

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 447
Sacramento, California
March 26, 2010

Present: Member Cynthia Bryant, Chairperson
Representative of the Director of the Department of Finance
Member Francisco Lujano, Vice Chairperson
Representative of the State Treasurer
Member Richard Chivaro
Representative of the State Controller
Member Cathleen Cox
Acting Director of the Office of Planning and Research
Member Sarah Olsen
Public Member
Member J. Steven Worthley
County Supervisor
Member Paul Glaab
City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Bryant called the meeting to order at 9:40 a.m. Executive Director Paula Higashi called the roll.

APPROVAL OF MINUTES

Item 1 January 29, 2010

The January 29, 2010 hearing minutes were adopted by a vote of 7-0.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

Item 2 Staff Report (if necessary)

There were no appeals to consider.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS ON TEST CLAIMS AND STATEMENT OF DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (GOV. CODE, § 17551) (action)

DISMISSAL OF WITHDRAWN PORTIONS OF TEST CLAIM

Item 9* *School Accountability Report Cards IV*, 01-TC-22A
Education Code Section 52056, subdivision (b).
Statutes 1999-2000x1 (SB 1X), Chapter 3, Statutes 2000, Chapter 695 (SB 1552)
San Juan Unified School District, Claimant

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS,
TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES
STATE CONTROLLER'S OFFICE REQUEST TO UPDATE BOILERPLATE
LANGUAGE

- Item 11* SCHOOL DISTRICT PROGRAMS
- A. *Caregiver Affidavits*, 05-PGA-46
Education Code Section 48204, Subdivision (d)
Family Code Sections 6550 and 6552
Statutes 1994, Chapter 98 (SB 592)
 - B. *County Office of Education; Fiscal Accountability Reporting*,
05-PGA-47
Education Code Sections 1240, subdivision (j), 1240.2, 1620, 1622, 1625,
1628, and 1630
Statutes 1987, Chapters 917 (AB 93) and 1452 (SB 998); Statutes 1988,
Chapters 1461 (AB 3403) and 1462 (SB 1677); Statutes 1990, Chapter
1372 (SB 1854); Statutes 1991, Chapter 1213 (AB 1200);
Statutes 1992, Chapter 323 (AB 2506); Statutes 1993, Chapters 923
(AB 2185) and 924 (AB 1708); Statutes 1994, Chapters 650 (AB 3141)
and 1002 (AB 3627); Statutes 1995, Chapter 525 (AB 438)
 - C. *Financial Compliance Audits*, 05-PGA-49
Education Code Sections 1040, 14501, 14502, 14503, 14504, 14505,
14506, 14507, 41020, 41020.2, 41202.3, and 41023
Statutes 1977, Chapters 36 (AB 447) and 936 (SB 787); Statutes 1978,
Chapter 207 (SB 1511); Statutes 1980, Chapter 1329 (AB 3269); Statutes
1984, Chapter 268 (SB 1379); Statutes 1985, Chapters 741
(AB 1366) and 1239 (AB 514); Statutes 1986, Chapter 1150 (AB 2861)
Statutes 1988, Chapter 1351 (AB 3417), Chapters 1461 (AB 3403) and
1462 (SB 1677); Statutes 1992, Chapter 962 (SB 1996); Statutes 1994,
Chapter 20 (SB 858) and 1002 (AB 3627); Statutes 1995, Chapter 476
(SB 125)
State Controller's Office Standards and Procedures for Audits of
California K-12 Local Educational Agencies
 - D. *Graduation Requirements*, 05-PGA-50
Education Code Section 51225.3
Statutes 1983, Chapter 498 (SB 813)
 - E. *Law Enforcement Agency Notifications*, 05-PGA-55
Education Code Section 48902, Subdivision (c)
Statutes 1989, Chapter 1117 (SB 1275)
 - F. *Pupil Suspensions: Parent Classroom Visits*, 05-PGA-58
Education Code Section 48900.1
Chapter 1284, Statutes of 1988 (AB 3535)
 - G. *Physical Education Reports*, 05-PGA-60
Education Code Sections 51223.1
Statutes 1997, Chapters 640 (AB 727)

- H. *Physical Performance Tests*, 05-PGA-61
Education Code Section 60800
Chapter 975, Statutes of 1995 (AB 265)
California Department of Education Memorandum,
Dated February 16, 1996
- I. *Pupil Classroom Suspension: Counseling*, 05-PGA-62
Education Code Section 48910, Subdivision (a)
Chapter 965, Statutes of 1977 (AB 530); Chapter 498, Statutes of 1983
(SB 813)
- J. *Pupil Health Screenings*, 05-PGA-63
Health and Safety Code Sections 324.2 (now 124100)
and 324.3 (now 124105)
Statutes 1976, Chapter 1208 (AB 4284); Statutes 1991, Chapter 373
(AB 52); Statutes 1992, Chapter 759 (AB 1248)
- K. *Pupil Residency Verification and Appeals*, 05-PGA-64
Education Code Sections 48204.5 and 48204.6
Revenue and Taxation Code Section 97.3
Section 5 of Statutes 1995, Chapter 309 (AB 687)
- L. *Removal of Chemicals*, 05-PGA-66
Education Code Section 49411
Statutes 1984, Chapter 1107 (AB 3820)
As Amended by Statutes 1994, Chapter 840 (AB 3562)
Department of Education Guidelines
- M. *School District Fiscal Accountability Reporting*, 05-PGA-67
Education Code Sections 42100, 42127, 42127.5, 42127.6, 42128, 42131
Government Code Section 3540.2
Statutes 1981, Chapter 100 (AB 777); Statutes 1985, Chapter 185
(AB 367); Statutes 1986, Chapter 1150 (AB 2861); Statutes 1987,
Chapters 917 (AB 93) and 1452 (AB 998); Statutes 1988, Chapters 1461
(AB 3403) and 1462 (SB 1677); Statutes 1990, Chapter 525 (SB 1909);
Statutes 1991, Chapter 1213 (AB 1200); Statutes 1992, Chapter 323
(AB 2506); Statutes 1993, Chapters 923 (AB 2185) and 924 (AB 1708);
Statutes 1994, Chapters 650 (AB 3141) and 1002 (AB 3627);
Statutes 1995, Chapter 525 (AB 438)
- N. *Law Enforcement College Jurisdiction Agreement*, 05-PGA-70
Education Code Section 67381
Statutes of 1998, Chapter 284 (SB 1729)
- O. *Health Benefits for Survivors of Peace Officers and Firefighters*,
05-PGA-55
Labor Code Section 4856, Government Code Section 21635
Statutes 1996, Chapter 1120 (AB 3748); Statutes 1997, Chapter 193
(SB 563)

Member Chivaro made a motion to adopt items 9 and 11 on the consent calendar. With a second by Member Glaab, the consent calendar was adopted by a vote of 7-0.

Paula Higashi, Executive Director, noted that Items 3 and 4 have been removed from the agenda because they were withdrawn by the claimant, Los Angeles Unified School District.

HEARING AND DECISIONS ON TEST CLAIMS AND STATEMENTS OF DECISION, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, § 17551) (action)

Ms. Higashi swore in parties and witnesses participating in the hearing.

TEST CLAIMS

Item 5 *Discharge of Stormwater Runoff, Order No. R9-2007-000, 07-TC-09 California Regional Water Quality Control Board, San Diego Region Order No. R9-2007-001, NPDES No. CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L; County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, Vista, Claimants*

Eric Feller, Senior Commission Counsel presented this item stating that the claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region. A primary issue in dispute is whether the permit activities in the test claim constitute a federal mandate on local agencies under the Clean Water Act. Staff finds that the activities in the permit are not mandated by federal law.

Another issue in dispute is whether the claimants have fee authority for the various activities in the permit. Staff finds that the claimants do not have the authority within the meaning of Government Code 17556 because of the election requirement in Proposition 218, except for the hydromodification plan (HMP) and the low-impact development (LID) activities.

Staff recommended the test claim be partially approved for the activities listed in the analysis, and that any fees or assessments imposed after a Proposition 218 election, or in the absence of a Proposition 218 protest, be recognized as offsetting revenue.

Parties were represented as follows: Timothy Barry and Jon Van Rhyn representing the County of San Diego; Shawn D. Hagerty, Helen Holmes Peak and James P. Lough representing the 21 claimant cities; Elizabeth Miller Jennings representing the State Water Resources Control Board; and Susan Geanacou and Carla Shelton representing the Department of Finance.

Timothy Barry, with the County of San Diego, addressed the staff's recommendation regarding fee authority for HMP and the LID, asserting that a regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purpose and provisions of a regulation. The fees must not exceed the reasonable costs of providing services, and may not be levied for an unrelated revenue purpose. Mr. Barry indicated that while claimants agree that the co-permittees have authority to assess fees to developers who bring in their priority development projects for approval, their authority to assess a regulatory fee is not so broad as to include the costs incurred, and will incur, in developing and implementing these programs. There is not a sufficient nexus between the future projects that may come in to any co-permittee office for approval and the appropriate fee.

Mr. Barry reviewed the two cases relied upon by staff in their analysis: *The California Association of Professors, Professional Scientists v. The Department of Fish and Game*, and *Sinclair Paints*; pointing out that all of the activities that are referred to in these cases are activities that are performed subsequent to the development and implementation of the program that constitutes the regulation.

Mr. Barry explained the fees that the co-permittees are seeking reimbursement for in this case are costs that were incurred by the co-permittees in developing the original HMP and LID plan. Co-permittees retained a consultant and had expended in excess of a million dollars towards the development of this HMP. With respect to those development costs, there is not a sufficient nexus to any particular project to which the fees could attach, and it would be speculative to determine what would be an appropriate and reasonable fee that could be assessed against projects that would come forward in the future.

Mr. Barry also disagreed with staff that the HMP and LID cost are not reimbursable because construction of municipal projects is not mandated. Constructing public improvements that provide services to the public are core services that government is expected to provide. As such, the development of municipal projects is not discretionary.

Elizabeth Miller Jennings with the State Water Board stated she is aware that the Commission upheld the staff recommendation in the Los Angeles stormwater permit, but argued that this proposed decision takes that determination to an extreme and illogical conclusion.

Ms. Jennings asserted that even the most basic activities the cities have always performed, such as street sweeping and cleaning their own storm drainage, have now been deemed to be reimbursable state mandates.

After reviewing the history of NPDES permits, she stated that federal law specifically requires municipal and industrial dischargers to obtain these stormwater permits. As required by federal law, the San Diego Water Board began issuing NPDES permits to the city and counties in San Diego who discharge stormwater with pollutants to the San Diego Bay. Federal law requires this most recent permit issued in 2007. Its terms do not exceed minimum federal requirements.

Ms. Jennings stated that the obligation to obtain this permit is placed directly on local agencies, and not the state. The Regional Water Board has done no more than comply with federal law in issuing the permit. Local agencies have the opportunity to assess fees to pay for the cost to comply with the permit. Federal law states that the permit must include programs and requirements to ensure that the permittees reduce pollutants in their stormwater to the maximum extent practicable (MEP). The federal regulations that have been adopted for this program only tell what must be included in the permit application.

Ms. Jennings clarified that the Ninth Circuit Court of Appeal stated that U.S. EPA or the state that is issuing the specific permit must design the controls that are in the actual permit. In this case, Commission staff looked at these application regulations and basically said that any words that are not specifically found in the regulations must be a state mandate that goes beyond federal mandates. The court, in the *Rancho Cucamonga* case, held specifically that the federal law, however, requires the Regional Board to specify the detailed programs in its permits. While it is conceivable that a permit issued by a regional board could exceed the minimum federal requirements, that did not happen here. Numerous courts have upheld these very same provisions as reflecting MEP and no more.

Ms. Jennings reported that the State Water Board does concede that this permit is more detailed than the prior permit. But again, federal law requires improvements in subsequent permits to achieve MEP.

According to Ms. Jennings, it is not appropriate to compare the permit to others. Federal law requires that MEP be assessed for each specific locality, and requires municipalities that discharge stormwater containing pollutants to obtain NPDES permits. It is the operator of the municipal stormwater system that must obtain the permit.

Ms. Jennings also pointed out that the permit is not unique to local government. The requirement to obtain NPDES permits for stormwater discharges applies to municipalities and to industrial facilities that discharge stormwaters. This permit looks a little different than industrial permits because: (1) each permit must specify the specific activities that are required; and (2) the activities for a municipal stormwater system are somewhat different than a construction site. The permits that are issued to industrial and construction have more stringent requirements than municipal permits under federal law.

Ms. Jennings added that the local agencies do have the ability to pay for the activities, stating appreciation for staff's findings that fees and assessments that are actually collected are not subject to reimbursement. But where local agencies have the authority to make assessments, the amount should not become reimbursable simply because state law sets hurdles for assessment. The analysis by staff appears to mean that if a local agency made no effort whatsoever to collect any fees, they could simply turn to the state for reimbursement.

Carla Shelton, Department of Finance, stated that Finance is in general support of the Water Board's comments and Finance's comments are noted on record.

Chairperson Bryant asked for a staff response.

Mr. Feller responded that the issue is whether or not local agencies have fee authority. State law does not require the local agencies to make a good-faith effort to impose a fee. Regarding Proposition 218, if the vote fails, the local agency has no fee authority to impose for these programs. In the absence of fee authority, there are reimbursable mandated costs.

Mr. Feller responded to the argument that the permits are not unique to local government by stating that all the Commission has jurisdiction over is this San Diego permit, which does not apply to private entities.

Regarding federal requirements, in each case, staff found that the permit was more specific than federal law. Mr. Feller pointed out that both federal and state statutes authorize the state to impose more stringent requirements on the local agencies for stormwater purposes.

Chairperson Bryant stated that, in the State Water Code, the Water Board is directed to only go as far as federal law allows them.

Mr. Feller read Water Code section 13377 from the staff analysis, which allows the state to impose more stringent requirements than the federal requirements and is consistent with federal law.

Chairperson Bryant referred to Water Code section 13374, which says that California's wastewater discharges requirements are equivalent to federal requirements. Therefore, the threshold question is whether this permit includes more than federal law requires.

Shawn Hagerty, representing the claimant cities, responded that "waste discharge requirements are equivalent to NPDES permits." The language that staff cited clearly gives the state authority to go beyond federal requirements. The Los Angeles test claim is a good example of where the state went beyond federal regulations. Mr. Hagerty cited the *Burbank* case where the state law actually preceded the federal requirements by three years so the state had a very robust and

expansive system in place which was more stringent and allowed the state to regulate more than under federal law.

Mr. Hagerty stated that clearly a portion of the permit goes beyond federal law, and cited an analysis done by the San Diego Regional Board in 2001, showing there was a 60/40 split.

Chairperson Bryant stated that if the federal requirement is to achieve improved stormwater discharge to the maximum extent practical than there is a federal permit under federal law.

Mr. Hagerty responded that there are standards and goals. The federal law has very specific requirements of what needs to be in the permits. The standards imposed in those permits well exceed those requirements.

Camille Shelton, Commission Chief Legal Counsel, explained the difference in analyzing a federal-mandated versus a state-mandated program. Case law says that if the state is directing and has taken control of the program and has independently directed particular activities, those activities are, in fact, mandated by the state and not the federal government. The key example is the *Long Beach Unified School District* case, where federal law required school districts to have a desegregation plan but gave the state choices on how to comply. The state had specific activities in their own plan and directed the school districts. The argument went up on appeal and the state said it was a federal mandate. The court said it was not because the control and the activities were directed and mandated by the state, not the federal government.

Ms. Jennings disagreed that the *Long Beach* case applies because the question is MEP. While it is possible that a regional board could go beyond MEP, they have not. Federal law requires the Board to specify the practices, but the practices do not go beyond federal law. Ms. Jennings explained that staff's reference to the analysis done by the San Diego Regional Board in 2001 was by a non-lawyer, a low-level staff person. Subsequently, the court of appeals decided that the permit did not exceed MEP at all.

Chairperson Bryant stated that MEP would vary from place to place.

Ms. Shelton clarified that the state could have done a number of different things in San Diego County. Again, the courts have said that is a state mandate and not a federal mandate when the state has options.

Mr. Feller explained that the comparison to the *Long Beach* case works because the federal government set out the goal and it was up to the state to figure out how to reach the goal. That is where the more specific state mandates came in.

Member Glaab asked staff whether the claimants have authority sufficient to add fees. If they do not have fee authority, then it would be eligible for full reimbursement.

Mr. Feller stated that regulatory fees could apply to the entire permit, potentially, if it were not for the Proposition 218 election requirement. That threshold negates most of the fee authority that the local governments have. The only ones found to be exempt from Proposition 218 were fees imposed for property development purposes. Because HMP and LID plans are so closely tied to priority development projects in the permit, local governments have fee authority that is not subject to Proposition 218 elections.

Member Glaab asked if they have the authority to assess the fee, then does the Commission just deem it as not reimbursable. Mr. Feller stated that they could put the fee out to the voters. It could be any part or all of the permit activities. If the fee were enacted as a result of the election, they would have fee authority that would be considered an offset under the permit. However, the

election requirement negates their fee authority under 17556, because some local agencies might never win voter approval for the fees.

Ms. Shelton stated that under Government Code Section 17556, the Commission is directed to not find costs mandated by the state if the local entity has fee authority sufficient to pay for the costs of the mandated activity. Often, the Commission finds that there is fee authority but it is not sufficient to cover the cost of the mandate. The Commission does not deny the claim, but rather lists that fee revenue as offsetting revenue in the parameters and guidelines. Here, by law, there is fee authority for everything. If the local entity puts the fee forward, it has to go to a vote of the people. They do not control whether that fee passes. If the voters agree with the fee, the local agency may ultimately have no costs. There is no evidence in the record that the fee has been put to a vote. And Government Code section 17556 (d) is not applicable because the local entity does not have control over the fee.

Member Worthley summarized the claimant's position as having fee authority but nobody to charge that fee to because nobody is coming forward with a project. Ms. Shelton clarified that argument is related only to the HMP and LID activities because the fee authority does not have to go to a vote.

Member Worthley asked if the Commission needs to also decide who the fee can be charged to in order for 17556 (d) to apply. From a practical standpoint, fee authority is of no value because there is nobody to charge. Mr. Feller described the HMP and LID permit requirements and the priority development projects and stated that any developer with projects in any of those categories could be charged not only a regulatory fee but also a developer fee under the Mitigation Fee Act. Therefore, staff found that there was that nexus to charge the fee to develop the HMP and LID.

Ms. Shelton referred to the *Connell* case to clarify the argument of whether something is sufficient. The claimant in that case said it was not economically feasible to charge a fee and therefore it was not sufficient. The court, however, said that they did have the authority and under the law it is sufficient.

