



September 15, 2023

Mr. Joe Stephenshaw, Director
Department of Finance
State Capitol, Room 1145
Sacramento, CA 95814

Re: Commission on State Mandates: Report to the Director of Finance on
Workload Levels and Backlog Reduction Plan

Dear Mr. Stephenshaw:

Enclosed is the Commission on State Mandates' *2023 Report to the Director of Finance on Workload Levels and Backlog Reduction Plan*. This report satisfies the statutory requirement to submit an annual *Report to the Director of the Department of Finance*, in accordance with Provision 2 of Item 8885-001-0001 of Statutes 2023, chapter 43 (SB 101, Skinner).

Sincerely,

Heather Halsey
Executive Director

STATE *of* CALIFORNIA
**COMMISSION ON STATE
MANDATES**



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Office of Planning
and Research

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Public Member

Lee Adams
County Supervisor
County of Sierra

Renee Nash
School District Board Member
Eureka Union School District

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814
(916) 323-3562
www.csm.ca.gov

DIRECTOR OF FINANCE: 2023 REPORT ON WORKLOAD LEVELS AND BACKLOG REDUCTION PLAN

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Executive Summary

This report provides information on the Commission on State Mandates' (Commission's) workload levels and backlog reduction plan on a fiscal year basis.

A. Statutory Reporting Requirement

The 2023 Budget Act requires the Commission to report to the Director of Finance on workload levels and backlog. Specifically, it states:

The Commission on State Mandates shall, on or before September 15, 2015, and annually thereafter, submit to the Director of Finance a report identifying the workload levels and any backlog for the staff of the Commission.¹

This report satisfies that statutory reporting requirement.

B. Historic Reasons for the Backlog

The backlog resulted from several factors:

- 1984 – When the Legislature created the Commission, the Government Code allowed the filing of test claims on statutes and regulations going back to 1975, with no statute of limitations.
- 2002 – Statutes 2002, chapter 1124 imposed a three-year statute of limitations for the filing of test claims. It also provided a one-year grandfather clause to file test claims on statutes and executive orders going back to 1975, resulting in 51 new test claims filed in 2002-2003, and 23 test claims filed in 2003-2004.
- From fiscal year 2002-2003 to 2008-2009 the Commission's position authority was reduced from 17 PYs to 10.5 PYs.²
- 2004 – AB 2856 imposed a new statute of limitations of one year from the effective date of a statute or executive order, or the date of first incurring costs, resulting in 22 test claims being filed in the 2003-2004 fiscal year.
- 2004-2009 – Through AB 2851, 2855, 138, and 1805 and SB 512 and 1895, the Legislature directed the Commission to reconsider 14 test claim decisions, which the Commission did. In 2009, the Third District Court of Appeal found the reconsideration statutes unconstitutional and directed the Commission to set several reconsideration decisions aside.
- *National Pollutant Discharge Elimination System (NPDES) Permit Claims.* Prior to 2010, Government Code section 17516(c) defined 'executive orders' to exclude any order, plan, or regulation issued by the State Water Resources Control Board or any regional water quality control board. Therefore, NPDES permits were not subject to

¹ Statutes 2022, chapter 43 (AB 154, Skinner), Item 8885-001-0001, Provision 2.

² Beginning fiscal year 2013-2014 the Commission's staff was increased by two PYs to 12.5 and beginning fiscal year 2019-2020 was increased by one-half PY to 13, and beginning fiscal year 2022-2023, was increased by three PYs to 16.

mandate determination. The courts ruled that Government Code section 17516(c) was unconstitutional and local agencies have since filed 46 NPDES permit test claims. The Commission decided five of the first of these claims filed. However, litigation on those decisions addressing the threshold issue of whether NPDES permits impose state or federal mandates, was pending in the courts since June 2010 and the then remaining 13 claims were placed on inactive status pending the California Supreme Court decision on this issue, which was issued on August 29, 2016. During that time, one of the inactive claims was withdrawn because it was a duplicate claim. Since 2016, local agencies have filed 28 additional NPDES test claims. In 2021, one of the new NPDES test claims was withdrawn because the claimant and the San Francisco Bay Regional Water Quality Control Board reached a settlement and one was dismissed because it was not timely filed. In 2022, a new NPDES test claim was filed. In 2023, one NPDES claim was partially approved by the Commission and one of the previously decided NPDES claims was remanded by the court. As of July 1, 2023, 37 NPDES test claims are tentatively set for hearing, and constitute a backlog of test claims. These matters raise complex issues of law and fact and the records for each of them can reach up to 200,000 pages. As a result, these claims are taking longer to complete than typical test claims filed on a statute or regulation. All pending stormwater litigation resolved in 2022-2023, but we anticipate additional stormwater litigation on issues not yet addressed by the courts.

C. Staffing and Workload

As of July 1, 2023, the Commission has a pending caseload of 44 test claims,³ two parameters and guidelines,⁴ and one statewide cost estimate (SCE). These items have statutory deadlines for completion and the Commission prioritizes them over other items.

Also currently pending is one incorrect reduction claim (IRC) which was filed in fiscal year 2022-2023 and is tentatively set for hearing on March 22, 2023. There are no parameters and guidelines amendments (PGA) or requests for mandate redetermination (MR) currently pending. Unlike test claims, parameters and guidelines,

³ Two of these claims were filed in fiscal year 2022-2023 but were not deemed complete and issued for comment until after July 1, 2023. 42 of the pending claims (including one test claim to be reconsidered) are local agency claims, 37 of which are regarding National Pollutant Discharge Elimination System (NPDES) permits. There are also two school district test claims currently pending.

⁴ One of these parameters and guidelines was previously on inactive status pending the outcome of litigation on the underlying Test Claim Decision. It was remanded to the Commission by the Second District Court of Appeal on May 11, 2023, was decided on May 26, 2023, and the Parameters and Guidelines are set for hearing on October 27, 2023.

and SCEs, these matters do not have a statutory deadline for completion, but the Commission must hear them within a reasonable amount of time from the date of filing.⁵

For the 2022-2023 fiscal year, the Commission had 16 PYs, including 3 new PYs approved in the 2022-2023 budget. However, the Commission experienced significant turn-over in four existing positions and vacancies in the three new positions. For two of these positions, the Commission had to recruit twice within the FY, due to the first successful candidates for those positions not finding a good fit at the Commission. In other words, for those seven positions the Commission completed nine recruitments in the FY, one of them for the Commission's sole HR position. Specifically, the Commission's Attorney I was vacant for 1 month, the new Information Technology Specialist I was vacant for a total of 8 months in its first FY, the Office Technician was vacant for 5 months, the Associate Budget Analyst for 5.5 months, the AGPA-Accounting about 2.5 months, new AGPA-Procurement about 2.5 months, and the new AGPA-HR just under 2 months. In sum, during the FY there were just under 13.75 PYs filled for the year and 25 percent of the Commission's attorneys, the entire fiscal unit, and the Information Technology Specialist I, Office Technician, and the AGPA-HR are new to the Commission.

During the 2022-2023 fiscal year, the Commission completed four test claims, one test claim amendment, one parameters and guidelines, three SCEs, one PGA, three IRCs, and one Order to Set Aside a Test Claim Decision, for a total of 14 matters heard by the Commission, in addition to completing one regulation package, substantial work on several active litigation matters, administrative (especially recruitment and onboarding and providing back-up for the duties of the vacant positions), and other workload. The Commission had five cases pending in the courts, which required significant staff time to brief and argue. Many of the matters being litigated in 2022-2023 addressed complex issues regarding constitutional law, federal law, and issues of jurisdiction and procedure and many were issues of first impression. Additionally, Commission staff continued to focus its efforts on working on draft proposed decisions for the stormwater claims.

D. Backlog Reduction Plan

As of July 1, 2023, there are 44 test claims pending. 42 of the pending claims (including one test claim to be reconsidered) are local agency claims, 37 of which are regarding National Pollutant Discharge Elimination System (NPDES) permits. The other two are school district test claims.

Ten of the NPDES claims were placed on inactive status pending the outcome of litigation in the California Supreme Court addressing the issue of whether the permits imposed a federal mandate. The Supreme Court issued its decision on August 29, 2016, and the 37 NPDES claims were then tentatively set for hearing though litigation continued on several major cross-cutting issues. They are currently set or tentatively set for hearing between September 22, 2023 and July 24, 2026. These claims are large, complex, raise several legal issues, some of which have not yet been

⁵ *Horner v. Board of Trustees of Excelsior Union High School District of Los Angeles* (1964) 61 Cal.2d 79, 86.

litigated, and are not suited for a speedy determination. Of the five pending non-NPDES local agency test claims, one was filed in fiscal year 2021-2022 and is set for hearing on September 22, 2023; three were filed in fiscal year 2022-2023 and are set or tentatively set for hearing between September 22, 2023 and July 24, 2024. The fifth non-NPDES local agency test claim was remanded to the Commission by the court. The Order to Set Aside the Test Claim Decision was adopted on January 27, 2023⁶ and the Test Claim was set for hearing for September 22, 2023, but was postponed to the December 1, 2023 hearing at the request of the claimant.

