash capture devices, or equivalent, by the June 30, 2025 compliance date.[145]

  "To support these Provision C.10.a.ii higher levels of service requirements, in Fiscal Year 22/23 the Program held subcommittee meetings and prepared guidance for members on the new requirements, updates and modifications were made to GIS maps to support members, and GIS-based inspection applications were developed. (Mathews Decl., ¶ 9.e.) In addition, in Fiscal Year 22/23, the City attended the Program's Trash Subcommittee meetings and used a consultant to update its Trash Generation Area Map, an activity that continued into Fiscal Year 23/24. (Azim Decl., ¶ 8.d.)"[146]

- Collectively develop a Trash Impracticability Report that includes a process for both evaluating impracticability and implementing partial benefit actions to the maximum extent practicable by March 31, 2023. "Further, Provisions C.10.d and

[143] Exhibit A, Test Claim, pages 29-30.

[144] Exhibit A, Test Claim, page 30.

[145] Exhibit A, Test Claim, pages 30-31.

[146] Exhibit A, Test Claim, pages 30-31.

C.10.e.iv require Permittees to use an approved Trash Impracticability Report in developing updated Trash Load Reduction Work Plans." (Provision C.10.e.)[147]

The Program worked collaboratively with the four other countywide programs to fund the development of the Trash Impracticability Report. The Trash Impracticability Report was submitted to the Regional Water Board on March 27, 2023. (Mathews Decl., ¶ 9.f.)[148]

- Implement or cause to be implemented stormwater control measures to treat old industrial land use at 70% efficiency, or by demonstrating an equivalent mercury load reduction. In addition, implement or cause to be implemented treatment control measures to treat old industrial land use at 70% efficiency, or by demonstrating an equivalent PCBs load reduction. (Provisions C.11.c., C.12.c.)[149]

  "To support these increased requirements, in Fiscal Year 22/23 the Program developed the Old Industrial Area Control Measure Plan that included plans and schedules for implementing the required control measures. The Plan was submitted in March 2023. Subsequent to submittal, the Program members and consultants met with Regional Water Board staff and planned revisions to the plan, which are due in March 2024. (Mathews Decl., ¶ 9.g.) Additionally, in Fiscal Year 22/23, the City engaged in planning activities with the Program regarding these increased Provision C.11.c and C.12.c requirements. (Azim Decl., ¶ 8.e.)"[150]

- Quantify and report the PCBs load reductions achieved through all the pollution prevention, source control, green stormwater infrastructure, and other treatment control measures and submit documentation annually confirming that all control measures effectuated during the previous Permit term for which PCB load reduction credit was recognized continues to be implemented at an intensity sufficient to maintain the credited load reduction. The test claim permit requires annual assessment of loads reduced with documentation of the implementation level to justify the method (credits). (Provision C.12.a.)[151]

  "To support member agencies' compliance with this increased requirement, the Program consultants tracked and analyzed data on control measure implementation to calculate loads reduced. (Mathews Decl., ¶ 9.h.)"[152]

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[147] Exhibit A, Test Claim, page 31.

[148] Exhibit A, Test Claim, page 31.

[149] Exhibit A, Test Claim, page 32.

[150] Exhibit A, Test Claim, page 32.

[151] Exhibit A, Test Claim, page 33.

[152] Exhibit A, Test Claim, page 33.

- Collectively convene a regionwide Firefighting Discharges Working Group with Water Board staff and other stakeholders to identify and evaluate opportunities to reduce the impacts of emergency discharges to the MS4 associated with firefighting water and foam. (Provision C.15.b.iii.)[153]
- Collectively develop and submit a best management practice report that identifies practices to address non-stormwater discharges into MS4s associated with homelessness that impact water quality and specific milestones for reducing such discharges; report on the programmatic efforts being implemented within Permittee's jurisdiction, or at the countywide or regional level, to address MS4 discharges associated with homelessness; and submit a map identifying, the approximate locations of unsheltered homeless populations, including encampments and other areas where other unsheltered homeless people live relative to storm drains, creeks, and flood control channels. (Provision C.17.a.)[154]

  "To meet this new MRP3 requirement, the Program collaborated with the other four countywide programs on a regional project to develop the required best management practice report, which was submitted with each Permittee's Fiscal Year 22/23 annual report. (Mathews Decl., ¶9.j.) Additionally, each Permittee is required to submit a map identifying, the approximate locations of unsheltered homeless populations, including encampments and other areas where other unsheltered homeless people live relative to storm drains, creeks, and flood control channels. To support its members, the Program worked with County officials to obtain the required geo-located point in time count data, developed an approach for creating the maps, and updated its GIS system to produce the required maps for each of its members. (*Id*.) The City submitted the maps with its Fiscal Year 22/23 annual report."[155]
- Develop a cost reporting framework and methodology to perform an annual fiscal analysis. Permittees are encouraged to collaboratively develop the framework and methodology for purposes of efficiency, cost-savings, and regionwide consistency and comparability. The framework shall consider identification of costs incurred solely to comply with the Permit's requirements as listed in Provision C.20.b.(iii) as compared to costs shared with other programs or regulatory requirements, provide meaningful data to assess costs of different program areas, and allow for comparisons and to identify trends over time. (Provision C.20.b.)[156]

  "To meet this new requirement, the Program collaborated with the other four countywide programs on a regional project to develop the cost reporting

[153] Exhibit A, Test Claim, page 33.

[154] Exhibit A, Test Claim, page 34.

[155] Exhibit A, Test Claim, page 34.

[156] Exhibit A, Test Claim, pages 34-35.

framework and methodology, which was submitted on June 26, 2023. (Mathews Decl., ¶ 9.k.) Updates to the cost reporting framework and methodology based on Regional Water Board comments are in process. The Program will additionally provide training for its members on the use of the cost reporting framework and methodology. (*Id.*)"[157]

- Complete a Climate Change Adaptation Report to identify potential climate change-related threats to assets and appropriate adaptation strategies. The report shall assess existing, new, and increasing threats from climate change to the condition of Permittees' inventoried hard assets over the next 50 years and identify approaches that Permittees may implement to address those threats, such as the modification of design standards and countywide technical guidance documents. The Climate Change Adaptation Report may be developed on an all-Permittee (regional) scale or countywide scale. (Provision C.21.b.)[158]

  "Permittees are required to develop and implement an asset management plan to ensure the satisfactory condition of all hard assets constructed during MRP3 and the pervious permit terms pursuant to provisions C.2, C.3, C.10, C.11, C.12, C.13, and C.17. Mathews Decl., ¶9.l.) Additionally, Permittees are required to develop and submit a climate change adaptation report to identify potential climate change-related threats to assets and appropriate adaptation strategies. To help Permittees meet these new requirements the Program initiated work on a framework to guide the development of the asset management plans by individual members. (*Id.*)"[159]

The claimant states that it incurred costs of $51,619 in fiscal year 2022-2023 to comply with the new requirements.[160] The claimant estimates statewide costs for fiscal year 2023-2024 of $68,200,880.[161] The claimant is not aware of any dedicated state, federal, or non-local funds available to pay for the new mandated requirements. The claimant has a Clean Water Fund, which obtains revenue from property tax assessments and is supplanted with general funds. Salaries and benefits are paid with general funds and the other costs are paid by the City's General Fund and the Clean Water Fund. The claimant contends it has no fee authority to increase revenue sources without seeking voter approval under Proposition 218.[162]

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[157] Exhibit A, Test Claim, page 35.

[158] Exhibit A, Test Claim, pages 35-36.

[159] Exhibit A, Test Claim, page 36.

[160] Exhibit A, Test Claim, page 36.

[161] Exhibit A, Test Claim, page 40.

[162] Exhibit A, Test Claim, pages 40-41.

B. Water Boards

The Water Boards request that the Commission deny the Test Claim. The Water Boards state the following:

> The challenged provisions are not subject to subvention under Article XIII B, section (6)(a) of the California Constitution. None of the provisions are a new program or higher level of service. Union City also has fee authority to cover the costs of the challenged provisions. Additionally, some of the provisions are subject to the subvention exceptions for offsetting savings and federal mandates. The Commission should deny the Test Claim in its entirety.[163]

The specific comments raised by the Water Boards are summarized in the Decision.

C. Department of Finance

Finance requests that the Commission deny this Test Claim and joins in the comments raised by the Water Boards.[164]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[165] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[166]

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.[167]

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[163] Exhibit B, Water Boards' Comments on the Test Claim, page 2.

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

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

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

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

2. The mandated activity constitutes a "program" that 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.[168]
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.[169]
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 reimbursable if an exception identified in Government Code section 17556 applies to the activity.[170]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[171] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[172] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[173]

A. **The Test Claim Was Timely Filed and Has a Potential Period of Reimbursement Beginning July 1, 2022.**

Government Code section 17551 provides local government test claims shall be filed "not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[174] The test claim permit became effective on July 1, 2022.[175] The

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

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

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

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

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

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

[174] Government Code section 17551(c).

[175] Exhibit A, Test Claim, page 784 (test claim permit).

claimant filed the Test Claim on June 30, 2023, within 12 months of the effective date of the test claim permit. Therefore, the Test Claim was timely filed.

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claim was filed June 30, 2023 (fiscal year 2022-2023), the potential period of reimbursement under Government Code section 17557 begins on July 1, 2021 (fiscal year 2021-2022). However, since the test claim permit (R2-2022-0018) has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or July 1, 2022.

B. <u>The Claimant Has Not Identified Any Activities or Requirements Imposed by Order R2-2023-0019, and Thus the Commission Does Not Take Jurisdiction Over that Order.</u>

Government Code section 17553(b)(1) requires Test Claims to identify the *specific* sections of the executive order alleged to contain a mandate *and* a detailed description of the new activities mandated by the state.

The claimant seeks reimbursement to comply with specific sections of Order R2-2022-0018, "effective July 1, 2022, and amended in October 2023 by Order No. R2-2023-0019."[176] The claimant further states "None of the provisions of the MRP3 at issue in this Test Claim are affected by the October 2023 modifications."[177]

Permit amendment R2-2023-0019 added Provision C.3.c.i.2.c.iii. regarding Alternative Treatment Systems when LID treatment systems are not feasible; and amends Provision C.3.e.ii.5., regarding Special Project Criteria (Affordable Housing) and the reporting requirements in Provision C.3.e.v.3.f.[178] The claimant has not requested reimbursement for any activities or requirements imposed by Provisions C.3.c.i.2..c.iii., C.3.e.ii.5., and C.3.e.v.3.f. The claimant's Test Claim addresses only the following Provisions: C.3.b.i., C.3.b.ii.4., C.3.b.ii.5., C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., C.3.j.ii.4., C.5.f., C.8.d., C.8.e., C.8.f., C.10.a.i., C.10.a.ii., C.10.e., C.11.c., C.12.a., C.12.c., C.15.b.iii., C.17.a., C.20.b., and C.21.b.,[179] none of which were affected by the permit amendment R2-2023-0019.

Accordingly, this Decision does not address the amendments adopted by Order R2-2023-0019.

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[176] Exhibit A, Test Claim, page 11.

[177] Exhibit A, Test Claim, page 11, footnote 1.

[178] Exhibit X (4), Order R2-2023-0019.

[179] Exhibit A, Test Claim, pages 2, 22, 24, 42, 46.

C. The Test Claim Permit Imposes Some New Requirements, But There Are No Costs Mandated by the State Pursuant to Government Code Section 17556(d) Because the Claimants Have Fee Authority Sufficient as a Matter of Law to Cover the Costs of the Requirements.

The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to the prior law, forcing them to spend their local proceeds of taxes.[180]

As described below, the test claim permit imposes some new requirements on the permittees when compared to prior law. However, there are no costs mandated by the state. The period of reimbursement for this Test Claim begins July 1, 2022, the permit's effective date and, as more fully explained below, the permittees have the legal authority during the entire period of reimbursement to impose stormwater fees and regulatory fees sufficient as a matter of law to cover the costs of all the requirements pursuant to Government Code section 17556(d), and therefore there are no costs mandated by the state.[181] Since reimbursement is required only when all mandate elements are satisfied, including costs mandated by the state,[182] there are no findings on whether the *new* requirements mandate a new program or higher level of service.

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[180] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues).

[181] Government Code sections 17556(d), 53750, 53751; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-565; and *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[182] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

1. The Test Claim Permit Imposes Some New Requirements, Which May Mandate a New Program or Higher Level of Service.

a. The implementation of LID controls for road projects of 5,000 square feet or more, as required by Provisions C.3.b.i., C.3.b.ii.4., and 5., do not mandate a new program or higher level of service.

Provision C.3. addresses new development and significant redevelopment projects, which are subject to the Clean Water Act.[183] Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[184] A permittee's proposed management program shall include a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas, including "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems."[185]

i. Provisions C.3.b.i., and C.3.b.ii.4. and 5. require the implementation of low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for public and private new or widening road projects of 5,000 square feet or more and road reconstruction projects of existing streets or roads that create or replace greater than or equal to one contiguous acre of impervious surface.

The claimant requests reimbursement to implement low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for public and private new or widening road projects and road reconstruction projects as required Provisions C.3.b.ii.4. and 5.[186] Provisions C.3.b.ii.4. and C.3.b.ii.5. identify the types of road projects and reconstruction projects that are subject to the requirements of Provision C.3.b.i., which imposes the LID source control, site design, and stormwater treatment requirements.[187] Provision C.3.b.i. was not specifically identified in the Test Claim pleading. However, the Test Claim narrative and declarations identify the requirements in Provision C.3.b.i. as they relate to the road projects and reconstruction projects in Provisions C.3.b.ii.4. and 5. and the costs

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183 Exhibit A, Test Claim, page 561.

184 United States Code, title 33, section 1342(p)(3)(B)(iii) (Public Law 100-4).

185 Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(3) (71 FR 33639, June 12, 2006).

186 Exhibit A, Test Claim, pages 24-25.

187 Exhibit A, Test Claim, pages 562-563, 568-570.

associated with those requirements.[188] Therefore, this Decision will address Provision C.3.b.i. as it relates to Provisions C.3.b.ii.4. and 5.

Provision C.3.b.i. states "[t]he Permittees shall require all projects fitting the category descriptions listed in Provision C.3.b.ii. below (hereinafter called Regulated Projects) to implement LID source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility in accordance with Provisions C.3.c. and C.3.d., unless the Provision C.3.e. alternate compliance options are invoked."[189] Provision C.3.c. requires that all "regulated projects" implement source control measures onsite that, at a minimum, include the following:

- Minimization of stormwater pollutants of concern in urban runoff through measures that may include plumbing of the following discharges to the sanitary sewer, subject to the local sanitary sewer agency's regulations and standards: Discharges from indoor floor mat/equipment/hood filter wash racks or covered outdoor wash racks for restaurants; Dumpster drips from covered trash, food waste, and compactor enclosures; Discharges from covered outdoor wash areas for vehicles, equipment, and accessories; Swimming pool water, if discharge to onsite vegetated areas is not a feasible option; and Fire sprinkler test water, if discharge to onsite vegetated areas is not a feasible option.
- Properly designed covers, drains, and storage precautions for outdoor material storage areas, loading docks, repair/maintenance bays, and fueling areas.
- Properly designed trash storage areas.
- Landscaping that minimizes irrigation and runoff, promotes surface infiltration, minimizes the use of pesticides and fertilizers, and incorporates other appropriate sustainable landscaping practices and programs such as Bay-Friendly Landscaping.
- Efficient irrigation systems.
- Storm drain system stenciling or signage.[190]

Provision C.3.c. also requires each regulated project to implement the following design strategies:

- Limit disturbance of natural water bodies and drainage systems; minimize compaction of highly permeable soils; protect slopes and channels; and minimize impacts from stormwater and urban runoff on the biological integrity of natural drainage systems and water bodies.
- Conserve natural areas, including existing trees, other vegetation, and soils.

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[188] Exhibit A, Test Claim, pages 24, 46.

[189] Exhibit A, Test Claim, pages 562-563.

[190] Exhibit A, Test Claim, pages 573-574.

- Minimize impervious surfaces.
- Minimize disturbances to natural drainages.
- Minimize stormwater runoff by directing runoff onto vegetated areas.[191]

In addition, Provision C.3.c. requires regulated projects to treat 100 percent of the runoff with LID treatment measures (harvesting and use, infiltration, evapotranspiration, and biotreatment) onsite or with LID treatment measures at a joint stormwater treatment facility.[192]

Provision C.3.d. governs stormwater treatment systems, and identifies numeric design specifications for regulated projects to treat stormwater runoff, as specified.[193]

Provision C.3.e. addresses alternate compliance options, where a portion of the runoff for the project is treated with LID treatment measures onsite or with LID treatment measures at a joint stormwater treatment facility, and the other portion treated as an offsite project or with the payment of in lieu fees to treat the runoff at a regional project or offsite project.[194]

The goal of the LID provisions is “to reduce runoff and mimic a site’s predevelopment hydrology by minimizing disturbed areas and impervious cover and then infiltrating, storing, detaining, evapotranspiring, and/or biotreating stormwater runoff close to its source. LID employs principles such as preserving and recreating natural landscape features and minimizing imperviousness to create functional and appealing site drainage that treats stormwater as a resource, rather than a waste product.”[195]

Provisions C.3.b.ii.4. and C.3.b.ii.5. define two of the regulated projects that are subject to the requirements for LID source control, site design, and stormwater treatment, which, the claimant states, now includes for the first time certain new or widening roads and road construction projects as defined below:

- The following types of “public and private” road projects that fall under the building and planning authority of a permittee, which creates 5,000 square feet or more of *newly* constructed contiguous impervious surface:
  - (a) Construction of new streets or roads, including sidewalks and bicycle lanes built as part of the new streets or roads.
  - (b) Widening of existing streets or roads with additional traffic lanes, as specified.
  - (c) Construction of impervious trails that are greater than or equal to 10 feet wide or are creek-side (within 50 feet of the top of bank).

[191] Exhibit A, Test Claim, pages 574-575.

[192] Exhibit A, Test Claim, page 575.

[193] Exhibit A, Test Claim page 576.

[194] Exhibit A, Test Claim, page 580.

[195] Exhibit A, Test Claim, page 573.

The following are *excluded* from the LID requirements for regulated projects: sidewalks built as part of new streets or roads and built to direct stormwater runoff to adjacent vegetated areas; bicycle lanes built as part of new streets or roads, but that are not hydraulically connected to the new streets or roads and that direct stormwater runoff to adjacent vegetated areas; impervious trails that direct stormwater runoff to adjacent vegetated areas, or other non-erodible permeable areas, preferably away from creeks or towards the outboard side of levees, where those areas are at least half as large as the contributing impervious surface area; sidewalks, bicycle lanes, or trails constructed as pervious pavement systems; and Caltrans highway projects and associated facilities.[196]

- Road reconstruction projects of existing streets or roads that create or replace greater than or equal to one contiguous acre of impervious surface and that are public road projects or fall under the building and planning authority of a permittee, including sidewalks and bicycle lanes that are built or rebuilt as part of the existing streets or roads.

  This category includes utility trenching projects which "are - on average, over the entire length of the project - greater than or equal to 8 feet wide;" public pavement maintenance practices listed in Provision C.3.b.ii.(1)(b)(iii)(b).

  Excluded projects are listed maintenance projects in Provision C.3.b.ii.1.b.iv. as follows: pothole and square cut patching; overlaying existing asphalt or concrete pavement with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping/regrading drainage systems; crack sealing; pavement preservation activities that do not expand the road prism; upgrading from a bituminous surface treatment (e.g., chip seal) with an overlay of asphalt or concrete, without expanding the area of coverage; applying a bituminous surface treatment to existing asphalt or concrete pavement, without expanding the area of coverage; vegetation maintenance; and layering gravel over an existing gravel road, without expanding the area of coverage.[197]

Thus, the requirements in Provisions C.3.b.i. as it relates to new or widening road projects identified Provisions C.3.b.ii.4. and 5., apply to: (1) public roads accepted into a permittee's road system of 5,000 square feet or more; and (2) to a permittee under its authority to regulate private road projects.

Under the prior permit, new or widening road projects that created 10,000 square feet or more of newly constructed contiguous impervious surface were also subject to LID source control requirements.[198] Thus, the test claim permit expands the requirement to

[196] Exhibit A, Test Claim, pages 568-569.

[197] Exhibit A, Test Claim, pages 564-565, 569-570.