Mr. Barry added that a regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purpose of a regulation. The co-permittees have expended over a million dollars to develop an HMP that is required by the permit. Once it is approved by the regional board, it presumably will be adopted as ordinances in the co-permittees' administrative codes. The costs incurred to develop the plan are not incurred to carry out a program where applicants can be assessed a fee for getting their developments approved. The difference is whether the regulatory authority to assess a fee is so broad as to include the development and implementation of the initial HMP.

And, according to Mr. Barry, it is speculation as to whether a developer will come in with a priority development plan and how many, how often and how big will those projects be. The co-permittees are without any rational basis for determining how to spread the million dollar cost against priority development projects that may come in the door sometime in the future.

Mr. Feller stated that staff's position is that the authority is broad enough to cover administration as well as the development and implementation of the HMP.

Member Olsen stated that, in the implementation of any program, there is the planning phase. There has to be a way to estimate how to spread the fee for the development of the program over a period of time to recover costs.

Member Worthley offered an example of how Tulare County spent a substantial amount of money developing a general plan. That was an expense that the County had to incur to create a plan that will impact projects in the future, but cannot be charged back against projects in the future. They can, however, charge applicants for the processing of building permits as they relate to the general plan. Member Worthley suggested some kind of analysis based on the history and projections of the plan to estimate the costs.

As to the state's argument that the permit is not a "program," Mr. Feller said that, in *County of Los Angeles v Commission on State Mandates*, the court found that "The applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6." This executive order is the only thing the Commission has jurisdiction over. Because it does not apply to private entities, the executive order does constitute a program under article XIII B, section 6.

Ms. Geanacou stated that Finance does not believe the opinion goes as far as the Commission staff is suggesting. The opinion is not suggesting that the Commission ignore the existence of similarly issued permits that may affect private dischargers.

Ms. Shelton responded that the court found that each permit was a stand-alone executive order. This permit applies only to local entities.

Ms. Geanacou stated that if requirements on local government are just contained in a test claim statute directed to a school district or a city or a county, but the same requirements apply to private industries, then the Commission must recognize the existence of other statutes that may similarly apply.

Mr. Hagerty explained that there is a very different regulatory structure applicable to municipalities. The permits are unique to municipalities and very specifically directed at the operations of municipalities.

Ms. Jennings stated that "municipalities" is defined to include state and federal agencies.

Mr. Hagerty stated that there is a different federal process. Phase II permitting is for different entities. This Phase I permit applies to cities and counties in San Diego County.

Ms. Shelton added that the activities in the conclusion are specifically mandating local entities, the county and the cities, to do a lot of collaboration between the regional, jurisdictional and the watershed areas. Those activities are imposed solely on government.

Ms. Shelton responded to the Water Board's argument about the permit not being unique to local government as opposed to state and federal government, stating that the courts have said it does not matter if it is imposed on local government versus state government, it is still governmental.

Chairperson Bryant asked, when determining which parts of the permit are reimbursable, if other permits could be compared. Ms. Shelton stated that other permits are not part of this record.

Mr. Feller indicated that there is a different standard for private dischargers under best available technology (BAT) instead of MEP and deferred to Ms. Jennings.

Ms. Jennings stated that the requirements for industrial and construction activities, with over half of those activities actually being conducted by government entities, are more stringent.

With a motion by Member Worthley and a second by Member Glaab, the staff recommendation was adopted by a vote of 6-1 with Chairperson Bryant voting no.

- Item 6 Proposed Statement of Decision: *Discharge of Stormwater Runoff*,
Order No. R9-2007-000, 07-TC-09
[See Item 5 above.]

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Glaab, the Statement of Decision was adopted 6-0 with Chairperson Bryant abstaining. Member Cox exited the meeting room.

- Item 7 *Airport Land Use Commission/Plans II*, 03-TC-12 and 08-TC-05
Public Utilities Code Sections 21670, 21671.5, 21675, and 21676;
Statutes 1967, Chapter 852 (SB 256); Statutes 1970, Chapter 1182
(AB 1856); Statutes 1972, Chapter 419 (AB 677); Statutes 1973,
Chapter 844 (AB 2207); Statutes 1980, Chapter 725 (SB 1381); Statutes
1981, Chapter 714 (SB 1192); Statutes 1982, Chapter 1047 (AB 2525);
Statutes 1984, Chapter 1117 (AB 3551); Statutes 1987, Chapter 1018
(SB 633); Statutes 1989, Chapter 306 (SB 253); Statutes 1990, Chapter
563 (AB 4265); Statutes 1990, Chapter 1572 (); Statutes 1991, Chapter
140 (SB 532); Statutes 1993, Chapter 59 (SB 443); Statutes 1994,
Chapter 644 (AB 2831); Statutes 2000, Chapter 506 (SB 1350); Statutes
2002, Chapter 438 (AB 3026); and Statutes 2002, Chapter 971
(SB 1468);
Public Resources Code Section 21080,
Statutes 1983, Chapter 872 (AB 713); Statutes 1985, Chapter 392
(AB 43); Statutes 1993, Chapter 1131 (SB 919); Statutes 1994, Chapter
1230 (SB 749); Statutes 1996, Chapter 547 (AB 298)
County of Santa Clara, Claimant

Commission Counsel Heather Halsey presented this item. Ms. Halsey stated that this test claim addresses airport land use commissions (ALUCs) and airport land use compatibility plans. Generally, each ALUC prepares an airport land use compatibility plan focused on broadly defined noise and safety impacts.

The claimant alleges the following activities are required by the test claim statutes: review and revise airport land use commission plans, which include CEQA compliance; review and act on referrals; and provide staff assistance and other resources.

Ms. Halsey explained that the activities required of ALUCs have increased since 1975, thus indirectly increasing the cost that counties are required to incur pursuant to Public Utilities Code section 21671.5. However, there has been no shift in fiscal responsibility from the state to the counties. Rather, there has been an increase in activities required of ALUCs and a commensurate expansion of the ALUC fee authority sufficient to cover the costs of the ALUC activities.

To the extent the ALUC decides not to fully exercise that fee authority; it shifts the costs to the county. Therefore, the primary holding in *City of San Jose* is directly on point, that nothing in article XIII B prohibits the shifting of costs between local government entities. Staff recommended that the Commission adopt this staff analysis to deny the test claim.

The parties were represented as follows: Lizanne Reynolds representing the County of Santa Clara; Donna Ferebee and Carla Shelton representing the Department of Finance.

Ms. Reynolds stated that the Commission previously determined, under CSM-4507, that the requirement for counties to establish ALUCs is a reimbursable mandate. The key issue in this

test claim is whether additional duties that the Legislature imposes on ALUCs thereby impose additional duties on counties. This relationship between ALUCs and their counties stems from Public Utilities Code section 21671.5 (c), which requires a county to provide ALUCs with staff assistance, and also states that the usual and necessary operating expenses of the commission shall be a county charge.

Ms. Reynolds disagreed that this is, as the staff analysis asserts, a cost-shifting. Both of these duties were imposed on ALUCs and on counties by the Legislature. So, every time the Legislature increases duties on ALUCs, it automatically imposes additional responsibilities on counties to support those activities.

She explained that the commissions are volunteer and deal with land use planning activities similar to those of cities and counties. They do need professional staff assistance to help develop their plans and to review the referrals they receive from other land use jurisdictions.

Ms. Reynolds disagreed with staff that the only thing the statute requires or deems reasonable as staff assistance or usual and necessary operating expense of an ALUC is clerical or administrative support. It is not feasible for airport land use commissioners to perform their duties without some level of professional assistance.

Ms. Reynolds stated that the Santa Clara County ALUC did adopt some fees for the first time in 2004. Those fees, however, apply to referrals, and not to the actual establishment and development of the comprehensive land use plan. This is not a situation where the Legislature took an activity that was mandated for one local agency and shifted it over to a different local agency. These activities flow from new mandates that were imposed by the state on ALUCs after 1975, which then flow through to counties due to their responsibility to provide staff assistance and cover the usual and necessary operating expenses of ALUCs.

Carla Shelton stated the Department of Finance agrees with the staff analysis.

Member Worthley pointed out that even if an entity has fee authority, it may not have anybody to charge. In this case, the obligation is put upon the smaller entity, but the smaller entity has no way to capture the funds to pay for the plan except through the county. So the county is, by default, required then to put up the money.

Ms. Reynolds stated that, even though the ALUC adopted fees for project referral, those referrals come from other local agencies, the cities, and there is trouble collecting the fees.

Member Worthley stated that creating a plan is different from dealing with referrals when it comes to collecting fees.

Member Glaab asked if staff had a chance to review the letter dated March 25, 2010 from the Santa Clara County Office of County Counsel. Ms. Halsey stated that she first saw the letter this morning. She has only skimmed it but has not read it closely.

Donna Ferebee, Department of Finance, on the issue of whether an ALUC can or cannot charge a fee, pointed to a citation of the Santa Clara County Board of Supervisors where it sounds as though there was a policy decision made not to charge a fee to avoid deterring jurisdictions from referring projects and thus diminishing appropriate land use planning around the county's airports.

Ms. Halsey stated that they did impose a substantial fee but not to fully recover their costs.

Ms. Reynolds clarified that that was a board of supervisors' review of an ALUC fee adoption. But the County's ALUC takes the position that based on state law; the ALUC is the one with fee adoption authority, not the board of supervisors.

Member Worthley stated that it is not uncommon that fees are not fully recovered and that would not be a basis for making a claim against the state for a mandate.

With a motion by Member Chivaro and a second by Member Olsen, the staff recommendation was adopted by a vote of 4-2 with Members Glaab and Worthley voting no.

- Item 8 Proposed Statement of Decision: *Airport Land Use Commission/Plans II*, 03-TC-12 and 08-TC-05
[See Item 7 above.]

Member Worthley made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the Statement of Decision was adopted by a vote of 6-0.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES DIRECTED BY THE LEGISLATURE

- Item 10 *Mandate Reimbursement Process*, CSM-4204 and 4485
Statutes 1975, Chapter 486; Statutes 1984, Chapter 1459; Statutes 1995, Chapter 303 (Budget Act of 1995); Statutes 1996, Chapter 162 (Budget Act of 1996); Statutes 1997, Chapter 282 (Budget Act of 1997); Statutes 1998, Chapter 324 (Budget Act of 1998); Statutes 1999, Chapter 50 (Budget Act of 1999); Statutes 2000, Chapter 52 (Budget Act of 2000); Statutes 2001, Chapter 106 (Budget Act of 2001); Statutes 2002, Chapter 379 (Budget Act of 2002); Statutes 2003, Chapter 157 (Budget Act of 2003); Statutes 2004, Chapter 208 (Budget Act of 2004); Statutes 2005, Chapter 38 (Budget Act of 2005); Statutes 2006, Chapter 47 (Budget Act of 2006); Statutes 2007, Chapter 171 (Budget Act of 2007); Statutes 2008, Chapter 268 (Budget Act of 2008); Statutes 2009-2010, Third Extraordinary Session, Chapter 1 (Budget Act of 2009)

Assistant Executive Director Nancy Patton presented this item. From 1995 through 2009, the State Budget Acts have required the Commission to amend the *Mandate Reimbursement Process* parameters and guidelines to limit state reimbursement of local government costs for independent contractors used to prepare and submit reimbursement claims.

Until 2006, the Commission made this amendment each year on a proposed consent calendar. Since 2006, the Commission has not adopted the amendment because the *Mandate Reimbursement Process* program was set aside.

The program has been reinstated. Therefore, staff is again proposing the independent contractor language be inserted in the parameters and guidelines. The proposal also adds standard language that clarifies there shall be no reimbursement for any period in which the Legislature has suspended the mandate. The League of California Cities (League) and California State Association of Counties (CSAC) are opposed to the proposed language regarding suspensions. Staff disagrees with the League and CSAC and recommends the Commission adopt the proposed language, including the suspension language.

The parties were represented as follows: Allan Burdick representing the League and CSAC; Ginny Brummels representing the State Controller's Office and Lorena Romero and Donna Ferebee representing the Department of Finance.

Mr. Burdick stated that the number 1 issue of *Mandate Reimbursement Process* is “Can you suspend a mandate which does not exist?” While that decision was being litigated, the State budget continued to suspend the mandate. Mr. Burdick pointed out that in order to suspend a mandate, there has to be a mandate in the first place, and this mandate had been set aside. He asked “how can you suspend a mandate that’s not there?” The second key issue, from the League and CSAC point of view, is whether you can suspend *Mandate Reimbursement Process* itself at all?

Ms. Shelton stated that the suspensions were enacted as part of the Budget Acts and they are separate statutes. The Commission does not have jurisdiction to decide whether those statutes are unconstitutional or invalid.

Ms. Brummels stated that the State Controller’s Office supports the staff analysis. Ms. Romero stated that the Department of Finance supports the staff analysis.

Ms. Romero added that the process by which the suspensions were done for the *Mandate Reimbursement Process* program is no different from any other test claim. It is looked at in the whole to determine when the suspension of funds will be done.

Mr. Burdick stated that there is a difference. For example, the Legislature has actually changed statutes on other test claims. However, there is no place to change statutes on the Mandate Reimbursement Process.

Ms. Shelton stated that these issues have come before the Commission in *Carmel Valley II* where they were alleging the statutes were unconstitutional. The court said that they must exhaust all administrative remedies with the Commission even though the Commission has no jurisdiction to decide whether or not a statute is unconstitutional. The issues raised by Mr. Burdick are constitutional issues challenging those State Budget Acts and the Commission simply does not have jurisdiction to make those decisions.

With a motion by Member Olsen and a second by Member Chivaro, the recommendation to adopt the staff analysis was approved by a vote of 4-2 with Members Worthley and Glaab voting no.

Mr. Burdick asked if this technical amendment will still require the State Controller to issue claiming instructions. Ms. Higashi stated that when the Commission has adopted this language in the past, the State Controller’s Office has issued claiming instructions.

STAFF REPORTS

Item 13 Update on Implementation of Recommendations from Bureau of State Audits October 15, 2009 Report 2009-501

Ms. Patton presented this item. In October 2009, the Bureau of State Audits (BSA) released its follow-up audit report on the mandate process. The State Auditor requires the Commission to reply to the final audit report within 60 days, six months and one year of the report’s issue date regarding the implementation of their proposed recommendations. On October 30, 2009, the Commission adopted and submitted a work plan to implement the BSA recommendations.

Ms. Patton indicated that the six-month report is now due. Staff has updated the work plan to reflect the actions completed since the 60-day report, including:

- Beginning work on incorrect reduction claims (IRC) by issuing a draft staff analysis and setting hearings for the *Investment Reports* IRC for Los Angeles County.
- Developing amendments to the Commission regulations.

- Completing an additional 41 boilerplate requests for parameters and guidelines amendments.
- Legislative Subcommittee conducted a meeting on proposed language for requesting adoption of a new test claim decision.

Staff recommends that the Commission approve the updated work plan for implementing the BSA recommendations.

With a motion by Member Worthley and a second by Member Chivaro, the updated work plan was approved by a vote of 6-0.

Item 14 Legislative Update

Ms. Patton presented this item. Two bills, AB 548 which would have revised the State Controller's audit period, and AB 917 regarding suspension of school mandates, have died.

SB 894, which contains our proposed modifications to our reports to the Legislature, is set for hearing in Senate Local Government on April 21, 2010. AB 2082, a new bill that staff is tracking, would expand the Legislative Analyst's Office current reporting requirements on mandates to require them to annually report on each education mandate that has not been funded.

On March 25, 2010, the Commission's Legislative Subcommittee conducted a workshop to discuss the proposed language on requesting adoption of a new test claim decision, formerly known as the reconsideration process. Member Olsen and Member Glaab will report on that workshop.

Member Olsen reported that the workshop was well attended by interested parties. Commission staff presented new draft language. Two primary issues were addressed in that language. The first issue was how to define this new process since interested parties had substantial concerns about naming it a 'reconsideration process' when there already is a 'reconsideration process' in place. Therefore, staff will further define the process.

The second issue was that, in this draft, the statute of limitations has been removed. As the process moves forward, the language will be updated and available. The language is not placed in legislation yet, but it could be placed in a budget trailer bill.

Member Glaab stated that there is concern over the unintended consequences of implementing such a policy. Therefore staff will continue to work to consider all of the concerns that were issued at the workshop.

Mr. Burdick stated that this proposal could have serious and significant impacts on the Commission and its decisions as well as on local government. Mr. Burdick expressed his desire to have this process go through a normal legislative process rather than a trailer bill to allow for participation from all parties.

Member Olsen agreed, and assured Mr. Burdick that the Commission wants to pursue the whole policy and fiscal evaluation but does not want other parties drafting the language that affects this process. Therefore, the Commission is moving on a staff and interested-party level before it becomes an official part of any process.

Mr. Burdick questioned the appropriateness of letting the Legislature and Governor know of the potential impact on this process which will take very careful deliberation.

Ms. Higashi stated that there is no action scheduled for this agenda and suggested conveying a message to the budget committee staff that a working group involving all parties be convened to go over it before anything is put into print.

Item 15 Chief Legal Counsel's Report (info)

Ms. Shelton reported another case of interest, *the California School Boards Association v. the State of California*. The Commission is not a party to this case. CSBA is challenging the state's practice of deferring mandate reimbursement for school districts. This case is pending in the 4th District Court of Appeal and briefing is underway.

Item 16 Executive Director's Report (info)

Ms. Higashi stated that there are action items within this report. The first concerns a response to Senate Budget Subcommittee No. 4. All the state agencies that are subject to Budget Subcommittee No. 4 were asked to provide a mission statement, a strategic plan, a summary of our enabling legislation, a brief summary of who we serve and how many we serve, and a description of measurements and outcomes that we use to define success for each of our major programs.

Ms. Higashi indicated that all of the information requested is readily available, either from the Executive Director's monthly reports or from reports to the Legislature. However, the strategic plan is something that none of the sitting members of the Commission have ever approved. Therefore, Ms. Higashi recommends adopting and submitting an interim strategic plan. She further recommends that the interim strategic plan be sent to parties, posted on the Commission's website. Staff will also solicit public comments, provide staff comments and work this into a more formal strategic plan. Then, the Commission can adopt a final strategic plan at the May 27, 2010 hearing.

With a motion by Member Lujano and a second by Member Chivaro, the staff recommendation was approved by a vote of 6-0.

Ms. Higashi presented the 2010 meeting and hearing calendar and stated that, during Anne Sheehan's tenure, the Commission started meeting on Fridays instead of Thursdays. The May hearing is scheduled for a Thursday because that was the date that was most convenient for all the Commission members. Staff would recommend going back to a Thursday calendar and those tentative dates are presented for consideration.

Member Worthley expressed a scheduling conflict with the CSAC board of directors meeting on Thursdays if the Commission were to change to Thursday hearings.

Member Glaab expressed the opposite scheduling conflict with the Metrolink board meetings being held on Fridays so Commission hearings on Thursdays work best.

Member Olsen and Chairperson Bryant expressed conflicts with the tentative date of Thursday, June 24, 2010.

Member Glaab asked about the feasibility of meeting on another day such as Wednesday.