The two pending K-12 school district test claims were filed on May 12, 2023 and May 23, 2023, and are tentatively set for hearing on March 22, 2024 and May 24, 2024.

Of the two pending parameters and guidelines, one is set for hearing on September 22, 2023 and one is set for hearing on October 27, 2023.

The single pending SCE is tentatively set for hearing on January 26, 2024. SCEs are now tentatively set for hearing at the earliest possible date after the Commission approves the test claim, adopts the parameters and guidelines, and receives claims data from the Office of the State Controller (Controller). The parameters and guidelines and SCE caseloads are not backlogged.

With regard to MRs, there are zero pending as of July 1, 2023. Therefore, there is no MR backlog.

Additionally, there are zero PGAs pending, therefore, there is no PGA backlog.

Finally, as of July 1, 2023, there is currently one IRC pending which was filed in fiscal year 2022-2023 and is tentatively set for hearing on March 22, 2024. Therefore, there is no IRC backlog.

Based on the above, the only backlogged matters remaining are the 44 test claims and this is primarily due to the NPDES permit test claims being complex and voluminous.

Because there is a statutory duty to adopt an SCE within 12-18 months of the filing of a test claim, test claims, parameters and guidelines, and SCEs take priority over all other matters. The next priority for the Commission is resolution of MRs and PGAs, as these have a material effect on all eligible claimants for the program and for the state. IRCs have the lowest priority, since they affect only one local agency and have no statutory deadline for hearing.

Hearing IRCs with crosscutting issues first is one way that the Commission has helped to spur informal resolution of these claims between the claimants and the State Controller's Office (Controller). In 2015, there was a backlog of 41 IRCs and as of July 1, 2023, there is only one IRC pending. Though most IRCs are not suitable for consolidation, since they pose unique issues of fact or law and so must be analyzed individually, to the extent that there are cross-cutting issues, staff is analyzing and

⁶ Pursuant to the unpublished opinion issued April 29, 2022 in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgement and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS.

presenting them together for hearing, as much as is feasible, for purposes of efficiency and consistency.

Based on the tentatively scheduled hearing dates for the currently pending IRC, the Commission will likely hear IRCs filed in 2023-2024 within one year of its filing date. This represents a significant improvement in speediness over prior years. However, because IRCs have the lowest priority for hearing out of all Commission matters, its scheduling may be pushed to a later date if other items with higher priority, such as test claims, MRs, and PGAs are filed or if there is a temporary (such as staff turnover or furloughs) or permanent reduction in staff. Whether the completion of the currently pending IRC takes less time or more time than the staff expectation of approximately March 22, 2024 will depend on a variety of factors discussed further in this report.

The temporary elimination of the test claim backlog in 2014-2015 (while the NPDES claims were on inactive status) enabled staff to redirect its efforts to the IRC backlog, thereby eliminating it, and has allowed new (non-NPDES) test claim filings to be immediately analyzed and set for hearing upon closure of the record. Beginning in the 2013-2014 fiscal year, Commission staff started tracking how long it takes to complete each test claim, excluding the NPDES permit claims, from the filing date to the adoption of the SCE. Test claims that are amended, severed, or consolidated restart the clock for the statutory deadline.⁷ Additionally, pursuant to the Commission's regulations, extensions of time, postponements, continuances, and time for preparing joint reasonable reimbursement methodologies (joint RRM)s requested by the parties do not count against the statutory deadline.⁸ Therefore, to improve transparency with regard to how the mandates process is working, Commission staff has also begun tracking the time for delays requested by the parties and deducting that time from the time it takes to adopt an SCE once a test claim is filed.⁹ For non-NPDES test claims filed since July 1, 2013, the Commission has been adopting test claim decisions within an average of 254 days (not including the average of 49 days tolled) and SCEs within an average of 429 days from the filing of the test claim (not including the average of 306 days tolled) from the date of the test claim filing.¹⁰

⁷ Title 2, California Code of Regulations, Section 1183.18.

⁸ Title 2, California Code of Regulations, Section 1183.18.

⁹ See Exhibit A.

¹⁰ Pursuant to Commission regulations, the following days shall be tolled and may not be counted toward the date on which a statewide cost estimate must be adopted by the Commission: days representing extensions of time and postponements of hearings granted to the parties (section 1183.18(a)(2)); days following a test claimant's submission of incomplete information, from the date on which Commission staff returns the incomplete information to the claimant up to the date on which the Commission receives complete information from the test claimant (section 1183.18(a)(3)); and days between the effective date of the parameters and guidelines and the date the initial reimbursement claims are due to the Office of the State Controller (section 1183.18(a)(8)).

E. Administrative Workload

The Commission must perform all of the general duties of state agencies relating to human resources, budget, accounting, procurement, and maintaining and providing access to public records. In addition, Commission staff must also fulfill the specific statutory duty of the executive director to “keep a full and true record of all proceedings of the Commission . . .” pursuant to Government Code 17530.

However, during a significant portion of the 2022-2023 fiscal year, several administrative staff positions were vacant. Remaining staff worked to back-up the duties of the vacant positions and management worked to keep up with general human resources, information technology, budget, accounting, procurement, and recruitment for nine vacancies in seven positions. Several plans, policies, and protocols pertaining to telework, office reopening, and health and safety measures, were prepared, adopted, and implemented and then revised, re-adopted, and implemented numerous times as conditions, requirements, and guidance shifted. Doing so involved significant time and effort from all Commission staff.

2023 REPORT TO FINANCE AND BACKLOG REDUCTION PLAN

I. Background

A. Constitutional and Statutory Requirements for the Mandate Process

Article XIII B, section 6 of the California Constitution requires the state to provide a subvention of funds to reimburse local government for the costs of new programs or increased levels of service mandated by the state. Because the Legislature found that the State Board of Control had failed to “adequately and consistently resolve complex legal questions involved in the determination of state-mandated costs” it created the Commission to succeed the Board of Control in making determinations on whether new statutes or executive orders are state-mandated programs within the meaning of article XIII B, section 6.¹¹ Specifically, the Commission was established to “relieve unnecessary congestion of the judicial system . . .,” render sound quasi-judicial decisions, and provide an effective means of resolving disputes over the existence of state-mandated local programs.¹²

The Commission’s process provides the sole and exclusive procedure for local governments (claimants, which may include cities, counties, special districts, K-12 school districts, and community college districts) to seek reimbursement for costs mandated by the state as required by article XIII B, section 6 of the California Constitution.¹³ The Commission is required to hear and decide claims filed by local governments that they are entitled to be reimbursed by the state for costs mandated by the state.¹⁴

Under the mandates process, local governments may file “test claims” with the Commission alleging that statutes, regulations, and executive orders enacted by the Governor, the Legislature, or state agencies, impose new programs or increased levels of service upon local entities. A “test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state.¹⁵

State law requires the Commission to adopt procedures to ensure that it adopts a statewide cost estimate (SCE) within 12 to 18 months after receipt of a test claim, when the Commission determines that a reimbursable mandate exists.¹⁶ Prior to adopting an SCE for a mandated program, the Commission must first hear and decide the test claim and the parameters and guidelines, which may include reasonable reimbursement methodologies (RRMs) pursuant to Government Code sections 17557 (RRMs in

¹¹ Government Code section 17500.

¹² Government Code section 17500.

¹³ Government Code section 17552.

¹⁴ Government Code section 17551.

¹⁵ Government Code section 17521.

¹⁶ Government Code section 17553.

proposed parameters and guidelines) or 17557.1 (joint RRM). The parameters and guidelines is the document that specifies the activities that are reimbursable, including the scope of the activities and how local government may claim reimbursement. Without specific understanding of the nature and scope of the reimbursable activities, any cost estimate would be highly speculative. Based on the above, the statute requires the Commission to adopt test claim decision, parameters and guidelines, and SCE within 12 to 18 months of a test claim filing.

For RRM proposed for inclusion in the parameters and guidelines pursuant to Government Code sections 17557 and 17518.5, the Commission is required to make additional factual determinations, based on substantial evidence in the record, that the proposed formula or unit cost reasonably reimburses all eligible claimants' actual costs mandated by the state. The proposed RRM must be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs; and shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner. If the Commission makes these findings and adopts an RRM in the parameters and guidelines, then the claiming is based on the adopted formula or unit cost, in lieu of requiring detailed documentation of actual costs incurred.

The Commission's adoption of an RRM in parameters and guidelines pursuant to Government Code sections 17557 or 17518.5 streamlines the claiming process and reduces or eliminates auditing issues on reimbursement claims filed with the Controller, and thus would presumably also reduce the number of incorrect reduction claims (IRCs) filed with the Commission. The Legislative Analyst's Office (LAO) originally proposed the RRM process for these reasons. However, the process of adopting an RRM pursuant to Government Code 17557 when adopted the parameters and guidelines increases the workload of the Commission on the front end, by requiring the additional factual finding that the proposal reasonably reimburses all eligible claimants' actual costs mandated by the state as required by article XIII B, section 6 of the California Constitution. Analyzing such proposals requires significant staff time, in some instances more time than was required for the underlying test claim analysis.