[198] Exhibit A, Test Claim, pages 1546, 1549 (Order R2-2015-0049, Provision C.3.b.).

smaller projects; those creating between 5,000 and 9,999 square feet of new or reconstructed contiguous impervious surface.

The Water Boards contend that the changes provided in Provisions C.3.b.ii.4. and 5. do not mandate a new program or higher level of service for the following reasons:

> As Union City acknowledges, Permittees were previously required to implement low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for "regulated projects." [Fn. omitted.] Under MRP 2, "regulated projects" included enumerated "road projects that create 10,000 square feet or more of newly constructed contiguous impervious surface that fall under the building and planning authority of a Permittee." [Fn. omitted.] MRP 3 continues to require Permittees to implement LID requirements for the same enumerated road projects, except that it applies to road projects that create 5,000 square feet or more of newly constructed continuous impervious surface. [Fn. omitted.] The change in square footage will increase the number of road projects that are subject to the LID requirements and will increase costs. However, an increase in costs alone is not sufficient to establish a new program or higher level of service. The change does not require Permittees to do anything new or to provide a higher level of service compared to the actions required under MRP 2.[199]

The Commission finds that the requirements in Provisions C.3.b.i., and C.3.b.ii.4. and 5. do not mandate a new program or higher level of service.

ii. Provisions C.3.b.i., and C.3.b.ii.4. and 5. do not mandate a new program or higher level of service with respect to public roads accepted into a permittee's road system.

With respect to public roads accepted into a permittee's road system, the Commission finds that the requirements in Provisions C.3.b.i., and C.3.b.ii.4. and 5. do not mandate a new program or higher level of service.

When determining whether the test claim permit compels compliance and, thus, creates a state-mandated program for purposes of reimbursement under article XIII B, section 6, the courts have identified two distinct theories: legal compulsion and practical compulsion.[200] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[201] The California Supreme Court has described legal compulsion as follows:

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[199] Exhibit B, Water Boards' Comments on the Test Claim, page 12.

[200] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[201] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[202]

Here, the permittees have the authority, but not the legal requirement, to accept roads into their system, which can only be accomplished by the voluntary action of the governing body.[203] Therefore, because state law permits, but does not legally require, the permittees to accept roads into their system, the downstream requirements imposed by the test claim permit cannot be said to be legally compelled. The courts have made it clear "activities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice."[204]

Nonetheless, even where a local government entity is not legally compelled to perform required activities, it may be practically compelled to do so. As the California Supreme Court recently stated in *Coast Community College Dist. v. Commission on State Mandates*, practical compulsion "arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply."[205] However, substantial evidence is required for a showing of practical

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727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

[202] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

[203] Streets and Highways Code sections 941(b) ("No public or private road shall become a county highway until and unless the board of supervisors, or its designee, by appropriate action, has caused the road to be accepted into the county road system."), and 1806(a) ("No city shall be held liable for failure to maintain any road until it has been accepted into the city street system.").

[204] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.)* (2003) 30 Cal.4th 727, 742; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[205] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern*

compulsion and no evidence has been filed in this case to show that the permittees are practically compelled to create between 5,000 and 9,999 square feet of *newly* constructed contiguous impervious surface or engage in road reconstruction projects of existing streets or roads that create or replace greater than or equal to one contiguous acre of impervious surface.[206] Thus, the requirements imposed by Provisions C.3.b.i., and C.3.b.ii.4. and 5. are not mandated by the state.

Even if there was evidence of practical compulsion, the requirements to implement low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for public new or widening road projects and road reconstruction projects are not new, since the prior permit also required the same activities,[207] which are not unique to government or provide a governmental service to the public and, thus, the requirements do not constitute a new program or higher level of service. "New program or higher level of service" is defined as "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."[208]

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[209] The law at issue in the *County of Los Angeles* case addressed increased workers' compensation benefits for government employees, and the court concluded that:

> …section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker's compensation benefits that employees of private individuals or organizations receive. Workers'

High School Dist.) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute).

[206] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368-1369; Government Code section 17559; California Code of Regulations, title 2, section 1187.5.

[207] Exhibit A, Test Claim, pages 1546, 1549 (Order R2-2015-0049, Provision C.3.b.).

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

[209] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57, emphasis added.

> compensation is *not* a program administered by local agencies to *provide service to the public*.[210]

The court also concluded that the statute did not impose unique requirements on local government:

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[211]

In *City of Sacramento*, the court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[212] The court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[213] Rather, the court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[214]

In *County of Los Angeles v. Department of Industrial Relations*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all

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[210] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58, emphasis added.

[211] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

[212] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[213] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[214] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 (Finding that statute eliminating local government exemption from liability for worker's compensation death benefits for public safety employees "simply puts local government employers on the same footing as all other nonexempt employers.").

elevators, not just those that were publicly-owned.[215] The court found that the regulations were plainly not unique to government.[216] The court also found that the regulations did not carry out the *governmental* function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[217] The court reasoned:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[218]

Here, the requirements to implement LID source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for new or widening road projects are not uniquely imposed on government. The requirements equally apply to private roads.[219] The requirements are triggered based on the size and impact of the road project, and not on whether its proponent is a private or government entity. In this respect, the requirements of the test claim permit are not unique to government, but apply only *incidentally* to the copermittees when they are the proponent of a road project subject to the test claim permit's requirements. This is no different from the situation addressed in the *County of Los Angeles* and *City of Sacramento* cases; in

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[215] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[216] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[217] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[218] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, footnote 5.

[219] Exhibit A, Test Claim, pages 568 (Provision C.3.b.ii.4., which states, "Any of the following types of road projects that create 5,000 square feet or more of newly constructed contiguous impervious surface, *that are both public and private road projects*, and that fall under the building and planning authority of a Permittee." Emphasis added) and 569 (Provision C.3.b.ii.5., which states, "Road projects that involve the reconstruction of existing streets or roads, which create and/or replace greater than or equal to one contiguous acre of impervious surface and *that are public road projects and/or fall under the building and planning authority of a Permittee*." Emphasis added.).

each of those cases the alleged mandate applied to the local government as an employer, and applied in substantially the same manner as to all other employers, and for that reason the law at issue was not considered a peculiarly governmental "program" uniquely imposed on local government within the meaning of article XIII B.[220] An even closer analogy is seen in *County of Los Angeles v. Department of Industrial Relations*, in which the regulations complained of applied to publicly- and privately-owned elevators alike, and the court found that this did not constitute a unique requirement imposed on local government and did not carry out the *governmental* function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[221]. The LID requirements apply to both municipal and private road projects.

Accordingly, with respect to public roads accepted into a permittee's road system, the Commission finds that the requirements in Provisions C.3.b.i., and C.3.b.ii.4. and 5. do not mandate a new program or higher level of service.

iii. Provisions C.3.b.i., and C.3.b.ii.4. and 5. do not impose a new program or higher level of service to verify, under the permittees' regulatory authority, the implementation of low impact development (LID) source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility for private new road projects between 5,000 and 9,999 square feet, and even if they did, the costs are not reimbursable as stated in Section IV.C.2.b. of this Decision because the permittees have fee authority to pay for any new requirements imposed by these provisions.

The activity to verify under the permittees' regulatory authority that all private new or widening road projects between 5,000 and 9,999 square feet implement LID source control, site design, and stormwater treatment onsite or at a joint stormwater treatment facility, does not impose new program or higher level of service. Under the prior permit, the permittees were also required to verify LID compliance for private road projects that create 10,000 square feet or more of newly constructed contiguous impervious surface.[222] Although the permittees may now have to verify additional road projects and incur additional costs with the decrease in the road project size from 10,000 to 5,000 square feet required to comply with the LID requirements, the required activity is the

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[220] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58.

[221] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[222] Exhibit A, Test Claim, pages 1546, 1549 (Order R2-2015-0049, Provision C.3.b.).

same and the courts have been clear that increased costs alone do not require reimbursement under article XIII B, section 6.[223]

In addition, as more fully described in section IV.C.2.b. of this Decision, reimbursement is not required since the claimants have regulatory fee authority to cover the costs of the new required activities.[224]

b. <u>Green infrastructure planning and implementation requirements imposed by Provisions C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., and C.3.j.ii.4., are not new.</u>

The claimant requests reimbursement for several activities under Provision C.3.j., the "Green Infrastructure and Implementation" provision of the test claim permit. The introductory paragraphs of Provision C.3.j. direct the permittees *to continue to implement* their Green Infrastructure Plans (completed during the prior permit), as necessary to comply with the test claim permit, for the inclusion of LID drainage design into storm drain infrastructure on public and private lands, including streets, roads, storm drains, parking lots, and building roofs.[225] The stated goals are as follows:

(1) The Plans are intended to serve as an implementation guide and reporting tool during this and subsequent Permit terms to provide reasonable assurance that urban runoff TMDL wasteload allocations (e.g., for the San Francisco Bay mercury and PCBs TMDLs and the Urban Creeks Pesticides TMDL) will be met, and to set goals for reducing, over the long term, the adverse water quality impacts of urbanization and urban runoff on receiving waters.

(2) Over the long term, the Plans are intended to describe how the Permittees will shift their impervious surfaces and storm drain infrastructure from gray, or traditional storm drain infrastructure where runoff flows directly into the storm drain and then the receiving water, to green—that is, to a more-resilient, sustainable system that slows runoff by dispersing it to vegetated areas, harvests and uses runoff, promotes infiltration and evapotranspiration, and uses bioretention and other green infrastructure practices to clean stormwater runoff.

(3) Green infrastructure project prioritization is described in the Green Infrastructure Plans based on local characteristics and priorities, and therefore green infrastructure projects will typically be designed to achieve multiple benefits in addition to mercury and PCBs load reduction.

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[223] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; see also, *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[224] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-593.

[225] Exhibit A, Test Claim, pages 25-26, 604-605 (Test claim permit, Provision C.3.j.i.).

> Furthermore, this Provision establishes a separate impervious surface retrofit requirement for other-than Regulated Projects.[226]

The Green Infrastructure Plan and implementation requirements were originally required by Provision C.3.j. of the prior permit (Order R2-2015-0049) and identified the same goals described above.[227]

The claimant pleads Provisions C.3.j.ii.1.a.-g. (update green infrastructure plans), C.3.j.ii.2.a.-j. (numeric retrofit requirements for projects), and C.3.j.ii.4. (long-term green infrastructure implementation), of the test claim permit.

i. The requirements in provision C.3.j.ii.1.a.-g. to update the Green Infrastructure Plan are not new.

Provision C.3.j.ii.1.a.-g. requires the permittees to "update" their Green Infrastructure Plans to ensure that municipal processes and ordinances allow and encourage green infrastructure by seeking cooperation with non-municipal entities to implement green infrastructure; update planning documents with green infrastructure implementation; develop funding mechanisms including transportation grants, stormwater fees, and application review fees; review countywide green infrastructure implementation guidance documents and adapt them as necessary to account for local considerations "if this has not already been completed during the Previous Permit term;" continue to implement the tools developed during the previous permit term to track and map completed public and private green infrastructure projects; continue to adopt or amend policies, ordinances, and other appropriate legal mechanisms; and continue to conduct outreach and education, as follows:

> The Permittees shall, individually or in a coordinated manner, update and/or supplement their Green Infrastructure Plans as needed to ensure that municipal processes and ordinances allow and appropriately encourage implementation of green infrastructure, and incorporate lessons learned, by:
>
> (a) Revising implementation mechanisms to include consideration, or reconsideration, of cooperation with non-municipal entities such as schools on green infrastructure implementation, and otherwise updating implementation mechanisms as appropriate.
>
> (b) Following through with the development or updates of general plans, specific plans, urban forestry plans, climate change adaptation plans, complete streets plans and other planning documents with a green infrastructure nexus to include language which is more supportive of green infrastructure implementation, as identified by Permittees in their Green Infrastructure Plans. Upon request by Water Board staff, Permittees shall provide justifications for planning documents that they

[226] Exhibit A, Test Claim, page 605.

[227] Exhibit A, Test Claim, pages 1576-1582 (Order R2-2015-0049, Provision C.3.j.).

assert do not need to be updated to further support green infrastructure implementation.

(c) Developing funding and funding mechanisms identified in the Green Infrastructure Plans, such as by working with the relevant agencies to expand the scope of transportation grants to include allocation for green infrastructure; establishing green infrastructure-based or green infrastructure-incorporating stormwater fees, including work that sets the foundation for additional future stormwater fees; establishing or increasing application review fees, and evaluating other opportunities to leverage municipal approval of private development to fund green infrastructure implementation.

(d) Reviewing countywide green infrastructure implementation guidance documents and adapting them as necessary to account for local considerations if this has not already been completed during the Previous Permit term, and otherwise reviewing and updating general guidelines and standard specifications as appropriate.

(e) Continuing to implement the tools developed during the Previous Permit term to track and map completed public and private green infrastructure projects, and making the information publicly available.

(f) Continuing to adopt or amend policies, ordinances, and/or other appropriate legal mechanisms to ensure implementation of the Green Infrastructure Plan in accordance with the requirements of this Provision, as necessary.

(g) Continuing to conduct outreach and education as follows:

(i) Conduct public outreach on the requirements of this Provision, including outreach coordinated with adoption or revision of standard specifications and planning documents, and with the initiation and planning of infrastructure projects. Such outreach shall include general outreach and targeted outreach to and training for professionals involved in infrastructure planning and design.

(ii) Train appropriate staff, including planning, engineering, public works maintenance, finance, fire/life safety, and management staff on the requirements of this Provision and methods of implementation.

(iii) Educate appropriate Permittee elected officials (e.g., mayors, city council members, county supervisors, district board members) on the requirements of this Provision and methods of implementation.[228]

The Water Boards contend that Provision C.3.j.ii.1.a.-g., does not mandate a new program or higher level of service as follows:

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[228] Exhibit A, Test Claim, pages 605-607.

> Under 40 C.F.R. section 122.42(c), Permittees are required [to] submit an annual report that includes the status of implementing components of their stormwater management program that are established as permit conditions and any proposed changes to those controls. Additionally, as part of their permit application, Permittees are required to describe their existing legal authority to control discharges to the MS4 and to demonstrate that they have the legal authority to require compliance with conditions in ordinances, permits, contracts, or orders. [Fn. omitted.] The challenged provision falls within the scope of what was already required under MRP 2 and existing law—it is not new or a higher level of service.[229]

The Commission finds that these requirements are not new. Permittees were required by the prior permit to develop and implement a Green Infrastructure Plan for the inclusion of low impact development (LID) drainage design into storm drain infrastructure on public and private lands.[230] The Plan was intended to serve as an implementation guide and reporting tool for subsequent permit terms to provide reasonable assurance that urban runoff TMDL wasteload allocations from mercury and PCBs were met and to set goals for reducing the adverse water quality impacts of urbanization and urban runoff on receiving waters.[231] "Over the long term, the Plan is intended to describe how the Permittees will shift their impervious surfaces and storm drain infrastructure from gray, or traditional storm drain infrastructure where runoff flows directly into the storm drain and then the receiving water, to green—that is, to a more-resilient, sustainable system that slows runoff by dispersing it to vegetated areas, harvests and uses runoff, promotes infiltration and evapotranspiration, and uses bioretention and other green infrastructure practices to clean stormwater runoff."[232] The Green Infrastructure Plan had to contain the following:

- Mechanisms to prioritize and map planned projects to assess load reductions of mercury and PCBs, and specifications to incorporate green infrastructure into development projects in the permittee's jurisdiction.
- Requirements that projects be designed to meet the treatment and hydromodification sizing requirements.
- Summaries of planning documents the permittee had to update or modify to incorporate green infrastructure requirements (i.e., General Plans, Specific Plans, Street Plans, Transportation Plans, Storm Drain Master Plans, Pavement Work Plans, Urban Forestry Plans, Flood Control Plans).

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229 Exhibit B, Water Boards' Comments on the Test Claim, page 14.

230 Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

231 Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

232 Exhibit A, Test Claim, page 1577 (Order R2-2015-0049, Provision C.3.j.).

- A workplan identifying how the permittee will ensure that green infrastructure and low impact development (LID) measures are appropriately included in future plans.
- An evaluation of prioritized project funding options, including, but not limited to: Alternative Compliance funds; grant monies, including transportation project grants from federal, State, and local agencies; existing Permittee resources; new tax or other levies; and other sources of funds.[233]

Permittees were also required by the prior permit to adopt policies, ordinances, and other legal mechanisms to ensure implementation of the Green Infrastructure Plan; conduct public outreach and education public officials on the plan; train appropriate staff; and implement the plan.[234]

The requirements imposed by Provision C.3.j.ii.1.a.-g. to update the plan and to continue to implement the plan, develop funding mechanisms, conduct public outreach and education, and provide training are not new, state-mandated requirements. As indicated above, the Green Infrastructure Plan, which had to include these components, was developed and implemented under the prior permit. Federal law requires a permittee's proposed management program to include an assessment of controls to ensure that water quality standards are met and a fiscal analysis for each fiscal year covered by the permit to accomplish the activities of the program.[235] Federal law also requires permittees to annually submit a report to the Regional Board that includes proposed changes and necessary revisions to the assessment of controls and to the fiscal analysis previously reported.[236] In addition, federal law requires the permittees to have adequate legal authority to control pollutants to the MS4 and to require compliance with the NPDES permit rules.[237]

Thus, Provision C.3.j.ii.1.a.-g. does not mandate a new program or higher level of service.

ii. Provision C.3.j.ii.2.a.-j., which requires the permittees to implement green infrastructure projects in their jurisdictions, is not new.

Provision C.3.j.ii.2.a.-j. (numeric retrofit requirements for projects) requires the permittees, by June 30, 2027, to implement or cause to be implemented green infrastructure projects within their jurisdictions *which are not already defined as "regulated projects"* under Provision C.3.b., so that the impervious surface retrofits listed

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233 Exhibit A, Test Claim, pages 1577-1579 (Order R2-2015-0049, Provision C.3.j.ii.2.).

234 Exhibit A, Test Claim, pages 1579-1580 (Order R2-2015-0049, Provision C.3.j.ii.3.-4., C.3.j.iii.).

235 Code of Federal Regulations, title 40, section 122.26(d)(2)(v-vi).

236 Code of Federal Regulations, title 40, section 122.42(c).

237 Code of Federal Regulations, title 40, section 122.26(d)(2)(i).

in Table H-1 of Attachment H are achieved.[238] Table H-1 identifies the number of acres subject to the numeric retrofit requirements for each permittee and a total by county.[239] The bottom of Table H-1 explains: "The retrofit assignment is three acres per 50,000 population, prorated, with a minimum expectation of 0.20 acres and a maximum expectation of five acres. The population data in this table is from the 2019 U.S. Census Bureau Population Estimate."[240] Thus, for example, 4.66 acres in Alameda City (with a population of 77,624) are required to be retrofitted, 5.00 acres in Alameda County (with a population of 147,218) are required to be retrofitted, and 1.18 acres in Albany (with a population of 19,696) are required to be retrofitted, with a total of 58.42 acres for all permittees in Alameda County required to be retrofitted with green infrastructure projects.[241] Provision C.3.j.ii.2.b. states the "Permittees may meet the numeric retrofit requirements listed in Table H-1 of Attachment H on a countywide basis. If Permittees within a given county do not collectively achieve their numeric retrofit requirements, each Permittee within that county shall be separately responsible for achieving its individual retrofit requirement."[242] Provision C.3.j.ii.2.c. states that although the permittees may meet their total individual numeric retrofit requirements on a countywide basis, each permittee "shall implement, or cause to be implemented, a green infrastructure project or projects treating no less than 0.2 acres of impervious surface within its jurisdiction" or "may contribute substantially to such a green infrastructure project(s) outside of its jurisdiction and within its County."[243] The remaining subdivisions in Provision C.3.j.ii.2. discuss ways for the permittees to meet their numeric compliance requirements.[244]

The Water Boards state that the requirement to implement green infrastructure projects that are not classified as "regulated projects" does not impose a new program or higher level of service because under the prior permit, the permittees were required to establish retrofit targets in the Green Infrastructure Plans, citing to Provisions C.3.d., C.3.j., C.11.c., and C.12.c. of the prior permit.[245] The Water Boards acknowledge that while the number of green infrastructure projects may increase, the underlying

[238] Exhibit A, Test Claim, page 607.