Ms. Higashi stated that scheduling meeting rooms would be problematic. Ms. Higashi asked the members to submit their meeting calendars and definitive dates and stated that there are no plans for a June 2010 meeting unless there is new litigation. Ms. Higashi called for a vote on the May 27, 2010 hearing date.

With a motion by Member Olsen and a second by Chairperson Bryant, the hearing date of May 27, 2010 was approved by a vote of 6-0.

Ms. Higashi pointed out the section in the Executive Director's report titled "New Practices" which will be reserved for reporting and publicizing new efficiencies or recommendations from the BSA audit.

Ms. Higashi noted that the rulemaking workshop held on March 25, 2010 was well attended. The primary changes were bringing Commission regulations into the 21st century and adding and changing sections so that the Commission would have an e-filing and e-mailing system. It is substantial progress and a lot of the work has been done by staff. The actual proposal will come before the Commission to issue the notice of rulemaking at the May meeting.

Ms. Higashi noted the calendar's tentative agendas for the next couple of meetings as well as a copy of the Legislative Analyst's report with a special report focusing on mandates.

PUBLIC COMMENT

Ms. Patton asked Mr. Glen Everroad from the City of Newport Beach to come forward. Upon his retirement, Ms. Patton read a resolution from the Commission congratulating him for his many years of dedicated service.

Mr. Everroad thanked the Commission and said that it has been rewarding to spend half of his 34 years with the City of Newport Beach involved with the mandate process. Mr. Everroad recognized the professional process that has been developed and the Commission staff for the thorough and professional work.

Member Glaab commented that he and Mr. Everroad have been occasional seat mates on the airplane to Sacramento for over five years. Member Glaab stated that Mayor Curry of Newport Beach commended Mr. Everroad and valued him as a professional employee who will be missed.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (action).

A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

State of California, Department of Finance v. Commission on State Mandates, et al.,
Sacramento Superior Court Case No. 03CS01432,
[Behavioral Intervention Plans]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

B. PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a)(1).

Hearing no further comments, Chairperson Bryant adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation published in the notice and agenda; to confer and receive advice from legal counsel

regarding potential litigation; and also to confer on personnel matters and a report from the personnel subcommittee pursuant to Government Code section 11125, subdivision (a)(1).

REPORT FROM CLOSED EXECUTIVE SESSION

At 11:55 a.m., Chairperson Bryant reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and potential litigation, and also to confer on personnel matters listed on the published notice and agenda pursuant to Government Code section 11126, subdivision (a)(1).

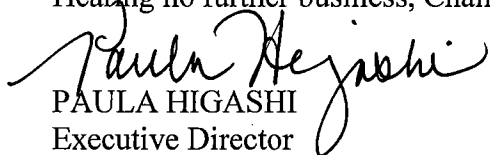
Item 17 Salary Adjustment: Attorney to the Commission/Chief Legal Counsel
 (CEA IV), pursuant to Government Code Section 17529

Member Lujano, Personnel Subcommittee, stated that the chief legal counsel is at the CEA IV pay level and received a pay increase two years ago. The chief legal counsel has not reached the top of her pay scale. Based on her excellent work performance and duties and the fact that the Commission's budget can absorb this salary adjustment, the Personnel Subcommittee is recommending increasing the salary of the chief legal counsel by five percent.

With a motion by Member Chivaro and a second by Member Olsen, the Personnel Subcommittee recommendation to adjust the chief legal counsel's salary by five percent, effective April 1, 2010, was approved by a vote of 6-0.

ADJOURNMENT

Hearing no further business, Chairperson Bryant adjourned the meeting at 12:00 p.m.


PAULA HIGASHI
Executive Director

**PUBLIC HEARING
COMMISSION ON STATE MANDATES**

—o0o—

TIME: 9:30 a.m.
DATE: Friday, March 26, 2010
PLACE: State Capitol
Room 447
Sacramento, California

—o0o—

REPORTER'S TRANSCRIPT OF PROCEEDINGS

—o0o—

Reported by:

Debra P. Codiga
California Certified Shorthand Reporter #5647
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Commission on State Mandates – March 26, 2010

A P P E A R A N C E S

COMMISSIONERS PRESENT

CYNTHIA BRYANT
(Commission Chair)
Representative for ANA MATOSANTOS
Director, State Department of Finance

CATHLEEN COX
Acting Director
Director, Office of Planning & Research
(Present for Items 1 through 6)

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

PAUL GLAAB
City Council Member
City of Laguna Niguel

FRANCISCO LUJANO
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare

—o0o—

COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director
(Item 16)

HEATHER HALSEY
Commission Counsel
(Items 7 and 8)

A P P E A R A N C E S

COMMISSION STAFF PRESENT

(continued)

NANCY PATTON
Assistant Executive Director
(Items 10, 13 and 14)

CAMILLE SHELTON
Chief Legal Counsel
(Items 10 and 15)

ERIC FELLER
Senior Commission Counsel
(Items 5 and 6)

—o0o—

PUBLIC TESTIMONY

**Appearing Re Items 5 and 6 (Discharge of Stormwater
Runoff, Order No. R9-2007-000, 07-TC-09):**

For Claimant County of San Diego:

TIMOTHY M. BARRY
Senior Deputy County Counsel
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, California 92101

JON VAN RHYN
Water Quality Program Manager
County of San Diego
San Diego, California

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 5 and 6 (Discharge of Stormwater
Runoff, Order No. R9-2007-000, 07-TC-09): *(continued)*

For the 21 City Claimants:

SHAWN D. HAGERTY
Best Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, California 92101

HELEN HOLMES PEAK
Lounsbery Ferguson Altona & Peak LLP
960 Canterbury Place, Suite 300
Escondido, California 92025

JAMES P. LOUGH
Lounsbery Ferguson Altona & Peak LLP
960 Canterbury Place, Suite 300
Escondido, California 92025

For State Water Resources Control Board:

ELIZABETH MILLER JENNINGS
Senior Staff Counsel IV
State Water Resources Control Board
Office of Chief Counsel
1001 J Street
Sacramento, California 95814

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, California 95814

Commission on State Mandates – March 26, 2010

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Items 5 and 6 (Discharge of Stormwater
Runoff, Order No. R9-2007-000, 07-TC-09):** *(continued)*

For Department of Finance:

CARLA SHELTON
Finance Budget Analyst
Department of Finance
915 L Street
Sacramento, California 95814

**Appearing Re Items 7 and 8 (Airport Land Use
Commission/Plans II, 03-TC-12 and 08-TC-059):**

For Claimant County of Santa Clara:

LIZANNE REYNOLDS
Deputy County Counsel
County of Santa Clara
Office of the County Counsel
70 West Hedding Street, 9th Floor, East Wing
San Jose, California 95110

For Department of Finance:

DONNA FEREBEE
Senior Staff Counsel
Department of Finance
915 L Street
Sacramento, California 95814

CARLA SHELTON
Finance Budget Analyst
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 10 (Mandate Reimbursement Process,
CSM-4204 and 4485):

For California State Association of Counties and League
of California Cities:

ALLAN P. BURDICK
Maximus
3130 Kilgore Road, Suite 400
Rancho Cordova, California 95670

For State Controller's Office:

GINNY BRUMMELS
State Controller's Office
3301 C Street
Sacramento California 95816

For Department of Finance:

DONNA FEREBEE
Senior Staff Counsel
Department of Finance
915 L Street
Sacramento, California 95814

LORENA ROMERO
Finance Budget Analyst
Department of Finance
915 L Street
Sacramento, California 95814

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Commission on State Mandates – March 26, 2010

1 BE IT REMEMBERED that on Friday, March 26,
2 2010, commencing at the hour of 9:40 a.m., thereof, at
3 the State Capitol, Room 447, Sacramento, California,
4 before me, DEBRA P. CODIGA, CSR #5647, RMR, the
5 following proceedings were held:

6 —o0o—

7 CHAIR BRYANT: Okay. This meeting of the
8 Commission on State Mandates is called to order.

9 Paula, will you call the roll?

10 MS. HIGASHI: Chivaro?

11 MEMBER CHIVARO: Present.

12 MS. HIGASHI: Cox?

13 MEMBER COX: Present.

14 MS. HIGASHI: Glaab?

15 MEMBER GLAAB: Here.

16 MS. HIGASHI: Lujano?

17 MEMBER LUJANO: Here.

18 MS. HIGASHI: Olsen?

19 MEMBER OLSEN: Here.

20 MS. HIGASHI: Worthley?

21 MEMBER WORTHLEY: Here.

22 MS. HIGASHI: Bryant?

23 CHAIR BRYANT: Here.

24 MS. HIGASHI: The first order of business is
25 approval of the minutes from January 29th.

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1 CHAIR BRYANT: Are there any objections to, or
2 corrections of, the January 29th minutes?

3 *(No response)*

4 CHAIR BRYANT: Is there any public comment?

5 *(No response)*

6 CHAIR BRYANT: Is there a motion?

7 MEMBER CHIVARO: I move approval.

8 MEMBER GLAAB: Second.

9 CHAIR BRYANT: We have a motion and a second
10 for adoption of minutes. All those in favor say "aye."

11 *(A chorus of "ayes" was heard.)*

12 CHAIR BRYANT: Any opposed or abstentions?

13 *(No response)*

14 CHAIR BRYANT: I didn't think I said "aye," but
15 I'm "aye" also. Sorry.

16 MS. HIGASHI: There are no appeals to consider
17 under item 2.

18 And this brings us to the hearing portion — I
19 should say this brings us to our proposed consent
20 calendar, and you should have it before you. It's on
21 this off-white colored paper.

22 The consent calendar consists of item 9 and
23 item 11. Item 11 consists of proposed amendments to
24 parameters and guidelines for a number of school
25 district programs.

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1 CHAIR BRYANT: Are there any objections to the
2 proposed consent calendar?

3 MEMBER CHIVARO: Move approval.

4 MEMBER GLAAB: Second.

5 CHAIR BRYANT: All those in favor?

6 *(A chorus of "ayes" was heard.)*

7 CHAIR BRYANT: Any opposed?

8 *(No response)*

9 CHAIR BRYANT: Anybody abstaining?

10 *(No response)*

11 CHAIR BRYANT: Okay. The motion carried.

12 I just, again, Nancy, thank your team for
13 this. I mean it's so sad that we have to do this so
14 quickly, and there's an amazing amount of work, again,
15 in all of these items, so thank you.

16 MS. HIGASHI: I'd like to note that items 3 and
17 4 have been taken off the agenda because the test claim
18 for item 3 has been withdrawn by the Los Angeles Unified
19 School District.

20 What we'll be doing is noticing the withdrawal,
21 and over the next — over a 60-day period, if no other
22 claimant takes it over, then the Commission would then
23 have it scheduled for dismissal.

24 So we're at the hearing portion of our
25 meeting.

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1 I'd like to ask all of the parties, witnesses,
2 representatives who plan to speak on their test claim
3 items to please stand at this time for swearing in of
4 the witnesses.

5 (The parties, witnesses and representatives
6 stood up.)

7 MS. HIGASHI: Do you solemnly swear or affirm
8 that the testimony which you are about to give is true
9 and correct based upon your personal knowledge,
10 information or belief?

11 (The parties, witnesses and representatives
12 responded affirmatively.)

13 MS. HIGASHI: Thank you very much. Be seated.
14 Our first test claim is item 5, and this will
15 be presented by Senior Commission Counsel Eric Feller,
16 the *Discharge of Storm Water Runoff, Order*
17 *No. R9-2007-000*.

18 MR. FELLER: Good morning. In this claim, the
19 claimants allege various activities for reducing
20 stormwater pollution in compliance with a permit issued
21 by the California Regional Water Quality Control Board,
22 the San Diego region.

23 The primary issues in dispute are whether the
24 permit activities in the test claim constitute a federal
25 mandate on local agencies under the Clean Water Act.

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1 Staff finds that the activities in the permit
2 are not mandated by federal law.

3 Second, whether the claimants have fee
4 authority for the various activities in the permit.

5 Staff finds that the claimants do have — do
6 not have the authority within the meaning of Government
7 Code 17556 because the — of the election requirement in
8 Proposition 218 with the exception of the
9 hydromodification plan and the low-impact development
10 activities.

11 The staff recommends that the test claim be
12 partially approved for the activities listed on
13 pages 122 to 132 in the analysis, and that any fees or
14 assessments imposed after a Proposition 218 election, or
15 in the absence of a Proposition 218 protest, be
16 recognized as offsetting revenue.

17 Would the parties and witnesses please state
18 your names for the record?

19 MR. BARRY: Good morning, Madam Chair, members
20 of the Commission. My name's Timothy Barry. I'm
21 Senior — Senior Deputy Counsel for the County of
22 San Diego.

23 MR. VAN RHYN: Good morning. I'm Jon Van
24 Rhyn. I'm a Water Quality Program Manager with the
25 County of San Diego.

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1 MR. HAGERTY: Shawn Hagerty, of Best Best &
2 Krieger, on behalf of the claimants.

3 MS. JENNINGS: Elizabeth Miller Jennings for
4 the state and regional water boards.

5 MS. GEANACOU: Susan Geanacou, Department of
6 Finance.

7 MS. CARLA SHELTON: Carla Shelton, Department
8 of Finance.

9 MR. LOUGH: James Lough on behalf of the
10 claimants.

11 MS. PEAK: Helen Peak, Lounsbery Ferguson, also
12 on behalf of the claimants.

13 CHAIR BRYANT: Okay. If there aren't any
14 objections, what I thought we could do today was start
15 with the claimants for — to go about 15 minutes, and
16 then we can hear from the respondents — or the State
17 Water Board and Finance for 15 minutes, if that works
18 for everybody. We'll see how it goes.

19 MR. BARRY: Thank you.

20 Madam Chair, again, my name's Timothy Barry.
21 I'm senior deputy counsel with the County of San Diego.

22 It was my intent to speak for about six or
23 seven minutes with respect to the issues that the staff
24 analysis has determined not to be reimbursable mandates
25 and then hopefully reserve our time to either respond

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1 to questions or respond to the comments from the state.

2 Initially, I'd like to thank my co-counsel and
3 the other copermittees for all the work that went into
4 preparing the test claim and submitting it. I'd also
5 like to recognize Commission staff and thank them for
6 their efforts.

7 I know, not being a water — a stormwater
8 expert myself, this was sort of my induction into the
9 stormwater arena. I've been assisted by very competent
10 counsel and staff and could not have actually put all
11 this together without, certainly, their assistance.

12 The — the staff's analysis for disallowing two
13 items in the stormwater permit — that being the
14 hydromodification management plan — and for purposes of
15 the discussion, if I can use "HMP," it probably will
16 make my comments go more swiftly.

17 Also, if I can use — the other issue is the
18 low-impact development plan, and I'm going to refer to
19 that as LID, if I could do that also.

20 The — the staff has determined that those two
21 items are not reimbursable because the — under the
22 staff analysis, it was determined that the copermittees
23 have the authority to assess a regulatory fee.

24 The two items in the permit that we're talking
25 about is part D.1.g., which requires the copermittees

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1 to collaborate with the other copermittees to develop and
2 implement an HMP to manage an increase run — I'm sorry;
3 manage increases in runoff discharge and durations from
4 all priority-development projects as defined in the
5 permit.

6 Part D.1.d.(7) and (8) require the copermittees
7 to collectively review and update their best management
8 practices requirements in the local standard urban
9 stormwater management plan, which I'll refer to as
10 "SUSMPS."

11 The staff analysis concludes that, while these
12 are activities mandated by the regional board, they are
13 not reimbursable because the copermittees have the
14 authority to assess a regulatory fee to cover the cost
15 of these mandates under the police power granted to
16 local governments by article XI, section 7 of the
17 California Constitution.

18 The regulatory — a regulatory fee may be
19 imposed under the police power when the fee constitutes
20 an amount necessary to carry out the purpose and
21 provisions of a regulation. The fees must not exceed
22 the reasonable costs of providing services necessary to
23 the activity and may not be levied for an unrelated
24 revenue purpose.

25 While we agree that the copermittees have

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1 authority to assess fees to developers who bring in
2 their project — priority development projects for
3 approval, we do not agree that our — our authority to
4 assess a regulatory fee is so broad to include the costs
5 that we have incurred, and will incurred — incur, in
6 developing and implementing these programs, in that,
7 No. 1, there's not a sufficient nexus between the future
8 projects that may come in to — in to any copermittee's
9 office for approval, and it would be speculative for the
10 copermittees to determine what would be the appropriate
11 fee at this point in time.

12 In the two cases that are relied upon by staff
13 in their analysis, the California Association of
14 Professors, Professional Scientists and — versus the
15 Department of Fish and Game, the court found that
16 regulatory fees may be assessed to recover, quote, "cost
17 incident to the issuance of a license or permit,
18 investigation, inspection, administration, maintenance
19 of supervision and enforcement."

20 All of these activities that are referred to in
21 this case are activities that are performed subsequent
22 to the development and implementation of the program
23 that constitutes the regulation.

24 Similarly, in Sinclair Paints, which is also a
25 case that is relied upon by staff, the fees that were

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1 assessed were for costs of a state program of
2 evaluation, screening and follow-up services for
3 children determined to be at risk for lead poisoning.
4 Again, these were services that were incurred and — and
5 the costs that were incurred subsequent to the implement
6 and — development and implementation of the program.

7 The fees that the — the copermittees are
8 seeking reimbursement for in this case are — are costs
9 that were incurred by the copermittees in developing the
10 original hydromodification plan and the low-impact
11 development plan.

12 Copermittees retained a consultant and had
13 expended in excess of a million dollars towards the
14 development of this hydromodification plan, which, per
15 the permit, has been submitted to the regional board for
16 approval.

17 The — the permit — or the plan that has been
18 prepared and submitted to the regional board is in
19 excess of 200 pages and took more than two years to
20 develop and, as I said earlier, is not related to any
21 specific priority development project that may come
22 forward for approval in the future.

23 So with — with respect to those costs, we
24 believe that there's not a sufficient nexus to any
25 particular project to which the fees could — could

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1 attach, and that it would be speculative for the
2 copermittees, at this point in time, to be required to
3 determine what would be an appropriate fee — a
4 reasonable fee that would — could be assessed against
5 projects that would come forward in the future.

6 Staff also concludes, at page 46, that the
7 additional cost incurred by the copermittees to
8 construct public improvements due to the HMP and the LID
9 requirements are not reimbursable because whether to
10 construct a hospital, a park, a recreational —
11 recreational facility, a street, road or highway, or any
12 other municipal project, is, according to staff, a
13 discretion — within the discretion of the local
14 governmental entity and not mandated by the permit.

15 The copermittees respectfully disagree and
16 believe that, in constructing — that constructing
17 public improvements that provide services to the public
18 are core services that government is expected to
19 provide.