As of July 1, 2023, the Commission has adopted five, denied five, and dismissed four withdrawn RRM proposals submitted pursuant to 17557- most during fiscal years 2013-2014 through 2015-2016. However, Statutes 2016, Chapter 31, amended Government Code section 17518.5 to require that RRM "based in whole or in part on costs included in reimbursement claims submitted to the Controller, only use costs that have been audited by the Controller" and no RRM have been proposed since. Since this language requiring audited costs sunsetted effective July 1, 2019, there may be RRM proposed for inclusion in in parameters and guidelines in the future.

The joint RRM process, under Government Code sections 17557.1 and 17557.2, allows the claimant and the Department of Finance (Finance), with broad support from a wide range of affected local governments, to jointly develop an RRM and statewide estimate

of costs¹⁷ for adoption by the Commission. The parties are required to notify the Commission of their intent to proceed under the joint RRM process within 30 days of the adoption of the test claim decision. To date, the Commission has only ever approved one joint RRM, and one extension of that joint RRM.

The Commission is also required to hear and decide other claims that affect the workload of the Commission. These include: 1) IRCs filed by local governments alleging that the Controller has incorrectly reduced reimbursements; 2) mandate redeterminations (MRs); 3) proposed amendments to previously adopted parameters and guidelines (PGAs); and 4) review of the Controller's claiming instructions. There is no statutory timeframe for completing IRCs, MRs, PGAs, or the review of claiming instructions. However, an administrative agency is required to hold a hearing within a reasonable time when the statutes governing the process do not fix a time limit to conduct the hearing.¹⁸ The ability of the Commission to hear and decide these matters within a reasonable timeframe is affected by the number of pending matters in the initial mandate determination process, as well as pending litigation and current staffing levels.

B. Historic Reasons for the Backlog

The backlog resulted from several factors:

- 1984 – When the Legislature created the Commission, the Government Code allowed the filing of test claims on statutes and regulations going back to 1975, with no statute of limitations.
- 2002 – Statutes 2002, chapter 1124 imposed a three-year statute of limitations for the filing of test claims. It also provided a one-year grandfather clause to file test claims on statutes and executive orders going back to 1975, resulting in 51 new test claims filed in 2002-2003, and 23 test claims filed in 2003-2004.
- From fiscal year 2002-2003 to 2008-2009 the Commission's position authority was reduced from a high of 17 PYs to a low of 9.5 PYs.¹⁹
- 2004 – Statutes 2004, chapter 890 imposed a new statute of limitations of one year from the effective date of a statute or executive order, or the date of first incurring costs, resulting in 22 test claims being filed in the 2003-2004 fiscal year.
- 2004-2009 – Through AB 2851, 2855, 138, and 1805 and SB 512 and 1895, the Legislature directed the Commission to reconsider 14 test claim decisions, which the Commission did. In 2009, the Third District Court of Appeal found the

¹⁷ Not to be confused with a statewide cost estimate (SCE).

¹⁸ *Horner v. Board of Trustees of Excelsior Union High School District of Los Angeles* (1964) 61 Cal.2d 79, 86.

¹⁹ Beginning fiscal year 2013-2014 the Commission's staff was increased by two PYs to 12.5, beginning fiscal year 2019-2020 was increased by one half PY to 13, and beginning fiscal year 2022-2023, was increased by three PYs to 16.

reconsideration statutes unconstitutional and directed the Commission to set several reconsideration decisions aside.

- 2010 to present – *National Pollutant Discharge Elimination System (NPDES) Permit Claims*. Prior to 2010, Government Code section 17516(c) defined ‘executive orders’ to exclude any order, plan, or regulation issued by the State Water Resources Control Board or any regional water quality control board, thus prohibiting test claims on NPDES permits issued by the state or regional boards. Government Code section 17516(c) was ruled unconstitutional by the courts and, local agencies have since filed 46 NPDES permit test claims. The Commission decided five of these claims and one of these claims was withdrawn because it was duplicative. However, litigation on those decisions (a Los Angeles permit case and a San Diego permit case), addressing the threshold issue of whether NPDES permits impose a state or a federal mandate, whether the activities required by the permits impose a new program or higher level of service and, if so, whether the claimants have fee authority sufficient to fund the costs of the program, among other issues, was pending in the courts from June 2010 to October 2022 and the remaining NPDES claims were placed on inactive status for several years.

On August 29, 2016, the California Supreme Court decided the Los Angeles case, *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, and upheld the Commission’s finding that the permit imposed state-mandated requirements. The court reversed the appellate decision: “We reverse, concluding that no federal law or regulation imposed the conditions nor did the federal regulatory system require the state to impose them. Instead, the permit conditions were imposed as a result of the state’s discretionary action.” The court remanded the matter to the lower courts to address whether the state-mandated requirements in the permit in question in that case impose a new program or higher level of service and whether there is fee authority sufficient to fully fund certain requirements of the permit, as was determined by the Commission.

On January 4, 2021, the Second District Court of Appeal issued a published decision in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, finding that the permit conditions in the Los Angeles case (installing and maintaining trash receptacles at transit stops and inspecting commercial sites, and industrial and commercial facilities) imposed a new program or higher level of service because the requirements were uniquely imposed on local government and provided a service to the public. The court further held that the claimants have regulatory fee authority under their police powers sufficient as a matter of law to cover the costs of the inspection requirements and, thus, there are no costs mandated by the state for the inspection requirements pursuant to Government Code section 17556(d). However, based on existing statutes and article XIII D, section 6 of the California Constitution, the court found that the claimants did not have the authority to impose fees for the trash receptacle requirements on either transit riders or on property owners and, thus, the trash receptacle requirements are reimbursable under article XIII B, section 6.

The San Diego case also raised similar issues, and some new ones. The San Diego case addressed requirements to collaborate, street sweeping and reporting, conveyance system cleaning and reporting, educational component requirements,

watershed activities and collaboration on the Watershed Urban Runoff Management Program, the Regional Urban Runoff Management Program, and program effectiveness assessment and long term assessments. On December 19, 2017, the Third District Court of Appeal issued a published decision reversing the decision of the trial court and upholding the Commission's decision on the state mandate issue. (*Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661.) The court determined that the trial court used the wrong standard and so the court applied the standard recently upheld by the California Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749. Under the Supreme Court's test, the permit terms are mandated by the federal government when they are expressly required by federal law, or were adopted by the Regional Board as only means by which the federal "maximum extent practicable" standard can be met. In this case, the court agreed with the Commission's Test Claim Decision that the challenged activities are not expressly required by federal law. The court further found that although the activities may have been "necessary" to meet the maximum extent practicable standard, as argued by the State, nowhere in the record did the San Diego Regional Board find its conditions were the only means by which the permittees could meet the standard. Thus, the court determined that the San Diego Regional Board exercised true discretion when imposing the new requirements and that the requirements were mandated by the state. The court of appeal did not reach the new program or higher level of service and fee authority issues, and remanded the matter to the trial court to determine those issues.

On October 24, 2022, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, finding that the activities required in the San Diego case imposed a new program or higher level of service, and except for the street sweeping requirement, the remaining activities result in costs mandated by the state. With respect to the street sweeping requirement, the court found that the condition expressly requires permittees to collect refuse and, thus, a fee for collecting refuse is exempt from article XIII D's voter approval requirement, and only the voter protest provisions apply. Consistent with its ruling in *Paradise Irrigation Dist.*, the court concluded that the permittees have sufficient authority to levy a fee for the street sweeping condition within the meaning of Government Code section 17556(d). However, the court found that the remaining requirements require voter approval before fees can be imposed pursuant to article XIII D of the California Constitution and, under these circumstances, local agencies do not have the authority to impose fees within the meaning of Government Code section 17556(d). Thus, there are no costs mandated by the state for the remaining activities of collaboration, street sweeping reporting, conveyance system cleaning and reporting, educational component requirements, watershed activities and collaboration on the Watershed Urban Runoff Management Program, the Regional Urban Runoff Management Program, and program effectiveness assessment and long term assessments, and reimbursement is required by article XIII B, section 6 for these activities.

The 37 remaining NPDES test claims have now been tentatively set for hearing, thus creating a new backlog of test claims. These matters raise complex issues of law and fact and the records for each of them can reach up to 200,000 pages. In addition,

several of the issues raised are currently being litigated, as discussed above. As a result, they will take longer to complete than typical test claims.

II. Commission Workload Considerations

A. Workload Completed in 2022-2023

In 2022-2023, the Commission completed four test claims, one test claim amendment, one parameters and guidelines, three SCEs, one PGA, and three IRCs. The Commission also had five cases pending in the courts during 2022-2023 that required significant staff time to brief and argue. Many of the claims completed and litigation pending in 2022-2023 addressed complex issues regarding constitutional law, federal law, and issues of procedure and many of these issues were issues of first impression.