[239] Exhibit A, Test Claim, pages 1247-1250 (Test claim permit, Attachment H, Table H-1).

[240] Exhibit A, Test Claim, page 1250.

[241] Exhibit A, Test Claim, pages 1247-1250 (Test claim permit, Attachment H, Table H-1).

[242] Exhibit A, Test Claim, page 607.

[243] Exhibit A, Test Claim, page 607.

[244] Exhibit A, Test Claim, pages 607-608.

[245] Exhibit B, Water Boards' Comments on the Test Claim, pages 13-14.

requirements are the same and, thus, there is no new program or higher level of service.[246]

The Commission finds that Provision C.3.j.ii.2.a.-j. does not mandate a new program or higher level of service. As indicated above, permittees were required by the prior permit to develop and implement a Green Infrastructure Plan for the inclusion of low impact development (LID) drainage design into storm drain infrastructure on public and private lands, including development projects that were not defined as "regulated projects."[247] The Plan was intended to serve as an implementation guide and reporting tool for subsequent permit terms to provide reasonable assurance that urban runoff TMDL wasteload allocations from mercury and PCBs were met and to set goals for reducing the adverse water quality impacts of urbanization and urban runoff on receiving waters.[248] The prior permit further stated that "[o]ver the long term, the Plan is intended to describe how the Permittees will shift their impervious surfaces and storm drain infrastructure from gray, or traditional storm drain infrastructure where runoff flows directly into the storm drain and then the receiving water, to green—that is, to a more-resilient, sustainable system that slows runoff by dispersing it to vegetated areas, harvests and uses runoff, promotes infiltration and evapotranspiration, and uses bioretention and other green infrastructure practices to clean stormwater runoff."[249] In this respect, the prior permit required the Green Infrastructure Plan to include targets for the amount of impervious surface from public and private projects within the permittee's jurisdiction to be *retrofitted* over specified time schedules, consistent with the deadlines for load reductions for mercury and PCBs.[250] The permittees were required to achieve load reductions consistent with their share of the county total, based on the proportion of county population in each municipality.[251]

Thus, the requirement in Provision C.3.j.ii.2.a.-j. to implement or cause to be implemented green infrastructure projects within the permittees' jurisdictions which are not already defined as "regulated projects" is not new. Although the test claim permit may require more projects to be retrofitted than under the prior permit, increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution.[252]

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[246] Exhibit B, Water Boards' Comments on the Test Claim, page 14.

[247] Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

[248] Exhibit A, Test Claim, page 1576 (Order R2-2015-0049, Provision C.3.j.).

[249] Exhibit A, Test Claim, page 1577 (Order R2-2015-0049, Provision C.3.j., page 50).

[250] Exhibit A, Test Claim, pages 1578, 1642-1644, 1649-1651 (Order R2-2015-0049, Provisions C.3.j.i.2.c., C.11.c., C.12.c.).

[251] Exhibit A, Test Claim, pages 1642-1644, 1650-1651 (Order R2-2015-0049, Provisions C.11.c.ii., C.12.c.ii.).

[252] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th

Accordingly, Provision C.3.j.ii.2.a.j. does not mandate a new program or higher level of service.

iii. Provision C.3.j.ii.4., which provides that the permittees "may" form a technical working group to discuss long term green infrastructure goals does not impose a state-mandated requirement.

Provision C.3.j.ii.4. provides that the permittees, together with Water Board staff and science experts, "may" collectively form a Technical Working Group to discuss long term green infrastructure goals and recommend long term percentage reductions in permittees' impervious surfaces at individual, countywide, and regional scales. Discussions should prioritize long term goals for development and redevelopment projects not already defined as "regulated projects" by Provision C.3.b. The group "should meet at a minimum biannually," and subsequent to a report required by another Provision, "should meet annually."[253] The claimant contends that "To support its member agencies implementing the increased requirements under Provision C.3.j.ii.(4), in Fiscal Year 22/23 the Program updated and maintained a GIS platform that allows members to track their green infrastructure projects in order to comply with this new requirement."[254]

The Water Boards contend Provision C.3.j.ii.4., which provides that the permittees, together with Water Board staff and science experts, "may" collectively form a Technical Working Group, does not impose a mandate, but is voluntary.[255]

The Commission finds that Provision C.3.j.ii.4. does not, by its plain language, impose a state-mandated requirement. Nor is there a requirement to update and maintain a GIS platform that allows members to track their green infrastructure projects, as alleged by the claimant. These activities are voluntary and not mandated by the state.

c. <u>The requirements to develop and implement a LID monitoring plan in accordance with Provision C.8.d. and form a Technical Advisory Group to review and make recommendations regarding the LID monitoring plan are new.</u>

Provision C.8.d. addresses the development and implementation of low impact development (LID) monitoring plans to measure compliance and effectiveness of LID controls.

> LID Monitoring is intended to measure compliance and effectiveness of LID implementation. It will improve the understanding of the following two

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727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

[253] Exhibit A, Test Claim, pages 609-610.

[254] Exhibit A, Test Claim, page 25.

[255] Exhibit B, Water Boards' Comments on the Test Claim, page 15.

management questions (which are repeated in Finding C.8-6 above) related to the implementation of LID controls:

(1) What are the pollutant removal and hydrologic benefits, such as addressing impacts associated with hydromodification, of different types of LID facilities, systems, components, and design variations, and how do they change over time?

(2) What are the minimum levels of O&M necessary to avoid deteriorated LID facilities, systems, and components that reduce pollutant removal and hydrologic benefit performance?[256]

Provision C.8.d. imposes the following requirements on the permittees:

- At the regional or countywide level, develop LID monitoring plans, which shall do the following:

  (a) Explain how the study(s) will address both management questions and propose monitoring questions necessary that will address both management questions.

  (b) Describe the LID facility(s) or system(s) and study area(s), including the characteristics, land use and management actions within the tributary drainage area to the LID facility(s) or system(s) that will be monitored.

  (c) List the monitoring stations, monitoring parameters, and associated measurement, sample and analytical methods that will be utilized.

  (d) Establish a monitoring schedule, including number and type (wet weather and dry weather) of monitoring events for each site, that may result in a greater number of total and/or annual monitoring events than the minimum required in Table 8.d.2, and including a discussion of the allocation of samples between and within sites.

  (e) Describe the data evaluation methods, such as statistical analyses to test whether differences in concentrations are statistically significant.

  (f) Include study-specific Quality Assurance Project Plans (QAPPs), which, at a minimum, are comparable to the "SWAMP QAPrP."

  (g) Provide annual cost estimates for the implementation of the LID Monitoring Plan.

  (h) Explain how sampling and analytical methodologies will be regionally consistent.[257]

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256 Exhibit A, Test Claim, page 643.

257 Exhibit A, Test Claim, pages 643-644 (test claim permit, Provision C.8.d.i.1.).

- Implement the LID monitoring plans no later than the start of the 2024 Water Year, which is October 1, 2023.[258] The LID effectiveness monitoring methods listed in Table 8.d.1. shall be implemented and shall investigate pollutant removal benefits, hydrologic performance, and changes over time.[259] LID monitoring shall be consistent with the parameters and intensities in Table 8.d.2., which identify the total number of samples required and the pollutants to be monitored for each countywide stormwater program, as follows:[260], [261]

<table>
<tr><th>Countywide Stormwater Program</th><th>Anticipated Type(s) of LID Facilities Monitored</th><th>Total Minimum Number of Water Quality Sample Events During Permit Term (Annual Minimum)[Fn. omitted]</th><th>Parameters [Fns. omitted]</th></tr>
<tr><td>Alameda</td><td>High flow rate tree well filters and/or a combination of several LID measures.</td><td>25 (3)</td><td rowspan="5">Required:
• Total Hg (mercury);
• Total PCBs;
• TSS (total suspended solids)
• PFAS (forever chemicals;
• TPH (total petroleum hydrocarbons);
• Total and Dissolved Copper;
• Flow;
• Total Hardness; and
• pH.
Optional:
• Other emerging contaminants; [Fn. omitted] and Other ancillary parameters. [Fn. omitted]</td></tr>
<tr><td>Contra Costa</td><td>Bioretention and/or other infiltration-based LID measures.</td><td>25 (3)</td></tr>
<tr><td>San Mateo</td><td>Regional multi-benefit stormwater capture facility(s).</td><td>25 (3)</td></tr>
<tr><td>Santa Clara</td><td>Bioretention and/or other LID measures.</td><td>25 (3)</td></tr>
<tr><td>Solano</td><td>Bioretention and/or other LID measures.</td><td>12 (1)</td></tr>
</table>

258 Exhibit A, Test Claim, pages 643-644 (test claim permit, Provisions C.8.d.i.2., C.8.d.v.).

259 Exhibit A, Test Claim, pages 645-646.

260 Exhibit A, Test Claim, page 645. Tables 8.d.1. and 8.d.2. are on pages 646-647.

261 Exhibit A, Test Claim, page 647 (test claim permit, Table 8.d.2.).

A footnote to Table 8.d.2. states the following: "Samples shall be collected via automated sampler as flow-weighted composite event mean concentrations (EMCs); time-weighted composites are allowed if they have many subsamples and can be closely approximated as flow-weighted composites. In order to assess performance, each sample event must include simultaneous sampling of the influent and effluent. The Permittees are encouraged to additionally collect sediment samples (e.g., to analyze for total PCBs and total mercury), however such sediment sample collection shall not count towards the required water quality samples specified in this column."[262]

The Fact Sheet explains that "Flow- or time-weighted composite EMCs involve the collection of a sample aliquot [or small samples] at a certain increment of flow passing through the monitored orifice, or at a certain increment of time, which is then added to a storage container to form a single composite sample."[263]

- Form a Technical Advisory Group, which includes Water Board staff and science advisors, to review and make recommendations regarding the LID monitoring plans before submission to the Executive Officer. Draft monitoring plans shall be submitted to the advisory group by March 1, 2023. Prior to the Executive Officer's approval or conditional approval of the LID monitoring plans, the advisory group shall be convened at least biannually. Thereafter, it shall be convened at least annually to provide continued feedback regarding the implementation.[264]
- Submit LID monitoring plans for Executive Officer approval by May 1, 2023.[265]

The Water Boards contend that Provision C.8.d. does not mandate a new program or higher level of service as follows:

> [The prior permit] MRP 2 included monitoring and reporting requirements for LID and trash. Under MRP 2, Permittees were required to submit various LID reports [Fn. omitted, which refers to "MRP 2, S.F. Bay Water Board Order R2-2015-0049, Provisions C.3.b.iv, C.3.c.ii, C.3.h.v, and C.3.j.v."] and to implement an Operation and Maintenance Verification Program that included Permittee inspections of installed LID stormwater treatment systems and reporting on results of inspections, including findings of whether the system was operating properly and whether enforcement action was taken. [Fn. omitted, which refers to "MRP 2, S.F. Bay Water Board Order R2-2015-0049, Provision C.3.h.i, ii, iv."].
>
> The challenged monitoring provisions are not new programs or higher levels of service. Under the Clean Water Act, the Water Boards must

[262] Exhibit A, Test Claim, page 647, footnote 33.

[263] Exhibit A, Test Claim, page 993 (Fact Sheet).

[264] Exhibit A, Test Claim, page 645 (test claim permit, Provision C.8.d.ii.).

[265] Exhibit A, Test Claim, page 645 (test claim permit, Provision C.8.d.v.i.)

> include conditions in NPDES permits to assure compliance with permit limitations, including conditions on data and information collection (i.e., monitoring) and reporting. [Fn. omitted.] Additionally, under the Clean Water Act implementing regulations, a stormwater permit must establish the "type, intervals, and frequency [of monitoring] sufficient to yield data which are representative of the monitored activity." [Fn. omitted.] An NPDES permit is unlawful if a permittee is not required to monitor its discharges in a manner sufficient to comply with the permit. [Fn. omitted.][266]

The Commission finds that the requirement to develop a LID monitoring plan in accordance with Provision C.8.d. and the requirement to form a Technical Advisory Group to review and make recommendations regarding the LID monitoring plan are new requirements. The Water Boards identify a number of provisions from the prior permit to argue that these requirements are not new, but none require the permittees to develop and submit a LID monitoring plan or form a Technical Advisory Group. Provision C.3.b.iv. of the prior permit required the permittees to report on regulated development projects, including the status of the project, the source control measure used, and the operation and maintenance responsibility mechanism for the life of the project.[267] Provision C.3.c.ii. of the prior permit required the permittees to report on the design specifications for pervious pavement systems.[268] Provision C.3.h.v. required the permittees to have an inspection program for LID and hydromodification management source controls to ensure they are maintained.[269] The closest provision from the prior permit is Provision C.3.j.iv., which required the permittees to develop and implement methods to track and report on the implementation of green infrastructure measures on public and private parcels, which had to provide reasonable assurance that the wasteload allocations for PCBs and mercury TMDLs and reductions for trash were being met.[270] However, the requirement to track and report on the implementation of green infrastructure measures is still required by the test claim permit, in Provision C.3.j.v.[271] The requirement in the test claim permit to develop a LID monitoring plan, due to the Executive Officer by May 1, 2023, is a new plan that was not required by the prior permit. Thus, the following requirements are new:

- At the regional or countywide level, develop LID monitoring plans as specified.[272]

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[266] Exhibit B, Water Boards' Comments on the Test Claim, pages 16-17.

[267] Exhibit A, Test Claim, pages 1550-1551 (Order R2-2015-0049, Provision C.3.b.iv.).

[268] Exhibit A, Test Claim, page 1554 (Order R2-2015-0049, Provision C.3.c.ii., p. 27).

[269] Exhibit A, Test Claim, page1575 (Order R2-2015-0049, Provision C.3.h.v.).

[270] Exhibit A, Test Claim, pages 1580-1581 (Order R2-2015-0049, Provision C.3.j.iv.).

[271] Exhibit A, Test Claim, page 611.

[272] Exhibit A, Test Claim, pages 643-644 (test claim permit, Provision C.8.d.i.).

- Form a Technical Advisory Group, which includes Water Board staff and science advisors, to review and make recommendations regarding the LID monitoring plans before submission to the Executive Officer. Draft monitoring plans shall be submitted to the advisory group by March 1, 2023. Prior to the Executive Officer's approval or conditional approval of the LID monitoring plans, the advisory group shall be convened at least biannually. Thereafter, it shall be convened at least annually to provide continued feedback regarding the implementation.[273]
- Submit the LID monitoring plan for Executive Officer approval by May 1, 2023.[274]

In addition, the requirement to implement the LID monitoring plan to measure compliance and effectiveness of LID implementation by collecting samples using flow- or time-weighted composite event mean concentrations (EMCs), is a new requirement. Under federal law, an NPDES permit is unlawful if a permittee is not required to monitor its discharges in a manner sufficient to comply with the permit.[275] The prior permit required the implementation of LID and hydromodification controls on development. However, the prior permit did not specifically require LID monitoring. It required, as the Water Boards contend, inspections of installed LID stormwater treatment systems and reporting on results of inspections, including findings of whether the system was operating properly.[276] The prior permit also required the permittees to monitor for the pollutants at issue under the pollutants of concern monitoring, by collecting and analyzing the pollutants in stormwater runoff or bedded sediments.[277] However, LID monitoring specifically to determine the pollutant removal and hydrologic benefits of different types of LID components and design variations, and the minimum levels of operation and maintenance necessary to avoid deteriorated LID components[278] was not required by the prior permit.

Although these requirements are new, the Commission does not determine if these requirements mandate a new program or higher level of service since the claimants have fee authority sufficient as a matter of law to cover the costs of these requirements within the meaning of Government Code section 17556(d) and, thus, reimbursement is denied.

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[273] Exhibit A, Test Claim, page 645 (test claim permit, Provision C.8.d.ii.).

[274] Exhibit A, Test Claim, page 645 (test claim permit, Provision C.8.d.vi.)

[275] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207 ("That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. See 40 C.F.R. § 122.26(d)(2)(i)(F) . . .").

[276] Exhibit A, Test Claim, pages 1570-1575 (Order R2-2015-0049, Provision C.3.h.i., ii., iv.).

[277] Exhibit A, Test Claim, page 1616 (Order R2-2015-0049, Table 8.2.).

[278] Exhibit A, Test Claim, page 643.

d. The MS4 map requirement in Provision C.5.f. to develop and submit a plan and schedule with the 2026 Annual Report to update existing storm sewer system information, maps, drawings, and databases is new; but all other requirements are not new.

Provision C.5.f. requires the permittees to update their maps of the MS4 and make them available to the public. Provision C.5.f. imposes the following requirements on the permittees:

- Make the current map(s) of its MS4 available to the public either electronically or in hard copy. Public availability shall be made through a single point of contact convenient to the public, such as a staffed counter or web-accessible map. The availability of the map shall be publicized through permittee directories and web pages.
- Update the maps.
  - Determine information missing from the current MS4 map, which may include Oakland Museum watershed maps, existing MS4 maps or drawings in the Permittee files, or other storm sewer system information databases.
  - Identify and make available to the Water Board maps of the storm sewer system and other stormwater controls installed after publication of the Oakland Museum watershed maps within the permittees' jurisdictional area.
  - Develop a plan and schedule for updating the Permittee's storm sewer system information. Permittees or countywide stormwater programs may work together or with the Oakland Museum of California to develop a plan and schedule for updating existing information, maps, drawings, and databases. The plan will consider the potential to identify storm sewer system component locations, size or specifications, materials of construction, and condition.
- Reporting.
  - In the 2024 Annual Report, Permittees shall discuss how they make MS4 maps available to the public and how they publicize the availability of the MS4 maps.
  - Submit a plan and schedule with the 2026 Annual Report to update existing storm sewer system information.[279]

The Water Boards contend that Provision C.5.f., requiring the permittees to update their maps, does not mandate a new program or higher level of service because updated maps are required by federal regulations as follows:

[279] Exhibit A, Test Claim, pages 629-630.

> As required by 40 C.F.R. section 122.26(d)(1)(iii), the Permittees must include a topographic map in their application identifying the location of known MS4 outfalls that discharge to waters of the U.S., a description of land use activities and population densities within the drainage area, the location of municipal landfills, the location of discharges to the MS4 authorized by an NPDES permit, location of major structural controls for stormwater discharge, and identification of public parks and other open spaces. [Fn. omitted.] The Permittees must also identify the location of any major outfall [Fn. omitted.] that is not identified in the required map. [Fn. omitted.] Requiring Permittees to update maps to include information that is missing is not a new program or higher level of service—it is a requirement to do what is already required by existing law.[280]

The prior permit, in Provision C.5.f. also required each permittee to make a map of its MS4, make it available to the public, and report on that progress in the annual reports as follows:

> **C.5.f. Municipal Separate Storm Sewer System (MS4) Map**
>
> **i. Task Description** – Each Permittee shall make the map(s) of its MS4 available.
>
> **ii. Implementation Level** – Permittees shall make maps of the MS4 publicly available, either electronically or in hard copy. Public availability shall be made through a single point of contact that is convenient for the public, such as a staffed counter or web accessible maps. The MS4 map availability shall be publicized through Permittee directories and web pages.
>
> **iii. Reporting** – In the 2016 and 2019 Annual Reports, Permittees shall discuss how they make MS4 maps available to the public and how they publicize the availability of the MS4 maps.[281]

Thus, the permittees already had to have a map, make their maps available to the public, report on how the permittee makes their maps available, and federal law in section 122.26(d)(1)(iii) of the title 40 Code of Federal Regulations requires each permittee, when submitting an application to discharge pollutants, to provide a current map of all existing outfalls and land use activities within the drainage area served by the MS4 municipal storm sewer system. Thus, these activities are not new and do not mandate a new program or higher level of service.

However, developing and submitting a plan and schedule with the 2026 Annual Report to update existing storm sewer system information is new. This is consistent with the Fact Sheet, which states that the "[p]revious permits did not require Permittees to submit regular updates to their MS4 system maps" as follows:

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[280] Exhibit B, Water Boards' Comments on the Test Claim, pages 14-15.

[281] Exhibit A, Test Claim, page 1593 (Order R2-2015-0049, Provision C.5.f.).