20 As such, the development of municipal projects
21 is not discretionary, and additional costs incurred to
22 comply with the HMP and the LID requirements in the
23 permit by copermittees when they develop municipal
24 projects should be found to be a reimbursable mandate.

25 If you don't have any questions, I'd like to

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1 reserve the remaining portion of our time to respond to
2 questions or rebut what the — the state has to say.

3 CHAIR BRYANT: Okay. That's — any questions
4 immediately from anyone?

5 *(No response)*

6 CHAIR BRYANT: Okay. Did either of you
7 gentlemen have something to add, or do you want to just
8 pause for a moment?

9 MR. HAGERTY: Pause.

10 CHAIR BRYANT: Okay.

11 MR. HAGERTY: Thank you.

12 CHAIR BRYANT: I apologize; I didn't catch your
13 last name.

14 MS. JENNINGS: My name is Elizabeth Miller
15 Jennings, and I'm an attorney with the State Water
16 Board.

17 CHAIR BRYANT: Okay.

18 MS. JENNINGS: Good morning, Ms. Bryant and
19 members.

20 I have worked on the stormwater program since
21 its inception in 1987. In the few minutes allotted, I
22 can't fully respond to the lengthy staff report and
23 proposed Statement of Decision.

24 Instead, I will preserve the arguments that we
25 made in our various submissions and briefly outline

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1 some of the major issues that we see here.

2 I'm also aware that this Commission has upheld
3 the staff recommendation in the Los Angeles stormwater
4 permit, but this proposed decision takes that
5 determination to an extreme and illogical conclusion.

6 Here, even the most basic of activities the
7 cities have always performed, such as street sweeping
8 and cleaning their own storm drainage, have now been
9 deemed to be state-reimbursable state mandates.

10 In 1972, the federal Clean Water Act first
11 required all persons discharging pollutants in the
12 waters of the United States to obtain NPDES permits.

13 California was the very first state authorized
14 to permit — to issue these permits in lieu of the
15 federal EPA. In 1987, several years later, the federal
16 Clean Water Act was amended to clarify that persons who
17 discharge stormwater containing pollutants must also
18 obtain NPDES permits. The federal law specifically
19 requires municipal and industrial dischargers to obtain
20 these stormwater permits.

21 "Municipal" has been defined by U.S. EPA to
22 include local, state and federal agencies. It is not
23 the typical term that one thinks of as a municipality
24 being only cities or counties or local agencies.

25 As required by federal law, the San Diego Water

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1 Board began issuing NPDES permits to the city and
2 counties in San Diego who discharge stormwater with
3 pollutants to San Diego Bay.

4 The most recent permit issued in 2007 is the
5 one before you today. Federal law requires this
6 permit. Its terms do not exceed minimum federal
7 requirements. The obligation to obtain this permit is
8 directly on the local agencies and not on the state.

9 The Regional Water Board has done no more than
10 comply with federal law in issuing the permit and
11 writing its terms. The permit is similar to permits
12 issued to state and federal agencies and to private
13 industry and construction firms. Local agencies have
14 the opportunity to assess fees to pay for the cost to
15 comply with the permit.

16 Now I will go into a few of these arguments in
17 a little bit more detail.

18 First, stormwater permitting is a federal
19 program, and this permit does not exceed the minimum
20 federal requirements. Federal law states that the
21 permit must include programs and requirements to ensure
22 that the permittees reduce pollutants in their
23 stormwater to the maximum extent practicable, or MEP.
24 Federal law states that the permit writer must state
25 what the specific programs and requirements are.

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1 The federal regulations that have been adopted for this
2 program only tell what must be included in the permit
3 application. They do not state which specific
4 activities should be required in the permit.

5 The Ninth Circuit Court of Appeal has stated
6 that U.S. EPA or the state who is issuing the specific
7 permit must design the controls that are in the actual
8 permit.

9 In this case, what you're — what the staff has
10 done is that they've looked at these application
11 regulations and basically said that any words that are
12 not specifically found in the regulations must be a
13 state mandate that goes beyond federal mandates.

14 In other words, it appears that your staff is
15 saying, since the regulations are only application
16 requirements, that our permits should either just have
17 two — a couple words and say, "Just do whatever is
18 MEP," or, perhaps, "Let each entity write its own permit
19 to give us a plan, and we just accept, no matter what."

20 The court, in the Rancho Cucamonga case, held
21 specifically that the federal law, however, requires the
22 Regional Board to specify the detailed programs in their
23 permits.

24 If the Regional Board did not issue a permit at
25 all, or if it issued a permit that simply said either,

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1 "Do MEP," or "Do whatever you think your plan wants you
2 to do," this permit would not be adequate under federal
3 law, and the county, the cities, the special districts
4 would be subject to citizen lawsuits in federal court
5 and to enforcement by U.S. EPA for failing to comply
6 with federal law.

7 While it is conceivable that a permit issued by
8 a regional board could exceed the minimum federal
9 requirements, that did not happen here. Numerous courts
10 have upheld these very same provisions as reflecting MEP
11 and no more.

12 We do concede that this permit is more detailed
13 than the prior permit. But again, federal law requires
14 improvements in subsequent permits to — to achieve MEP.

15 San Diego is a large urban area situated on a
16 water body that is important as a tourist destination,
17 as an environmental asset to the state and to the
18 federal government.

19 It is clear, from federal guidance that we have
20 provided, that federal law requires that the local
21 agencies undertake the activities that are specified in
22 this permit. It's not appropriate to compare the permit
23 to others, as staff has done. Federal law requires that
24 MEP be assessed for each specific locality.

25 The federal mandate is on the local agencies,

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1 not on the state, and there has been no shifting of the
2 cost or burden. Federal law requires that
3 municipalities that discharge stormwater containing
4 pollutants obtain NPDES permits.

5 It is the operator of the municipal stormwater
6 system that must obtain the permit. The state and
7 regional water boards do not operate stormwater
8 systems. Their only role is in issuing NPDES permits
9 that comply with federal law in lieu of U.S. EPA.

10 The permit is also not unique to local
11 government. The requirement to obtain NPDES permits for
12 stormwater discharges applies to municipalities and to
13 industrial facilities that discharge stormwaters.

14 There are two reasons why this permit looks a
15 little different than, for instance, our industrial
16 permit. And that is because, as I stated, each permit
17 must specify the specific activities that are required,
18 and, obviously, the activities for a municipal
19 stormwater system are somewhat different than, let's
20 say, for a construction site.

21 The boards have to delineate the specific
22 practices, and also the permits that are issued to the
23 industrial and construction, as are referred to in your
24 staff report, in fact, have more stringent requirements
25 than municipal permits because federal law requires more

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1 of industrial and construction discharges.

2 As I stated, the term "municipality" is defined
3 by federal law to include state and federal agencies.
4 It is not only local agencies. Thus Caltrans, a state
5 agency, is subject to a very similar municipal
6 stormwater permit for the storm drains in its highway
7 system.

8 Finally, the local agencies do have the ability
9 to pay for the activities. We appreciate staff's
10 findings that fees and assessments that are actually
11 collected are not subject to reimbursement, but where
12 local agencies have the authority to make assessments,
13 the amount should not become reimbursable simply because
14 the state law set certain hurdles for assessment.

15 The analysis by staff appears to mean that if a
16 local agency made no effort whatsoever to collect any
17 fees, they could simply turn to the state for
18 reimbursement.

19 That concludes my presentation, unless you have
20 any comments or questions.

21 CHAIR BRYANT: Department of Finance, did you
22 have anything to add?

23 MS. CARLA SHELTON: We have nothing to add. We
24 are in general support of the water boards' comments,
25 and our comments are — our comments are noted on

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1 record.

2 CHAIR BRYANT: Thank you. Staff, did you have
3 any response to the testimony heard so far?

4 MR. FELLER: Well, where to start.

5 The — as far as the fee authority goes, state
6 law does not require the local agencies to make a
7 good-faith effort to impose a fee. And it just — it's
8 whether they have the fee authority or they do not.

9 The — as you saw in the analysis, the
10 Proposition 218 voting requirement is — is — it's
11 an all-or-nothing requirement, so that if there —
12 whether they attempt to vote or not, if they're — and
13 if the vote loses, then the local agency has no fee
14 authority to impose for these programs. So in the
15 absence of — of fee authority, then it's — they're
16 reimbursable mandated costs.

17 As far as the — the argument that the — these
18 are not unique to local government, the — all the
19 Commission has jurisdiction over is this San Diego
20 permit. And that, as an executive order, does not apply
21 to any private entities, and so that's why staff found
22 that this constituted a program subject to
23 article XIII B, section 6.

24 As for the federal requirements, the
25 regulations — I mean I went over them fairly thoroughly

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1 in the analysis, that they — in each case, I found that
2 the permit was more specific.

3 I understand about MEP, but it seems like the
4 argument is that with MEP, the — the federal law can be
5 anything that the Regional Board says it is because of
6 the requirement for MEP.

7 And we — and we don't see it that way when it
8 says, in both the federal and the state statutes, that
9 the state can make more — impose more stringent
10 requirements on the local agencies for stormwater
11 purposes.

12 CHAIR BRYANT: Could we just talk about that
13 for a second?

14 So the State Water — the State Water Code, one
15 provision that's — I don't — I didn't write it down, I
16 don't think. But somewhere I saw in the State Water
17 Code that the water board is directed to only go as far
18 as federal law allows them, that the permitting process
19 is what the federal law says.

20 Did I misread that?

21 MR. HAGERTY: If you —

22 MR. FELLER: Actually, if you look on — I'm
23 sorry.

24 MR. HAGERTY: No, go ahead.

25 MR. FELLER: On page 5 of the analysis, we

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1 quote Water Code 13377:

2 "Notwithstanding any other provision
3 of this division" — and that's the last
4 indented paragraph on the page — "the
5 state board or regional boards shall, as
6 required or authorized by the federal Water
7 Pollution Control Act, as amended, issue
8 waste discharge requirements and dredged or
9 fill material permits" — by the way,
10 "waste discharge requirements," read "NPDES
11 permits" in the federal scheme — "which
12 apply and ensure compliance with all
13 applicable provisions of the acts and acts
14 amendatory thereof or supplementary,
15 thereto, together with any more stringent
16 effluent standards or limitations necessary
17 to implement water quality control
18 programs."

19 So I believe that that allows the state to
20 impose more stringent requirements than the federal
21 requirements. And that — that's consistent with
22 federal law as well.

23 CHAIR BRYANT: I think I have an orange sticky
24 and a little mark above that because I think I was
25 reading the prior water code, 13374. It seemed to say

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1 that, in California — that — that California's
2 wastewater discharges requirements were equivalent to
3 the federal.

4 And, to me, that kind of — it gets to this
5 thing — I mean obviously I've had this — been thinking
6 about this for a while, but it seems to me that these —
7 I don't see how we can separate the federal — what the
8 federal law requires and the federal permit and separate
9 it into a state permit.

10 I just can't get over that threshold question
11 that there's more in this water permit than the federal
12 law requires. That's — I just land there every single
13 time I think about this issue.

14 MR. HAGERTY: May I respond to that?

15 CHAIR BRYANT: Please.

16 MR. HAGERTY: Because I think the section that
17 you're referring to really just is almost a terminology
18 issue. It's "waste discharge requirements are
19 equivalent to NPDES permits." It's kind of a technical
20 thing, but the language that staff has cited very
21 clearly gives the state authority to go beyond the
22 federal requirements.

23 And I think a number — you know, the L.A. test
24 claim is a good example of one such time where — where
25 they went beyond it. The state cases recognize that

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1 there are times when the state boards or the regional
2 boards can go beyond federal requirements.

3 And the Burbank case that your staff has cited
4 really does a good job of explaining that. But the
5 statutory structure is really set up. It's a federal
6 structure. So there's federal law; there's state law.

7 The state law in this case actually preceded
8 the — the federal requirements by three years, and so
9 the state had a very robust and expansive system in
10 place already which is more stringent, allows the state
11 to regulate more than under federal law. It touches
12 areas that federal law doesn't touch.

13 And so while I can see how it sometimes can be
14 confusing, there very clearly is a portion that is
15 beyond federal law. And the staff pointed out one of
16 the exhibits that we submitted was an analysis done by
17 the San Diego Regional Board in the 2001 time frame
18 showing that, in their assessment, there were — it was
19 a 60/40 split.

20 So it's very clear that that analysis has been
21 done, and it can be done. Staff has done a good job of
22 doing that here. And that's just the system that —
23 that we deal with, where there can be components that
24 exceed the federal requirements.

25 CHAIR BRYANT: But — but overall, the federal

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1 requirement is to achieve — to achieve improved
2 stormwater discharge to the maximum extent practical;
3 right? Isn't that — that's the federal standard.

4 MR. HAGERTY: That's the federal standard for
5 municipal districts.

6 CHAIR BRYANT: And so if this permit goes
7 beyond the maximum extent practical, then we have —
8 don't we have a case where we have — I mean isn't that
9 how you measure if the state's gone beyond permit?
10 That's where I just keep getting trapped.

11 I think when the — when the federal law — and
12 the regulations seem to imply as well — that this is an
13 iterative process, and that — I think one place I read
14 there that it's a term of art, that there's kind of a —
15 the federal law contemplates a back-and-forth.

16 And it seems to me that if the target is
17 maximum extent practical — that's what the federal law
18 requires us to get to, is the maximum extent practical.
19 And if the State Water Board says it's — we — this is
20 the maximum extent practical, then you have a federal
21 permit under a federal law.

22 And I don't see where there's an increase
23 that's — that's somehow or another additional to the
24 state. I just can't get there.

25 MR. HAGERTY: I mean I think the confusing part

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1 is that there's this — there's standards and goals, but
2 the reality is there's very specific requirements. The
3 federal law has very specific requirements of what needs
4 to be in the application, which means, ultimately, in
5 the permits. And the standards that are imposed in
6 these permits well exceed those requirements.

7 So there is a way to compare it. Staff has
8 done a good job of doing that. And the — the separate
9 analysis is inconsistent with the statutory structure
10 because that really does mean, as staff just pointed
11 out, that anything that the regional board then says
12 becomes federal law.

13 And the courts, I think, have rejected that.
14 The Burbank case specifically looked at that point, and
15 it was — it was pushed by some of the intervenors in
16 that case to say, "Well, everything, then, becomes a
17 federal law once it's implemented at the regional board
18 level."

19 And the Burbank case said, "No. That's not
20 true." You need to do the type of comparison that your
21 staff has done to really parse out the different
22 requirements.

23 CHAIR BRYANT: Ms. Shelton?

24 MS. CAMILLE SHELTON: Just a reminder of a
25 couple of mandates cases that came down from the Third

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1 District Court of Appeal, and one from the Second
2 District Court of Appeal, that analyzed, you know, and
3 determined how you analyze whether or not there's a
4 federal-mandated versus a state-mandated program.

5 And when you're talking about mandates, you're
6 really talking about who has control over the program
7 and the activities and who is the entity that is forcing
8 the particular activities that are incurring costs for
9 the local entities.

10 And the law — the case law says any time —
11 you know, if the state is directing — even if it's a
12 pass-through program from federal directly to local
13 entities passed through, through the state, if the state
14 has taken control of the program and has independently
15 directed particular activities, those activities are, in
16 fact, mandated by the state and not mandated by the
17 federal government.

18 And the key example is the Long Beach Unified
19 School District case where federal law required school
20 districts to have a desegregation plan, and under
21 federal law, it said, "You can do it this way, this way
22 or this way; you choose, or you can do your own way."

23 Well, the state came forward, had particular
24 specific activities in their own plan directed to the
25 school districts, and the argument went up on appeal,

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1 and the state was making the argument that it's a
2 federal mandate.

3 And the court said, "No," because the control
4 and the directed activities were directed and mandated
5 by the state, not by the federal government.

6 And we have — we believe that case is relevant
7 and on point here.

8 CHAIR BRYANT: Okay.

9 MS. JENNINGS: Ms. Bryant, can I make a
10 response?

11 CHAIR BRYANT: Please.

12 MS. JENNINGS: Thank you.

13 We do not think that the Long Beach case
14 applies here. And the reason that we don't is because I
15 think, as Ms. Bryant correctly stated, the question is:
16 Is MEP achieved?

17 We do concede that it is possible that a
18 regional board could go beyond MEP, but, in fact, they
19 haven't here.

20 The question is what aspect of this goes
21 beyond. I think that the representative for the county
22 actually just explained why one of the main aspects of
23 this staff report is certainly incorrect.

24 I believe he said the regulations are
25 application regulations, and it's expected that the

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1 permit will include the requirements to implement what
2 is put in the application.

3 That is where we disagree with your staff.
4 They basically said, "Even if the activities derived
5 directly from what is included as an application, that
6 goes beyond federal law."

7 And we simply disagree. We haven't made
8 choices here. Yes, the federal law requires us to
9 specify what are the practices, but the practices here
10 do not go beyond federal law.

11 The representative from the local agencies also
12 said — referred back to a 2001 staff analysis about a
13 60/40 split. What he failed to tell you was that that
14 was by a non-lawyer, a low-level staff person.

15 After that occurred, and after the city —
16 well, the building industry, in that lawsuit, tried to
17 say that the judge should listen to that, the judge and
18 the court of appeals both decided that, in fact, that
19 permit did not exceed MEP at all.

20 So we would agree that it is conceivable, and
21 that's why we're here before you. I think that's — the
22 only question is: Does this exceed MEP?

23 And I think all of the court cases on
24 stormwater, all of the findings by the State Water
25 Board — to whom I think you have to owe some discretion

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1 as to what is MEP — have all said these activities
2 required in this permit do not exceed MEP.

3 CHAIR BRYANT: I don't mean to take up all the
4 time with this. I want to — I've thought a lot about
5 the Long Beach case, because obviously we have —
6 anyway, I think that when you — in Long Beach they talk
7 about simply there's a federal mandate that says, "You
8 will not discriminate." And then the state Department
9 of Education made up a list of things schools had to do
10 to not — to — and maybe one of you guys can help me.

11 MR. FELLER: Desegregate.

12 MS. CAMILLE SHELTON: Actually, the federal law
13 required a desegregation —

14 CHAIR BRYANT: Plan.

15 MS. CAMILLE SHELTON: — plan.

16 CHAIR BRYANT: And so the state came up with
17 very specific activities that you had to do.

18 And in this case, I mean I feel like, the way
19 the federal law reads, it says, "maximum extent
20 practicable," and it — in the federal regulations, and
21 even in the statute, it seems to imply that that's going
22 to vary from — from place to place; it's going to vary
23 from — from district to — from area to area.

24 It just seems — it seems different to me.
25 That it's not exactly on point. That that federal law

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1 didn't — this federal law specifically says, "It's
2 going to be different from place to place to place."

3 MS. CAMILLE SHELTON: Right. And then bring in
4 the Hayes principle. And under the Hayes, the Third
5 District Court of Appeals said that the state has
6 options.