B. Position Authority

Like many state agencies, during the long-term budget crisis of 2001-2002 through 2012-2013, Commission staffing levels decreased significantly. This was a significant contributor to the Commission's backlog. In the 2001-2002 to 2003-2004 budget years, Commission staff was drastically reduced from a high of 17 positions to a low of 9.625 positions. Around the same time, Statutes 2002, chapter 1124 imposed a statute of limitation for filing a test claim and included a grandfather clause, allowing the filing of test claims on statutes, regulations and executive orders dating back to 1975 until September 30, 2003. Thus, a great number of large and complex test claims were filed without sufficient staff to analyze them resulting in a significant backlog of claims. In 2006, the Legislature provided the Commission with three limited-term positions to eliminate the backlog. Since those positions were very difficult to fill, one was eliminated and two were made permanent in 2007. However, as a result of budget cuts in 2008 and 2009, the two new permanent positions were eliminated. Finally, for most of the time from 2008-2009 to 2012-2013, Commission staff, like most state employees, were subject to furlough and personal leave programs, which effectively reduced personnel hours by an additional five to fifteen percent throughout those years.

According to the Bureau of State Audits (BSA): "despite the State's budget issues, cutting staff who determine state mandates has been shortsighted. Specifically, such actions over the last few years have contributed to delays related to stalled test claims that allow the buildup of millions of dollars of potential claims that the State is constitutionally required to reimburse."²⁰

Based on these facts, the Commission submitted a budget change proposal for 2013-2014, which was approved and established two new positions: an attorney III and a senior legal analyst. Based on another approved budget change proposal for 2018-2019, beginning July 1, 2019, the Commission had a half-time associate governmental program analyst position to perform the Commission's human resources-related duties, raising the total PYs to 13. And, beginning January 24, 2020, the Commission reclassified one of three attorney III positions to an attorney IV position to help the Commission to retain attorneys with mandate law experience, which is

²⁰ California State Auditor Report 2009-501, page 22.

specialized and which most non-Commission attorneys lack. Due to the lack of administrative staff, however, supervisors and managers have been required to personally perform staff-level administrative duties which has slowed down the mandate determination process. As a result, the Department of Finance and the Legislature approved a budget change proposal for the 2020-2021 budget for 1.5 additional associate governmental program analyst positions to perform human resources, procurement, and budgeting duties. Unfortunately, due to the increased costs and a projected decrease in revenues resulting from the COVID-19 pandemic, Finance withdraw this proposal like those of most other agencies. However, in 2021, when both of the Commission’s half time AGPA (HR and Procurement) positions were vacated, the Commission consolidated them into a single full-time associate budget analyst position, since the Commission had no staff level employees to perform budget drills. And, in 2021-2022, Department of Finance and the Legislature approved a budget change proposal for two additional associate governmental program analyst positions to perform human resources and procurement, and one information technology specialist to perform some of the IT duties of the Commission, raising the total PYs to 16 effective July 1, 2022.

Beginning July 1, 2022, the Commission has authority for 16 positions: one executive director (exempt), one chief legal counsel (CEA B), one assistant executive director (SSM II), one attorney IV, two attorney IIIs, one attorney I, one senior information systems analyst II, one senior information systems analyst I, one senior legal analyst, five associate governmental program analyst positions (1 each for Program, HR, Procurement, Accounting, and Budget) and one office technician.

Administration

Exec Director	1.0	1.0
Atty IV	1.0	1.0
C.E.A. B (Attorney)	1.0	1.0
Atty III	2.0	2.0
Staff Svc Mgr II-Mgrl	1.0	1.0
Info Tech Spec II	1.0	1.0
Atty	0.9	1.0
Info Tech Spec I	0.4	1.0
Sr Legal Analyst	1.0	1.0
Assoc Budget Analyst	0.5	1.0
Assoc Govtl Prog Analyst	3.2	4.0
Ofc Techn-Typing	0.5	1.0
Temporary Help	-	0.5

TOTALS, AUTHORIZED POSITIONS

13.5 16.5

In addition to the small number of positions, there has been significant turnover. Out of a total of four staff attorney positions, one experienced turnover in 2022-2023, one in 2021-2022, one in 2020-2021, three in 2019-2020, and two in 2017-2018. These are the primary positions involved in preparing the legal analysis of proposed mandate decisions for hearing. The legal practice at the Commission is very specialized. There are only a handful of mandates law attorneys in the state and the work is very complex,

detail oriented, and the analyses are lengthy. To be successful, an attorney must be comfortable with constantly learning new areas of law and developing a deep understanding of the programs, laws, and funding involved, which may involve several complex issues, all of which need to be flushed out and explained concisely in plain English. The research is very academic, painstakingly detail-oriented, and solitary, and the office tends to be very quiet, which does not suit every attorney. Finding attorneys who possess these skills and an academic temperament such that they can enjoy digging deeply as they must, can timely produce voluminous and complex analyses as is statutorily required, and can work quietly for extended periods of time with little interaction as is often necessary, is a constant challenge for the Commission. As a result, these positions have significant recruitment and retention challenges. In addition to the challenges of recruiting an attorney with the requisite skills and temperament, there has been a perceived lack of promotional opportunities at the Commission, and there is competition with the private sector and with local agencies and other state agencies that have greater promotional opportunities. Once an attorney promotes to attorney III, there has been little room for advancement at the Commission unless the attorney chose to pursue an executive position as chief legal counsel or executive director. In 2019-2020, the Commission reclassified one attorney III position as an attorney IV position, for recruitment and retention purposes and due to the complexity of the work and the fact that Commission attorneys litigate their own matters all the way up to the California Supreme Court in most cases. Commission staff anticipates that this re-class will help to reduce the trend of experienced Commission attorneys separating from the Commission to promote elsewhere.

Table A. shows completed workload and position authority for the past five fiscal years. Table A. includes matters heard by the Commission as well as matters withdrawn or dismissed prior to a hearing since significant staff resources are also committed to matters that are withdrawn or dismissed as this usually occurs after the draft proposed decision, and often after the proposed decision, have been issued by Commission staff. This table does not reflect work completed for litigation, which has seen a recent uptick; regulations; or special projects.

**Table A. Commission Decision Making and Position Authority
2018-2019 to 2022-2023²¹**

²¹ This table does not reflect work completed for litigation, regulations, and special projects, nor does it reflect staff turnover. Substantial resources were also expended on five litigation matters, one Order to Set Aside a Test Claim Decision, one regular regulation package, recruitment, and workforce, succession, strategic, and facilities planning. Moreover, 25 percent of the Commission's attorneys in 2022-2023 were new to the Commission, as were approximately 63 percent of the administrative staff. New Commission attorneys need to first work on less complex mandates claims as part of their on-the-job training before beginning work on NPDES claims and new administrative staff require time for onboarding and training and higher levels of supervision than their more experienced counterparts.

Matters Completed	2018-2019	2019-2020	2020-2021	2021-2022	2022-2023
Test Claims	5	2	5	3	5 ²²
Parameters and Guidelines	2	2	2	2	1
Parameters and Guidelines Amendments	0	2	0	1	1
Requests for Reconsideration	0	0	0	0	0
Statewide Cost Estimates	1	2	2	2	3
Requests to Review Claiming Instructions	0	0	0	0	0
Requests for Mandate Redetermination	0	2	0	0	0
Requests for Mandate Redetermination to be Amended, Set Aside, or Reinstated, as Directed by the Legislature or Court Action	0	1	0	0	0
Requests for Mandate Redetermination Reconsideration Based on Court Action	0	1	0	0	0
Incorrect Reduction Claims	4	1	11	4	3
Appeal of Executive Director Decisions	0	0	0	0	0
Order to Set Aside a Test Claim, Parameters and Guidelines, or Incorrect Reduction Claim Decision	0	1	0	0	1
Personnel Years	12.5	13	13	13	16

C. Pending Workload

The Commission's current caseload consists of: test claims, parameters and guidelines, SCEs, IRCs, MRs, and PGAs. Workload also consists of regulatory actions, litigation, and inquiries from the Legislature and state agencies, as well as administrative workload including budget, procurement, human resources, public records, and public meetings requirements.

Table B. Pending Workload as of June 30, 2023²³

Type of Action	Number Pending
Test Claims	44
Incorrect Reduction Claims	1

²² This includes one test claim amendment pursuant to the court's writ of mandate.

²³ You can find the current status of the Commission's pending caseload here:

<https://csm.ca.gov/pending-caseload.shtml>

Type of Action	Number Pending
Proposed Parameters and Guidelines	2
Proposed Parameters and Guidelines Amendments	0
Mandate Redeterminations	0
Statewide Cost Estimates	1
Litigation Matters Pending	2
Regulatory Actions	0
Responding to inquiries and audits from the Legislature, LAO, BSA, and other state and local agencies	Ongoing ²⁴

Test Claims

As of July 1, 2023, there are 44 test claims pending and the Commission's test claim caseload is backlogged due to the NPDES permit test claims. Since 2013, for all non-NPDES permit test claims filed, Commission staff have analyzed them as soon as the comment and rebuttal periods are complete and the record is closed and are set for hearing as soon as possible thereafter. Table C. shows the pending test claim filings by fiscal year and claimant type.