. . . this Permit also requires Permittees to identify information missing from the current MS4 maps and develop a plan and schedule to compile additional storm sewer system information. *Previous permits did not require Permittees to submit regular updates to their MS4 system maps*, so the current status of the overall MS4 systems as compared to previous maps is unknown. To effectively manage and respond to illicit discharges, as well as potential impacts from conditionally exempted discharges like emergency firefighting discharges, it is essential for Permittees to understand their current MS4 system layout and conditions, as well as how discharge sources are connected to outfalls that discharge to their system.[282]

The Commission, however, does not reach the issue of whether these requirements mandate a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, reimbursement is not required since the claimants have fee authority to cover the costs of the requirement and, thus, there are no costs mandated by the state pursuant to Government Code section 17556(d).

e. The requirement to submit a revised Trash Generation Area Map with the 2024 annual report, which includes trash management areas and private land drainage areas that will be retrofitted with full trash capture devices or the equivalent by June 30, 2025, pursuant to Provision C.10.a.ii., is new; but the other requirements in Provisions C.8.e.ii..1., C.8.e.ii.2., C.10.a.i, and C.10.e. are not new.

The claimant pleads Provisions C.8.e.ii.1., C.8.e.ii.2., C.10.a.i., C.10.a.ii., and C.10.e. regarding trash.[283]

Provision C.8.e. addresses trash monitoring. Provisions C.8.e.ii.1. and C.8.e.ii.2. impose the following trash monitoring requirements on the permittees:

- Collect and analyze the amount of trash discharged from MS4 outfalls that drain tributary drainage areas controlled to the low trash generation level during storm events that will likely result in discharges of trash through the MS4 system.

  Sampling of MS4 outfalls includes the use of netting devices attached to the end of the outfall pipe (that capture trash discharging through the MS4), or other equivalent end-of-pipe (or in-line) devices and structures, whether existing, modified, or new. The device used to monitor trash shall not be used to control trash.

  Provision C.8.e.iii.1. states "Permittees shall conduct MS4 outfall monitoring annually, starting October 1, 2023, at no less than the number of sites and events specified in the table below, according to the approved or conditionally

[282] Exhibit A, Test Claim, page 966 (Fact Sheet), emphasis added.

[283] Exhibit A, Test Claim, pages 28-31.

approved Trash Monitoring Plan."[284] The table identifies the minimum number of sites and monitoring events for each countywide stormwater program as follows:

County	MS4 Outfall Monitoring	
	Minimum Number of Sites	Minimum Number of Wet Weather Monitoring Events
Alameda	3	3
Contra Costa	2	3
Solano	1	3
San Mateo	2	3
Santa Clara	3	3[285]

- Implement a pilot program to directly sample sections of receiving waters (in-stream) that receive runoff primarily from MS4 outfalls that drain tributary drainage areas controlled to the low trash generation level during storm events that will likely result in discharges of trash through the MS4 system.

  Sampling a receiving water directly (in-stream) involves the use of trawls, nets, or other equivalent devices, that are designed to capture as much of the width and depth of the receiving water's cross section (especially the thalweg) as is feasible and safe, during storm events that will (or that Permittees estimate are likely to) result in discharges of trash through the MS4 system.[286]

  Provision C.8.e.iii.2. states "Permittees shall implement a pilot program for direct in-stream monitoring. Permittees shall conduct this monitoring annually, starting October 1, 2024, at no less than the number of sites and events specified in the table below, according to the approved or conditionally approved Trash Monitoring Plan."[287]

[284] Exhibit A, Test Claim, page 651.

[285] Exhibit A, Test Claim, page 651.

[286] Exhibit A, Test Claim, pages 649-650.

[287] Exhibit A, Test Claim, page 651.

County	Direct In-Stream Monitoring	
	Minimum Number of Sites	Minimum Number of Wet Weather Monitoring Events
Alameda	2	3
Contra Costa	1	3
Solano	0	0
San Mateo	1	3
Santa Clara	2	3[288]

Provisions C.10.a.i and C.10.a.ii. address the following trash reduction requirements:

- Implement trash load reduction control actions in accordance with the following schedule and trash generation area management requirements, including mandatory minimum full trash capture systems, to meet the goal of 100 percent trash load reduction or no adverse impact to receiving waters from trash by June 30, 2025.

  Permittees shall reduce trash discharges from 2009 levels, described below, to receiving waters in accordance with the following schedule:

  (1) 90 percent by June 30, 2023; and

  (2) 100 percent by June 30, 2025.[289]

- Permittees that do not attain the 90 percent compliance benchmark by June 30, 2023, shall submit a revised trash load reduction plan as described in Provision C.10.d and a schedule of implementation of additional trash load reduction control actions sufficient to achieve compliance with the 90 percent compliance benchmark within a reasonable timeframe, and the 100 percent compliance benchmark by June 30, 2025.[290]
- Demonstrate attainment of trash discharge percentage reductions by management of Trash Generation Area Maps included with their Long-Term Trash Reduction Plans, submitted in February 2014.[291]

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[288] Exhibit A, Test Claim, page 651.

[289] Exhibit A, Test Claim, page 680 (test claim permit, Provision C.10.a.i.).

[290] Exhibit A, Test Claim, page 680 (test claim permit, Provision C.10.a.i.).

[291] Exhibit A, Test Claim, page 680 (test claim permit, Provision C.10.a.ii.).

- With the 2024 Annual Report, submit a revised Trash Generation Area Map that includes trash management areas, as well as private land drainage areas (See Provision C.10.a.ii.b) that will be retrofitted with full trash capture devices, or equivalent, by June 30, 2025. The updated trash generation map(s) shall include GIS layers and appropriate metadata (including tables etc.) that identify locations and associated drainage areas of full trash capture systems, and other trash control actions, and shall highlight any revisions or changes from the previous map(s).[292]
- Implement trash prevention and control actions, including full trash capture systems or other trash management actions, or combinations of actions, with trash discharge control equivalent to or better than full trash capture systems, to reduce trash generation to a Low trash generation rate or better.[293]
- By July 1, 2025, ensure that private lands that are moderate, high, or very high trash generating, and that drain to storm drain inlets that Permittees do not own or operate (private), but that are plumbed to Permittees' storm drain systems are equipped with full trash capture systems or are managed with trash discharge control actions equivalent to or better than full trash capture systems. If there is a full trash capture device downstream of these private lands that is designed, operated, and maintained to control trash discharges from that land area, no other trash control is required.[294]

Provision C.10.e. states in relevant part: "Permittees *may* collectively submit a programmatic report by March 31, 2023, for the approval of the Executive Officer, that describes conditions under which it is impracticable to control trash via full trash capture devices. The impracticability report shall include, but not be limited to, the following:

i. A description of the engineering constraints that prevent the installation of full trash capture devices.

ii. A process for evaluating and determining impracticability of full trash capture devices.

iii. Alternative Controls: The report shall include alternative controls or a combination of controls that may be implemented to reduce trash loads to meet the requirements and deadlines in Provision C.10.a. Examples of alternative controls include, but are not limited to, requiring businesses or property owners to pick up litter, successful implementation of excess trash receptacles and collection services, increased code enforcement or parking enforcement/ticketing/towing, additional trash pick-ups, street sweeping, assessment and execution of cooperative implementation opportunities with Caltrans or neighboring Permittees, curb inlet screens, and long term measures

[292] Exhibit A, Test Claim, page 681 (test claim permit, Provision C.10.a.ii.).

[293] Exhibit A, Test Claim, page 681 (test claim permit, Provision C.10.a.ii.a.).

[294] Exhibit A, Test Claim, page 682 (test claim permit, Provision C.10.a.ii.b.).

> such as pump station or storm drain retrofits, implementation of green stormwater infrastructure that controls trash, or changes to the catchment to allow effective implementation of full trash capture measures."[295]

The Water Boards contend that these provisions do not mandate a new program or higher level of service. They contend the prior permit required trash monitoring and specific reductions in trash and, thus, these provisions are not new.[296] Specifically, the permittees were required by the prior permit to perform visual monitoring on land to assess the effectiveness of trash controls and to conduct receiving water monitoring and develop a monitoring plan to determine the presence of trash and whether trash was causing or contributing to adverse trash impacts, and if the permittee's trash control actions effectively prevented trash.[297] The Water Boards further contend the requirement for a plan of additional trash controls that is triggered by failure to meet the 90% reduction deadline is not a new program or higher level of service, since this provision was carried over from the prior permit.[298]

The Commission finds that most of these requirements are not new and do not mandate a new program or higher level of service. The requirements in Provisions C.8.e.iii.1. and 2. of the test claim permit to monitor for trash and to conduct a pilot program to sample sections of receiving waters that receive runoff primarily from MS4 outfalls that drain tributary drainage areas controlled to the low trash generation level during storm events that will likely result in discharges of trash through the MS4 system are not new. The prior permit also required the permittees to conduct receiving water monitoring and to develop receiving monitoring tools and protocols to determine if their trash control actions effectively prevented trash from discharging into receiving waters and to determine sources that were causing or contributing to adverse trash impacts in receiving waters.[299] The prior permit also required the permittees to conduct visual on land assessments of trash to determine or verify the effectiveness of the trash control actions.[300] Federal law also requires monitoring sufficient to determine if the conditions

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[295] Exhibit A, Test Claim, pages 688-689, emphasis added. Provision C.10.e.iv. is not quoted above, but states "Permittees shall use an approved trash impracticability report in developing the updated Trash Load Reduction Workplans required by Provision C.10.d." The claimant did not plead Provision C.10.d. or request reimbursement to update the Trash Load Reduction Workplans, and therefore the language in Provision C.10.e.iv. is not addressed in this Decision.

[296] Exhibit B, Water Boards' Comments on the Test Claim, page 17, 21-22.

[297] Exhibit B, Water Boards' Comments on the Test Claim, page 17.

[298] Exhibit B, Water Boards' Comments on the Test Claim, page 22.

[299] Exhibit A, Test Claim, pages 1634-1635 (Order R2-2015-0049, Provision C.10.b.v.).

[300] Exhibit A, Test Claim, page 1633 (Order R2-2015-0049, Provision C.10.b.ii.b.).

of the permit, including the receiving water limitations and discharge prohibitions, are being met.[301] Thus, these activities are not new.

In addition, the prior permit required a 100 percent reduction in trash discharges from 2009 levels by July 1, 2022 by implementing trash prevention and control actions, including full trash capture systems or other trash management actions, or combinations of actions, with trash discharge control equivalent to or better than full trash capture systems.[302] The test claim permit simply extends that deadline to July 1, 2025, and implementing trash reduction actions required by Provisions C.10.a.i. and C.10.a.ii. to meet the deadline are not new and do not mandate a new program or higher level of service.

The requirement in Provision C.10.a.ii.b. to ensure that private lands that are moderate, high, or very high trash generating, and that drain to storm drain inlets that permittees do not own or operate, but that are plumbed to permittees' storm drain systems are equipped with full trash capture systems or are managed with trash discharge control actions equivalent to or better than full trash capture systems, is not new. The same requirement was imposed by Provision C.10.a.ii.b. of the prior permit.[303]

The requirement in Provision C.10.e., which states that "Permittees *may* collectively submit a programmatic report by March 31, 2023, for the approval of the Executive Officer, that describes conditions under which it is impracticable to control trash via full trash capture devices" is a local discretionary decision and is not mandated by the state.

However, the requirement to submit a revised Trash Generation Area Map with the 2024 annual report, which includes trash management areas and private land drainage areas that will be retrofitted with full trash capture devices or the equivalent by June 30, 2025, pursuant to Provision C.10.a.ii., is new. The prior permit states that the permittees "designated trash management areas on their February 2014 maps encompassing one or more trash generation areas, which they will implement trash control actions" and that the permittees had an opportunity under the prior permit to

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[301] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1); *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207 ["[T]he Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following ...monitoring requirements ... to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers ... shall include ...monitoring procedures necessary to determine compliance and noncompliance with permit conditions....")."].

[302] Exhibit A, Test Claim, pages 1630-1631 (Order R2-2015-0049, Provision C.10.a.).

[303] Exhibit A, Test Claim, page 1631 (Order R2-2015-0049, Provision C.10.a.ii.b.).

revise their maps in an annual report submittal.[304] The requirement in Provision C.10.a.ii. of the test claim permit is a new and additional requirement to submit another revised map with new information that was not previously required; namely, the private land drainage areas that will be retrofitted with full trash capture devices or the equivalent by June 30, 2025. In addition, the prior permit did not require the map to include GIS layers. Thus, the requirement to submit a revised map, as specified in Provision C.10.a.ii., is new. The Commission, however, does not reach the issue of whether the requirement mandates a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

f. The Pollutants of Concern monitoring requirements imposed by Provision C.8.f. are not new.

The claimant requests reimbursement to comply with Provision C.8.f., which addresses pollutants of concern monitoring.[305] The introductory paragraph in Provision C.8.f. states the following:

> Pollutants of Concern (POC) monitoring is intended to assess inputs of select POCs to the Bay from local tributaries and urban runoff, provide information to assess compliance with receiving water limitations, support implementation of TMDLs and other pollutant control strategies, assess progress toward achieving wasteload allocations for TMDLs and help resolve uncertainties associated with loading estimates and impairments associated with these pollutants.
>
> In particular, monitoring required by this provision must be directed toward addressing the following six priority POC management information needs:
>
> (1) **Source Identification** - identifying or confirming which sources or watershed source areas provide the greatest opportunities for reductions of POCs in urban stormwater runoff;
>
> (2) **Contributions to Bay Impairment** - identifying which watershed source areas contribute most to the impairment of San Francisco Bay beneficial uses (due to source intensity and sensitivity of discharge location);
>
> (3) **Management Action Effectiveness** - evaluating the effectiveness or impacts of existing management actions, including compliance with TMDLs and other POC requirements and providing support for planning future management actions;

[304] Exhibit A, Test Claim, page 1630 (Order R2-2015-0049, Provision C.10.a.ii.).

[305] Exhibit A Test Claim, page 29.

(4) **Loads and Status** - providing information on POC loads, concentrations, and presence in local tributaries or urban stormwater discharges;

(5) **Trends** - evaluating trends in POC loading to the Bay and POC concentrations in urban stormwater discharges or local tributaries over time; and

(6) **Compliance with Receiving Water Limitations** - providing information to assess whether receiving water limitations (RWLs) are achieved.

Provision C.8.f. then imposes the following requirements on the permittees:

- Implement or cause to be implemented the monitoring components shown in Table 8.1 (analyzing pollutants of concern in a dissolved phase, on suspended sediment, or fish tissue) to address the six POC management information needs described above. To assess compliance with receiving water limitations, permittees are required to collect and analyze analytes during the wet and dry season in receiving waters influenced by urban stormwater and dry season runoff.[306]
- Conduct pollutants of concern monitoring and sampling consistent with Tables 8.2 and 8.3, which identify the pollutants of concern, and the total number of samples required for each countywide stormwater program, the minimum number of samples for each monitoring type addressing the six priority pollutants of concern management information needs, in a Water Year (October 1-September 30), and analytical methods. For the assessment of receiving water limitations, four wet season samples and one dry season sample is required.

  The pollutants of concern are PCBs; total mercury; copper; emerging contaminants including contaminants likely in stormwater associated with vehicles, per and polyfluoroalkyl substances (PFAS), organophosphate, ester plastic additives, flame retardants, bisphenol plastic additives, and ethoxylated surfactants; ancillary parameters, including total organic carbon, suspended sediments, and hardness; and for the receiving water limitation assessment, copper, zinc, fecal indicator bacteria, and analytes determined under Provision C.8.h.iv. [those that may result in levels in receiving waters approaching or exceeding water quality objectives].[307]

  For the emerging contaminants of concern identified above, footnote c. to Table 8.2 requires the permittees to collectively produce or cause to be produced a stormwater monitoring strategy that prioritizes the emerging contaminants based on specific or likely physico-chemical properties, sources, transport pathways, and fate. In addition, the footnote states the monitoring can be satisfied either

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[306] Exhibit A, Test Claim, pages 655-657.

[307] Exhibit A, Test Claim, pages 658-659, 661-662, 671.

through sampling and analysis of the number of samples indicated in the table or through augmentation of the San Francisco Bay Regional Monitoring Program Emerging Contaminants Monitoring Strategy in the amount of $100,000 per year for all Permittees combined.[308]

The Water Boards contend that the pollutants of concern monitoring required by Provision C.8.f. does not mandate a new program or higher level of service.[309] "Even if the frequency and analytes may vary, the actions are not new—Permittees were required to monitor for compliance with receiving water limitations under previous permits and existing federal law."[310]

The Commission finds that Provision C.8.f. is not new and does not mandate a new program or higher level of service. Provision C.8.f. of the prior permit also required pollutants of concern monitoring to address five of the six priority management information needs identified in the test claim permit, with only information on compliance with receiving waters missing as a stated information need from the prior permit. Although compliance with receiving waters was not specifically spelled out in Provision C.8.f. of the prior permit, all monitoring was conducted to determine if the permittees were complying with the receiving water limitations. The receiving water limitations of the prior permit prohibited conditions that created a nuisance or adversely affected the beneficial uses of the receiving waters and prohibited conditions that caused or contributed to a violation of water quality standards for the receiving waters.[311] Provision C.1. of the prior permit then stated "[t]he Permittees shall comply with Discharge Prohibitions A.1 and A.2 and Receiving Water Limitations B.1 and B.2 through the timely implementation of control measures and other actions *as specified in Provisions C.2 through C.15*."[312] The pollutants of concern monitoring was required by Provision C.8.f. and, thus, was intended to implement and ensure compliance with the receiving water limitations.[313]

Provision C.8.f. of the prior permit required pollutants of concern monitoring and also identified the parameters and monitoring frequency required for the pollutants identified in the test claim permit and required the permittees to conduct or cause to be conducted a special study that addresses relevant management information needs for emerging contaminants.[314] Although some of the specifics for the pollutants of concern

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[308] Exhibit A, Test Claim, page 660.

[309] Exhibit B, Water Boards' Comments on the Test Claim, pages 19-21.

[310] Exhibit B, Water Boards' Comments on the Test Claim, page 21.

[311] Exhibit A, Test Claim, page 1538 (Order R2-2015-0049, Provision B.).

[312] Exhibit A, Test Claim, page 1539 (Order R2-2015-0049, Provision C.1.).

[313] See also, Code of Federal Regulations, title 40, section 122.44(i)(1) ("each NPDES permit shall include . . . monitoring requirements . . . *To assure compliance with permit limitations."),* emphasis added.

[314] Exhibit A, Test Claim, pages 1614-1617 (Order R2-2015-0049, Provision C.8.f.).

monitoring in the test claim permit may result in increased costs, those differences do not result in a mandated new program or higher level of service. Existing federal law requires monitoring sufficient to determine if the conditions of the permit, including the receiving water limitations and discharge prohibitions, are being met and are consistent with water quality standards.[315]

Thus, the pollutants of concern monitoring requirements in Provision C.8.f. of the test claim permit are not new.

g. <u>The control measures for PCB reduction in Provision C.12.a. are not new.</u>

The claimant requests reimbursement to comply with Provision C.12.a.,[316] which addresses the requirements to assess PCBs load reductions from stormwater in accordance with a previously adopted TMDL. Provision C.12.a. imposes the following requirements:

- Implement an assessment methodology and data collection program to quantify, in a technically sound manner, PCBs loads reduced through implementation of pollution prevention, source control, and treatment control, green stormwater infrastructure and other measures taken as part of the PCBs control program. A technically sound load reduction accounting system is described in the Fact Sheet and is based on information submitted by Permittees in the January 2014 Integrated Monitoring Report and updated through reporting during the last Permit term as part of Reasonable Assurance Analysis reporting submitted by all Programs in September 2020. This accounting system describes calculation methodologies, data requirements, and model parameters used to quantify the load reduction for each type of control measure. The Permittees shall use the assessment methodology to demonstrate the load reductions achieved during this Permit term as well as progress toward achieving the MRP program area PCBs TMDL wasteload allocations. The Permittees shall update this assessment methodology as necessary for use in the subsequent permit term.

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[315] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1); *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1207 ["[T]he Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following ...monitoring requirements ... to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers ... shall include ...monitoring procedures necessary to determine compliance and noncompliance with permit conditions....")."].

[316] Exhibit A, Test Claim, pages 33, 704-705.

"For this Permit term, the Permittees will achieve an estimated regionwide total load reduction of 1.47 kg/yr PCBs if they implement effective PCBs control measures consistent with all requirements of Provisions C.12.b through C.12.g. The Permittee-specific portion of the regionwide PCBs load reduction estimate shall be based on the proportion of county population in each municipality."[317]

- Reporting.