7 And here, clearly, the state could have done a
8 number of different things in San Diego County and
9 area. They could have done a number of different
10 things. They worked it out. They had the permit
11 procedure, but the state ultimately came down and
12 mandated the activities.

13 In that particular situation, again, the courts
14 have said that's a state mandate and not a federal
15 mandate.

16 MR. FELLER: Can I just add that in this — and
17 we see it like Long Beach in that MEP is — I don't know
18 of any definition in federal law, just like
19 desegregation wasn't defined in the Long Beach case.
20 And it was up to the state in both — in both instances
21 to — I mean the federal government set out the goal,
22 and it's up to the state to — to figure out how to get
23 there. And that's where the more specific state
24 mandates come in. And that's how I compare it to Long
25 Beach.

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1 CHAIR BRYANT: Any other questions or comments
2 from board members on any of the details?

3 Mr. Glaab?

4 MEMBER GLAAB: Thank you, Madam Chairman and
5 members.

6 One of the questions I have is — and I think
7 counsel alluded to it in his comments — are not
8 reimbursable because the claimants have the authority
9 sufficient to add fees directly related to the point.

10 And I think you said — and please clarify if I
11 missed it — if they didn't have the fee authority to
12 assess it, then it would be eligible for full
13 reimbursement?

14 Do I understand that correctly?

15 MS. FELLER: What — I think what I tried to
16 say in the analysis was that regulatory fees could apply
17 to the entire permit, potentially, if it weren't for the
18 Proposition 218 election requirement.

19 And because of that threshold, that that
20 negates most of the fee authority that the local
21 governments have. The only ones that we found that were
22 exempt from Proposition 218 were fees imposed for
23 property-development purposes.

24 And because the hydromodification plan and the
25 low-impact developments were so closely tied to what

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1 they call "priority development projects" in the
2 permit — or in — and in those two activities — permit
3 activities, specifically, that they, the local
4 government, had fee authority for those two activities
5 in the permit because they were not — they're not
6 subject to Proposition 218 elections.

7 MEMBER GLAAB: So if they have — if they have
8 the authority to assess the fee, then we just deem it as
9 unreimbursable?

10 MR. FELLER: They don't have the authority
11 because of the election requirement. So if they put the
12 fee to — out to the voters for — and it could be any
13 part of the permit or all the permit activities, and the
14 fee was enacted as a result of the election, then they
15 would have fee authority, and that would be considered
16 an offset under the permit.

17 But because of that election requirement, that
18 would — that they could potentially never obtain, in
19 some local agencies, then that negates their fee
20 authority under 17556.

21 MEMBER GLAAB: Thank you, Madam Chairman.

22 MEMBER WORTHLEY: Madam Chairman, if I might —

23 CHAIR BRYANT: Ms. Shelton?

24 MEMBER WORTHLEY: — speak after Ms. Shelton,
25 please.

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1 MS. CAMILLE SHELTON: Let me try to clear that
2 up a little bit.

3 Under Government Code Section 17556, the
4 Commission is directed to not find costs mandated by the
5 state if the local entity has fee authority sufficient
6 to pay for the costs of the mandated activity.

7 If you find that they have sufficient cost to
8 pay for the mandated activity, those activities have to
9 be denied as a matter of law. You don't proceed.

10 Oftentimes the Commission finds that there's
11 fee authority, but it's not sufficient to cover the
12 costs of the mandate. So you can't deny the claim in
13 those situations, but you can list that offsetting
14 revenue — that fee revenue as offsetting revenue in the
15 parameters and guidelines, which reduces the amount of
16 the claim.

17 Here, they have — there's fee authority for
18 everything. By law, they have fee authority for
19 everything. But under most of the activities, except
20 for the hydromodification and the LID activities, if an
21 entity —

22 They have the fee authority. If they put the
23 fee forward, it has to go to a vote of the people. So
24 they don't have control over the final outcome on
25 whether that fee passes or not.

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1 If the voters agree with the fee or, in some
2 circumstances, if they don't reject the fee, then, in
3 those circumstances, they may have no costs,
4 ultimately.

5 But you don't know that yet. There's no
6 evidence on the record that the fee has been put to a
7 vote, that the voters have agreed to pay it. So there's
8 an extra step.

9 And in those cases, we're finding that, under
10 17556(d), it's not applicable because they — it's not
11 in total control of the local entity. The voters have
12 control over the fee.

13 CHAIR BRYANT: I think — right.

14 MEMBER WORTHLEY: Well, I guess my thought was
15 that if — I think what I hear the applicants or
16 claimants saying is that, just because you have fee
17 authority, you still have to make a nexus. You can't
18 just say, "I've got fee authority." I've got an
19 obligation to create a plan; I don't have somebody
20 coming forward with a project.

21 I mean it's very clear, if someone has a
22 project and they come forward, I've got fee authority, I
23 can charge them for the project.

24 But if I have an obligation to create a plan in
25 general, which, I think, is the situation here, I have

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1 fee authority, but to whom — to whom do I charge? To
2 whom can I file — can I require them to pay me?
3 Because there's nobody out there with a project. I just
4 have this plan I have to put together. I've got fee
5 authority, but no one to charge.

6 MS. CAMILLE SHELTON: And that argument,
7 actually — Eric needs probably to clear that up. Those
8 are related only to those two activities —

9 MEMBER WORTHLEY: Right.

10 MS. CAMILLE SHELTON: — dealing the
11 hydromodification and the LID.

12 MEMBER WORTHLEY: That's the one I was
13 referring to.

14 MS. CAMILLE SHELTON: And the analysis in the
15 staff analysis was, in those two situations, you don't
16 have to put that fee authority to a vote. So that is
17 why it's different than all the other activities.

18 Now, you can ask Eric what his analysis is with
19 respect to the nexus and the relationship between the
20 fee and the activity.

21 MEMBER WORTHLEY: My question is, Eric, just
22 because there's fee authority, do we not have to make
23 another step of determination: Okay. You've got
24 authority, but from a practical standpoint, who can you
25 charge a fee? If you can charge no one a fee, then,

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1 from a practical standpoint, that fee authority is of no
2 value. You can't use it in any way.

3 MR. FELLER: And if you look on page 46 and 47,
4 the — the hydromodification plan permit requirements
5 are detailed. And the purpose — in the first paragraph
6 on the bottom of page 46, "Each copermitttee shall
7 collaborate with other copermitttees to develop and
8 implement an HMP to manage increases in runoff
9 discharges and durations from all priority development
10 projects."

11 And then if you skip over to 47, where it says,
12 "The HMP shall:" again, "Identify a standard for channel
13 segments which receive urban runoff discharges from all
14 Priority Development Projects."

15 And priority development projects are also in
16 (b), (c), (d) and (f). These priority development
17 projects are listed on the footnote on page 32. So it
18 was — I'm sorry; it's not on page 32. Where is it?

19 All right. All right. Well, look on page 12
20 and 13.

21 MS. HIGASHI: Page 42.

22 MR. FELLER: Was it 42? All right. Let me go
23 there instead.

24 Either — well, page 12 and 13, or page 42. In
25 the footnote, it lists priority development project

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1 categories, starting on the bottom of page 12.

2 And if you look at these categories — (a)
3 housing subdivisions of ten or more dwelling units; (b)
4 commercial developments greater than one acre — and you
5 look at all those priority development project
6 categories, we find that any developer that proposes any
7 of those should be charged a fee — not only a
8 regulatory fee, but what we call a "developer fee" under
9 the Mitigation Fee Act.

10 We found two, more or less, separate bases of
11 authority, although there's some — some authority that
12 Mitigation Fee Act is part of the police power. But the
13 courts treat those two fees separately.

14 And that's why we found this with that —
15 the — and the same with the low-impact development,
16 that those activities were so closely tied to the
17 priority development projects we felt that there was
18 that nexus there to charge that fee.

19 MS. CAMILLE SHELTON: Could I maybe also help
20 clear things up?

21 We — you know, on page 101, there's a citation
22 to the Connell case which sort of goes to the argument
23 of whether something is sufficient.

24 There the argument was a little bit different,
25 though, because they were saying — the claimant was

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1 saying that it wasn't economically feasible to charge a
2 fee, and therefore it wasn't sufficient. And the court
3 just said, "Well, yes, you have the authority, and under
4 law it is sufficient."

5 We had another case that went to court, but it
6 stopped at the trial level and really not — didn't
7 reach the issue, but for those of you that were here for
8 regional housing, there was an argument that — I forgot
9 exactly what the activities were, but they didn't have
10 anybody to charge for the regional housing plans that
11 they had to develop. They had — they couldn't charge
12 the developer; they couldn't charge — there were no
13 homeowners at the time.

14 They'd made that argument. The court never
15 reached it. So it really is an issue of first
16 impression for you with respect to that particular
17 issue.

18 MR. BARRY: If I may just address —

19 CHAIR BRYANT: Go ahead.

20 MR. BARRY: — that question?

21 The — the staff analysis refers to what —
22 when you may assess the regulatory fee, and it talks
23 about that a regulatory fee may be imposed under the
24 police power when the fee constitutes an amount
25 necessary to carry out the purpose and provisions of a

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1 regulation.

2 The cases that staff relied upon and that I
3 mentioned before also talk about recovering the costs to
4 carry out a program after it's been adopted.

5 What we're talking about here is that the
6 copermittees have expended in excess of a million
7 dollars to develop a hydromodification plan —
8 hydromodification management plan that's required by the
9 permit.

10 Once it's approved by the regional board, it
11 presumably will be adopted as an ordinance or ordinances
12 in the different copermittees' administrative codes.

13 Those are the costs that we're talking about,
14 and those aren't costs that were incurred to carry out a
15 program where you have applicants coming in to get their
16 developments approved.

17 And we agree that when an applicant comes in
18 and says, "Here is my priority development project, and
19 here is my hydromodification plan that complies with
20 your ordinance," then we can assess a fee for staff's
21 time to review to see if it's in compliance with the
22 ordinance. We agree that those fees are assessable.

23 Where we — we differ is whether our regulatory
24 authority to assess a fee is so broad as to include the
25 development and implementation of the initial

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1 hydromodification plan, which is essentially complete at
2 this point.

3 The other issue that I — or argument that I
4 made was that the — whether a developer comes in with a
5 priority development project, in theory, is speculative;
6 of course, it will happen. But how many and how often
7 and how big that those projects may be, or what they may
8 be, is somewhat speculative, certainly, at this point.

9 And so the copermittees are without any real
10 rational basis for determining how to spread this
11 million-dollar cost against priority development
12 projects that may come in the door over — sometime in
13 the future.

14 And so our argument is that — that the — the
15 authority to implement — or authority to assess a fee
16 is not so broad as to include the development and
17 implementation, and that it would be speculative to
18 assess a fee against developers when they come in
19 because there's no reasonable relationship between the
20 fee and — and the particular project that may come in
21 the door tomorrow.

22 MR. FELLER: Well, it's staff's position that
23 the authority is that broad. It's broad enough to cover
24 administration; it's certainly broad enough to cover
25 implementation of a hydromodification plan; and we feel

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1 that it's broad enough to cover development as well.

2 MEMBER WORTHLEY: Well, Eric, I think what
3 you're saying is that the staff report would — would
4 say that these are identifiable parties that could then
5 be charged the fee.

6 And I guess I — what I hear the applicants
7 saying is that, really, in the process creating this
8 plan, everything is prospective. There are — nobody's
9 coming forward and saying, "Here's my building permit
10 application, and that's why I'm here at the table to
11 want to do what you're telling me to do in terms of
12 being participants in this — in this process."

13 It almost is — to me, it sounds almost more
14 like a stakeholder type of situation where you say,
15 "Okay. The building industry's going to be at the table
16 because that's the industry that's in this — in this
17 business, and so they're going to be participants in the
18 process."

19 But it's not like you have an actual applicant
20 coming and saying, "I want to build a tower, and that's
21 why I'm here to — to be involved in this process."

22 MR. FELLER: There are ways to estimate this,
23 though. I mean they could go in and look at, for the
24 past year, three years, five years, how many of these
25 permits have come in, and then make a good-faith crack

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1 at estimating an appropriate fee for this program.

2 MEMBER WORTHLEY: Okay. Then somebody coming
3 in later on with a project would — you would say,
4 "Okay. Here's your fee for what he was talking about as
5 far as reviewing your plan as it relates to the overall
6 plan — I'm sorry; your project as it relates to the
7 plan, and here's your fee for your part of the cost of
8 actually creating the plan."

9 That's — that's basically what we're saying.

10 MR. FELLER: Creating it and the other
11 activities they have to do under it, implementing it.

12 MEMBER WORTHLEY: Yes. Okay.

13 CHAIR BRYANT: Ms. Olsen?

14 MEMBER OLSEN: Well, it seems to me that
15 Mr. Barry — is that correct?

16 MR. BARRY: Yes.

17 MEMBER OLSEN: — when you speak, you're sort
18 of speaking — to me, it's sounds like you're speaking
19 counter to yourself.

20 Either you don't have broad-enough authority
21 and — and then argument ends there, or you do have
22 broad-enough authority but you can't figure out who to
23 charge and how much to charge.

24 You know, if you're going to speak to that
25 second issue, then it sounds to me like you have

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1 broad-enough authority.

2 And it seems to me that in the implementation
3 of any program, there is a planning phase. So if this
4 were the case that you can never recover the costs for
5 planning, that — that seems impractical to me.

6 There has to be a way of — as Mr. Feller says,
7 to figure out — estimate how to spread the fee
8 across — for the development of the program across
9 those folks who are going to be coming through the door
10 in the next five years, ten years, however — however
11 long that period of time is that you're going to spread
12 costs over.

13 I mean we do that all the time. I just — I'm
14 sure that — I'm sure that if I knew more about how
15 San Diego County runs, I could find lots of instances in
16 which San Diego County actually does that.

17 MEMBER WORTHLEY: Before — before he responds,
18 if he wants to, let me just give an example. I mean
19 Tulare County just underwent and spent substantial
20 amount of money developing a general plan.

21 We can't charge that general plan back
22 against — that's an expense that the county has
23 incurred to create the general plan.

24 Now, when people come in for building permits,
25 we will certainly charge them for the processing of

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1 those building permits as it relates back to the general
2 plan.

3 But there's not a part of the plan that we can
4 go back and say, "Oh, by the way, we expended this much
5 time and energy creating this general plan, and we want
6 you to pay a certain portion of that." I don't see
7 there's a real nexus for doing that.

8 I mean — and I think that's a similar kind of
9 situation we're talking about here. You're creating a
10 plan. Somebody has to bear that cost of creating a
11 plan. It's mandated by the State of California. You've
12 go to do it. But who — who do I charge? I mean how do
13 I go back out — I think there is a speculative nature
14 to this. I mean how do you do that? It's —

15 That's — I think it's a very similar situation
16 to the general-plan argument. So we — we have to bear
17 the costs at the county for creating the general plan.
18 We — we do not see that we can create a fee basis for
19 charging back against projects in the future.

20 The one thing different about the general plan,
21 perhaps, is it's so — it is so broad, it encompasses a
22 lot more than just planning-for-a-particular-project
23 type of a thing.

24 But — but that's kind of, I think, the
25 situation we're talking about here. You're creating a

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1 plan that will have an impact on projects in the future,
2 and you're saying somehow we're going to be able to
3 charge those people for — for the plan that we've
4 created.

5 And — and I think Eric's not incorrect in
6 saying you still could go through some kind of an
7 analysis based upon history, the projections of the plan
8 in terms of what is the plan expected to — you know,
9 what is the scope of the plan; so a full build-out, what
10 will that look like, breaking out costs that way,
11 perhaps something of that nature.

12 But it is a — it is a quandary, I think, for
13 local government or entities on how to deal with that
14 particular issue.

15 CHAIR BRYANT: Any other questions or
16 comments? Did anybody have anything left to say here?

17 MS. JENNINGS: Ms. Bryant, I did want to
18 comment on one statement that Mr. Feller raised.

19 As I mentioned to you, we have similar permits
20 for private industry, for private construction. We have
21 virtually identical permits for state agencies, for
22 federal agencies. And I mentioned in particular the
23 Caltrans permit.

24 And I believe that Mr. Feller's response was,
25 "But we're only looking at this one permit."

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1 And I would say that that's not the appropriate
2 response. I think that the question is, is this program
3 only for local agencies.

4 If you have to issue a separate permit for each
5 entity, that should not mean that you close your eyes to
6 the fact that Caltrans, right next door, is a state
7 agency with the same type of permit.

8 So I — I did want to raise that point. Thank
9 you.

10 MR. FELLER: May I respond to that?

11 CHAIR BRYANT: Sure.

12 MR. FELLER: If you look on page 37, this —
13 this issue came up in a published case, County of
14 Los Angeles versus Commission on State Mandates, which
15 is — which gave — basically gave the Commission
16 jurisdiction over these, which, prior to that '07 case,
17 statutorily didn't have.

18 But the court was faced with the same argument
19 and dismissed it, saying — and it's in the second
20 paragraph there, in the middle, "The applicability of
21 permits to public and private dischargers does not
22 inform us about whether a particular permit or an
23 obligation thereunder imposed on local governments
24 constitutes a state mandate necessitating subvention
25 under article XIII B, section 6."

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1 In other words, the issue isn't all NPDES law
2 or all federal law. This is — this executive order is
3 the only thing the Commission has jurisdiction over at
4 this time. And because this executive order doesn't
5 apply to private entities, it does constitute a program
6 under article XIII B, section 6.

7 CHAIR BRYANT: Any other questions?

8 MS. GEANACOU: I just — I have a comment, if I
9 may.

10 Perhaps the Water Board is far more familiar
11 with this case than Finance, having — I believe they
12 were a party involved in the case, but I don't believe
13 that the opinion goes as far as the Commission staff is
14 suggesting.

15 It's not suggesting that the Commission, were
16 they to face a test claim on a permit, ignore the
17 existence of, perhaps, similarly issued permits that may
18 affect private dischargers.

19 So I don't know that the Commission staff is in
20 a position to ignore, perhaps, other permits that are
21 issued to, as Ms. Jennings said, federal government,
22 other state entities or private dischargers.

23 CHAIR BRYANT: Ms. Shelton?

24 MS. CAMILLE SHELTON: The court did find,
25 though, that each permit was an executive order. It's a

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1 stand-alone executive order. This permit applies only
2 to local entities.

3 CHAIR BRYANT: I just — I think Ms. Geanacou
4 makes a real good point here, actually.

5 MS. GEANACOU: I think my concern is it's just
6 kind of a general mandates law, and I think it's also in
7 the City of Richmond case.

8 We need to — if requirements that are the same
9 on local government are just contained in a test claim
10 statute directed to a school district or a city or a
11 county, but the very same requirements are applicable to
12 private industries, to private whatever, whether it be
13 workers' comp or some other topic that may crosscut
14 entities, I don't think the Commission can just look at
15 the test claim statute and close their eyes as to the
16 existence of other statutes that may similarly apply,
17 but only to private entities in the same kind of
18 business or service.