Table C. Pending Test Claims by Fiscal Year of Filing and Claimant Type

Filing Date by Fiscal Year	School District (K-14)	Local Agency	Total
2010-2011	0	6	6
2011-2012	0	1	1
2012-2013	0	0	0
2013-2014	0	2	2
2014-2015	0	1	1
2015-2016	0	1	1
2016-2017	0	2	2
2017-2018	0	24	24 ²⁵
2018-2019	0	0	0
2019-2020	0	0	0
2020-2021	0	0	0
2021-2022	0	1	1
2022-2023	2	4	6
Totals	1	41	44

²⁴ The Commission regularly responds to inquiries from the Legislature, LAO, and other state and local agencies regarding mandates. The Commission is also under audit at nearly all times including purchase authority accreditation audits, SPB audits, and cyber security audits.

²⁵ This includes one non-NPDES Local Agency Test Claim originally filed in 2019-2020, which was decided by the Commission on March 22, 2019 and remanded to the

Parameters and Guidelines

As of July 1, 2023, there is one parameters and guidelines that had been inactive pending court action on the underlying test claim which is now active. As noted above, parameters and guidelines are a high priority for the Commission since an SCE cannot be adopted until after claims have been filed following adoption of the parameters and guidelines and issuance of the Controller's claiming instructions. Generally, the most common reasons for delay of these items include litigation on the test claim decision, disputes regarding the activities claimed to be reasonably necessary to comply with the mandate, pending agreements between the parties on a RRM, or pending requests by one of the parties to include an RRM in the parameters and guidelines. Table D shows the pending parameters and guidelines. Commission staff, following the backlog reduction plan, have been expediting all parameters and guidelines immediately upon an approved or partially approved test claim. Therefore, parameters and guidelines can be heard as soon as two Commission hearings after the test claim decision is adopted, thus preventing a backlog in parameters and guidelines.

Table D. Pending Parameters and Guidelines by Fiscal Year of Test Claim Filing and Claimant Type

Year Test Claim Decision Adopted	School District (K-14)	Local Agency	Total
2022-2023	0	2	2
Totals	0	2	2

Statewide Cost Estimates

Existing law requires the Commission to adopt a SCE within 12 to 18 months of a test claim filing, if the Commission determines that a state mandate exists. Generally, the Commission's practice is to use actual reimbursement claims filed by the claimants to develop the SCE, because prior attempts to prepare SCEs using other data provided no useful information. Though not perfect, using actual reimbursement claims data does provide useful information that brings the estimate much closer to the actual costs than in past SCEs, which did not rely on actual claims. Moreover, staff is able to include assumptions in the SCEs, based upon issues that are addressed in the test claim or parameters and guidelines decisions, or that arise in the claiming process which can help provide a context for the numbers and may be useful in the decision making process. The Controller develops claiming instructions within 90 days after the adoption of parameters and guidelines. Claimants have 120 days from the release of the claiming instructions to file claims for the initial period of reimbursement. However, if reimbursement is based on a uniform cost, it may be possible to prepare the SCE before reimbursement claims have been filed, since costs can be more accurately predicted using the formula. Commission staff typically set SCEs for the first hearing after the claims data is received from the Controller which is typically 7 to 9 months after

Commission by the court, and is currently set for hearing on December 1, 2023, due to postponement by the request of the claimant.

the adoption of parameters and guidelines. Commission staff has also begun preparing SCEs when a PGA has been adopted (which may be triggered by a request for a PGA or mandate redetermination) that may change the state’s liability due to a clarification of the mandated program, a change in reimbursement method, or a subsequent change in law. Table E. shows the current SCE caseload pending before the Commission as of July 1, 2023.

Table E. Pending Statewide Cost Estimates by Fiscal Year and Claimant Type

Fiscal Year Parameters and Guidelines Adopted	School District (K-14)	Local Agency	Total
2022-2023	0	1	1
Totals	0	1	1

Incorrect Reduction Claims (IRCs)

The IRC caseload is not backlogged. As of July 1, 2023, there is one IRC pending alleging \$2,295,922 in incorrect reductions to mandate reimbursement claims for the *California Assessment of Student Performance and Progress (CAASPP)* program. Table F. shows the pending IRC caseload by fiscal year that the claim was filed and claimant type, as of July 1, 2023.

Table F. Pending Incorrect Reduction Claims by Fiscal Year of Filing and Claimant Type

Fiscal Year of Filing	School District (K-14)	Local Agency	Total
2022-2023	1	0	1
Totals	1	0	1

IRCs are filed with the Commission based on reductions of reimbursement claims taken by the Controller. Unlike test claims, where one claimant represents all potential claimants statewide, IRCs are filed on individual reimbursement claims filed by a single claimant.²⁶ Though the Commission may combine IRCs on the same program and similar issues for purposes of analysis, oftentimes IRCs do not lend themselves to consolidation because issues unique to each claim must be addressed.

The process for resolving IRCs can be complex, and differs with each claim. For some claims, once the claimant files an IRC, an informal conference may be conducted where Commission staff mediates the issues in dispute between the claimant and the Controller. If the issues are resolved in the informal conference, the IRC is settled. When the issues cannot be resolved, Commission attorneys prepare a detailed analysis

²⁶ California has 58 counties so county claims are limited to 58 potential IRCs per program, per year. However, audits of mandate reimbursement claims of cities, school districts, and special districts create the potential for many more IRCs per program, per year (currently there are a total of 36 audits on 8 programs that are within the three-year period of limitation to file an IRC and could potentially result in an IRC filing).

of the legal and factual issues, the Commission approves, partially approves, or denies the IRC, and adopts a decision. Whether or not the issues are resolved at an informal conference, staff must spend time to prepare and review the record (including the records for the test claim and parameters and guidelines decisions, and the claiming instructions), review detailed reimbursement claims, and determine the legal and audit issues. This process can be lengthy. There is currently one state-mandated program with a pending IRC. Table G. shows the number of IRCs listed by program, claimant type, and total reduction amount per program.

Table G. Pending IRCs and Amount of Alleged Incorrect Reductions by Program

School District Claims	Number of IRCs	Reduction Amount
<i>California Assessment of Student Performance and Progress (CAASPP)</i>	1	\$2,295,922
Local Agency Claims	0	0
TOTAL	1	\$2,295,922

Parameters and Guidelines Amendments (PGAs)

As of July 1, 2023, there are no PGAs pending. As with mandate redeterminations, there is no statutory deadline for completing PGAs, but the Commission generally prioritizes PGAs over IRCs because, like test claims and mandate redeterminations, they affect all eligible claimants as well as the state.

III. Challenges to Reducing the Backlog

As of July 1, 2023, the Commission has 44 test claims pending.²⁷ Additionally, the current caseload of the Commission includes parameters and guidelines, an SCE, and an IRC, which are included in the plan to provide a fuller understanding of the Commission’s caseload and priorities. The Commission faces a wide range of challenges and factors that may delay completion of the caseload, as discussed below.

A. Multiple Statutory Requirements

The Commission is charged by law with multiple responsibilities in addition to hearing test claims and IRCs. Government Code section 17500 et seq. also requires the Commission to adopt parameters and guidelines, prepare SCEs, hear mandate redetermination requests, hear requests to amend parameters and guidelines, hear requests to review the Controller’s claiming instructions, and review county applications for a finding of severe financial distress. Each matter must proceed in accordance with the due process procedures outlined in the Government Code and the Commission’s

²⁷ Two of these claims were filed in fiscal year 2022-2023 but were not deemed complete and issued for comment until after July 1, 2023. 42 of the pending claims (including one test claim to be reconsidered) are local agency claims, 37 of which are regarding National Pollutant Discharge Elimination System (NPDES) permits. There are also two school district test claims currently pending.

regulations, and required by the Constitution, which allow for party, interested party, and public participation.

While the Commission has not received a county application for a finding of significant financial distress since 2005, state law is clear that when these applications are filed, the county is entitled to a final decision by the Commission within 90 days. If the Commission receives an application, nearly all of the Commission's staff resources will be shifted to conduct the required investigation, hearing, and determination.

Parties are authorized to request extensions of time to file comments and postponement of hearing on quasi-judicial matters pending before the Commission. Under specified conditions, when good cause is shown, the executive director is required by statute to grant the request. The Commission frequently receives requests for extensions that result in delays and for postponements that result in items on the agenda being postponed.