  (1) In each Annual Report, Permittees shall submit documentation confirming that all control measures effectuated during the previous Permit term for which load reduction credit was recognized continue to be implemented at an intensity sufficient to maintain the credited load reduction.

  (2) In the 2026 Annual Report, Permittees shall report the total loads reduced using the assessment methodologies described and cited in the Fact Sheet to demonstrate cumulative PCBs load reduced from each control measure implemented since the beginning of the Permit term. This report shall also include an estimate of load reductions from control measures taking place after the 2026 Annual Report submittal but before the end of the permit term. Permittees shall submit all supporting data and information necessary to substantiate the load reduction estimates.

  (3) In their 2026 Annual Report, the Permittees shall submit, for Executive Officer approval, any refinements, if necessary, to the measurement and estimation methodologies to assess PCBs load reductions from control measures in the subsequent Permit. Any refinements to the methodologies shall be subject to public review.[318]

These requirements are not new. The Regional Board adopted the PCBs TMDL on February 13, 2008; it was approved by the State Board on October 20, 2009; was approved by the Office of Administrative Law on March 1, 2010; and was approved by the U.S. EPA on March 29, 2010.[319] The PCBs TMDL found the baseline of PCBs loads into the San Francisco is 33 kg/yr total from all sources, of which 20 kg/yr came from urban and non-urban stormwater runoff.[320] The TMDL set the wasteload allocation for the entire Bay at 10 kg/yr, of which 2 kg/yr is allotted to stormwater runoff.[321] And

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[317] Exhibit A, Test Claim, page 704.

[318] Exhibit A, Test Claim, page 705.

[319] Exhibit X (3), Order R2-2008-0012, PCBs TMDL, page 3; California Code of Regulations, title 23, section 3919.6.

[320] Exhibit X (3), Order R2-2008-0012, PCBs TMDL, pages 6, 7.

[321] Exhibit X (3), Order R2-2008-0012, PCBs TMDL, page 7.

1.6 kg/yr of the wasteload allocation was allocated to permittees, to be achieved by March 2030.[322]

The prior permit, in Provision C.12.b., also required an assessment methodology and data collection program to quantify, in a technically sound manner, PCBs loads reduced through implementation of pollution prevention, source control, and treatment control, green stormwater infrastructure and other measures taken as part of the PCBs TMDL control program, as follows:

> **i. Task Description** – The Permittees shall develop, document, and implement and assessment methodology and data collection program to quantify in a technically sound manner PCBs loads reduced through implementation of pollution prevention, source control, and treatment control measures, including PCBs source control, stormwater treatment, green infrastructure and other measures. The Permittees shall use the assessment methodology to demonstrate progress toward achieving the load reductions required in this Permit term and the program area wasteload allocations.
>
> A reasonable and technically sound load reduction accounting system is described in the Fact Sheet and is based on information submitted by Permittees in the January 2014 Integrated Monitoring Report. This task consists of documenting the method described in the Fact Sheet or any alternative methodology, updating and refining the accounting system to account for new information, justifying assumptions, analytical methods, sampling schemes and parameters used to quantify the load reduction for each type of control measure, and indicating what information will be collected and submitted to confirm the calculated load reduction for each unit of activity.
>
> **ii. Implementation Level** – The Permittees shall adequately quantify the PCBs load reductions achieved through all the pollution prevention, source control, and treatment control measures Permittees will implement in this Permit term, except for measures to manage PCB-containing materials and wastes during building demolitions (C.12.f).[323]

The reporting requirements are also the same as what was required in the prior permit.[324]

Thus, Provision C.12.a. does not impose any new requirements on the permittees and does not mandate a new program or higher level of service.

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[322] Exhibit A, Test Claim, page 704 (Test Claim Permit, Provision C.12.); Exhibit B, Water Boards' Comments on the Test Claim, page 15.

[323] Exhibit A, Test Claim, pages 1648-1649 (Order R2-2015-0049, Provision C.12.b.).

[324] Exhibit A, Test Claim, page 1649 (Order R2-2015-0049, Provision C.12.b.iii.).

h. The requirements to submit plans and schedules for implementing control measures for reductions of Mercury and PCBs in old industrial areas by March 31, 2023, in accordance with Provisions C.11.c.iii.1. and C.12.c.iii.1., are new; but the remaining requirements in Provisions C.11.c. and C.12.c. are not new.

The claimant requests reimbursement to comply with Provisions C.11.c. and C.12.c., which require control measures for the reduction of mercury and PCBs in old industrial areas.[325] The test claim permit explains the permittees have over 33,100 acres of old industrial land use draining to an MS4 that have not been redeveloped or treated with green stormwater infrastructure.[326] Provisions C.11.c. and C.12.c. impose the following requirements:

(a) Implement or cause to be implemented control measures (treatment controls, diversion to wastewater treatment plants, redevelopment (provided GSI implemented in compliance with Provision C.3.b), enhanced operation and maintenance controls, or other controls) for the following mercury and PCB load reductions (for 70% control measure efficiency) in the number of old industrial acres identified below by the end of the permit term:

Mercury:

- Alameda County: 664 acres (28 grams/yr)
- Contra Costa County: 664 acres (28 grams/yr)
- San Mateo County: 445 acres (19 grams/yr)
- Santa Clara County: 664 acres (28 grams/yr)
- Solano County: 142 acres (6 grams/yr)[327]

PCB:

- Alameda County: 664 acres (121 grams/yr)
- Contra Costa County: 664 acres (121 grams/yr)
- San Mateo County: 445 acres (81 grams/yr)
- Santa Clara County: 664 acres (121 grams/yr)
- Solano County: 142 acres (26 grams/yr)[328]

Permittees may comply with this provision element either through implementation of control measures on the following amounts of old industrial land use, based on

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[325] Exhibit A, Test Claim, page 32.

[326] Exhibit A, Test Claim, pages 698, 707.

[327] Exhibit A, Test Claim, page 698.

[328] Exhibit A, Test Claim, page 707.

implementation of 70% efficient control measures, or through accounting for the mass reduction of mercury shown in parentheses.[329]

(b) Reporting.

(1) By March 31, 2023, permittees shall submit plans and schedules for implementing control measures and stormwater diversion to wastewater treatment facilities in old industrial areas to address mercury and PCB load reduction requirements. This reporting shall include maps of the areas where control measures are to be implemented, the acreage of these catchments, and a description of design and sizing features all control measures, treatment devices and stormwater diversion facilities implemented for each treated catchment.

(2) Beginning in 2023, in each Annual Report, permittees shall submit an account of control measure and stormwater diversion implementation consistent with the plan submitted in March 2023 and any modifications thereto. Reporting shall include maps of the areas treated, the acreage of catchments addressed, and a description of all control measures, installed treatment devices and routing facilities for each treated catchment.

(3) In their 2026 Annual Report, permittees shall report as part of reporting under Provisions C.11.a.iii.2. and C.12.a.iii.2. on all control measures and stormwater diversion measures implemented during the permit term and provide the total acreage treated and an estimate of the total mercury and PCB mass load reduced resulting from this implementation.[330]

The Water Boards contend these requirements are not new and do not mandate a new program or higher level of service.

> MRP 3 continues the MRP 2 requirement by requiring Permittees to implement control measures in areas where benefits are most likely to accrue (i.e., old industrial areas) to make progress toward achieving the wasteload allocations in the respective TMDLs and report on the control measures in their annual reports. Based on monitoring data, the San Francisco Bay Water Board identified old industrial areas as high PCBs-yielding watersheds and thus areas where load reduction benefits are most likely to accrue. [Fn. Omitted.] The requirement to implement control measures to meet wasteload allocations in the TMDLs is not new and does not provide a higher level of service. The wasteload allocations are the level of service that will be provided by the control measures, and

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329 Exhibit A, Test Claim, pages 698, 707 (test claim permit, Provision C.11.c.i., ii., and C.12.c.i., ii.).

330 Exhibit A, Test Claim, pages 699-700, 708 (test claim permit, Provisions C.11.c.iii. and C.12.c.iii.).

those allocations were established in the TMDLs and included in MRP 2.[331]

Although Provisions C.11.c. and C.12.c. of the test claim permit focus on old industrial areas, the requirements to implement control measures to implement mercury and PCB load reductions in accordance with the TMDLs and to report on the progress of their reductions, including a list and location of the control measures used, are not new and do not mandate a new program or higher level of service. The prior permit also required the permittees to implement mercury and "sufficient" PCB source and treatment control measures and other pollution prevention strategies to reduce mercury and PCB loads for entire permit area, and to provide similar annual reports.[332]

However, the requirements to submit plans and schedules for implementing the control measures by March 31, 2023, in accordance with Provisions C.11.c.iii.1. and C.12.c.iii.1., are new and require the submittal of new reports. The Commission, however, does not reach the issue of whether the requirement mandates a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

i. <u>The requirements in Provision C.15.b.iii. to convene a firefighting non-stormwater emergency discharge working group, the work of the working group, and the submittal of a report to the Regional Board's executive officer by September 30, 2025, are new requirements; but the remaining requirements in Provision C.15.b.iii. are not new.</u>

The claimant requests reimbursement to comply with Provision C.15.b.iii., which addresses non-stormwater emergency firefighting discharges and requires the permittees to convene a regionwide working group to identify and evaluate opportunities to reduce the adverse impacts of these discharges to the MS4.[333] The requirements are as follows:

(a) Permittees shall collectively convene a regionwide Firefighting Discharges Working Group (Working Group) together with Water Board staff and other stakeholders to identify and evaluate opportunities to reduce the impacts of emergency discharges to the MS4 associated with firefighting activity.[334]

The Working Group shall:

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[331] Exhibit B, Water Boards' Comments on the Test Claim, page 25.

[332] Exhibit A, Test Claim, pages 1640-1641, 1646-1647 (Order R2-2015-0049, Provisions C.11.a., C.12.a.).

[333] Exhibit A, Test Claim, pages 33, 748-752.

[334] Exhibit A, Test Claim, pages 748-749.

(i) Prior to the submittal of the Firefighting Discharges Report, convene the Working Group at least twice per year. Thereafter, convene the Working Group at least annually.

(ii) Assess the adequacy of existing BMPs and standard operating procedures (SOPs) to address the potential adverse water quality impacts of firefighting water and foam discharged during emergencies (e.g., containment and cleanup), including coordination within and between municipal departments, districts and jurisdictions, coordination between firefighting personnel and containment and cleanup crews, coordination with contracted staff, and coordination with relevant agencies (e.g., CalFire), as appropriate. If the existing BMPs and SOPs need updates or are otherwise inadequate, suggest changes to those BMPs and SOPs so that they are updated and adequate. If new BMPs and SOPs are needed, recommend model BMPs and SOPs.

(iii) Assess the adequacy of existing resources (e.g., MS4 maps and maps that identify environmentally sensitive areas) used to determine if and how firefighting water and foam discharged during emergencies will impact receiving waters, in order to address pollutant discharges (e.g., by facilitating containment and cleanup).

(iv) Investigate which firefighting foams are the least environmentally harmful (i.e., have the least adverse water quality and beneficial use effects, including those related to biodegradation, biomagnification, bioaccumulation, and acute and chronic toxicity), both for Class A foams and Class B foams. Then, develop SOPs to use the least environmentally harmful firefighting foams (and dispose of the more environmentally harmful foams) and to reduce the use of firefighting foams, without jeopardizing the protection of life or property, during emergencies.

(v) Prepare outreach materials on containment and cleanup BMPs and SOPs for contractors that are hired by private parties to participate in the containment and cleanup of discharges of firefighting water and foam associated with firefighting activities within their jurisdictions. Additionally, prepare outreach materials – regarding good housekeeping practices and preventive measures – for sites that are prone to firefighting emergencies. Distribute those outreach materials to all such contractors and sites by September 30, 2025. Subsequently, if it is identified that the outreach materials need to be revised or updated, they shall be revised or updated, and then redistributed.

(vi) Pursue coordination, information sharing, feedback and Working Group participation, from relevant agencies and organizations such as the California Department of Forestry and Fire Protection (Cal Fire), the California Department of Toxic Substances Control (DTSC), the U.S. Forest Service (USFS), the State and Regional Water Boards, permittees of other NPDES municipal stormwater permits, other state and federal agencies, and external workgroups (such as Petro-Chemical Mutual Aid), regarding interagency coordination and communication, BMPs, SOPs, and the least environmentally harmful firefighting foams.

(vii) Discuss reporting on emergency discharges of firefighting water and foam. The purpose of this reporting is first to provide transparency about the usage and water quality impacts of firefighting water and foam, and second to track reductions in those impacts over time, which is an anticipated outcome of the implementation of Provision C.15.b.iii. This shall include discussion of the timing of such reporting, and how that reporting will be submitted to the Water Board. This shall additionally include discussion of how reporting is triggered (e.g., if a certain level of discharge enters the MS4 system, if any level of discharge enters a receiving water, and if any level of PFAS foam is used pursuant the exemptions in SB 1044), as well as the content of the reporting (e.g., the date and time of the discharge, Material Safety Data Sheet (MSDS) and any supplemental information for that foam, the quantity of water and foam concentrate used, the quantity and rate of water and foam concentrate discharged to the MS4 and/or receiving water, the point of discharge to the MS4 and/or receiving water, and impacts).[335]

(a) Collectively submit a Firefighting Discharges Report by September 30, 2025, that describes progress on, and recommendations regarding, the implementation of the items listed above. The Firefighting Discharges Report shall be updated as needed on an ongoing basis, to incorporate recommendations by the Working Group.[336]

(3) Ongoing Implementation Practices:

(a) Implement the recommendations in the Firefighting Discharges Report.

(b) Ensure proper BMPs and SOPs are included in contracts for non-municipal (contracted) staff hired by permittees to assist with containment and cleanup, and to assist with prevention and mitigation of adverse impacts, of discharges associated with firefighting emergencies.

(c) For large industrial sites within Permittees' jurisdictions – such as IGP sites, gas plants, gas concentration facilities, and chemical plants – evaluate the adequacy of those sites' BMPs and SOPs for the prevention, containment and cleanup of emergency firefighting discharges into storm drains and receiving waters within Permittees' jurisdictions, and cause those BMPs and SOPs to be improved as appropriate.

(d) By June 30, 2027, require all municipal staff and contracted staff hired by permittees that participate in the containment and cleanup of (and as

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[335] Exhibit A, Test Claim, pages 749-751.

[336] Exhibit A, Test Claim, page 751.

appropriate, that assist with any other activities associated with mitigating the adverse environmental impacts of) discharges of firefighting water and foam from firefighting emergencies within their jurisdictions to attend at least one training on containment and cleanup BMPs and SOPs (and other BMPs and SOPs, as appropriate). Trainings may be region-wide, program wide, or Permittee-specific. Permittees are encouraged to make these trainings available to contractors hired by private parties.

(e) Reporting:

(i) Report on the implementation of the above requirements in the Annual Reports.

(ii) In the 2027 Annual Report, report on the required trainings, including the dates of training, topics covered, and the percentage of applicable municipal and contracted staff involved in containment and cleanup activities in attendance.[337]

(4) Required BMPs:

(a) Implement and require firefighting personnel acting within their jurisdictions to implement BMPs and SOPs for emergency discharges – in order to reduce potential and actual water quality impacts – to the extent that the implementation of such BMPs does not interfere with immediate emergency response operations or impact public health and safety.

(b) During emergency firefighting situations, priority of efforts shall be directed toward life, property, and the environment (in descending order). Permittee staff, contractors, or firefighting personnel shall control the pollution threat from their activities during emergency firefighting situations to the extent that time and resources allow.[338]

(5) Reporting

(a) Upon submittal of the Firefighting Discharges Report, Permittees shall implement the reporting recommendations and guidance therein.

(b) Otherwise, reporting requirements will be determined by Water Board staff on a case-by-case basis, such as for fire incidents at chemical plants.[339]

The Water Boards contend that Provision C.15.b.iii. does not mandate a new program or higher level of service as follows:

> Provision C.15.b.iii is not a new program or a higher level of service. In accordance with the Clean Water Act, MRP 2 required Permittees to effectively prohibit the discharge of non-stormwater (i.e., materials other

[337] Exhibit A, Test Claim, page 751.

[338] Exhibit A, Test Claim, page 752.

[339] Exhibit A, Test Claim, page 752.

> than stormwater) into the MS4s and watercourses. [Fn. omitted.] MRP 2 conditionally exempted non-stormwater discharges of potable water from emergency firefighting activities on the condition that Permittees implement (or require firefighting personnel to implement) BMPs for emergency discharges. [Fn. omitted.] MRP 3 continues the conditional exemption and includes discharges of foam in the conditional exemption. [Fn. omitted.] Provision C.15.b.iii(2) requires the Permittees to convene a regionwide Firefighting Discharges Working Group to identify and evaluate opportunities to reduce the impacts of emergency discharges to the MS4 associated with firefighting activities. The provision also requires Permittees to collectively submit a Firefighting Discharges Report by September 30, 2025, containing recommendations regarding the implementation of BMPs, standard operating procedures, and resources used for the containment and cleanup of firefighting water and foam discharged during firefighting emergencies. [Fn. omitted.] The Firefighting Discharges Working Group and Firefighting Discharges Report will help create administrative efficiencies and reduce costs by allowing Permittees to pool resources and avoid the duplication of work that might occur if Permittees studied these issues individually, [fn. omitted] and are necessary to carry out the continuing requirement to implement BMPs for discharges associated with emergency firefighting activities.[340]

The Commission finds that the requirements to implement and require firefighting personnel acting within their jurisdictions to implement BMPs and SOPs for emergency discharges; to ensure those BMPs and SOPs are included in contracts; to evaluate the adequacy of BMPs and SOPs for the prevention, containment and cleanup of emergency firefighting discharges into storm drains and receiving waters within permittees' jurisdictions, and cause those BMPs and SOPs to be improved as appropriate; and report on these actions, are not new requirements but are required by federal law and the prior permit.

Federal law distinguishes between stormwater discharges and non-stormwater discharges. A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[341] Federal law requires that in order to achieve water quality standards and objectives, permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," except as authorized by an NPDES permit or the

[340] Exhibit B, Water Boards' Comments on the Test Claim, page 26.

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

discharges are conditionally exempted from the prohibition.[342] Those exempted discharge categories that are not prohibited from entering into the MS4 are allowed only if BMPs and control measures are implemented to manage any potential pollution from entering the MS4 and ultimately the receiving waters.[343] The discharge continues to be exempt *unless* the discharge is identified as a source of pollutants to waters of the United States.[344] If a discharge is identified as a pollutant, the municipality is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[345]

To "effectively prohibit" non-stormwater discharges requires the implementation of a program by the MS4 permittee to detect and remove illicit discharges, which under federal law shall contain the following:

- A program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4.[346]

  The program is required to address all types of illicit discharges and federal law identifies the following category of non-stormwater discharges that "shall be addressed" when identified as a source of pollutants to the waters of the United States: "street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States)."[347]
- Procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated.[348]
- Procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[349]
- Procedures to prevent, contain, and respond to spills that may discharge into the MS4;

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

[343] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.44(k).

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

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

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

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

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

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

- A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;
- Educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- Controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[350]

Federal law also requires that a permittee have legal authority established by statute, ordinance, or a series of contracts that enables the permittee to perform the following activities to ensure compliance with water quality standards:

- Prohibit illicit discharges to the MS4.
- Control the discharge to the MS4 of spills, dumping, or disposal of materials other than stormwater.
- Require compliance with conditions in ordinances, permits, contracts or orders.
- Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions, including the prohibition on illicit discharges to the MS4.[351]

And federal law requires an annual reporting and assessment of the control measures.[352]

The prior permit, in Provision A, prohibited non-stormwater discharges and, in Provision C.15.b.iii., the prior permit conditionally exempted emergency discharges from firefighting activities from the prohibition, provided BMPs (such as plugging the storm drain collection system for temporary storage, proper disposal of water according to jurisdictional requirements, and the use of foam where there may be toxic substances on the property) were implemented to control the pollutant threat from their activities.[353] Thus, under the prior permit, the claimants had to ensure that BMPs and other conditions were implemented to prevent all firefighting non-stormwater discharges from entering the MS4 and into the receiving waters. Therefore, the implementation requirements in Provision C.15.b.iii. are not new and do not mandate a new program or higher level of service. And the prior permit required the permittees to submit an annual report certifying they are in compliance with the permit.[354]

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

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

[352] Code of Federal Regulations, title 40, section 122.42(c).