19 I understand what they're saying, but I don't
20 know that that's a principled approach in mandates law.

21 MR. HAGERTY: I would just add that — I'm
22 sorry; if I may — that the — there's a very different
23 regulatory structure applicable to municipalities. The
24 permits are very unique to municipalities, and they are,
25 you know, very specifically directed at the operations

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1 of municipalities.

2 So in addition to staff's analysis, they are —
3 they are very unique permits that apply to
4 municipalities only.

5 MS. JENNINGS: Well, "municipalities" is
6 defined to include state and federal agencies. I think
7 it's important you understand that.

8 MR. HAGERTY: Well, but there's a different —
9 there's a different federal process. There's Phase II
10 permitting for different entities. There's — we're
11 talking about a Phase I permit that applies to cities
12 and counties in San Diego County. It's very unique.

13 CHAIR BRYANT: Ms. Shelton?

14 MS. CAMILLE SHELTON: I was just going to make
15 a couple of points.

16 When you look — actually look at the
17 activities in the conclusion, a lot of them are
18 specifically mandating local entities — the county and
19 the cities — to do a lot of collaboration between the
20 regional collaboration, the jurisdictional
21 collaboration, the watershed collaboration. Those are
22 activities imposed solely on government.

23 And with respect to the Water Board's argument
24 about it not being unique because the same activities
25 possibly are imposed on state government and other,

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1 maybe, federal government, the courts have said it
2 doesn't matter if it's imposed on local government
3 versus state government; it's still governmental.

4 You know, when you're doing that analysis, you
5 have to look to see if it's imposed on government versus
6 private entity.

7 So other government issues are not relevant.

8 CHAIR BRYANT: So in terms of — in terms of if
9 you think there's a mandate here, and if you're going to
10 look and see which parts of it are reimbursable, would
11 you then — could you then compare other permits, or can
12 you never look at anything but the permit in front of
13 you?

14 MS. CAMILLE SHELTON: I don't believe anybody's
15 put any other permits into this record. I have never
16 seen another permit, so I can't — I don't know.

17 MR. FELLER: I was under the impression from
18 the Water Board's comments that it was a different
19 standard for private dischargers under best available
20 technology. Instead of MEP, it was BAT. Ms. Jennings
21 can answer that more thoroughly, perhaps, but —

22 MS. JENNINGS: The requirements — well, it's
23 interesting. The requirements for industrial and
24 construction activities — which, by the way, I would
25 say that roughly close to half of those are actually

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1 activities conducted by government entities, like doing
2 their own construction or running sewage treatment
3 plants. All of those things need — those have similar,
4 but more stringent, requirements.

5 *(Member Cox exits meeting room.)*

6 CHAIR BRYANT: I do — I am really clear
7 there's — I am really clear that we don't have that
8 here in front of us and that, you know, we have to
9 consider the record that we have, all this and
10 everything in the binder. So —

11 MEMBER WORTHLEY: Madam Chairman, I'd like to
12 move the recommendation.

13 CHAIR BRYANT: Is there a second?

14 MEMBER GLAAB: Second.

15 CHAIR BRYANT: What happened to Ms. Cox? She
16 stepped out?

17 MS. HIGASHI: She just stepped out.

18 CHAIR BRYANT: Okay. So you want us to take a
19 pause? Just pause.

20 MEMBER WORTHLEY: Is that a legal term?

21 *(Laughter)*

22 CHAIR BRYANT: Do you want to take a ten-minute
23 pause? We could. All right. Why don't we take a
24 ten-minute pause, also known as a break.

25 *(Recess)*

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1 *(All members of the Commission are present.)*
2 CHAIR BRYANT: All right. We're back on the
3 record.
4 We have a motion and a second on the staff
5 recommendation.
6 Paula, can you call the roll?
7 MS. HIGASHI: Chivaro?
8 MEMBER CHIVARO: Aye.
9 MS. HIGASHI: Cox?
10 MEMBER COX: Aye.
11 MS. HIGASHI: Glaab?
12 MEMBER GLAAB: Aye.
13 MS. HIGASHI: Lujano?
14 MEMBER LUJANO: Aye.
15 MS. HIGASHI: Olsen?
16 MEMBER OLSEN: Aye.
17 MS. HIGASHI: Worthley?
18 MEMBER WORTHLEY: Aye.
19 MS. HIGASHI: Bryant?
20 CHAIR BRYANT: No.
21 MS. HIGASHI: Motion is carried.
22 Item 6.
23 MR. FELLER: Unless there's objections, staff
24 recommends that the Commission adopt the proposed
25 Statement of Decision, which accurately reflects the

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1 Commission's decision on item 5 to partially approve the
2 test claim.

3 Staff also recommends that the Commission allow
4 minor changes to be made to the proposed Statement of
5 Decision, including reflecting the witnesses, hearing
6 testimony and the vote count that will be included in
7 the final decision.

8 CHAIR BRYANT: Are there any comments from the
9 parties?

10 *(No response)*

11 CHAIR BRYANT: Is there a motion?

12 MS. OLSEN: I move it.

13 MEMBER GLAAB: Second.

14 CHAIR BRYANT: Paula, could you call the roll?

15 MS. HIGASHI: Cox?

16 MEMBER COX: Aye.

17 MS. HIGASHI: Glaab?

18 MEMBER GLAAB: Aye.

19 MS. HIGASHI: Lujano?

20 MEMBER LUJANO: Aye.

21 MS. HIGASHI: Olsen?

22 MEMBER OLSEN: Aye.

23 MS. HIGASHI: Worthley?

24 MEMBER WORTHLEY: Aye.

25 MS. HIGASHI: Chivaro?

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1 MEMBER CHIVARO: Aye.

2 MS. HIGASHI: Bryant?

3 CHAIR BRYANT: Abstain.

4 MS. HIGASHI: Okay. Motion is carried. Thank
5 you very much.

6 CHAIR BRYANT: Motion carried.

7 *(Member Cox exits meeting room.)*

8 CHAIR BRYANT: Okay. Let's —

9 MS. HIGASHI: This brings us to item 7. This
10 test claim will be presented by Commission Counsel
11 Heather Halsey, *Airport Land Use Commission/Plans II*.

12 MS. HALSEY: Good morning. This test claim
13 addresses airport land use commissions and airport land
14 use compatibility plans.

15 Generally, each airport land use commission
16 prepared an airport land use compatibility plan focused
17 on broadly defined noise and safety impacts.

18 In addition, airport land use commissions make
19 compatibility determinations for proposed amendments to
20 airport master plans, general plans, specific plans,
21 zoning ordinances and building regulations within the
22 boundary established by the airport land use
23 commission.

24 The claimant alleges the following activities
25 are required by the test claim statutes: review and

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1 revise airport land use commission plans, which include
2 CEQA compliance; review and act on referrals; and
3 provide staff assistance and other resources.

4 However, the activities required of airport
5 land use commissions have increased since 1975, thus
6 indirectly increasing the cost that counties are
7 required to incur pursuant to section 21671.5.

8 There has been no shift in fiscal
9 responsibility from the state to the counties. Rather,
10 there's been an increase in activities required of
11 airport land use commissions and a commensurate
12 expansion of the airport land use commission fee
13 authority sufficient to cover the costs of the airport
14 land use commission activities.

15 However, to the extent the airport land use
16 commission decides not to fully exercise that fee
17 authority, it shifts the costs to the county.
18 Therefore, the primary holding in City of San Jose is
19 directly on point, that nothing in article XIII B
20 prohibits the shifting of costs between local government
21 entities.

22 Staff recommends that the Commission adopt this
23 staff analysis to deny the test claim.

24 Will the parties please state your names for
25 the record?

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1 MS. REYNOLDS: Lizanne Reynolds, Deputy County
2 Counsel for the County of Santa Clara.

3 MS. FEREBEE: Donna Ferebee, Department of
4 Finance.

5 MS. CARLA SHELTON: Carla Shelton, Department
6 of Finance.

7 CHAIR BRYANT: Do you have anything to add,
8 Ms. Reynolds?

9 MS. REYNOLDS: Yes, I do. Thank you.

10 The Commission has already determined that the
11 requirement for counties to establish ALUCs is a
12 reimbursable mandate. That was in decision CSM-4507.

13 The key issue in this test claim is whether
14 additional duties that the Legislature imposes on ALUCs
15 thereby impose additional duties on counties. This
16 relationship between ALUCs and their counties stems from
17 section 21671.5(c), which requires a county to provide
18 ALUCs with staff assistance, and also states that the
19 usual and necessary operating expenses of the commission
20 shall be a county charge.

21 The staff analysis asserts that this is a
22 cost-shifting. I disagree with that. That — both of
23 these duties were imposed on the Legislature — by the
24 Legislature on both ALUCs and on counties.

25 So every time the Legislature increases duties

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1 on ALUCs, it automatically imposes additional
2 responsibilities on counties to support those
3 activities. And that's what we're dealing with here.

4 Those types of activities include adopting and
5 amending a comprehensive land use plan — it's like a
6 mini general plan for areas surrounding public-use
7 airports — and also reviewing referrals from local land
8 use agencies for general plan amendments, zoning
9 amendments, building regulations, legislative types of
10 activities.

11 As you can imagine, commissions are
12 volunteers. They're — they're kind of like you. I
13 mean their issues might not be quite as complex as what
14 you deal with, but they — there is a level of
15 complexity to them. They're similar to
16 land-use-planning activities that cities and counties
17 deal with.

18 They do need professional staff assistance to
19 help them review those — develop their plans and to
20 review the referrals that they receive from other
21 land-use jurisdictions.

22 And we respectfully disagree with staff that —
23 that the only thing the statute requires or is
24 reasonable as a — as a staff assistance or usual and
25 necessary operating expense of an ALUC is clerical or

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1 administrative support.

2 It just would not be feasible for airport land
3 use commissioners to perform their duties without some
4 level of professional assistance.

5 Although state law does give ALUCs fee
6 authority, that fee authority rests with the ALUCs, and
7 you have a situation, somewhat akin to what was
8 described in the earlier test claim, whereas the ALUC
9 has to prepare a comprehensive land use plan, this
10 overarching plan that's similar to a general plan, and
11 then — and then it also acts on referrals.

12 So we did finally persuade our ALUC to adopt
13 some fees in 2004 — they had not adopted any fees
14 before then — and those apply to referrals. But they
15 don't apply to the actual establishment and development
16 of the comprehensive land use plan, for reasons
17 discussed earlier in — in the San Diego permitting
18 process.

19 So I don't think staff's analogy that this is a
20 cost-shifting between local agencies — you know, if the
21 ALUC refuses to adopt — to exercise its fee authority,
22 that's somewhat of a cost-shifting.

23 I don't think that analysis works here. This
24 isn't a situation where the Legislature took an activity
25 that was mandated for one local agency and shifted it

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1 over to a different local agency.

2 These — these activities flow from new
3 mandates that were imposed by the state on ALUCs after
4 1975, which then flow through to counties due to their
5 responsibility to provide staff assistance and cover the
6 usual and necessary operating expenses of ALUCs.

7 That's all that I have at the moment, so if you
8 have any questions, I'm happy to answer them.

9 I have — just wanted to add, in addition to
10 being an attorney for the county, I've represented ALUCs
11 for the last ten years, so I've got quite a bit of
12 experience with them personally.

13 CHAIR BRYANT: Thank you.

14 Department of Finance, anything to add?

15 MS. CARLA SHELTON: We agree with the staff's
16 staff analysis.

17 CHAIR BRYANT: Are there any questions or
18 comments from the Commission?

19 MEMBER WORTHLEY: Madam Chairman, I do think
20 that the point's well taken that you have the same
21 problem we talked about earlier, which is, even if you
22 have fee authority, to whom do you charge the fee?
23 Who's out there?

24 You got to create a plan in this case, even
25 more so, perhaps, than in the one we had previously.

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1 It's a problem, because there you might be able to come
2 back and say, "Well, we know there's going to be
3 construction; there's going to be different things we
4 can apply this — this fee to."

5 But with the type of — as you say, general
6 plan type of approach on these requirements for these —
7 these airstrips, you don't have anybody that you can
8 really charge.

9 We just had to do one of these for one of our
10 county-owned facilities, and we had to — we had to bear
11 the cost of development. There's no way to charge.
12 There's no way to turn and say, "You owe us a fee."
13 There may never be anybody from which we can collect the
14 fee. So the county has to bear those expenses.

15 And I don't see how you get away from it. I
16 mean the — the recommendation — the obligation is put
17 upon the — the smaller entity, but the smaller entity
18 really has no way to capture the funds to pay for the —
19 pay for the plan except through the county. So the
20 county is, by default, required, then, to put up the
21 money to do this.

22 I — I agree. I don't think there is a — I
23 think the shifting is — is disingenuous because the
24 actual cost will be borne by — by the county.

25 MS. REYNOLDS: Yeah. And even for the

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1 referrals, even though our ALUC has adopted fees for
2 project referrals that come in, those referrals come
3 from other local agencies, the cities, and we've had
4 trouble collecting those fees, so the county is left
5 holding the bag on the referrals as well as the plan.

6 MEMBER WORTHLEY: I do think under referrals,
7 however, that — that there is an adequate approach,
8 which I mean if you can't collect, then take them to
9 court.

10 But it's not unlike referrals that — you know,
11 if you go to DM — or, I'm sorry, Fish and Game for
12 permits. You're going to pay a fee regardless of who
13 you are, whether you're a governmental entity or a
14 private entity, and that's just standard. So I can see
15 that — a distinction there.

16 But creating a plan is a very different animal
17 from dealing with the referrals, where you can go back
18 and say, "Hey, wait. We expended this amount of effort
19 to respond to it. We have to charge you for that," and
20 you have the authority to do that.

21 MS. REYNOLDS: Yeah. And I agree that where
22 the ALUC has adopted fees and those fees provide for
23 full cost recovery, that there is, you know, expense
24 reimbursement.

25 But the problem is with counties whose ALUCs

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1 have not adopted fees, because we really have no way of
2 forcing them to do so, or if those fees do not provide
3 for full cost recovery. Those are areas where you might
4 have only no cost recovery or partial cost recovery.

5 CHAIR BRYANT: Any other questions or
6 comments? Mr. Glaab?

7 MEMBER GLAAB: Thank you, Madam Chair and
8 members.

9 I just have a question of staff. We have this
10 letter from the Office of County Counsel from the County
11 of Santa Clara, a letter dated yesterday, for today's
12 meeting.

13 Has staff had a chance to review the content of
14 the letter as it relates to the claim?

15 MS. HALSEY: No. I just received it when I sat
16 down in here today. I skimmed it a little bit but
17 haven't read it closely. It looks — I think it's
18 pretty similar to the comments on the draft staff
19 analysis. I don't think it raises anything new.

20 MS. REYNOLDS: That's correct.

21 MEMBER GLAAB: Thank you, Madam Chair.

22 MS. FEREBEE: May I make a comment, please?

23 CHAIR BRYANT: Sure.

24 MS. FEREBEE: I would like to say we only just
25 saw that this morning as well.

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1 But on the issue of the — of who can —
2 whether they can charge the fee or not charge the fee,
3 on page 35 of the final staff analysis, there's a
4 quote — a citation back to the Santa Clara County Board
5 of Supervisors, where it sounds as though there was a
6 policy decision made not to — not to do so to avoid
7 deterring jurisdictions from referring projects and thus
8 diminishing appropriate land use planning around the
9 county's airports.

10 MS. HALSEY: Actually, they did impose a fee.
11 They decided not to impose a fee fully recovering
12 costs. So they imposed, actually, a substantial fee but
13 not — not enough to fully recover their costs.

14 MS. REYNOLDS: Yeah. And I just wanted to
15 clarify that that was based on — that was a board of
16 supervisors' review of an ALUC fee adoption. It went to
17 the board. It was referred to the board.

18 But our ALUC takes the position that, based on
19 state law, it is the one with fee adoption authority,
20 not the board of supervisors.

21 MEMBER WORTHLEY: Well, I was just going to
22 say, with regard to fees, it's not uncommon that fees
23 are not fully recovered and that that would not be a
24 basis for making a claim against the state for a
25 mandate.

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1 The authority is there. I know your argument
2 is "Well, the authority comes from the — not from the
3 county but rather from the subentity." But the fact
4 that they choose not to go after the full amount would
5 be their choice, obviously, but it's not — would not
6 lend itself, then, to a claim against the state.

7 MS. REYNOLDS: I — I would respectfully
8 disagree with that. I mean if the ALUC decides not to
9 exercise its fee authority, the county is kind of
10 stuck.

11 MEMBER WORTHLEY: That's a different situation.

12 MS. REYNOLDS: Okay.

13 MEMBER WORTHLEY: But the decision on whether
14 or not you're going to recover fully or partially,
15 that — that would be within the jurisdiction —

16 MS. REYNOLDS: Correct. I agree.

17 MEMBER WORTHLEY: — and discretion.

18 CHAIR BRYANT: What's the pleasure of the
19 Commission? Is there a motion?

20 MEMBER CHIVARO: I move staff recommendation.

21 MS. OLSEN: I'll second.

22 CHAIR BRYANT: Paula, can you call the roll?

23 MS. HIGASHI: Glaab?

24 MEMBER GLAAB: No.

25 MS. HIGASHI: Lujano?

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1 MEMBER LUJANO: Aye.
2 MS. HIGASHI: Olsen?
3 MEMBER OLSEN: Aye.
4 MS. HIGASHI: Worthley?
5 MEMBER WORTHLEY: No.
6 MS. HIGASHI: Chivaro?
7 MEMBER CHIVARO: Aye.
8 MS. HIGASHI: Cox is gone, and Ms. Bryant?
9 CHAIR BRYANT: Aye.
10 MS. HIGASHI: The motion is carried.
11 Item 8.
12 MS. HALSEY: Excuse me. My record fell apart
13 over here, and it's kind of a mess.
14 Staff recommends that the Commission adopt the
15 proposed Statement of Decision. The sole issue before
16 the Commission is whether the proposed Statement of
17 Decision accurately reflects the decision of the
18 Commission on item 7.
19 Minor changes to reflect the vote count will be
20 included in the final Statement of Decision.
21 CHAIR BRYANT: Are there any comments from the
22 parties?
23 *(No response)*
24 CHAIR BRYANT: Is there a motion?
25 MEMBER WORTHLEY: I'll move.

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1 MEMBER CHIVARO: Second.