The Commission also periodically amends its regulations. In 2021-2022, Commission staff prepared one emergency regulatory package which was adopted at the March 25, 2022 hearing and two regular regulatory packages, one of which was adopted at the May 27, 2022 hearing. In 2022-2023, the third regulatory package, amending the Commission's Conflict of Interest Code was adopted on July 22, 2022. The next scheduled clean up package will begin in 2023-2024. These regulatory packages require significant staff time to research, prepare, and usher through the regulatory process.

B. Litigation

The Commission was involved in five significant litigation matters in 2022-2023.

The Commission staff handled the following case at the trial court level:

- *County of Los Angeles v. Commission on State Mandates, Malia M. Cohen as State Controller*
Los Angeles County Superior Court, Case No. 23STCP00036
(*Municipal Stormwater and Urban Runoff Discharges Consolidated IRC*, 19-0304-I-04, 20-0304-I-06, 20-0304-I-08, 20-0304-I-09, 20-0304-I-10, 20-0304-I-11, and 20-0304-I-13)

In addition, four matters were pending in the Courts of Appeal and the California Supreme Court, which required the commitment of substantial staff time. Except for the last matter, which resolved in late July 2023, all of the following matters resolved in fiscal year 2022-2023, and these cases are no longer pending in the courts:

- REMAND of *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al.*
Third District Court of Appeal, Case No. C092139
Sacramento County Superior Court, Case No. 34-2010-80000604
(*Discharge of Stormwater Runoff*, 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)

- *City of San Diego v. Commission on State Mandates, State Water Resources Control Board, Department of Finance*,
Third District Court of Appeal, Case No. C092800
Sacramento County Superior Court, Case No. 2019-80003169
(*Lead Sampling in Schools: Public Water System No. 3710020 (17-TC-03)*)
- *Coast Community College District, et al. v. Commission on State Mandates*,
California Supreme Court, Case No. S262663
Third District Court of Appeal, Case No. C080349
Sacramento County Superior Court, Case No. 34-2014-80001842
[*Minimum Conditions for State Aid, 02-TC-25/02-TC-31*
(Education Code Sections 66721, 66721.5, 66722, 66722.5, 66731, 66732, 66736, 66737, 66738, 66740, 66741, 66742, 66743, 70901, 70901.5, 70902, 71027, 78015, 78016, 78211.5, 78212, 78213, 78214, 78215, 78216, 87482.6, and 87482.7; Statutes 1975, Chapter 802; Statutes 1976, Chapters 275, 783, 1010, and 1176; Statutes 1977, Chapters 36 and 967; Statutes 1979, Chapters 797 and 977; Statutes 1980, Chapter 910; Statutes 1981, Chapters 470 and 891; Statutes 1982, Chapters 1117 and 1329; Statutes 1983, Chapters 143 and 537; Statutes 1984, Chapter 1371; Statutes 1986, Chapter 1467; Statutes 1988, Chapters 973 and 1514; Statutes 1990, Chapters 1372 and 1667; Statutes 1991, Chapters 1038, 1188, and 1198; Statutes 1995, Chapters 493 and 758; Statutes 1998, Chapter 365, 914, and 1023; Statutes 1999, Chapter 587; Statutes 2000, Chapter 187; and Statutes 2002, Chapter 1169; California Code of Regulations, Title 5, Sections 51000, 51002, 51004, 51006, 51008, 51012, 51014, 51016, 51018, 51020, 51021, 51022, 51023, 51023.5, 51023.7, 51024, 51025, 51027, 51100, 51102, 53200, 53202, 53203, 53204, 53207, 53300, 53301, 53302, 53308, 53309, 53310, 53311, 53312, 53314, 54626, 54805, 55000, 55000.5, 55001, 55002, 55002.5, 55004, 55005, 55006, 55100, 55130, 55150, 55160, 55170, 55182, 55200, 55201, 55202, 55205, 55207, 55209, 55211, 55213, 55215, 55217, 55219, 55300, 55316, 55316.5, 55320, 55321, 55322, 55340, 55350, 55401, 55402, 55403, 55404, 55500, 55502, 55510, 55512, 55514, 55516, 55518, 55520, 55521, 55522, 55523, 55524, 55525, 55526, 55530, 55532, 55534, 55600, 55601, 55602, 55602.5, 55603, 55605, 55607, 55620, 55630, 55750, 55751, 55752, 55753, 55753.5, 55753.7, 55754, 55755, 55756, 55756.5, 55757, 55758, 55758.5, 55759, 55760, 55761, 55762, 55763, 55764, 55765, 55800, 55800.5, 55801, 55805, 55805.5, 55806, 55807, 55808, 55809, 55825, 55827, 55828, 55829, 55830, 55831, 58102, 58104, 58106, 58107, 58108, 59404, and 59410; Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002); and “Program and Course Approval Handbook” Chancellor’s Office California Community Colleges (September 2001).]
- *County of San Diego v. Commission on State Mandates, Department of Finance*
San Diego County Superior Court, Case No. 37-2020-00009631-CU-WM-CTL

C. Number and Complexity of Filings

As previously noted, the most labor-intensive activity for Commission staff is preparing proposed decisions for test claims, parameters and guidelines, MRs, and IRCs.

1. Test Claims

The 37 pending NPDES permit claims make up the most significant portion of the current caseload. The factual determinations for the pending claims will require the analysis of substantial evidence in the record in accordance with Government Code section 17559. Commission staff expects that analysis of the currently pending 37 NPDES claims will be completed by the July 2026 Commission meeting. However, some of these matters may be consolidated for hearing in the future, if appropriate, which might speed the process.

Finally, test claims are often thought to be filed on one individual statute or code section. This is not correct. Test claims can be filed on numerous statutes (each containing numerous code sections), regulatory sections, and executive order provisions. For example, the 51 test claims filed in 2002 alleged that nearly 500 statutes, and 400 regulatory sections and executive orders were mandated programs. By law, each statute, code section, regulation, and provision of the executive orders pled requires a finding by the Commission. Moreover, even when a test claim is only on one statute, that statute may raise complex issues of law or an issue of first impression and so may require substantial staff time despite its apparently small size. As a result, the time it may take to hear and decide any particular test claim is highly variable and is difficult to predict with widget-like accuracy.

2. Reasonable Reimbursement Methodologies and Parameters and Guidelines

A request to include a reasonable reimbursement methodology (RRM) in parameters and guidelines is a request made by a local government claimant, Finance, the Controller, or an affected state agency, pursuant to Government Code section 17557 and 17518.5. Under article XIII B, section 6 of the California Constitution and 17550 et seq. of the Government Code, the Commission is required to make the factual determination, based on substantial evidence in the record, of whether the proposed formula or unit cost reasonably represents the costs mandated by the state for all eligible claimants in the state. The proposed RRM must be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs; and shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner. If these findings are made and an RRM is adopted by the Commission in the parameters and guidelines, then the claiming is based on the adopted formula or unit cost, in lieu of requiring detailed documentation of actual costs incurred.

The adoption of an RRM pursuant to Government Code sections 17557 or 17518.1 streamlines the claiming process and reduces or eliminates auditing issues on reimbursement claims filed with the Controller and was originally proposed by the LAO

for that reason. However, the process increases the responsibility of the Commission when adopting parameters and guidelines, by requiring the additional factual finding that the proposal reasonably represents the mandated costs incurred by all eligible claimants in the state pursuant to article XIII B, section 6 of the California Constitution. Analyzing such proposals requires significant staff time, in some instances more than the time required for a test claim analysis. There are currently no proposed RRM parameters and guidelines or PGAs pending before the Commission.

3. *Incorrect Reduction Claims*

Unlike test claims, where one claimant represents all potential claimants statewide in a manner analogous to a class action lawsuit, individual claimants file IRCs with the Commission and seek redress for reductions that apply only to that one claimant.²⁸ The process for resolving IRCs can be complex and differs with each claim. Most IRCs involve issues of law and fact. Thus, analysis of each IRC requires legal and fiscal consideration, as well as a technical review of the Controller's audit. For some claims, once the claimant files an IRC, an informal conference is conducted where Commission staff mediates the issues in dispute between the claimant and the Controller. If the issues are resolved in the informal conference, the IRC may be settled.

When the issues cannot be resolved, Commission attorneys prepare a detailed analysis of the legal and audit issues in the proposed decision. The Commission approves, partially approves, or denies the IRC, and adopts a decision. Whether or not the issues are resolved at the informal conference, Commission staff must spend time to prepare and review the record (including the original test claim record, parameters and guidelines, and claiming instructions), review detailed reimbursement claims, and determine the legal and fiscal issues. This process can be lengthy.