[353] Exhibit A, Test Claim, page 1538, 1670-1671 (Order R2-2015-0049, Provisions A, C.15.b.iii.).

[354] Exhibit A, Test Claim, page 1680 (Order R2-2015-0049, Provision C.17.c.).

However, the requirements to convene a regionwide Firefighting Discharges Working Group (Working Group), the work of the working group, and the submittal of a report to the Regional Board's executive officer by September 30, 2025, in accordance with Provision C.15.b.iii. are new requirements. The Commission, however, does not reach the issue of whether these requirements mandate a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

j. <u>The requirements in Provision C.17.a. to collectively develop a report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness and specific milestones for reducing such discharges, and the requirements to submit a map of the locations of unsheltered homeless populations in relation to storm drain inlets and existing receiving waters with the 2023 Annual Report and submit an updated map with the 2025 Annual Report, are new requirements; but the remaining requirements in Provision C.17.a. are not new.</u>

The claimant requests reimbursement to comply with Provision C.17.a., which addresses discharges associated with unsheltered homeless populations.[355] The goals of Provision C.17.a. are as follows:

> This task's broader goals are to recognize non-stormwater pollutant sources associated with unsheltered homeless populations, reasons for discharges, and means by which they occur, and develop useful information that can be used toward prioritizing individual Permittee and collaborative best management practices for reducing or managing such discharges, while ensuring the protection of public health. Examples of collaborative implementation programs could include collaborative efforts between Permittees, Caltrans, sanitary sewer agencies, railroads, non-governmental organizations (NGOs), social service agencies and organizations, and other agencies.[356]

Provision C.17.a.i.-iii. impose the following requirements:

(1) Permittees shall use results from biennial point-in-time census surveys and related information, such as municipal reports, databases, complaint logs, and other efforts, to gain a better understanding of unsheltered homeless population numbers within the permittee's jurisdiction, the locations of

[355] Exhibit A, Test Claim, page 34.

[356] Exhibit A, Test Claim, page 758.

unsheltered homeless residents, discharges and water quality-related impacts associated with homelessness, and associated sanitation-related needs.[357]

(2) To encourage ongoing regional, countywide, and municipal coordination efforts, collectively develop a best management practice report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness into MS4s that impact water quality and specific milestones for reducing such discharges within a given timeframe. The report shall:

a. Describe practices that may be implemented by permittees, including to address discharges associated with homelessness that are impacting water quality;

b. Identify regional and countywide efforts and implementation actions to address discharges associated with homelessness (including how those efforts and actions have been affected by unsheltered homeless population growth). Include recommendations for engaging in these efforts and incorporating discharge-reduction strategies that also help meet the unsheltered population's clean water needs; and

c. Identify actions taken during the COVID-19 pandemic to reduce the spread of the virus in homeless populations, such as temporarily housing homeless people in hotels, that may have reduced discharges associated with homelessness. Permittees shall consider the practicability of such actions for longer-term implementation.[358]

(3) With the 2023 Annual Report, submit a map identifying, within each permittee's jurisdiction, the approximate location(s) of unsheltered homeless populations, including homeless encampments and other areas where other unsheltered homeless people live. The map shall identify those location(s) in relation to storm drain inlets and existing streams, rivers, flood control channels, and other surface water bodies within the Permittee's jurisdiction. The map shall be updated once during the Permit term and submitted with the 2025 Annual Report. Where Permittees are working collaboratively to address discharges associated with homelessness, they may collaborate to submit a joint map that covers their respective jurisdictions.[359]

(4) Report on the programmatic efforts being implemented within each permittee's jurisdiction, or at the countywide or regional level, to address MS4 discharges associated with homelessness. "Examples of these efforts may include, but are not limited to: funding initiatives; adoption of ordinances to implement service programs; coordination with social services departments

[357] Exhibit A, Test Claim, page 757.

[358] Exhibit A, Test Claim, pages 757-758.

[359] Exhibit A, Test Claim, pages 758, 759.

and NGOs; efforts to establish relationships with homeless populations; and alternative actions to reduce discharges to surface waters associated with homelessness, such as efforts towards providing housing, jobs, and related services for residents experiencing homelessness."[360]

(5) Identify and implement appropriate best management practices to address MS4 discharges associated with homelessness that impact water quality, including those impacts that can lead to public health impacts.[361]

Evaluate and assess the effectiveness of the BMP practices, specifically by reporting on the BMP control measures being implemented, the approximate portion of the Permittee's unsheltered homeless population and locations being served by those control measures, and the portion and locations of the permittee's unsheltered homeless population not reached, or not fully reached by the implemented control measures.

"Examples of actions that may be implemented include, but are not limited to, access to emergency shelters; the provision of social services and sanitation services; voucher programs for proper disposal of RV sanitary sewage; establishment of designated RV "safe parking" areas or formalized encampments with appropriate services; provision of mobile pump-out services; establishing and updating sidewalk/street/plaza cleaning standards for the cleanup and appropriate disposal of human waste; and establishing trash and waste cleanup or pickup programs within the Permittee's jurisdiction, or at the countywide or regional level."[362]

(6) Use the information generated through the biennial point-in-time census surveys and related information, and the regional coordination tasks to review and update implementation practices.[363]

(7) Reporting

(a) With the 2023 and 2025 Annual Reports, each Permittee shall report on the best management practices being implemented and

(b) Include the effectiveness evaluation reporting required in Provision C.17.a.ii.(3) and additional actions or changes to existing actions that the Permittee will implement to improve existing practices.[364]

The Fact Sheet explains that trash and human waste from homeless encampments are significant water quality and public health concerns and need to be addressed:

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360 Exhibit A, Test Claim, page 758.

361 Exhibit A, Test Claim, page 758.

362 Exhibit A, Test Claim, pages 758-759.

363 Exhibit A, Test Claim, page 759.

364 Exhibit A, Test Claim, page 759.

Driven in part by a lack of affordable housing and the high cost of living, a significant number of Bay Area residents are experiencing homelessness. That number increased markedly during MRP 2. For example, according to the latest Point-in-Time counts, between 2017 and 2019, the South Bay, East Bay, and the San Francisco Peninsula saw an approximate 25 percent increase (with individual increases of 17 to 43 percent) in their unsheltered homeless populations. Discharges associated with people experiencing unsheltered homelessness, including human waste and trash, are unauthorized discharges that are prohibited under the MRP. Such discharges are a significant water quality concern because they adversely impact water quality and public health (through the spread of disease). At the same time, these water quality and sanitation issues can be difficult to address because sanitation services can be challenging to provide and homeless populations may not always be receptive to the services being provided. In addition, while longer-term measures to address unsheltered homelessness, such as the provision of housing and supportive services may over time reduce problematic discharges, they do not effectively reduce ongoing discharges over the short term. Thus, actions to reduce and/or eliminate MS4 discharges associated with unsheltered homelessness are necessary to prevent and minimize impacts to water quality and public health. Such actions also can improve overall water quality and sanitary conditions for people experiencing unsheltered homelessness.

In 2015, the Water Board adopted Resolution No. R2-2015-0024, which identified discharges of trash and human waste from homeless encampments as significant water quality and public health concern. The resolution encouraged municipalities to consider water quality issues while addressing the broader social issue of homelessness and undertake efforts to prevent or eliminate discharges from homeless encampments. The resolution further recommended that municipal efforts "…include clear and measurable goals for preventing trash and human waste from discharging" to receiving waters. The resolution also affirmed the Board's authority to issue cleanup and abatement orders or waste discharge requirements to regulate discharges associated with homeless encampments.

Since adoption of the resolution, some Bay Area municipalities have made progress towards controlling discharges associated with unsheltered homelessness under the Provision C.10 Direct Discharge Control Program. Although efforts under that program have provided benefit with respect to reducing discharges of trash and certain other pollutants, they have not fully addressed discharges associated with unsheltered homelessness that impact water quality. Furthermore, only five Permittees have an approved Direct Discharge Control Plan.

A number of Permittees are taking actions that help address problematic discharges. For example, East Palo Alto and Mountain View have established formalized RV encampments or RV safe parking areas where RV waste can be appropriately collected and disposed using mobile services. In Oakland, where the unsheltered homeless population increased to about 4,000 in 2020, an increase of about 63 percent from 2017, [fn. omitted] the city has established formalized encampments and is directing resources into affordable housing with the aim of getting those who are willing into housing. In 2020, Oakland adopted a new ordinance regarding where homeless encampments could be located, and is also working to provide sanitary services and manage sites for RVs, and has been targeting services to encampments that are within 500 feet of waterways. [Fn. omitted.] Similarly, San Jose has a dedicated outreach team that provides emergency shelter, meals, showers, and other basic needs while working to match individuals experiencing homelessness with an appropriate housing program. The City of San Jose also coordinates with Santa Clara Valley Water District to address discharges associated with unsheltered homelessness in and around creeks.

As noted above, the Bay Area population of people experiencing unsheltered homelessness has continued to grow, and is expected to grow further as eviction moratoria implemented during the COVID-19 pandemic expire. Meanwhile, outbreaks of Shigella and Hepatitis A, both spread through fecal-oral contact, among homeless people in California underscore the risks posed by unregulated discharges, particularly of untreated human waste, from encampments. [Fn. omitted.] To encourage Permittees' efforts, gain a better understanding of populations experiencing unsheltered homelessness, the location of encampments in relation to storm drain inlets and receiving waters, water quality related impacts, and associated sanitation-related needs, and to better understand the portion of discharges that are being addressed by Permittee efforts, and the extent to which practices may be effective, Provision C.17 requires that Permittees use results from biennial point-in-time census surveys and related information (e.g., databases, complaint logs) to review and update municipalities' implementation practices.

To encourage regional coordination between cities, Caltrans, sanitary sewer agencies, flood control districts, and other agencies (e.g., railroads, non-governmental organizations), Provision C.17 requires that Permittees collectively develop a BMP report that identifies effective practices to address MS4 discharges associated with unsheltered homelessness that impact water quality. The clearing and abating of homeless encampments, in response to public complaints, can often result in the encampment simply moving to a different location and continuing the discharges in the new location. The intent of this BMP report is therefore to foster (and prioritize) regional collaboration that takes into account the transient nature of unsheltered homeless populations, and the inherent benefit to Permittees sharing knowledge and resources on proven and effective strategies to managing the associated discharges from homeless encampments that impact water quality. The three main components of this report include:

(1) Identifying practices (e.g., outreach, cleanup, sanitation) that could be implemented by Permittees to address discharges associated with unsheltered homelessness that are impacting water quality;

(2) Identifying regional and/or countywide efforts and implementation actions towards addressing discharges associated with unsheltered homelessness. Permittees should include recommendations for engaging in such efforts that aim to provide clean water and sanitation needs for the homeless population; and

(3) Identifying practices implemented by municipalities during the COVID-19 pandemic to reduce the spread of the virus in homeless populations (such as providing temporary housing, etc.) that may have contributed towards a water quality benefit.

The tasks identified above are intended to assist Permittees in developing a framework for controlling and eliminating MS4 discharges associated with homeless encampments, and refining individual and collaborative best management practices (associated with unsheltered homelessness) to ensure the protection of water quality and public health. Practices that harm or criminalize unsheltered homeless residents, such as encampment sweeps, are discouraged under this provision. To evaluate BMP effectiveness, Provision C.17 requires that Permittees report on the control measures being implemented, the approximate portion and locations of the unsheltered homeless population being served by those measures, and the portion (number of people) and location not reached, or not fully served by those measures. Examples of control measures include, but are not limited to, access to emergency shelters; the provision of social services, clean drinking water, and sanitation services; voucher programs for proper disposal of RV sanitary sewage; establishment of designated RV “safe parking” areas or formalized encampments with appropriate services; provision of mobile pump-out services; establishing and updating sidewalk/street/plaza cleaning standards for the cleanup and appropriate disposal of human waste; and establishing various cleanup or pickup programs within the Permittees jurisdiction, or at the countywide or regional level.[365]

The Water Boards contend that these requirements are not new and do not impose a state-mandated new program or higher level of service as follows:

[365] Exhibit A, Test Claim, pages 1124-1127 (Fact Sheet).

> The BMP report required under Provision C.17.a is not a new program or a higher level of service. Consistent with the Clean Water Act, MRP 2 and previous iterations of the permit required Permittees to effectively prohibit the discharge of non-stormwater to the MS4s. [Fn. omitted.] Under MRP 2, if the Permittees or the San Francisco Bay Water Board determined that discharges were causing or contributing to an exceedance of an applicable water quality standard, Permittees were required to submit a report describing controls or BMPs that were being implemented, the level of implementation, and additional controls or BMPs that would be implemented to prevent or reduce the discharge of pollutants that was causing or contributing to the exceedance. [Fn. omitted.] MRP 3 continues to require Permittees to effectively prohibit the discharge of non-stormwater to the MS4s. [Fn. omitted.] Provision C.17.a more specifically addresses non-stormwater discharges into MS4s associated with unsheltered homeless populations. [Fn. omitted.] The unauthorized discharges associated with homelessness impact water quality and public health leading to the need for the BMP report required under Provision C.17.a. [Fn. omitted.] BMP reports are not a new program or a higher level of service. Permittees were already required to effectively prohibit non-stormwater discharges and to prepare BMP reports when their BMPs were not effectively controlling the discharge of pollutants and thus impacting water quality.
>
> The requirement to submit a map of the locations of unsheltered homeless populations is not a new program or higher level of service either. Permittees were required to submit maps under MRP 2 and existing federal law. [Fn. omitted.][366]

The Commission finds that the requirements to identify and implement appropriate BMPs to address MS4 discharges associated with homelessness, evaluate and assess the effectiveness of the BMP practices, review and update implementation practices, and annually report on the BMPs and effectiveness evaluations are not new. Both federal law and the prior permit required permittees to prohibit non-stormwater discharges, such as trash; to comply with receiving water limitations by ensuring compliance with water quality standards; and reduce the discharge of pollutants in stormwater to the maximum extent practicable by implementing control measures, best management practices, and other actions.[367] The prior permit's Fact Sheet expressly identified homeless encampments as a significant source of trash:

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[366] Exhibit B, Water Boards' Comments on the Test Claim, page 27.

[367] United States Code, title 33, section 1342(p)(3)(B)(ii), (iii); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1); Exhibit A, Test Claim, pages 1538-1539 (Order R2-2015-0049, Provisions A, B, C.1.).

> Homeless encampments and creekside litter from a variety of sources is a significant source of trash directly dumped and placed in the riparian zone where it can be swept into receiving waters by storm flows.[368]

And,

> Trash Hot Spot cleanups have an added benefit in that may also remove discharges of trash from non-storm drain sources, e.g., direct dumping or homeless encampments.[369]

The prior permit also required that if exceedances of water quality standards in receiving waters were detected through monitoring and persisted, the permittees were required to submit a report to the Regional Board, which could be provided with the annual report, that "describes controls or best management practices (BMPs) that are currently being implemented, and the current level of implementation, and additional controls or BMPs that will be implemented, and/or an increased level of implementation, to prevent or reduce the discharge of pollutants that are causing or contributing to the exceedance of water quality standards. . . . [and the report] shall include an implementation schedule."[370] Thus, the requirements to identify and implement appropriate BMPs to address MS4 discharges associated with homelessness, evaluate and assess the effectiveness of the BMP practices, review and update implementation practices, and annually report on the BMPs and effectiveness evaluations are not new.

However, the requirement to collectively develop a best management practice report to be submitted to the Executive Officer with the 2023 Annual Report that identifies effective practices to address non-stormwater discharges associated with homelessness into MS4s that impact water quality and specific milestones for reducing such discharges is new. The report is required to be submitted in addition to the annual report required by Provision C.22. and in addition to any report required by Provision C.1. when it is determined that discharges are causing or contributing to an exceedance of water quality standards.[371] The report also requires new information to be reported; namely, regional and countywide efforts and implementation actions to address discharges associated with homelessness and actions taken during the COVID-19 pandemic to reduce the spread of virus in homeless populations.[372]

In addition, the requirements to submit a map of the locations of unsheltered homeless populations in relation to storm drain inlets and existing receiving waters with the 2023

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[368] Exhibit A, Test Claim, page 1780 (Order R2-2015-0049, Fact Sheet).

[369] Exhibit A, Test Claim, page 1788 (Order R2-2015-0049, Fact Sheet).

[370] Exhibit A, Test Claim, page 1539 (Order R2-2015-0049, Provision C.1.a.); see also pages 1621, 1623, 1680, (Order R2-2015-0049, Provisions C.8.h.i. (reporting on monitoring), C.8.h.vi. (assessment of compliance with water quality standards in monitoring reports), and C.17.c. (annual reports).).

[371] Exhibit A, Test Claim, pages 551, 782.

[372] Exhibit A, Test Claim, pages 757-758.

annual report and submit an updated map with the 2025 annual report, are new. Federal law requires the submittal of a map with the application for an NPDES permit, which identifies the jurisdiction's outfalls, description of land use, locations of landfills and disposal facilities for waste, locations of known discharges to the MS4, and locations of major structural controls.[373] And under the prior permit, permittees had to submit a map of trash generation areas pursuant to Provision C.10.a. and a map of the full trash capture systems pursuant to Provision C.10.b.[374] However, a map of the locations of unsheltered homeless populations was not previously required by federal law or the prior permit.

The Commission, however, does not reach the issue of whether the requirements to submit the report and maps mandate a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

k. The requirement in Provision C.20.b. to develop a cost reporting framework and methodology is new.

The claimant requests reimbursement to comply with Provision C.20.b., which requires the permittees to develop a cost reporting framework and methodology to perform the annual fiscal analysis required in Provision C.20.a., which states that permittees "shall annually prepare and submit a fiscal analysis of the capital and operation and maintenance costs incurred to comply with this Order's requirements listed in Provision C.20.b.(iii)."[375]

Provision C.20.b. imposes the following requirements on the permittees:

1. Develop a cost reporting framework and methodology to perform the fiscal analysis. "Permittees are encouraged to collaboratively develop the framework and methodology for purposes of efficiency, cost savings, and regionwide consistency and comparability. The framework shall consider identification of costs incurred solely to comply with this Order's requirements as listed in Provision C.20.b.(iii) as compared to costs shared with other programs or regulatory requirements, provide meaningful data to assess costs of different program areas, and allow for comparisons and to identify trends over time."
2. The analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds, and identify any funding resources shared on a regional or countywide basis. The analysis shall include the costs incurred to comply with this Permit, and an estimate of costs for the upcoming Permit year.

373 Code of Federal Regulations, title 40, section 122.26(d)(1)(iii), (iv.D.).

374 Exhibit A, Test Claim, pages 1630, 1632 (Order R2-2015-0049, Provisions C.10.a., C.10.b.).

375 Exhibit A, Test Claim, pages 34-35, 777.

3. The analysis shall include the following program areas:
    (1) Program management
    (2) Municipal operations
    (3) New development and redevelopment
    (4) Industrial and commercial site controls
    (5) Illicit discharge detection and elimination
    (6) Construction site controls
    (7) Public information and outreach
    (8) Water quality monitoring
    (9) Pesticides toxicity control
    (10) Trash load reduction
    (11) Mercury controls
    (12) PCBs controls
    (13) Copper controls
    (14) Bacteria controls
    (15) Discharges associated with unsheltered homeless populations
    (16) Asset management plan development and implementation
4. The costs reported for each program area shall address the following categories:
    (1) Total cost
    (2) Capital expenditures
    (3) Land costs
    (4) Personnel costs
    (5) Consultant costs
    (6) Overhead costs
    (7) Construction costs
    (8) Operation and maintenance costs
    (9) Other costs[376]

[376] Exhibit A, Test Claim, pages 777-778.