2 CHAIR BRYANT: It's been moved and seconded.

3 Paula, is there — can you recall the roll?

4 MS. HIGASHI: Sure. Lujano?

5 MEMBER LUJANO: Aye.

6 MS. HIGASHI: Olsen?

7 MEMBER OLSEN: Aye.

8 MS. HIGASHI: Worthley?

9 MEMBER WORTHLEY: Aye.

10 MS. HIGASHI: Chivaro?

11 MEMBER CHIVARO: Aye.

12 MS. HIGASHI: Glaab?

13 MEMBER GLAAB: Aye.

14 MS. HIGASHI: Bryant?

15 CHAIR BRYANT: Aye.

16 MS. HIGASHI: Motion is —

17 CHAIR BRYANT: Motion is carried.

18 MS. HIGASHI: — carried.

19 Item 10, final staff analysis, proposed

20 amendment to parameters and guide — to parameters and

21 guidelines for the Mandate Reimbursement Process.

22 Ms. Patton and Ms. Shelton will speak on this

23 item.

24 MS. PATTON: Good morning. From 1995 through

25 2009, the State Budget Acts have required the Commission

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1 to amend the Mandate Reimbursement Process parameters
2 and guidelines to limit state reimbursement of local
3 government costs for independent contractors used to
4 prepare and submit reimbursement claims.

5 Until 2006, the Commission made this amendment
6 each year on a proposed consent calendar. Since 2006,
7 the Commission has not adopted the amendment because the
8 Mandate Reimbursement Process was set aside.

9 The program has been reinstated. Therefore, we
10 are again proposing the independent contractor language
11 be inserted in the Ps and Gs.

12 The proposal also adds standard language that
13 clarifies there shall be no reimbursement for any period
14 in which the Legislature has suspended the mandate.

15 The League of California Cities and California
16 State Association of Counties are opposed to the
17 proposed language regarding suspensions.

18 Staff disagrees with the League and CSAC and
19 recommends the Commission adopt the proposed language,
20 including the suspension language.

21 Will the parties please state your names for
22 the record?

23 MR. BURDICK: Allan Burdick, staff to the CSAC
24 and League of California Cities Advisory Committee on
25 State Mandates.

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1 MS. BRUMMELS: Ginny Brummels, State
2 Controller's Office.

3 MS. ROMERO: Lorena Romero, Department of
4 Finance.

5 MS. FEREBEE: Donna Ferebee, Department of
6 Finance.

7 CHAIR BRYANT: Mr. Burdick?

8 MR. BURDICK: Thank you, Madam Chairman and
9 members.

10 Maybe what I could do — the easiest thing
11 would be to refer you to, I think, page 5 of the draft
12 staff analysis where I think staff has done a good job
13 of summarizing CSAC and the League's position at this
14 point and, I think, their analysis of it.

15 The issue really comes down to, you know, I
16 think, a couple points from the local standpoint. And
17 No. 1 is can you suspend a mandate which does not
18 exist?

19 I mean the Commission essentially went back and
20 set aside the mandate and said the Mandate Reimbursement
21 Process no longer exists as part of its action to set it
22 aside by the Legislature.

23 While this case was being litigated, the
24 Department of Finance continued to contain language in
25 their budgets that said it was suspended. However,

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1 essentially one of the criterias in order to suspend a
2 mandate is the Commission has to have found a mandate.
3 There has to be a mandate. We're essentially saying,
4 "How can you suspend a mandate that's not there?"

5 The second kind of key issue is whether or not
6 you can suspend the Mandate Reimbursement Process itself
7 at all. Whether there's a right to do that or whether,
8 you know, as part of the process.

9 Part of the finding on the Mandate
10 Reimbursement Process is — via mandate, is that local
11 government is entitled to its full cost of reimbursement
12 for a mandate and for an individual program.

13 So essentially, in getting reimbursed, your
14 costs for the reimbursement process were found to be
15 eligible. So, you know, we — we question whether or
16 not even the Legislature has the right to suspend it.

17 And, you know, I think essentially the way this
18 probably should have worked is maybe you have a Mandate
19 Reimbursement Process claim deal with test claims.
20 Almost everything else — whether it's incorrect
21 reduction claims or dealing with audits or filing
22 reimbursement claims — probably is all better related
23 to each individual reimbursement claim.

24 So as an example, if you — if you had a
25 reimbursement — let's just take now they're out filing

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1 the stormwater claims that were — you know, were
2 approved once the claiming instructions are out there —
3 is that maybe at the bottom of claiming instructions is
4 to have, you know, boilerplate language which includes,
5 you know, adding, "What were your costs for actually
6 preparing that claim? What were you out of pocket for
7 doing that," essentially.

8 So I think from — from the League and CSAC
9 standpoint, we do not think that, you know, these —
10 these programs could be suspended because they don't —
11 they don't meet the test of being in place at the time.

12 And secondly is we really question whether you
13 can suspend the Mandate Reimbursement Process at all.

14 Thank you.

15 CHAIR BRYANT: Ms. Brummels?

16 MS. BRUMMELS: Yes. The State Controller's
17 Office supports the staff analysis.

18 CHAIR BRYANT: Department of Finance?

19 MS. ROMERO: We support the staff analysis.

20 CHAIR BRYANT: Is there any questions or
21 comments from the Commissioners?

22 MEMBER WORTHLEY: I have a question.

23 Looking on the practical side, Mr. Burdick,
24 what is the impact of whatever decision we make here
25 today on counties and local government?

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1 MR. BURDICK: Well, I mean one thing it could
2 be is, you know, if you are successful in winning a test
3 claim, those costs are reimbursable. If that happened
4 during the fiscal years in which now you say this
5 mandate was suspended, those costs would not be eligible
6 for reimbursement.

7 So, as an example, you saw the time and effort
8 that went on in those fiscal years with all the costs
9 expended on these stormwater and other claims. I mean
10 you just look at your staff's burden on this. You know,
11 I don't know what — have any idea what Eric spent, but
12 he may have spent —

13 MEMBER WORTHLEY: He says a year.

14 MR. BURDICK: — half a — half a year, maybe,
15 you know, a person-year on that. And you look at the
16 costs associated with that, and, you know, maybe it's a
17 hundred thousand dollars, you know, just to make the
18 math simple.

19 You know, if that happened in '05-'06, '06-'07,
20 essentially you're saying, "Well, the mandate's
21 suspended," you know, the state is not responsible to
22 reimburse those costs.

23 So those are the kinds of things that happen,
24 you know. And part of it will be sorting it out with
25 the State Controller in terms of, you know, when those

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1 costs were incurred.

2 You know, as an example, these — these
3 flood-control cases have been going on for a long time,
4 multiple years, all during that, probably, period of
5 time. I don't know when they — but probably at least
6 the three or four years.

7 So all those years up to prior to this year
8 have been suspended. And so — but is the question,
9 "Are those costs eligible," or, because you have to wait
10 until you win, is San Diego County now still eligible
11 for all of those costs, because they really weren't
12 eligible until today, when a mandate was found.

13 So we have some issues with the controller, but
14 essentially it deals with, "Are those costs reimbursable
15 if you had an incorrect reduction claim, you went to an
16 audit," any of those other things that went on during
17 that period of time.

18 Are you — under the — under the MRP mandate,
19 the state is responsible for reimbursing locals for
20 those costs. So if you're successful with an incorrect
21 reduction claim, as an example, or a test claim, then
22 you're entitled to reimbursement.

23 CHAIR BRYANT: Ms. Shelton, did you want to add
24 anything?

25 MS. CAMILLE SHELTON: Just that the suspensions

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1 were enacted as part of the budget act, and they're
2 separate statutes, and the Commission does not have
3 jurisdiction to — to decide whether those statutes are
4 unconstitutional or invalid.

5 MS. ROMERO: I'd also like to add a comment.

6 The process in which the suspensions are
7 done — since this is a mandate, as with all of our
8 mandates, the process is not different whether it's
9 Mandate Reimbursement Process or one of the others.

10 It's looked at in the whole to determine what
11 will be — when the suspension of funds are going to be
12 done.

13 CHAIR BRYANT: Are there any other questions or
14 comments from the Commission?

15 MR. BURDICK: If I could just comment on that,
16 why — where we see the difference, as an example?

17 So if you have a regular program that's out
18 there, and you want to change it — so like last year,
19 as an example, the Legislature looked at a law relating
20 to crime victims and said, "Oh, we want to — you know,
21 we want to suspend that," and, in fact, we're actually
22 going to go into the statute in that case and change it
23 so that that previous mandate relates to that.

24 There's no place you can go into statute and
25 say, "Here's the Mandate Reimbursement Program." You

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1 know, it's not in there to say, you know, "Where is
2 it?" We can go over and say, "Okay, you know, we
3 don't — you know, we want to suspend Megan's Law." "We
4 want to suspend sexually violent predators." "We want
5 to suspend election programs."

6 Well, you can do that, but there's code
7 sections in there to do that. Where do you go for
8 Mandate Reimbursement Process? This process has really
9 made a determination that in order to make locals fully
10 whole, that, you know — because the state can
11 complicate the process, was — as example, is that the
12 test claim process is reimbursable.

13 This decision would essentially say the state
14 can go in and say, "No." You know, if you want to
15 suspend it — do you want to suspend it next year, in
16 the future, that, you know, even if you're successful,
17 your costs are not reimbursable.

18 And that's, I think, where locals would argue
19 is, "You can't do that. It's not subject to
20 suspension." And that's a little bit of a complex
21 issue, but I think there is a differentiation between
22 this program and any of the other hundred or so, you
23 know, city, county or school mandates out there. I
24 think this — this one is unique.

25 CHAIR BRYANT: Ms. Shelton?

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1 MS. CAMILLE SHELTON: You know, we've already
2 had these issues come before the Commission in Carmel
3 Valley II, where actually a challenge was made, first,
4 to the statutes that they were alleging were
5 unconstitutional.

6 And the court said, "No. You have to come back
7 to the Commission and exhaust your administrative
8 remedies," even though the Commission has no
9 jurisdiction to decide whether or not a statute's
10 unconstitutional.

11 And the court wants that to occur because, you
12 know, a record is prepared by the Commission. You might
13 be able to narrow the issues for the court. But it
14 still has to come here.

15 Regardless, though, all of the issues that
16 Mr. Burdick is raising are constitutional issues
17 challenging those State Budget Acts, and the Commission
18 simply doesn't have jurisdiction to make those
19 decisions.

20 CHAIR BRYANT: Right. I was — I'm sympathetic
21 to your policy argument. I was going to suggest you
22 talk to the colleagues in the rest of this building
23 about it. I don't think we can help you.

24 MR. BURDICK: I think we're going to be looking
25 for those guys with the robes on.

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1 CHAIR BRYANT: Or them too.
2 Is there a motion?
3 Were there any more questions?
4 MEMBER OLSEN: I'll move to accept the staff
5 recommendation.
6 MEMBER CHIVARO: Second.
7 CHAIR BRYANT: There's been a motion and a
8 second.
9 Paula, can you call the roll?
10 MS. HIGASHI: Olsen?
11 MEMBER OLSEN: Yes.
12 MS. HIGASHI: Worthley?
13 MEMBER WORTHLEY: No.
14 MS. HIGASHI: Chivaro?
15 MEMBER CHIVARO: Aye.
16 MS. HIGASHI: Cox is gone. Glaab?
17 MEMBER GLAAB: No.
18 MS. HIGASHI: Lujano?
19 MEMBER LUJANO: Aye.
20 MS. HIGASHI: And Bryant?
21 CHAIR BRYANT: Aye.
22 MS. HIGASHI: It's four to two. Motion is
23 adopted.
24 MR. BURDICK: Thank you very much.
25 Could I just ask one question on this —

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1 related to this?

2 Because this was a technical amendment, right,
3 and I think it was a little bit different, does this
4 still — will this be — will this still require the
5 State Controller to issue claiming instructions? Is
6 there any differentiation between a technical amendment
7 and a regular amendment?

8 MS. CAMILLE SHELTON: The law says what it
9 says.

10 MR. BURDICK: Thank you.

11 MS. HIGASHI: It's our understanding that when
12 the Commission has adopted this language in the past,
13 that the Controllers' Office has issued claiming
14 instructions and —

15 MR. BURDICK: Thank you very much.

16 MS. HIGASHI: This brings us to item 13, *Update*
17 *on implementation of recommendations from Bureau of*
18 *State Audits report*. Ms. Patton will present this.

19 MS. PATTON: In October 2009, the Bureau of
20 State Audits released its follow-up audit report on the
21 mandates process. The audit report — the State Auditor
22 requires the Commission to reply to the final audit
23 report within 60 days, six months and one year of the
24 report's issue date regarding how we are implementing
25 their proposed recommendations.

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1 On October 30th, 2009, we adopted a work plan
2 to implement the BSA recommendations and submitted it to
3 BSA.

4 The six-month report is now due. Staff has
5 updated the work plan to reflect the actions we've
6 completed since the 60-day report, which is before you,
7 and they include beginning work on incorrect reduction
8 claims by issuing a draft staff analysis and setting
9 hearing for the investment reports IRC for Los Angeles
10 County.

11 We are developing amendments to the Commission
12 regulations.

13 We've completed an additional 41 boilerplate
14 requests for Ps and Gs amendments.

15 And the Legislative Subcommittee conducted a
16 meeting yesterday on proposed language for requesting
17 adoption of a new test claim decision.

18 So the full list of actions is before you.

19 Staff recommends that the Commission approve
20 the updated work plan for implementing the
21 recommendations.

22 CHAIR BRYANT: Do we need to take an action
23 here?

24 MS. HIGASHI: If you'd like to. We thought it
25 was — it was important for us to bring this back to

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1 you, since we'll be filing an official response from the
2 Commission with the Bureau of State Audits.

3 MEMBER WORTHLEY: Move staff recommendation.

4 MEMBER CHIVARO: Second.

5 CHAIR BRYANT: Shall we just have our unanimous
6 roll call?

7 MS. HIGASHI: That would be great.

8 CHAIR BRYANT: Without objection.

9 Item 14.

10 MS. HIGASHI: Ms. Patton will present this item
11 as well.

12 MS. PATTON: Since I reported in January, two
13 of the bills regarding the mandates process have died:
14 AB 548 that would have revised the State Controller's
15 audit period; and AB 917 regarding suspension of school
16 mandates.

17 AB — the bills that are currently still in the
18 process: SB 894 contains our modifications — proposed
19 modifications to our reports to the Legislature. That
20 is set in — for hearing in Senate Local Government on
21 April 21st.

22 We have a new bill that we're tracking,
23 AB 2082, which would expand the Legislative Analyst's
24 Office current reporting requirements on mandates to
25 require them to annually report on each education

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1 mandate that has not been funded.

2 Yesterday, the Commission's Legislative
3 Subcommittee conducted a workshop to discuss the
4 proposed language for the process of requesting to adopt
5 a new test claim decision, which is formally known as
6 the reconsideration process, and Sarah and Paul will
7 report on that workshop.

8 MEMBER OLSEN: Yes. We met over — we met over
9 at the Commission's offices yesterday at four o'clock,
10 and there was quite a group there, interested folks.

11 The Commission presented — the Commission
12 staff presented new draft language, which I just — is
13 it in the binders?

14 MS. HIGASHI: It's — we passed it out.

15 MEMBER OLSEN: Okay.

16 MS. HIGASHI: It's up here too.

17 MEMBER OLSEN: And the two primary issues that
18 were addressed in that language were, you know, how to
19 name and how to define this thing, this — this new
20 process we're talking about, since folks at our last —
21 the previous meeting had had really substantial concerns
22 about calling it a "reconsideration process," since
23 there already is a reconsideration process, and this
24 isn't that one.

25 So as Ms. Patton said, we've been talking about

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1 it as a new test claim decision to supercede one
2 previously adopted, which seems like a mouthful, but
3 also, we found out yesterday, there are still concerns
4 about that because it's not narrowly enough defined
5 or — or not, I guess, well-enough defined as to what
6 would come under that process as opposed to any other
7 process the Commission has.

8 So one of the things that I think staff is
9 going to work on is trying to figure out what might be
10 in that further definition of — of what this process
11 would be.

12 And then the other significant thing that
13 happened that is in this draft is that the statute of
14 limitations has been removed. And that did not seem to
15 be as controversial a subject yesterday, although some
16 people did have some concerns about it.

17 My understanding is that the process, as it
18 moves forward, is to update this language and to have it
19 available should we need to have it available.

20 You know, we — as I understand it, we are not
21 pushing legislation at this point, but we do want to be
22 in a position to have decent and appropriate language
23 should a process become part of, you know, a trailer
24 bill or anything else.

25 CHAIR BRYANT: Any questions?

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1 MEMBER GLAAB: Yeah. I'd just like to add,
2 excellent report, Ms. Olsen. You know, some of the
3 comments that were discussed, you know, at the table are
4 some of the — what are some of the unintended
5 consequences of implementing a policy such as this. And
6 I think staff will do a very good job in looking at
7 that, because what we don't want to do is open up
8 Pandora's box at any number of levels.

9 So I think, you know, the comfort that I have
10 is — going forward with this, is that letting staff
11 continue to work that so that we take into account some
12 of the concerns that were issued yesterday.

13 Thank you.

14 CHAIR BRYANT: We don't need to take an —
15 Oh, did you have something to add? Public
16 comment?

17 MR. BURDICK: Yeah. Just a quick comment.
18 Again, Allan Burdick on behalf of local agencies.

19 Madam Chair and members, I think the one thing
20 that was discussed that we would like — maybe the
21 Commission could take some action on — I don't know the
22 rules of your action — is the — is the fact that this
23 is — this legislation will have a significant — it
24 could have a serious, significant impact on the
25 Commission and their decisions, as well as locals, and

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1 that hopefully this would be done through a normal
2 legislative process and not a trailer bill.

3 That this would be done something where allows
4 for all parties to participate in this — in this kind
5 of a minefield effort that's possibly out there in terms
6 of doing that.

7 So I think the one thing, from a local
8 standpoint, we would like to recommend is, if the
9 Commission feels it is appropriate, that, you know, they
10 request at least the parties they represent or the
11 state, however you do it, to do this through the normal
12 process and not do it through a trailer bill process
13 where there is no public participation.

14 Thank you very much.

15 MS. OLSEN: Mr. Burdick, I, for one, would
16 absolutely agree with that, but we do all know how the
17 process works and how there are other processes that
18 work at the same time.

19 So I think, you know, absolutely. I think we
20 would all want to pursue the whole policy evaluation and
21 fiscal evaluation of this and all of that, but we also
22 don't want to get caught with other folks drafting the
23 language that affects this process.

24 So I think that's why we're trying to push it
25 along on a staff level and on an interested-parties

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1 level even before it becomes sort of an official part of
2 any process.

3 MR. BURDICK: Yeah. I was just saying that I
4 don't know what the appropriate action is — if it is
5 appropriate for the Commission to do that — to at least
6 let the Legislature and the Governor know the potential
7 impact this could have on your decisions, you know,
8 passing forward, and that this is something that's going
9 to take some very careful deliberation.

10 MS. HIGASHI: Let me just say that there's no
11 action scheduled for this agenda.

12 However, if it's the sense of the Commission,
13 I'm certainly happy to make — to convey that message to
14 budget committee staff, when we are asked about this
15 proposal, and to recommend that if — at a minimum, that
16 a working group involving all parties be convened to go
17 over it before anything is put into print.