Under the Commission's regulations, a claimant has three years from the notice of a reduction to file an IRC. As stated above, there is one IRC pending as of July 1, 2023, which is tentatively set for hearing on September 24, 2024. However, since the beginning of the 2020-2021 fiscal year, the Controller has issued approximately 36 audit reports on 8 mandated programs.²⁹ The FY 20-21 – FY 22-23 audits were on the following programs for local agencies: *Animal Adoption* (1), *Crime Statistics Reports for the Department of Justice* (8), *Custody of Minors-Child Abduction and Recovery* (4), *Identity Theft* (10), *Interagency Child Abuse and Neglect (ICAN) Investigation Reports Program* (4), *Municipal Storm Water and Urban Runoff Discharges* (1), and *Open Meetings Act/Brown Act Reform* (2). For K-12 school districts, the FY 20-21 – FY 22-23 audits were completed on: *California Assessment of Student Performance and Progress* (6). For community college districts, no audits were completed during FY 20-21 – FY 22-23. It is possible that, in response to recent Controller audits, and the fact that 36 of them are currently within the period of limitation for filing an IRC, that

²⁸ California has 58 counties, so county claims are limited to 58 potential IRCs per program, per year. Mandates involving cities or school districts, however, create the potential for over 1,600 IRCs per program, per year.

²⁹ The period of limitations to file an IRC is three years (2 CCR 1185.1).

numerous IRCs will be filed in the near future.

D. Administrative Workload

In addition to the processing and legal analysis of mandate related matters, Commission staff are responsible for all of the general administrative duties of a state agency, including budgeting, procurement, human resources, information technology, and public records related duties and the specific duty of the executive director to “keep a full and true record of all proceedings of the Commission. . .” pursuant to Government Code 17530. In recent years this has included audits in the areas of procurement, human resources, and information technology, which are now on-going continuous auditing processes, and which require that immense staff resources be diverted from mandate determination and hearing-related duties, at both the staff and the management and supervisory levels.

COVID-19

On March 19, 2020, the State Public Health Officer and Director of the California Department of Public Health issued an order requiring most Californians to stay at home to disrupt the spread of COVID-19 among the population. This order, along with numerous other related state and local orders, and subsequently changing orders and regulations have been in place since then. Commission staff prepared and implemented numerous plans and policies and complied with several additional and ongoing COVID-19 and telework reporting requirements, remote meeting procedures, and employee health and safety protocols, all of which were originally triggered by to the pandemic that required substantial staff resources, particularly at the management and supervisor levels. Additionally, several staff members and their families have been exposed or infected over the past 3.5 years (mostly since 2021-2022) and continue to be exposed and infected to this day, and this has been disruptive and has impacted productivity. Depending on what happens in the winter of 2023-2024, in the course of the pandemic, these impacts may continue.

E. Number and Level of Positions

As discussed above, the Commission’s position authority was reduced nearly half between 2002 and 2009 and the reductions were compounded by the furlough and personal leave programs that followed. The decrease in staff is one of the primary factors that caused or exacerbated the historic backlog. The number of matters completed is based on the number of positions and staff hours and on the classification and level of those positions. Any reduction in staff would likely result in a permanent reduction in productivity. Additionally, staff turnover results in a temporary reduction in productivity.

F. Delays Caused by Litigation and Requests for Extensions or Postponements

Commission decisions are sometimes delayed because of request for extensions and postponements or because they are litigated. When that occurs, Commission proceedings on parameters and guidelines and SCEs are delayed, sometimes for several years. An extreme example of this was in *Behavioral Intervention Plans* (BIPs), CSM 4464, where there were 27 extension requests granted while the parameters and guidelines were pending, followed by seven years of litigation resulting in a nearly 13-

year delay in the adoption of parameters and guidelines. Though this matter was an outlier, other claims are also sometimes significantly delayed because of extensions, postponements, and litigation.

Hearing postponements, by definition, delay the completion of pending matters. Currently, there is no limit to the number of extensions and postponements that may be requested by the parties. For some claims, more than 10 requests for 60-day extensions and postponements have been requested and granted. For every six requests granted, a year or more is added to the time to complete the claim. Under specified conditions, when good cause is shown, the executive director is required by statute and regulation to grant the request. The Commission frequently receives requests for extensions and postponements that result in items on the proposed agenda being postponed. The handling of these requests and revision and reissuance of the agenda also takes staff time away from the processing of other pending matters.

Additionally, handling litigation and administrative tasks draws staff time away from matters pending before the Commission.

G. Other Pending Work Contributes to the Test Claim Backlog

Litigation, parameters and guidelines, and PGAs that include complex RRM requests pursuant to 17557, mandate redeterminations, IRCs, and, requests to reconsider prior decisions, have all contributed to the delay in eliminating the test claim backlog in the past.

H. Unique Issues Related to IRCs Which May Contribute to the Backlog

The filing of an IRC is an appeal of the Controller's reduction of a reimbursement claim. The number and complexity of the filings, number, classification, and level of positions, and other pending matters all factor in the time that it takes to complete IRCs. Additionally, unlike for test claims, parameters and guidelines, and SCEs, there is no statutory deadline for completing IRCs. Therefore, IRCs have lower priority when setting matters for hearing, though the Commission makes every effort to hear all matters filed within a reasonable time. Finally, though it may appear at times that work on IRCs is delaying work on test claims, these relatively simpler matters must be assigned to newer staff so that they can learn mandates, and to more experienced staff who have been working on voluminous and complex test claims to prevent burnout. Moreover, having some of these claims set for hearing helps to ensure that there are matters on the agenda for the Commission to hear and decide when the pending test claims get bogged down with complex legal and factual issues and requests for extensions and postponements from the parties.

I. Number of Commission Meetings

The Commission is required by statute to conduct at least six public meetings per year, and tentatively schedules two additional meetings each year. Preparation for each Commission meeting consumes a significant amount of staff time, regardless of the number of items set for hearing. Though it may seem counterintuitive, the more meetings the Commission holds, the fewer items it can complete for hearing on an annual basis. This is attributable to timing of the release of drafts for public comment, the requirement to provide service and public notice on all matters, and the time

required of the Commission's very small staff to prepare hearing materials for Commission members and the public and to coordinate the participation of the parties, which is time diverted from preparing matters for hearing. It is to prevent this disruption of the work of preparing matters for hearing, that the use of the tentative hearing dates is avoided when possible.

IV. Backlog Reduction Strategy

The Commission has had a long-standing practice of prioritizing test claims, parameters and guidelines, and SCEs because of the statutory deadline attached to those matters and otherwise generally hears matters in the order filed with the Commission. This first-in-time approach is a core policy that has served the Commission well. Over the years, however, the Commission has made exceptions to this policy in certain circumstances. For example, when a court has ruled on a matter before the Commission, the Commission has consistently responded by moving that matter ahead in the queue, whether or not the courts have ordered the Commission to do so.

Commission staff has taken matters out of order for staff development purposes and has also, on occasion, assigned less-complicated matters out of order to a staff person who has just completed a particularly difficult assignment or who are new to the Commission. One staff attorney was new in 2022-2023, one in 2021-2022 and three in 2020-2021. This increases the opportunities for staff to gain experience in a wide variety of legal matters and prevents staff burnout.

The Commission remains committed to continuing to eliminate the backlog by adhering to the first-in-time policy, unless circumstances justify an exception. The following are strategies the Commission is employing to more efficiently decide matters, with a goal of eliminating the backlog as soon as possible: (1) claim consolidation; (2) common issues; (3) simple test claims and single-issue IRCs; (4) stakeholder requests; and (5) joint RRM.s.

A. Claim Consolidation

Pursuant to California Code of Regulations, title 2, section 1183.5, the executive director may, subject to appeal, "consolidate part or all of any test claim with another test claim or sever a test claim, if necessary to ensure the complete, fair, or timely consideration of any test claim." Similarly, Government Code section 17558.8 and section 1185.3 of the Commission's regulations allow the executive director to consolidate IRCs. To date, the Commission has consolidated numerous test claims. However, consolidation has been used sparingly for IRCs because it only works if the issues of law and fact are the same, the claimants filed their reimbursement claims in the same manner and for the same costs, and the Controller's auditors were consistent in making claim reductions based on similar findings of fact or law.

In addition, if the Commission decides an issue in one matter that is contested in other matters, the time required to complete those other matters may be reduced. The shorthand for this concept is "cross-cutting issues." For example, in 2010, the Commission adopted decisions on the County of Los Angeles and the City of Tustin *Investment Reports* IRCs. In doing so, the Commission resolved certain cross-cutting issues common to nearly all of the 72 then pending IRCs for that program. Then,

Commission staff worked to ensure that the remaining *Investment Reports* IRCs were resolved informally through negotiations between claimants and the Controller's staff. Likewise, in 2020-2021 there was a request for consolidation for several IRCs filed on the *Municipal Storm Water and Urban Runoff Discharges* program, which happened to be filed on the same issue and which resulted in the consolidation of seven claims for hearing.

B. Requests to Expedite

Commission staff occasionally receives requests from a party to expedite certain matters. Naturally, all parties would like their claims decided as quickly as possible. Though generally such requests are disfavored in the interest of fairness to other parties who have been waiting for a longer time to have their matters heard, on occasion certain matters may be expedited, particularly where consolidation with an earlier filed claim is appropriate or where the request has broad support or because of the importance of the speedy resolution of a particular matter to both state and local agencies.