Provision C.20.c. states that "[t]he Permittees shall submit the cost reporting framework and methodology, acceptable to the Regional Water Board Executive Officer, by June 30, 2023."[377]

The Fact Sheet explains that the purpose of this provision was, in part, to obtain a standardized cost reporting methodology as follows:

> **C.20-1** Fiscal analysis and cost reporting provide a useful tool to evaluate program implementation and effectiveness. U.S. EPA has found that "examining the levels of proposed spending and funding allows the permitting authority to gauge the ability of the applicant to implement the program and predict its effectiveness. The fiscal analysis also will help determine whether the applicant has met the statutory requirement of reducing the discharge of pollutants to the MS4 to the maximum extent practicable. Finally, the estimates help the applicant evaluate the feasibility and cost-effectiveness of its program." [Fn. omitted.]
>
> **C.20-2** Standardization and comparison of cost reporting is supported by the State Water Board-funded NPDES Stormwater Cost Survey, which finds that "standards for reporting costs and stormwater activities are needed to allow accurate cost comparisons to be made between stormwater activities." [Fn. omitted.]
>
> **C.20-3** The State Water Board's Office of Research, Planning, and Performance (ORPP) has also developed guidance for Water Board staff on obtaining MS4 Permit implementation costs from permittees. This guidance describes the benefits from greater detail and more standardization in cost reporting because stormwater issues vary from system to system, often making it difficult to compare compliance costs for individual MS4 permits. Collecting standardized data on what permittees spend to comply with their MS4 permits will allow the Water Boards and stakeholders to broadly compare across regions and systems and to identify trends over time.
>
> **C.20-4** The City of Salinas MS4 Permit provides another example of standardized cost reporting data being used to evaluate the effectiveness of program implementation. It finds that "consistent and reliable cost information is critical for the Permittee to manage its assets, programs, funding strategies, and potential future credit programs and stormwater utility fees."

[377] Exhibit A, Test Claim, page 778. The Test Claim does not request reimbursement to comply with Provision C.20.c. However, Provision C.20.c. is necessary to understand the requirements of Provision C.20.b.

> **C.20-5** The cost reporting categories were developed considering the ORPP guidance, as well as the cost reporting requirements of the City of Salinas MS4 Permit and the Regional MS4 Permit for Los Angeles and Ventura Counties. [Fn. omitted.]
>
> **C.20-6** To provide additional flexibility to Permittees in developing a reporting methodology that considers the unique aspects of each program, while also allowing for broad comparisons between program components and costs, the Permit allows Permittees to engage in a collaborative approach to developing a consistent framework.[378]

The Water Boards contend the requirements to develop a cost reporting framework and methodology to perform the fiscal analysis are not reimbursable because they implement federal law and the costs are de minimis:

> Here, under existing federal law Permittees are required to report on costs in their permit applications: 40 C.F.R. section 122.26(d)(1)(vi) requires "[for] each fiscal year to be covered by the permit, a description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs"; and 40 C.F.R. section 122.26(d)(2)(vi) requires "[for] each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) [characterization data] and (iv) [stormwater management program] of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds." The cost reporting framework and methodology required under Provision C.20.b provides the procedure for reporting costs for the federal requirements and does not significantly increase the cost of compliance. The requirement is intended to implement the federal cost-reporting requirements and part and parcel of them. Thus, any costs associated with Provision C.20.b are de minimis and not subject to subvention.[379]

The Commission finds that the requirements in Provision C.20.b. are new and not required by federal law or the prior permit. Federal law requires the permittees' application for a stormwater permit to include the following:

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[378] Exhibit A, Test Claim, pages 1140-1141 (Fact Sheet).

[379] Exhibit B, Water Boards' Comments on the Test Claim, page 28.

- A description of the municipality's budget for existing stormwater programs, including an overview of financial resources and budget, overall indebtedness and assets, and sources of funds for the stormwater programs.[380]
- *For each fiscal year covered by the permit*, a fiscal analysis of the necessary capital, operation and maintenance expenditures to accomplish the monitoring, analysis, and stormwater programs, including a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.[381]

Thus, federal law requires a fiscal analysis of the stormwater program each year the permit is in effect, which includes an analysis of the capital, expenditures, source of funds for the program, and any legal restrictions on the use of funds. However, federal law does not require the permittees to develop a cost reporting framework and methodology to perform the annual fiscal analysis, which has to be submitted to the Executive Officer by June 30, 2023.

And while the prior permit had annual reporting requirements,[382] it did not require the permittees to develop a cost reporting framework and methodology to perform the annual fiscal analysis.

Thus, the Commission finds that the requirement in Provision C.20.b. to develop a cost reporting framework and methodology to perform the annual fiscal analysis, which has to be submitted to the Executive Officer by June 30, 2023, is new and not required by prior law. The Commission, however, does not reach the issue of whether this requirement mandates a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

l. <u>The requirements in Provision C.21.b. to develop and implement an Asset Management Plan and to complete a Climate Change Adaptation Report are new, but the remaining requirements are not new.</u>

The claimant requests reimbursement to comply with Provision C.21.b., which requires the development of an asset management plan to ensure the satisfactory condition of hard assets.[383] "Hard assets" are defined as "structural controls that serve a water quality function, for example: bioretention cells, pervious pavement systems, full trash capture devices, trash receptacles, and pet waste stations."[384]

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[380] Code of Federal Regulations, title 40, section 122.26(d)(1)(vi).

[381] Code of Federal Regulations, title 40, section 122.26(d)(2)(vi), emphasis added.

[382] Exhibit A, Test Claim, page 1680 (Order R2-2015-0049, Provision C.17.).

[383] Exhibit A, Test Claim, pages 35-36.

[384] Exhibit A, Test Claim, page 779, footnote 67.

Provision C.21.b. imposes the following requirements on the permittees:

- Develop an Asset Management Plan by June 30, 2025, which, at a minimum, shall include the following:

  (1) A description of the asset categories to be included.

  (2) An inventory (or link to such an inventory) of permittees' existing hard assets built pursuant to the Provisions cited in Provision C.21.a, including at a minimum all LID/GSI systems and trash capture devices.

  (3) An Operation, Maintenance, Rehabilitation, and Replacement Plan (Asset Management O&M Plan), to evaluate data obtained through asset assessment in order to inform a strategy for prioritizing and scheduling maintenance, rehabilitation, and replacement of inventoried assets, including:

    (a) A process for prioritizing and scheduling operation and maintenance activities.

    (b) A process(es) for evaluating the current condition, and identifying the need for and carrying out, as appropriate, the rehabilitation and replacement of inventoried assets. The process(es) shall account for: (i) The minimum condition necessary to achieve minimum performance levels for each type of hard asset, including an assessment of stormwater volume and pollutant load reduction, necessary to comply with applicable Permit Provisions and TMDLs; (ii) current performance level and effectiveness, as indicated by condition; and (iii) consequence of failure and likelihood of failure.

    (c) An evaluation or forecast of costs necessary for the implementation of (a)-(b) above, at least through the end of the current permit term. On an ongoing basis, the Permittees shall compare these projections with available funding sources to determine the best manner in which to fund the operation, maintenance, rehabilitation, and replacement of inventoried assets. This evaluation or forecasting may supplement Permittees' compliance with Provision C.20 Cost Reporting.

  (4) Recommendations for a reporting strategy, which may have a nexus with the tracking systems referenced in Permittees' Green Infrastructure Plans, to include:

    (a) Municipality-specific reporting;

    (b) Assessment of the programmatic benefit from countywide or regional roll-up of collected information.[385]

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[385] Exhibit A, Test Claim, pages 779-780.

- Begin implementation of the Asset Management Plan no later than July 1, 2025.[386]
- Reassess and update the Asset Management Plan on an as-needed basis, to address changing conditions and resources.[387]
- Provide the latest version of the Asset Management Plan to Water Board staff during inspections and audits, or otherwise upon request.[388]
- Complete a Climate Change Adaptation Report to identify potential climate change-related threats to assets and appropriate adaptation strategies. The report shall assess existing, new, and increasing threats from climate change to the condition of permittees' inventoried hard assets over the next 50 years, and identify approaches that permittees may implement to address those threats, such as the modification of design standards and countywide technical guidance documents. The Climate Change Adaptation Report may be developed on an all-Permittee (regional) scale or countywide scale.[389]

The Water Boards contend that the requirements in Provision C.21.b. do not impose a new program or higher level of service as follows:

> The asset management requirements are not a new program or a higher level of service. Under 40 C.F.R. section 122.41(e), NPDES permittees are required to properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with its permit. The Asset Management Plan and the Climate Change Adaptation Report implement the existing federal requirement to ensure Permittees properly operate and maintain their systems of treatment and control. Without proper planning, assets cannot be properly maintained. The San Francisco Bay Water Board expects Permittees to use the information and data they already have about their own maintenance needs and the condition of their hard stormwater assets to prioritize maintenance and repairs. [Fn. omitted.] The intent of this requirement is to ensure that Permittees use their limited resources as efficiently as possible and that improvements or repairs are planned in areas where they are needed most to maintain their treatment and control systems.[390]

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[386] Exhibit A, Test Claim, page 780.

[387] Exhibit A, Test Claim, page 780.

[388] Exhibit A, Test Claim, page 780.

[389] Exhibit A, Test Claim, page 780.

[390] Exhibit B, Water Boards' Comments on the Test Claim, page 29.

Federal law requires permittees to maintain all systems and treatment and control measures to ensure compliance with the permit, including having appropriate quality assurance procedures:

> The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.[391]

The prior permit, in Provision C.3.b.iv.2.k. required the permittees to report on the operation and maintenance responsibility mechanism for the life of a regulated project.[392] Provision C.3.h. of the prior permit required the permittees to implement an “Operation and Maintenance Verification Program” for regulated projects, including agreements for maintenance, inspections, and enforcement provisions, and the permittees had to ensure that all stormwater treatment systems on the project were properly operated and maintained for the life of the project.[393] And, with respect to trash, Provision C.10.b of the prior permit required permittees to maintain Full Trash Capture Systems within their jurisdictions, maintain records of those systems, and certify annually that those systems are operated and maintained to meet the requirements for Full Trash Capture Systems.[394] Thus, implementing and assessing an operation and maintenance plan are not new.

However, the requirements in Provision C.21.b. to develop a new Asset Management Plan by June 30, 2025, and to implement that plan by July 1, 2025, are new requirements. In addition, the requirements that the plan include processes for “evaluating the current condition, and identifying the need for and carrying out, as appropriate, the rehabilitation and replacement of inventoried assets,” evaluating or forecasting costs and comparing those projections with available funding sources are new. Furthermore, the permittees were not required under prior law to complete a Climate Change Adaptation Report to identify potential climate change-related threats to assets and appropriate adaptation strategies, and this requirement is new. The Commission, however, does not reach the issue of whether these requirements mandate a new program or higher level of service since, as more fully described in section IV.C.2. of this Decision, the claimants have fee authority to cover the costs of

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391 Code of Federal Regulations, title 40, section 122.41(e).

392 Exhibit A, Test Claim, page 1551 (Order R2-2015-0049, Provision C.3.b.iv.2.k.).

393 Exhibit A, Test Claim, pages 1570-1572 (Order R2-2015-0049, Provision C.3.h.).

394 Exhibit A, Test Claim, page 1632 (Order R2-2015-0049, Provision C.10.b.).

the requirement within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.

2. There Are No Costs Mandated by the State for the Requirements Imposed by the Test Claim Permit Pursuant to Government Code Section 17556(d) Since the Claimants Have Fee Authority Sufficient as a Matter of Law During the Entire Period of Reimbursement to Cover the Costs of the Requirements.

Government Code section 17514 defines "costs mandated by the state" as any increased costs a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. Here, the claimant has filed declarations identifying the actual costs incurred by the claimant in fiscal year 2022-2023, which exceeds $1,000 ["The annual member contribution level for FY 22/23 was $2,535,000 for all Program costs regarding the MRP3, for which Union City's paid 5.31% or $134,609"][395] and estimates costs of over $852,000 in fiscal year 2023-2024 and statewide costs of $68,200,880.[396] The claimant states that these costs are funded from its general fund and a clean water fund, which obtains revenues from property tax assessments.[397]

However, Government Code section 17556(d) provides the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds "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."

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[395] Exhibit A, Test Claim, page 113 (Declaration of Sandra Mathews).

[396] Exhibit A, Test Claim, pages 40, 46-64 (Declaration of Farooq Azim).

[397] Exhibit A, Test Claim, page 40-41. However, reimbursement is not required to the extent the claimants receive revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes and use that revenue to pay for any state-mandated costs. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under article XIII B, section 6 is not required. *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."); *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno.*[398] 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.*[399]

Following the logic of *County of Fresno*, the Third District Court of Appeal held in *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[400]

For example, in *Connell* the court held the Santa Margarita Water District, and other similarly situated districts, had statutory authority to raise rates on water, notwithstanding argument and evidence that the amount by which the district would be forced to raise its rates would render the water unmarketable.[401] The district acknowledged the existence of fee authority, but argued it was not "sufficient," within the meaning of section 17556(d).[402] The court held "[t]he Districts in effect ask us to construe 'authority,' as used in the statute, as a practical ability in light of surrounding economic circumstances. However, this construction cannot be reconciled with the plain language of [section 17556(d)] and would create a vague standard not capable of reasonable adjudication."[403] The court concluded: "Thus, the economic evidence

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398 *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

399 *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

400 *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

401 *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

402 *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

403 *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry."[404]

More recently, the Third District Court of Appeal endorsed and followed *Connell* in *Paradise Irrigation District*: "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[405] Instead, the court held, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[406]

And the 2021 decision of the Second District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "[e]ven if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so."[407]

The claimant alleges it has no authority to impose or increase fees for the costs at issue in this claim: "The City has no fee authority to increase these revenue sources without seeking voter approval under Proposition 218. Thus, the City does not have authority to increase these fees – only the voters have that authority."[408]

As explained below, however, the Commission finds the permittees have fee authority during the entire period of reimbursement to impose stormwater fees on property owners for all requirements at issue in this Test Claim without the voter's approval and regulatory fees for the requirements associated with development and redevelopment, in accordance with Propositions 218 and 26. Thus, there are no costs mandated by the state and reimbursement is denied.

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[404] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[405] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[406] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[407] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[408] Exhibit A, Test Claim, page 41.

a. Property-related fees.

The permittees have authority pursuant to their constitutional police powers[409] and other statutory authority[410] to impose property-related fees for the required activities.[411] "[P]revention of water pollution is a legitimate governmental objective, in furtherance of which the police power may be exercised."[412] These fees are subject to procedural and substantive requirements imposed by Propositions 218 and 26, which added and amended article XIII C and XIII D to the California Constitution.

i. Articles XIII C and XIII D (Proposition 218 and 26).

Proposition 218, approved by voters in 1996, added articles XIII C and XIII D to the California Constitution and "is one of a series of voter initiatives restricting the ability of state and local governments to impose taxes and fees."[413] Article XIII D addresses property-based assessments and fees.[414]

Specifically, article XIII D of the California Constitution "imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.'"[415] For example, special assessments and property-related fees are subject to notice and hearing requirements, and must meet a threshold of proportionality with respect to the amount of the exaction and the benefits conferred. Section 4, addressing special assessments, provides:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation

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409 California Constitution, article XI, section 7.

410 See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

411 *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

412 *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561, citing *Freeman v. Contra Costa County Water Dist*. (1971) 18 Cal.App.3d 404, 408.

413 *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.

414 *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 381.

415 *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 citing California Constitution, article XIII D, section 3.

> 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.[416]

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency "shall consider all protests…and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.[417]

Similarly, article XIII D, section 6, which addresses property-related fees, provides for a proportionality requirement with respect to the fees and charges and imposes the following substantive requirements:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the

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[416] California Constitution, article XIII D, section 4(a).

[417] California Constitution, article XIII D, section 4(c); (d); (e).

> 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.[418]

And section 6 provides for notice and a public hearing similarly to section 4; but, unlike section 4, section 6 does not expressly require the notice to inform parcel owners of their right to protest the proposed fee, nor is the notice required to be in the form of a ballot to be returned.[419]

Section 6(c) also provides that *voter approval* is required for property-related fees and *charges other than* for water, sewer, and refuse collection services.[420] This section is discussed further below, but for charges for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, and are subject only to the voter protest provisions of article XIII D.

In 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to expressly overrule a prior court decision (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351), which held that stormwater fees were not charges for water, sewer, and refuse collection services and, thus, did not fall under the voter approval exception in article XIII D, section 6(c).[421] Effective January 1, 2018, Government Code section 53750(k) defines the term "sewer" for purposes of article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters." Therefore, effective January 1, 2018, Government Code sections 53750 and 53751 defined "sewer" to include stormwater fees subject only to the voter protest provisions of article XIII D.[422]

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[418] California Constitution, article XIII D, section 6(b).

[419] Compare California Constitution, article XIII D, section 6(a)(1)-(2) with article XIII D, section 4(a).

[420] California Constitution, article XIII D, section 6(c).

[421] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

[422] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)). The Commission is required to presume the amendments made to the Government Code by SB 231 are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional, unless an appellate court has determined the statute is unconstitutional.

In 2010, the voters approved Proposition 26 to amend article XIII C, section 1 of the California Constitution to define a "tax" subject to the voters' approval as "any levy, charge, or exaction of any kind imposed by a local government, *except*" as stated.[423] An exception to the definition of a tax includes "Assessments and property-related fees imposed in accordance with the provisions of Article XIII D."[424] Thus, as long as local government complies with the substantive and procedural requirements of article XIII D (added by Proposition 218), then the revenues received are not considered proceeds of taxes, but revenue from "nontax" property-related fees and assessments. Article XIII C also makes clear that the burden is on local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[425]

ii. The permittees have the authority to impose stormwater property-related fees to cover the costs of the alleged requirements, which are subject only to the voter protest provisions of article XIII D, section 6, and therefore there are no costs mandated by the state pursuant to Government Code section 17556(d).

The Commission finds that the permittees' authority to impose stormwater fees for the requirements imposed by the test claim permit satisfies both the substantive and procedural requirements of Propositions 218 and 26 and that since the fees are subject only to the voter protest provisions of article XIII D, section 6, there are no costs mandated by the state pursuant to Government Code section 17556(d).

As indicated above, article XIII D, section 6, imposes the following substantive requirements for property-related fees:

> 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

[423] California Constitution, article XIII C, section 1 (amended by the voters on Nov. 2, 2010, by Prop. 26).

[424] California Constitution, article XIII C, section 1(e)(7).

[425] California Constitution, article XIII C, section 1(e).

> 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.[426]

In 2021, the Second District Court of Appeal addressed a challenge to the Commission's Decision in *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-20, 03-TC-21, which required the local government permittees to install and maintain trash receptacles at public transit stops owned by *other* public entities.[427] The State contended the local governments could impose a fee on private property owners to pay for the cost of these requirements. However, the court determined that the State had not shown the fee would meet article XIII D's substantive requirements for property-related fees (i.e., that no fee or charge may be imposed for general government services that are available to the public at large in substantially the same manner as they are to property owners), and that common sense dictated the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public, as follows.[428]

> The state agencies have not satisfied their burden. Not only have the state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy the substantive constitutional requirements, but common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and

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[426] California Constitution, article XIII D, section 6(b).

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

[428] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 567-568.

> that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)-(4)), the placement of the receptacles at public transit stops makes the "service available to the public at large in substantially the same manner as it is to property owners" (*id.*, art. XIII D, § 6, subd. (b)(3)). The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements.[429]

In 2022, the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (addressing the Commission's Decision in *Discharge to Stormwater Runoff*, 07-TC-09) revisited the 2021 case and the substantive requirements in article XIII D, section 6(b) regarding property-related fees to cover the costs of street sweeping required by the NPDES permit as part of the receiving water limitations and discharge prohibitions to keep pollutants out of local waters.[430] The State acknowledged the general rule that the party claiming the applicability of an exception bears the burden of demonstrating that it applies. However, the State argued that this typical approach should not apply to the burden of showing fee authority under Government Code section 17556(d). The State argued "the inherent flexibility in permittees' police power means permittees may develop fees in any number of ways. Also, local governments like permittees have significantly more expertise and experience than the State agencies before us in designing, implementing, and defending local government fees. The State asserts that permittees' expertise means they should bear the burden on this point."[431] The court agreed, and held as follows:

> We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)[432]

The court further held that requiring the State to show affirmatively how permittees can create a fee that meets the substantive requirements *where no fee yet exists* requires the State to effectively engage in the rulemaking process itself and asks the State to do

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[429] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

[430] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[431] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584.