18 CHAIR BRYANT: That's exactly what I was going
19 to suggest —

20 MS. HIGASHI: Okay.

21 CHAIR BRYANT: Okay. Good.

22 MR. BURDICK: Thank you very much.

23 MS. HIGASHI: Item 15, Ms. Shelton.

24 MS. CAMILLE SHELTON: In this report I added a
25 second case of interest, the California School Boards

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1 Association versus the State of California.

2 These two cases of interest do not involve the
3 Commission as a party to the litigation, but this case
4 is where CSBA's challenging the state's practice of
5 deferring mandate reimbursement for school districts.
6 It's pending in the Fourth District Court of Appeal and
7 briefing is underway. So as I get more information,
8 I'll continue to let you know.

9 Otherwise, there's no other information to
10 provide.

11 MS. HIGASHI: Item 16. This is my report.

12 There were a couple of action items within this
13 item.

14 The first one concerns a response letter that
15 we need to send to the Senate Budget Subcommittee
16 chairman for a request-for-information letter.

17 And basically all the state agencies that are
18 subject to Budget Subcommittee No. 4 were asked to
19 provide a mission statement, a strategic plan, a summary
20 of enabling legislation, a brief summary of who we serve
21 and how many we serve, and a description of measurements
22 and outcomes that we use to define success for each of
23 our major programs.

24 All of the information requested is readily
25 available, either from my monthly reports or from our

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1 reports to the Legislature.

2 However, the strategic plan is something that
3 none of the sitting members of the Commission have ever
4 been involved with us in the strategic planning process,
5 so we thought it was necessary —

6 *(Cell phone ringing.)*

7 MR. BURDICK: I apologize. I turned it off
8 once, but I didn't turn it off.

9 MS. HIGASHI: — we thought it was necessary to
10 bring forward, at least at a minimum, what we termed an
11 "interim strategic plan," so we have something that we
12 can submit in response to this letter.

13 So on the pages following my report, there's a
14 very short document with bullets and short sentences,
15 and what I'd like to recommend is that this interim
16 strategic plan be adopted for the purpose of submission
17 to the Senate, and at the same time, what we plan to do
18 with it is to send it out to parties, post it on our
19 website, solicit public comments, staff comment, and
20 work through turning this into a more formal strategic
21 plan. But at least we can respond to the request
22 without sending them something dated 1999.

23 CHAIR BRYANT: Seems like a good plan.

24 Any comments or questions?

25 *(No response)*

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1 CHAIR BRYANT: Do you — do you need us to vote
2 on that or just —

3 MS. HIGASHI: Yes.

4 CHAIR BRYANT: Is there a motion?

5 MEMBER LUJANO: So move.

6 MEMBER CHIVARO: Second.

7 CHAIR BRYANT: Any objection to substituting
8 our unanimous roll call?

9 *(No response)*

10 CHAIR BRYANT: Okay.

11 MS. HIGASHI: Thank you.

12 The second item may not allow for a unanimous
13 roll call, but it's the issue of the 2010 meeting and
14 hearing calendar. This is the most contentious item
15 that we ever face.

16 CHAIR BRYANT: But I have no summer vacation
17 plans that will interfere, so —

18 MS. HIGASHI: Okay. What we've done is —
19 Ms. Patton has prepared alternatives for you. They're
20 on — mine's on green paper. And we have copies
21 available also for the public.

22 At some point during Anne Sheehan's tenure we
23 started to meet on Fridays, and prior to that, the
24 Commission had always had Thursday meetings, and we all
25 made the adjustment and we made it through furlough

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1 Fridays and everything.

2 So what we have given you is a calendar that
3 would show that, for May, we would meet on Thursday
4 because that was the date that was most convenient for
5 all the Commission members, but the rest of the dates
6 remain on Fridays.

7 Alternatively, if the Commission wishes to do
8 so, all of the dates could be changed to Thursdays. And
9 if so, we've given you tentative dates to consider.

10 The staff would recommend a Thursday calendar.
11 I know that, you know, all of you, though, have
12 different schedules. It's certainly up to the
13 Commission.

14 MEMBER WORTHLEY: Just a comment, Madam
15 Chairman, if I might. I'm on the executive committee
16 of — of the CSAC, board of directors, and also been on
17 the board of directors.

18 What has been happening, very conveniently for
19 me on the last of two meetings, is that we have had, on
20 the Thursday, a CSAC either executive or board of
21 directors meeting. And then I come up for that and
22 spend the night and stay here for the Commission meeting
23 on Fridays.

24 If we went to the Fridays all the time, I
25 would — I would have to miss the CSAC meeting because

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1 obviously they meet at the same time.

2 MEMBER OLSEN: Thursday.

3 MEMBER WORTHLEY: Yeah. I'm sorry; if we went
4 to Thursday, then I would have to miss one of my
5 meetings. So that's the only objection I have. I mean
6 I don't have a problem otherwise.

7 And I don't know today, as we sit here, if that
8 applies to all of our future meetings that I'll — it's
9 happened the last two times that it worked out well for
10 me, but —

11 CHAIR BRYANT: Mr. Glaab?

12 MEMBER GLAAB: Yes. I — I have kind of the
13 opposite problem from Mr. Worthley.

14 Thursdays, for me, work real well because
15 Fridays are generally reserved for a Metrolink board
16 meeting, and I'm on the board of Metrolink, and as some
17 of you may know, Metrolink has been a little bit into
18 the news lately down there, and so it does create a
19 little bit of an issue.

20 But I certainly understand Mr. Worthley's
21 concerns. Thursdays would do better for me, so for
22 whatever that's worth. Thank you.

23 CHAIR BRYANT: Ms. Olsen?

24 MEMBER OLSEN: And I have a one-time issue, and
25 that is Thursday, June 24th of 2010, my daughter

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1 graduates from high school. So I won't been here if we
2 meet on Thursday. But it is a tentative meeting, and
3 were we to meet on Friday, I would respectfully like it
4 to be later rather than the 9:30 time. If we could
5 start it at 10:30, I can take a reasonable flight up,
6 so — but I have no preferences between Thursday and
7 Friday ongoing.

8 CHAIR BRYANT: I actually have a conflict on
9 Thursday, June 24th. Otherwise, every other — any day
10 works for me, so —

11 MS. HIGASHI: We leave it up to the Commission.

12 MEMBER GLAAB: What if — is there a reason why
13 we wouldn't look at another day, like a Wednesday?

14 MS. HIGASHI: It gets to be more problematic in
15 terms of getting a meeting room and also for scheduling
16 Ms. Bryant.

17 CHAIR BRYANT: Yeah. It's really hard for me
18 to do it any day but Thursday or Friday.

19 MEMBER WORTHLEY: Paul, do you meet once a
20 month on the same — is it every — as far as your
21 Metrolink meetings?

22 MEMBER GLAAB: Yeah. The Metrolink is — I
23 think it's the second and fourth Friday. And we went
24 to — we went to twice a month because of the incredible
25 issues that are before us with positive train control

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1 and some of the litigation as a result of the incidents
2 that occurred. And so second and fourth Friday, if I
3 recall correctly, is — is when we meet.

4 MEMBER WORTHLEY: But you do meet twice a
5 month, and you meet every month as opposed to, for me,
6 the — the CSAC board of directors only meets
7 periodically.

8 MEMBER GLAAB: Oh, okay.

9 MEMBER WORTHLEY: Well, I'm just saying, as
10 opposed to — I would miss every board of director
11 meeting if it continued to be aligned as it is on
12 Thursdays, whereas you would only have to miss —

13 MEMBER GLAAB: Good point.

14 MEMBER WORTHLEY: — an occasional meeting, I
15 guess, if that made a difference, in your mind.

16 MEMBER GLAAB: Good point.

17 CHAIR BRYANT: I'm not —

18 MEMBER GLAAB: What about afternoons?

19 MEMBER OLSEN: My question would be, would
20 Thursday afternoon work for people? Does that work for
21 you? Is your meeting in the morning?

22 MEMBER WORTHLEY: Yeah.

23 CHAIR BRYANT: I think actually Thursday
24 afternoons aren't as hot for me. I have a Thursday
25 afternoon board meeting every — same day on the fourth

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1 Thursday, which is good, because it will get us out of
2 here by one on Thursday mornings.

3 I'm not hearing a good — I'm not hearing an
4 excellent consensus here. Maybe —

5 MS. HIGASHI: Then do —

6 CHAIR BRYANT: Do we need to decide today? I
7 mean what about —

8 MS. HIGASHI: No.

9 CHAIR BRYANT: — the possibility if we come —
10 we all know we're doing May 27th.

11 MS. HIGASHI: May 27th is set.

12 CHAIR BRYANT: Maybe you could talk to CSAC;
13 you can talk to Metrolink, and we can decide it.

14 MS. HIGASHI: And we can get your meeting
15 calendars and definitive dates.

16 CHAIR BRYANT: Okay. Let's do that.

17 MEMBER GLAAB: I think what we have to strive
18 for is maximum attendance, obviously, because the issues
19 that are before us are important as well, so —

20 CHAIR BRYANT: Okay. Right.

21 MS. HIGASHI: But, just for the record, at this
22 point, we don't have any plans for a June meeting. So
23 unless we have new litigation or some reason that we
24 need to have that meeting, at this time we have no plans
25 for that meeting.

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1 I would like to get a vote on May 27th because
2 that is an absolute new meeting date, and I just need to
3 know that everyone's in agreement on it.

4 MEMBER OLSEN: I move it.

5 CHAIR BRYANT: Is there a second?

6 MEMBER CHIVARO: Second.

7 CHAIR BRYANT: All right. Any objections to
8 substituting a unanimous roll call?

9 *(No response)*

10 MEMBER CHIVARO: For May —

11 CHAIR BRYANT: So our next meeting will be
12 May 27th.

13 MS. HIGASHI: And then what we will do, then,
14 as we send out our draft staff analyses for the July
15 meeting, we'll indicate it could be on either of those
16 days, because we try to give notice to the parties if
17 the draft is going out.

18 CHAIR BRYANT: Okay.

19 MS. HIGASHI: Okay.

20 CHAIR BRYANT: Is there —

21 MS. HIGASHI: I'd like to point out that in my
22 report we've added a section called "New Practices."
23 And what we're going to do here is just reserve this
24 section of my report to tell you about something new
25 that we've done that you may have missed otherwise,

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1 anything that we might do that we believe would qualify
2 for new efficiencies or recommendations from the BSA
3 audit. So this will just be used as a means of
4 publicizing those things.

5 And I'd like to note that yesterday we had a
6 rule-making workshop that was quite well attended, and
7 the primary changes that we discussed at that meeting
8 were bringing our regulations into the 21st century and
9 adding and changing sections so that we would actually
10 have an e-filing system and e-mailing system for all of
11 our work.

12 And it's substantial progress. A lot of work
13 has been done by staff. The actual proposal will come
14 before you so that we can issue the notice of
15 rule-making at the May meeting.

16 But it was a very well-attended meeting, and
17 folks generally are looking forward to the system
18 functioning on a regular basis and getting rid of U.S.
19 mail.

20 CHAIR BRYANT: Great.

21 MS. HIGASHI: So —

22 CHAIR BRYANT: Good for us, not the post
23 office.

24 MS. HIGASHI: The calendar's tentative agendas
25 for the next couple of meetings are included in my

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1 report. If you have any questions on these, now's the
2 time to ask.

3 And also we've included a copy of the leg
4 analyst's report, and there's a special report focused
5 on mandates, and some of you, we thought, might be
6 interested in this report.

7 CHAIR BRYANT: Any questions for Paula?

8 *(No response)*

9 CHAIR BRYANT: Okay. So we move on to public
10 comment.

11 Is there any public comment on any item that
12 wasn't on the agenda or any special presentations?

13 *(No response)*

14 MS. HIGASHI: I'd like to — if not, I'd like
15 to recognize Ms. Patton.

16 MS. PATTON: Glen Everroad, could you come up?

17 I think everyone knows that Glen Everroad is
18 retiring, long-time and excellent employee from the City
19 of Newport Beach, so the Commission has a resolution for
20 you, and I'll just read it.

21 "Whereas Glen Everroad has
22 distinguished himself as an outstanding
23 employee with the City of Newport Beach,
24 beginning as an animal control officer and
25 retiring as manager of the city's revenue

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1 division and the city's SB 90 coordinator;

2 "Whereas he is recognized throughout
3 the state and local governments for his
4 leadership in and knowledge of the mandates
5 process;

6 "Whereas he has advised and influenced
7 the Commission in determining if cities,
8 counties and other local agencies should be
9 reimbursed pursuant to Article XIII B,
10 Section 6, of the California Constitution;

11 "Whereas the members and staff think
12 of Glen as the cool claimant who lives on
13 the beach, surfs every morning, sails every
14 weekend, skis every winter;

15 "And whereas the members and staff
16 cannot believe Glen is old enough to retire
17 and we are envious in the extreme, Glen
18 Everroad is being honored by the members
19 and staff of the Commission on State
20 Mandates in appreciation for his
21 outstanding dedication, leadership and
22 service to the City of Newport Beach and
23 the State of California.

24 "Now, therefore be it resolved that
25 the members and staff of the Commission on

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1 State Mandates warmly congratulate Glen
2 upon his retirement and hope he keeps our
3 dream alive by actually surfing every
4 morning and sailing every weekend."

5 *(Applause)*

6 MR. EVERROAD: Thank you, everybody.

7 MEMBER WORTHLEY: Of course, you could retire
8 like Leonard. He's at every meeting, so I don't know
9 what that means.

10 *(Laughter)*

11 MR. EVERROAD: I actually did retire last
12 December, and they kept me back for bad behavior for
13 another 90 days.

14 Thank you so much.

15 I mean it's been a real treat for me to be
16 spending — as I was sitting back there calculating,
17 half of my 34 years with the city, I've been involved
18 with mandate process. So it's been — I guess, when
19 you're having fun, it goes by pretty quickly.

20 So thanks so much for the recognition.

21 And I would like to recognize, you know, the
22 professional process that's been developed, and
23 particularly Paula's staff, the thorough work that they
24 do.

25 While we might not always agree with their

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1 interpretation, they've always been very professional to
2 work with, and that's been a real pleasure and made it
3 much easier to do our work.

4 Thank you again.

5 CHAIR BRYANT: Thank you so much.

6 *(Applause)*

7 MEMBER GLAAB: I'd just like to comment that
8 for the last four or five years, if not a little bit
9 longer, Glen and I are occasional seat mates. At least
10 we're on the same plane together. So I'll be — I'll
11 miss my good buddy traveling up and back and everything,
12 and I wish you the very best, Glen.

13 I know that, you know, Mayor Curry and I had an
14 opportunity to have a visit — he's a very good
15 friend — and I mentioned the quality person that you
16 are and the professional representation that you have
17 provided your city, and he concurred 100 percent that
18 you're a valued employee and that you will be missed and
19 that you are one of the good guys. So thank you so
20 much.

21 MR. EVERROAD: Thank you for those comments.

22 *(Applause)*

23 CHAIR BRYANT: So the Commission will now meet
24 in closed executive session pursuant to Government Code
25 Section 11126, subdivision (E), to confer with and

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1 receive advice from legal counsel for consideration and
2 action as necessary and appropriate upon the pending
3 litigation listed on the published notice and agenda;
4 and to confer with, and received advice from, legal
5 counsel regarding potential litigation.

6 The Commission will also confer on personnel
7 matters and a report from the Personnel Subcommittee
8 pursuant to Government Code Section 11126, subdivision
9 (A).

10 We will reconvene in open session in
11 approximately 15 minutes.

12 *(The Commission met in closed executive*
13 *session from 11:39 to 11:55 a.m.)*

14 CHAIR BRYANT: The Commission met in closed
15 executive session pursuant to Government Code
16 Section 11126, subdivision (E), to confer with and
17 receive advice from legal counsel for consideration and
18 action as necessary and appropriate upon the pending
19 litigation listed on the published notice and agenda and
20 potential litigation, and to confer on personnel matters
21 and a report from the Personnel Subcommittee, listed on
22 the published notice and agenda pursuant to Government
23 Code Section 11126, Subdivision (A)(1).

24 The Commission will reconvene in open session.

25 MS. HIGASHI: We're at item 17, *salary*

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1 *adjustment, Attorney to the Commission/Chief Legal*
2 *Counsel, Personnel Subcommittee.*

3 CHAIR BRYANT: Personnel Subcommittee?

4 MEMBER LUJANO: Yes, I can do that, I believe,
5 unless I mix them up again.

6 Good morning. The — to give you a quick
7 summary of item 17, the chief legal counsel currently is
8 at the CEA IV pay level and received a — the last time
9 the chief counsel received a pay increase was two years
10 ago.

11 She hasn't reached the top of her pay scale,
12 and based on her excellent work performance and her
13 duties and the fact that the Commission's budget can
14 absorb this salary adjustment, the Personnel
15 Subcommittee is recommending that we increase the salary
16 of the chief legal counsel by five percent.

17 This would actually require a motion, and the
18 motion would say, "I move to adjust the Chief Legal
19 Counsel's salary by five percent effective" the date
20 that would be agreed upon.

21 MEMBER CHIVARO: Okay. Yeah. I'll move that
22 the salary be adjusted five percent effective the 1st of
23 the month, April — May. Yeah. April.

24 MEMBER OLSEN: Second.

25 MEMBER CHIVARO: April 1st.

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1 CHAIR BRYANT: Is there any further
2 discussion?
3 (No response)
4 CHAIR BRYANT: There's been a motion and a
5 second.
6 Can you please call the roll?
7 MS. HIGASHI: Chivaro?
8 MEMBER CHIVARO: Aye.
9 MS. HIGASHI: Cox is out. Glaab?
10 MEMBER GLAAB: Aye.
11 MS. HIGASHI: Lujano?
12 MEMBER LUJANO: Aye.
13 MS. HIGASHI: Olsen?
14 MEMBER OLSEN: Aye.
15 MS. HIGASHI: Worthley?
16 MEMBER WORTHLEY: Aye.
17 MS. HIGASHI: Bryant?
18 CHAIR BRYANT: Aye.
19 MS. HIGASHI: Thank you. Motion is carried.
20 MS. CAMILLE SHELTON: Thank you.
21 MS. HIGASHI: Congratulations.
22 CHAIR BRYANT: With no further business to
23 discuss, I'll entertain a motion to adjourn.
24 MEMBER GLAAB: So move.
25 CHAIR BRYANT: All those in favor?

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(A chorus of "ayes" was heard.)

CHAIR BRYANT: The meeting is adjourned.

(Gavel sounded.)

(The meeting concluded at 12:00 p.m.)

—o0o—

REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified; and

That the foregoing proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer-aided transcription.

Dated: April 15, 2010



DEBRA P. CODIGA, CSR #5647
Certified Shorthand Reporter
State of California