C. Joint Reasonable Reimbursement Methodologies (Joint RRM)s

A joint RRM and statewide estimate of cost (SEC, not to be confused with an SCE) is based on a settlement agreement between Finance and local governments pursuant to Government Code section 17557.1 and 17557.2. The RRM and SEC remains in effect for five years, unless another term is provided in the agreement or the agreement is jointly terminated by the parties. The Commission can approve a joint RRM and proposed SEC simply with a showing that an agreement between Finance and a local entity has been reached, and that the joint methodology is broadly supported by a wide range of local agencies or school districts. If more joint RRM)s and SECs are negotiated by the parties, as was recommended in the 2009 BSA Report and by others, the agreements may result in less work required of Commission staff and would likely reduce auditing issues on reimbursement claims for the Controller, since the claim would not need to be supported with documentation of actual costs incurred. To date, the Commission has adopted only one joint RRM and SEC, which took approximately three years for the parties to negotiate. The joint RRM and SEC was in effect for three fiscal years before the program was suspended by the Legislature. That joint RRM was extended through 2015 after which the parties let it lapse and Commission staff adopted parameters and guidelines for the program which require that, if the program is ever taken off suspension, claimants submit claims based on their actual costs incurred. Currently, there are no pending joint RRM)s.

V. Plan of Action

Despite the uncertainty caused by the many factors discussed in this report, only some of which are within the Commission's control, Commission staff believes that the following updated plan to reduce the backlog can be achieved.

The BSA 2009 Report shed light on the negative impacts both to the state and local governments posed by delays in deciding IRCs. Through implementing the backlog reduction plan and the diligent work of Commission staff, the Commission completed all pending IRCs in December 22.

The Commission currently has one new pending IRC tentatively scheduled for hearing by September 24, 2024.

Commission staff is now focused on the completion of the test claim backlog. Key to this pursuit is the retention of the Commission's experienced mandate attorneys turn-over in these positions result in major setbacks in completing these claims. Therefore, to help prevent burnout, the Commission will continue to rotate the legal staff between the more complex and difficult NPDES claims and the relatively easier other test claims and pending matters.

VI. Conclusion

Over the years, a significant backlog of test claims and IRCs accumulated in the Commission's pending caseload. The IRC backlog was completed in 2022-2023 and the Commission is now focused on completing the NPDES test claim backlog and ensuring the speedy resolution of newly filed test claims. This plan represents Commission staff's approach to reducing and ultimately eliminating the test claim backlog as quickly as possible. It is important to note, however, that this ambitious plan is only an *estimate* of what can be completed in the coming years based on what staff knows as of July 1, 2023. Many factors beyond the control of Commission staff could increase the time it takes to eliminate the backlog.

Exhibit A. Test Claim to Statewide Cost Estimate Tracking from July 1, 2013 to July 1, 2023

#	Program Name	Matter Number	Date Filed	Days delayed due to State Ext.	Days delayed due to State Postpone	Days delayed due to Claimant Ext.	Days delayed due to Claimant Postpone	Date TC Decision Adopted	Date Ps&Gs Adopted, Set, or Tentatively Set for Hearing	Date SCE Set, or Tentatively Set for Hearing
1.	<i>California Assessment of Student Performance and Progress (CAASPP)</i>	14-TC-01	Filed 12/23/14 Consolidate d 8/14/15 ³⁰	40	63	0	0	1/22/16	3/25/16	1/27/17
2.	<i>Training for School Employee Mandated Reporters</i>	14-TC-02	6/1/15	0	0	0	0	12/3/15	1/22/16	10/28/16
3.	<i>California Assessment of Student Performance and Progress (CAASPP) II</i>	14-TC-04	Filed 6/26/15 Consolidate d8/14/15	0	0	0	119	1/22/16	3/25/16	1/27/17
4.	<i>Local Agency Employee Organizations: Impasse Procedures</i>	15-TC-01	6/02/16	0	0	23	0	1/27/17	Test Claim Denied	Test Claim Denied

³⁰ 14-TC-01 and 14-TC-04 were consolidated for hearing on August 14, 2015 which restarts the statutory clock for adopting an SCE. (2 CCR 1183.18(a)(7).)

#	Program Name	Matter Number	Date Filed	Days delayed due to State Ext.	Days delayed due to State Postpone	Days delayed due to Claimant Ext.	Days delayed due to Claimant Postpone	Date TC Decision Adopted	Date Ps&Gs Adopted, Set, or Tentatively Set for Hearing	Date SCE Set, or Tentatively Set for Hearing
5.	<i>Certificated School Employees: Parental Leave</i>	16-TC-01	12/21/16	0	0	0	0	9/22/17	Test Claim Denied	Test Claim Denied
6.	<i>Cal Grant: Grade Point Average and Graduation Certification</i>	16-TC-02	6/26/17	30	0	0	0	1/26/18	5/25/18	3/22/19
7.	<i>Local Agency Employee Organizations: Impasse Procedures II</i>	16-TC-04	5/12/17	0	0	0	0	5/25/18	9/28/18	7/26/19
8.	<i>U Visa 918 Form, Victims of Crime: Nonimmigrant Status</i>	17-TC-01	3/06/18	0	0	14	0	9/28/18	1/25/19	11/22/19
9.	<i>Central Basin Municipal Water District Governance Reform</i>	17-TC-02	9/20/17	0	0	0	56	3/22/19	Test Claim Denied	Test Claim Denied
10.	<i>Lead Sampling in Schools: Public Water System No. 3710020</i>	17-TC-03	1/11/18	91	56	56	0	3/22/19	Test Claim Denied	Test Claim Denied

#	Program Name	Matter Number	Date Filed	Days delayed due to State Ext.	Days delayed due to State Postpone	Days delayed due to Claimant Ext.	Days delayed due to Claimant Postpone	Date TC Decision Adopted	Date Ps&Gs Adopted, Set, or Tentatively Set for Hearing	Date SCE Set, or Tentatively Set for Hearing
11.	<i>Peace Officer Training: Mental Health/Crisis Intervention</i>	17-TC-06	5/10/18	0	0	0	0	5/24/19	9/27/19	7/24/20
12.	<i>Youth Offender Parole Hearings</i>	17-TC-29	6/29/18	33	0	30	126	9/27/19	Test Claim Denied	Test Claim Denied
13.	<i>Public School Restrooms: Feminine Hygiene Products</i>	18-TC-01	12/07/18	0	0	0	56	5/24/19	11/22/19	12/4/20
14.	<i>Racial and Identity Profiling</i>	18-TC-02	6/14/19	0	0	0	0	5/22/20	9/25/20	7/22/22
15.	<i>Vote by Mail Ballots: Prepaid Postage</i>	19-TC-01	10/15/19	0	0	0	0	7/24/20	12/4/20	1/28/22
16.	<i>Accomplice Liability for Felony Murder</i>	19-TC-02	12/31/19	60	0	28	70	12/4/20	Test Claim Denied	Test Claim Denied
17.	<i>SANDAG: Independent Performance Auditor</i>	19-TC-03	3/19/20	31	0	0	0	9/25/20	Test Claim Denied	Test Claim Denied

#	Program Name	Matter Number	Date Filed	Days delayed due to State Ext.	Days delayed due to State Postpone	Days delayed due to Claimant Ext.	Days delayed due to Claimant Postpone	Date TC Decision Adopted	Date Ps&Gs Adopted, Set, or Tentatively Set for Hearing	Date SCE Set, or Tentatively Set for Hearing
18.	<i>County of Los Angeles Citizens Redistricting Commission</i>	19-TC-04	6/26/20	0	0	30	70	5/28/21	12/3/21	1/27/23
19.	<i>Sexual Assault Evidence Kits: Testing</i>	20-TC-01	12/31/20	0	0	0	0	7/23/21	9/24/21	9/23/22
20.	<i>Extended Conditional Voter Registration</i>	20-TC-02	12/23/20	0	0	0	0	12/3/21	Test Claim Denied	Test Claim Denied
21.	<i>California Voting for All Act: Ballot Translations and Posting Requirements</i>	20-TC-03	5/21/21	31	0	0	0	9/23/22	Test Claim Denied	Test Claim Denied
22.	<i>Juveniles: Custodial Interrogation</i>	21-TC-01	12/22/21	0	0	0	0	1/27/23	3/24/23	Tentatively Set for 1/26/24
23.	<i>Floodplain Restoration Condition (no. 12) of Water Quality Certification for Turlock Irrigation District and</i>	21-TC-02	1/14/22	0	0	0	0	7/22/22	Test Claim Dismissed	Test Claim Dismissed

#	Program Name	Matter Number	Date Filed	Days delayed due to State Ext.	Days delayed due to State Postpone	Days delayed due to Claimant Ext.	Days delayed due to Claimant Postpone	Date TC Decision Adopted	Date Ps&Gs Adopted, Set, or Tentatively Set for Hearing	Date SCE Set, or Tentatively Set for Hearing
	<i>Modesto Irrigation District – Don Pedro Hydroelectric Project and La Grange Hydroelectric Project</i>									