[432] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

more than establish permittees have the lawful authority to enact a fee, which is the sole issue under Government Code section 17556(d).[433] The court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact (as was the case in the 2021 *Department of Finance* case), then the finding that a fee would meet the substantive requirements is *implicit* in the determination that permittees have the right or power to levy a fee, as follows:

> The State has established that permittees have the right or power to levy a fee for the street cleaning condition pursuant to Public Resources Code section 40059. Implicit in that determination is that permittees have the right or power to levy a fee that complies with article XIII D's substantive requirements. Unless it can be shown on undisputed facts in the record or as a matter of law that a fee cannot satisfy article XIII D's substantive requirements, as was found in *Los Angeles Mandates II*, the establishment by the State of the local agencies' power or authority to levy a fee without voter approval or without being subject to other limitations establishes that a local government has sufficient fee authority for purposes of section 17556(d).[434]

The court further explained the following:

> Although the court of appeal in *Los Angeles Mandates II* [i.e., the 2021 *Department of Finance* case] stated the state bore the burden to show that a fee for public trash receptacles could satisfy the substantive requirements, and that the state did not satisfy its burden, the court actually ruled that the local governments could not establish a fee that could meet the substantive requirements as a matter of law or undisputed fact. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568-569, 273 Cal.Rptr.3d 619 ["common sense dictates" that fee would not meet requirements].) To require the State to show affirmatively how permittees

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[433] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585. This finding is consistent with provisions in articles XIII C and XIII D, which state the burden is on the local agency to demonstrate compliance with the substantive rules *when a fee exists* and is legally challenged. Article XIII D, section 6(b), states that "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article*;"* and article XIII C, section 1(e), states "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

[434] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

> can create a fee that meets the substantive requirements where no fee yet exists requires the State effectively to engage in the rulemaking process itself. That asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue. To the extent *Los Angeles Mandates II* requires the State to prove more, we respectively disagree with its interpretation.[435]

Similarly here, there is no showing as a matter of law or fact that a fee cannot meet the substantive requirements of article XIII D, section 6(b). The requirements in this case are *not* like the requirement to place trash receptacles on transit property owned by other entities and not within the regulatory control of the permittees. The requirements at issue here (planning and implementing LID BMPs and control measures for new development and redevelopment road projects, updating the MS4 map, trash requirements to ensure the discharge of zero trash, pollutants of concern monitoring, mercury and PCB requirements, non-stormwater discharges, and cost reporting and asset management planning) address waters and areas within the control of the permittees. Like street sweeping in the 2022 *Department of Finance* case, all of the new requirements implement the receiving water limitations and discharge prohibitions required by the permit to protect the beneficial uses of the local waters enjoyed by property owners in the San Francisco region and to prevent pollutants from causing or contributing to a violation of water quality standards.[436]

As indicated above, the courts have found that local government has the authority (i.e., the right and the power) to levy property-related fees for stormwater services under their police powers.[437] And the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they can properly develop property-related stormwater fees under section XIII D of the California Constitution, including elements incorporated into a stormwater fee for various types of parcels to cover the cost of reducing stormwater pollutant loading and public education.[438] CASQA describes the typical apportionment of costs for stormwater services as follows:

> Proposition 218 requires that property-related fees "shall not exceed the proportional cots of the service attributable to the parcel." Therefore, it is essential to develop an apportionment of costs that best reflects the stormwater services provided by the municipality.
>
> Across the U.S., most stormwater fee structures are based on the amount of impervious surface on a parcel, which is proportional to the amount of rainwater that runs off a parcel. This is a straight forward method, although

[435] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[436] Exhibit A, Test Claim, pages 549-552.

[437] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

[438] Exhibit X (1), CASQA, Fee Study and Ordinance.

impervious surface data may be difficult or expensive to obtain. Rate-setting consultants have experience working around this issue with sampling and statistical approaches, which can satisfy the Proposition 218 "proportionality" test.

> The majority of stormwater rate structures utilize an equivalent residential unit (ERU) as a basis for fees. ERUs estimate the average or median characteristics for a residential property. For stormwater, land use, impervious surface cover, or total size are possible metrics. Once established based on a sample of properties, each parcel in a municipality can be assigned an individual number of ERUs, which is multiplied by the base residential rate to establish the individual fee. With the ERUs assigned and totaled, the revenue requirement is divided by the total number of ERUs to establish the base residential rate.
>
> Most municipalities are bound to an NPDES permit requiring them to reduce stormwater pollutant loading as well as other objectives such as green infrastructure development and public education. These elements should be incorporated into the stormwater fees for various types of parcels.
>
> It is worth noting that Propositions 218's strict requirements on a fair apportionment method means that a municipality should create a thorough administrative record of how the rate and studies upon which it relies would need to be clearly referenced.[439]

Therefore, the Commission finds that the permittees have the legal authority to impose stormwater fees for the requirements at issue here, which meet the substantive requirements of article XIII D, section 6.

Moreover, with the amendment by SB 231 to Government Code sections 53750 and 53751, voter approval is not required by the California Constitution to impose or increase property-related fees for stormwater costs beginning January 1, 2018 (and during the period of reimbursement for this claim, which begins July 1, 2022). Instead, any new or increased fee is subject only to the voter protest provisions of article XIII D. The court in *Paradise Irrigation District* (a challenge to the Commission's Decision in *Water Conservation,* 10-TC-12/12-TC-01) held, in the context of water services, the *voter protest* requirements of Proposition 218 do not divest local agencies of their authority to impose fees sufficient as a matter of law pursuant to Government Code section 17556(d) and, thus, even when the voter protest provisions apply, there are no costs mandated by the state.[440] The Court of Appeal observed:

> This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and irrigation

[439] Exhibit X (1), CASQA, Fee Study and Ordinance, pages 2-3.

[440] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

> districts' authority to levy fees so that they are entitled to subvention for state-mandated regulations requiring water infrastructure upgrades. The Water and Irrigation Districts do not argue this court wrongly decided *Connell, supra,* 59 Cal.App.4th 382, 69 Cal.Rptr.2d, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell.*[441]

Ultimately the court preserved and followed the rule of *Connell*, finding that "Proposition 218 implemented a power-sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts' fee authority."[442] The court held, ". . . we presume local voters will give appropriate consideration and deference to state mandated requirements relating to water conservation measures required by statute."[443] In addition, the court held "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[444] The court concluded, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[445] The court found water service fees, being expressly exempt from the voter approval provisions of article XIII D, section 6(c), therefore do not require voter preapproval, as would new taxes.[446] In addition, the court followed and relied upon the court's analysis in *Bighorn-Desert View* of a power-sharing relationship between local agencies and their constituents, including the presumption "local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency…" and the notice and hearing requirements of article XIII D, section 6(a) "will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are

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441 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

442 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

443 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

444 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

445 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

446 *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

excessive."[447] Accordingly, the court found that power-sharing arrangement "does not undermine the fee authority that the districts have," and the majority protest procedure of article XIII D, section 6(a) "does not divest the Water and Irrigation Districts of their authority to levy fees."[448] The court noted statutory protest procedures already existed, and "the possibility of a protest under article XIII D, section 6 does not eviscerate the Water and Irrigation Districts' ability to raise fees to comply with the Water Conservation Act."[449] Thus, the court found Government Code section 17556(d) still applies to deny a claim when the fee authority is subject to voter protest under article XIII D, section 6(a).

Accordingly, the permittees have the legal authority to impose stormwater property-related fees to cover the costs of the alleged requirements, which are subject only to the voter protest provisions of article XIII D, section 6, and therefore there are no costs mandated by the state pursuant to Government Code section 17556(d).

b. Regulatory fees

As a separate ground for denial, the Commission finds that the permittees also have the legal authority to impose or increase regulatory fees to pay for the sections in Provision C.3. pled by the claimant, which impose LID (low impact development) and green infrastructure requirements on development and retrofitted real property projects, and Provision C.8.d. addressing LID monitoring to ensure compliance. Thus, there are no costs mandated by the state pursuant to Government Code section 17556(d) for these requirements.

Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[450] Interpreting this provision, and its predecessor, the courts have held that a local legislative body with police power "has a wide discretion" and its laws or ordinances "are invested with a strong presumption of validity."[451] The courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[452]

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[447] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[448] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[449] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[450] California Constitution, article XI, section 7.

[451] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[452] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 (in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors).

Accordingly, ordinances or laws regulating legitimate businesses or other activities within a city or county, as well as regulating the development and use of real property, have generally been upheld.[453] In addition, "[t]he services for which a regulatory fee may be charged include those that are "'incident to the issuance of [a] license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.'"[454] The courts also hold that water pollution prevention is a valid exercise of government police power.[455]

Moreover, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[456] and fees for development of real property.[457]

Thus, there is no dispute that the copermittees have the legal authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[458] The issue in dispute is only whether Propositions 26 and 218 impose procedural and substantive restrictions that so weaken that authority as to render it insufficient, within the meaning of Government Code section 17556(d).

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[453] See *Ex parte Junqua* (1909) 10 Cal.App. 602 (police power "embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others…"); *Sullivan v. City of Los Angeles Dept. of Building & Safety* (1953) 116 Cal.App.2d 807 (recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

[454] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, citing *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[455] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[456] See, e.g., Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[457] Government Code section 66001 (providing for development fees under the "Mitigation Fee Act," requiring local entities to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed).

[458] See also, *Ayers v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31 (upholding conditions imposed by the City on subdivision development, in the absence of any clear restriction or limitation on the City's police power); *Associated Home Builders etc. Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 (upholding state statute and local ordinance requiring dedication or in-lieu fees for parks and recreation as a condition of subdividing for residential building).

For purposes of background, Proposition 13 (1978) added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase *taxes*.[459] Proposition 13 generally limited the rate of any ad valorem tax on real property to one percent; limited increases in the assessed value of real property to two percent annually absent a change in ownership; and required that any changes in state taxes enacted to increase revenues and special taxes imposed by local government must be approved by a two-thirds vote of the electors.[460] Proposition 13, however, did not define "special taxes," and a series of judicial decisions tried to define the difference between fees and taxes, and diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[461]

In 1996, Proposition 218 added article XIII C to ensure and reiterate voter approval requirements for general and special taxes, because it was not clear whether Proposition 62, which enacted statutory provisions to ensure that all new local taxes be approved by a vote of the local electorate, bound charter jurisdictions.[462] As added by Proposition 218, article XIII C defined all taxes as general or special, and provided that special districts have no power to impose general taxes; and for any other local government, general taxes require approval by a majority of local voters, and special taxes require a two-thirds majority voter approval.[463]

Interpreting the newly-reiterated limitation on local taxes, the Court in *Sinclair Paint* held that a statute permitting the Department of Health Services to levy fees on manufacturers and other persons contributing to environmental lead contamination, in order to support a program of evaluation and screening of children, imposed bona fide *regulatory fees*, and not, as alleged by plaintiffs, a special tax that would require voter approval under articles XIII A and XIII C.[464] The Court noted with approval *San Diego Gas & Electric*, in which the air district was permitted to recover costs of its operations, which are not reasonably identifiable with specific industrial polluters, against all monitored polluters according to an emissions-based formula, and those fees were not held to constitute a special tax.[465] The *Sinclair Paint* Court cited with approval the court

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459 See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

460 *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

461 *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319.

462 *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

463 California Constitution, article XIII C, section 2(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."). See also, Exhibit X (2), Excerpts from Voter Information Guide, November 1996 General Election.

464 *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

465 *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

of appeal's finding that "A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves…"[466] The *Sinclair Paint* Court thus held: "In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision."[467]

In 2010, the voters adopted Proposition 26, partly in response to *Sinclair Paint*.[468] Proposition 26 sought to broaden the definition of "tax," (and accordingly narrow the courts' construction of permissible non-tax fees). However, Proposition 26 largely *codifies* the analysis of *Sinclair Paint*, in its articulation of the various types of fees and charges that are *not* deemed "taxes."[469] Thus, while Proposition 13 led a series of increasing restrictions on the imposition of new taxes, after *Sinclair Paint*, and Propositions 218 and 26, local governments have the power, subject to varying limitations, to impose or increase (1) general taxes [with voter approval];[470] (2) special taxes [with *two-thirds* voter approval];[471] and (3) levies, charges, or exactions that are not "taxes," pursuant to the exceptions stated in article XIII C, section 1(e), which include:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations,

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466 *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879 quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

467 *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

468 See Exhibit X (2), Excerpts from Voter Information Guide, November 2010 General Election, page 3.

469 *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7, citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

470 California Constitution, article XIII C, section 2.

471 California Constitution, article XIII C, section 2.

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.[472]

The plain language of article XIII C, section 1(e) thus describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[473] and fees or charges for a government service or product provided to the payor and not others.[474] Both of these could be described as "user" fees, or otherwise described as fees for a government service or benefit. In addition, section 1(e) provides for regulatory fees (including those for inspections),[475] development fees,[476] and assessments or property-related fees or charges adopted in accordance with article XIII D.[477] In each case, the local government bears the burden to establish that the fee or charge is not a tax, including that "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[478]

Although the limitations of article XIII C, section 1(e) may be newly expressed in the Constitution (i.e., added in 2010 by Proposition 26), the concepts that regulatory fees must be reasonably related to a legitimate public purpose, and in some way proportional

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[472] California Constitution, article XIII C, section 1(e).

[473] California Constitution, article XIII C, section 1(e)(1).

[474] California Constitution, article XIII C, section 1(e)(2).

[475] California Constitution, article XIII C, section 1(e)(3).

[476] California Constitution, article XIII C, section 1(e)(6).

[477] California Constitution, article XIII C, section 1(e)(7).

[478] California Constitution, article XIII C, section 1(e).

to the activity being regulated, are not at all new. The California Supreme Court described the history of such fees in *United Water Conservation Dist.*, saying, “the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other.”[479] The Court also noted: “*Sinclair Paint*, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis.”[480] Accordingly, the Court upheld the court of appeal’s finding that the conservation charges did not exceed the reasonable cost of the regulatory activity in the aggregate,[481] but presumed “each requirement to have independent effect,”[482] and remanded the matter for consideration of the latter issue.

Similarly, in *San Diego County Water Authority*, the First District Court of Appeal upheld non-property-related rates charged for conveying water from the Colorado River based on a two-part test.[483] The rates were held to satisfy both the express requirements of article XIII C, section 1(e)(2): “a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provided to those not charged and which does not exceed the reasonable costs…of providing the service”; and the more general test of *Sinclair Paint*: “[the volumetric rates] bear a fair and reasonable relationship to the benefits it receives from its use of the conveyance system.”[484]

Moreover, the courts have found that regulatory fees are flexible, and the Third District Court of Appeal in *California Assn. of Prof. Scientists v. Department of Fish & Game (Professional Scientists)* has identified the following general rules:

> General principles have emerged. Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A, section 4 analysis if the “ ‘ “fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes.” ’ “ (Citation omitted.) “A

[479] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7, citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

[480] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

[481] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[482] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.

[483] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[484] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

> regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." (Citation omitted.) "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." (Citation omitted.) Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. (Citation omitted.) Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[485]

As indicated by the court in *Professional Scientists,* regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement."[486] In *United Business Commission v. City of San Diego*, the court explained that regulatory fees include "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed" and that the following incidental costs are properly included in a regulatory fee: "inspection of hazards, travel time, office supplies, telephone expenses, overhead, and clerk's time"[487]

The 2021 *Department of Finance* decision of the Second District Court of Appeal found that the local agencies subject to an NPDES permit issued by the Los Angeles Regional Water Quality Control Board had the authority under their police powers to charge regulatory fees to periodically inspect commercial and industrial facilities to ensure compliance with various environmental regulatory requirements:

> We agree with the Commission that, based upon the local governments' constitutional police power and their ability to impose a regulatory fee that (1) does not exceed the reasonable cost of the inspections, (2) is not levied for unrelated revenue purposes, and (3) is fairly allocated among the fee payers, the local governments have such authority.[488]

Even though the imposition of the fee may be difficult, the court held that local governments have the authority to impose the fee and, thus, reimbursement under article XIII B, section 6 was not required:

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[485] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[486] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[487] *United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, footnote 2.

[488] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 546, 562-563.

> The local governments also argue that a fee that must be no more than necessary to cover the reasonable costs of the inspections "would be difficult to accomplish." They refer to problems that would arise from a general business license fee on all businesses, including those not subject to inspection, and to charging fees for inspections in years in which no inspection would take place. Even if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so. (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) As explained above, the police powers provision of the constitution and the judicial authorities we have cited provide that authority.[489]

And the Third District Court of Appeal recently held in *Department of Finance v. Commission on State Mandates* that regulatory fees properly included the costs of creating LID and hydromodification plans, which were "incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[490] The court rejected arguments from the County and cities that the costs of creating the plans could not be recovered through regulatory fees, and thus voter approval would be required, since the amount of the fee would exceed the reasonable costs of providing the services for which it is charged, and the amount of the fee would not bear a reasonable relationship to the burdens created by the feepayers' activities or operations, primarily because the costs were incurred before any priority development project was proposed.[491] The court also rejected arguments that the County and cities could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large and, thus, would constitute a tax.[492] The court found that local government has fee authority sufficient as a matter of law to cover the costs of the hydromodification management plan and LID requirements within the meaning of Government Code section 17556(d) and, thus, there were no costs mandated by the state for these activities based on the following findings:

- Creating the hydromodification management plans and the LID requirements constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution

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[489] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565.

[490] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590 (review denied March 1, 2023).

[491] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

[492] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

abatement program. "Setting the fee will not require mathematical precision. Permittees' legislative bodies need only "consider 'probabilities according to the best honest viewpoint of [their] informed officials' " to set the amount of the fee."[493]

- There was no evidence that the permittees could not levy a fee that would bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors . . . The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." The fee just has to be related to the overall cost of the governmental regulation.[494]
- The court rejected the claimants' argument that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large, relying *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service provided directly to the payor *that is not provided to those not charged* ...."[495] However, the court found that the service provided directly to developers of priority development projects was the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service was not provided to anyone else, and only affected priority project developers charged for the service. The service would not be provided to those not charged.[496]

Accordingly, there is no reason to believe that article XIII C imposes any greater limitation on local governments' authority under their police power to impose reasonable regulatory fees and other fees than existed under prior law. Article XIII C makes clear that the burden is on the local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created

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[493] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[494] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[495] See, for example, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 569, where the court held that article XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large.

[496] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

by such payors as a part of the rate setting process.[497] It is not the burden of the state to make this showing on behalf of local government.

Here, the activities, including the planning, inspection, and enforcement activities relating to LID and green infrastructure requirements are "incident to the development permit[s] which permittees will issue to . . . development projects and the administration of permittees' pollution abatement program."[498] The proposed fee would be imposed as a condition for approving real property development and based on the developer's application for government approval to proceed with the development. The fees would be not levied for unrelated revenue purpose, can be fairly allocated among the fee payers, and the service is not provided to those not charged.[499] Such fees are not taxes under Proposition 26 when they are charges imposed as a condition of property development.[500]

In addition, there is no evidence in the record indicating that the claimants cannot levy a fee that will bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors.[501] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.[502] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive, or the precise burden each payer may create. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. "An excessive fee that is used to generate general revenue becomes a tax."[503] And "No one is suggesting [that the claimants] levy fees that exceed their costs."[504]

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[497] California Constitution, article XIII C, section 1(e).

[498] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[499] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

[500] California Constitution, article XIII C, section 1(e)(6).

[501] *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194.

[502] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948.

[503] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438.

[504] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

Based on the foregoing, the Commission finds that article XIII C of the California Constitution does not render local government's authority to impose regulatory fees insufficient as a matter of law within the meaning of Government Code section 17556(d) and, therefore, there are no costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim permit does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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 June 29, 2026, I served the:

- **Current Mailing List dated June 23, 2026**
- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued June 29, 2026**

  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018, 22-TC-07, as modified by Order No. R2-2023-0019; NPDES Permit No. CAS612008; Provisions C.3.b.i., C.3.b.ii.4., C.3.b.ii.5., C.3.j.ii.1.a.-g., C.3.j.ii.2.a.-j., C.3.j.ii.4., C.5.f., C.8.d., C.8.e., C.8.f., C.10.a.i., C.10.a.ii., C.10.e., C.11.c., C.12.a., C.12.c., C.15.b.iii., C.17.a., C.20.b., C.21.b., Issued May 11, 2022, Effective July 1, 2022
  Union City, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 29, 2026 at Sacramento, California.

Jill Magee
____
Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 6/23/26

Claim Number: 22-TC-07

Matter: California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2022-0018

Claimant: Union City

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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